



SAMPLE PROCEDURAL ORDER

Dates have been retained to show sequence.

Note: this procedural order is based upon sequential exchange of witness statements, with expert reports being delivered after delivery of witness statements from all fact witnesses. In some cases, it is appropriate for both sides to exchange witness statements on the same schedule. In many cases, there is no need for expert reports to be delivered on a different schedule. In appropriate cases, these changes can result a considerable saving of time.

**IN THE MATTER OF AN ARBITRATION
Under the Arbitration Act, 1991, S.O. 1991, c. 17**

BETWEEN:

ABC

CLAIMANT

-AND-

XYZ

RESPONDENT

**Procedural Order #1
(April 26, 2019)**

Pleadings

1. The Pleadings shall be limited to the Notice of Arbitration and Answer to Notice of Arbitration, [which have already been delivered].

Exchange of Evidence

2. The evidence of both sides shall be presented in the form of witness statements, which shall be in writing and sworn or affirmed by the witnesses.

3. A party that requires evidence from a witness from whom a witness statement cannot be obtained shall, at or before the time that a witness statement from that witness would have been due, seek directions from the tribunal as to how and when the evidence of the witness in question shall be obtained and submitted to the arbitrator.
4. The witness statements submitted by each party shall include all the evidence that party seeks to put forward through its witnesses on all issues which have been identified by either party prior to the delivery of the witness statements.
5. The witness statements delivered by each party shall attach or be accompanied by all of the documents on which that party intends to rely at the hearing.
6. On or before May 31, 2019 the Claimant shall deliver its witness statements and documents.
7. On or before June 30, 2019 the Respondent shall deliver its responding witness statements and documents.
8. On or before July 31, 2019 the Claimant shall deliver its reply witness statements and documents, if any. Such reply witness statements and documents shall be limited to responding to new issues or evidence of which the Claimant was not previously aware and/or which the Claimant had no prior opportunity to address. In its reply witness statements and documents the Claimant may include evidence in respect of any information or documents obtained pursuant to the process described under the heading, "Disclosure Requests," below which the Claimant did not have an opportunity to address in its witness statements and documents delivered on or before May 31, 2019.
9. Any witness statement or document that a party wishes to file in response to the disclosure of documents, information, or a witness statement from the other side that the party did not have a reasonable opportunity to address, may be filed by agreement of the parties or, failing agreement, pursuant to further direction of the arbitrator. No further witness statements or documents shall be delivered prior to the hearing without agreement of the parties or leave of the arbitrator.
10. Any expert's report upon which the Claimant or Respondent wishes to rely on (an "Initial Expert Report") shall be delivered on or before September 15, 2019. An Initial Expert Report shall be accompanied by:
 - a. A copy of any written communication by which the expert was retained and instructed in the matter;
 - b. Copies of all documents and information (in written or digital format) with which the witness was provided by the party that retained the expert's services;
 - c. A statement that the witness has performed, and will perform, the expert's role in the arbitration in an independent and impartial manner with an over-riding

objective of assisting the tribunal in arriving at an informed and justified conclusion.

11. Any responding expert's report which the Claimant or Respondent wishes to deliver in response to an Initial Expert Report delivered by the other side (a "Responding Expert Report") shall be delivered on or before October 15, 2019. Any Responding Expert Report shall be limited to comments regarding the Initial Expert Report filed by the other party and shall not include new opinions, analysis or conclusions which an expert could have included in an Initial Expert Report.
12. A Responding Expert Report shall specifically list, explain and justify differences in assumptions between the expert delivering the Responding Report and the other expert.
13. Any objection to the qualifications of an expert, or to the admissibility of all or part of an expert report, shall be made in writing within 7 days of receipt of the expert's report, failing which it shall be presumed that there is no such objection. The arbitrator shall convene a conference call to receive submissions regarding any such objection and shall provide a prompt ruling.
14. On or before November 15, 2019, the experts who have delivered Initial or Responding Expert Reports shall meet, without counsel, and prepare a joint report a) identifying areas of disagreement, b) listing reasons for differences, and c) quantifying differences.
15. All witness statements, expert reports and documents shall be delivered by sending a copy by e-mail to the other party and the arbitrator, by 5 pm Eastern Time of the day in question, with an additional hard copy being delivered to the arbitrator within 24 hours.

Disclosure Requests

16. Either side may, at any time, request in writing information or documents from the other side relevant to the issues raised by the Pleadings or the witness statements. Such requests, in addition to specifying the documents or information sought, should be confined to information and documents not otherwise available to the party making the request. Documents requested must be specific documents or categories of documents that can be identified objectively, and not solely by theme or subject matter.
17. Any unreasonable delay in making a request for information or documents may be denied, if granting the request would cause unjustified delay in the arbitration schedule.
18. Requests for information or documents shall be responded to promptly as they are received.
19. Any disputes regarding information or document requests, which counsel are unable to resolve after reasonable attempts to do so, shall be raised with the arbitrator by e-mail,

and dealt with on a conference call, without a formal motion unless so directed by the arbitrator.

