

Sample Procedural Order #1

(Day 1)

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 parties' evidence shall be presented in the form of written witness statements sworn or affirmed by the witness.

[3] A party requiring evidence from a witness from whom a witness statement cannot be obtained shall, at or before the time that the witness' statement is due, seek directions from the tribunal as to how and when the evidence of the witness in question shall be obtained and submitted.

[4] Witness statements submitted by a party shall