20. No issue should be raised with the arbitrator before it has been discussed between counsel. All communications with the arbitrator shall be copied to the other side. However, it is not necessary to obtain prior approval of the other side for the content of any communication to the arbitrator.
21. Requests for further information or documents may include requests to conduct examinations for discovery. However, unless consented to by the other party, requests for examinations for discovery will only be granted if it is demonstrated that there is a specific need for further information before the hearing, and that the information requested can only be reasonably obtained in the manner requested.
22. In the absence of extraordinary circumstances, no requests for information, documents or discovery shall be made after August 15, 2019.
23. By no later than September 30, 2019 each party shall notify the other of the documents, information or discovery it has obtained from the other side which it intends to use or place in evidence at the hearing and the witnesses from the other side it requires to be produced at the hearing for cross examination.
24. Any issue as to the authenticity of any document produced at any stage of the arbitration shall be raised by the party receiving the document without undue delay and, in any event, no later than, September 30, 2019. Where the authenticity of any document is disputed, the tribunal shall give directions, if necessary, as to how and when further proof of authenticity may be provided. In the absence of any objection, the authenticity of all documents produced shall be presumed.

Pre-Hearing Delivery of Material

25. On or before November 30, 2019, the parties shall provide to the arbitrator:
 - a) Copies of all witness statements exchanged between the parties;
 - b) Copies of expert reports exchanged between the parties;
 - c) A joint brief containing all documents identified by both sides pursuant to paragraph 20 hereof, in chronological order, indexed and tabbed;
 - d) Disclosure of information or documents from one side which the other side intends to refer to or rely upon at the hearing;
 - e) A hearing schedule setting out the proposed order of proceeding at the hearing, including any preliminary motions, opening and/or closing statements, the order

in which the witnesses will be examined, and the anticipated time required for the examination of each witness.

26. If the parties are unable to agree as to any of the above, one or both of them shall initiate a meeting or conference call with the arbitrator to resolve the issue.
27. On or before December 7, 2019 the parties shall deliver any pre-hearing memorial, factum or other written submission that a party wishes to submit, along with copies of any key cases or other authorities with important passages highlighted and tabbed.

Privacy and Security Regarding Evidence

28. Each party and its counsel are responsible for ensuring that all relevant privacy and data security requirements prescribed by law or contract in relation to evidence put forward by that party are complied with, and that the arbitrator is made aware of any steps that the arbitrator needs to take in that regard.

The Hearing

29. The hearing shall take place on weekdays from December 15, 2019 to December 19, 2019.
30. The hearing shall be held in private. Attendance at the hearing, or during any part of the hearing, shall be restricted to those whose presence has been agreed by the parties or allowed by the arbitrator.
31. The hearing will conclude with oral submissions by both parties. Either party may also submit written closing submissions at or shortly after the hearing, at such time as can be agreed by the parties or as directed by the arbitrator.
32. The hearing shall be at any location upon which the parties agree. Costs relating to the hearing facility shall be borne equally by both sides, subject to reallocation among the parties pursuant to any cost order made by the arbitrator.
33. The hearing shall be transcribed, if that is requested by any party. Costs relating to the transcripts shall be borne by the party requesting the transcription, subject to reallocation among the parties pursuant to any cost order made by the arbitrator.
34. A witness who has provided a statement or report on behalf of a party shall be made available for cross-examination at the hearing unless the other party agrees otherwise. If a witness is unavailable for cross-examination, e.g. due to death or disability, the admission into evidence and the weight to be attached to the statement shall be in the discretion of the arbitrator.
35. At the evidentiary hearing, a witness may be briefly examined by the party that submitted the statement or report of the witness only for the purpose of introducing the witness and

highlighting key aspects of the witness' evidence, without adding any new evidence of substance. Such introductory examinations shall not take more than fifteen minutes and shall be followed by a cross-examination of the witness by the other party and re-examination, if requested.

36. By agreement of the parties or direction of the arbitrator, the cross-examination of any witness may take place at a time and place other than the hearing referred to above. However, unless the parties agree otherwise, the arbitrator shall be present at any such cross-examination.
37. No document may be put to a witness in cross-examination unless it was produced or referenced by one or more of the parties prior to the hearing in accordance with the directions above relating to the production of documents in the arbitration.
38. Information presented in the arbitration shall not be excluded on the basis of legal rules of evidence (including the rules relating to hearsay and the "Rule in *Browne v Dunn*"). The law of privilege will be applied in the arbitration. The arbitrator shall weigh the evidence based upon the submissions of the parties, and may exclude evidence that is immaterial, irrelevant, repetitive or disproportionate to the point that is sought to be proved.

Further Directions

39. Further directions may be sought from the arbitrator by either party at any time as the need arises.

William G. Horton, C. Arb., FCI Arb
Arbitrator
April 26, 2019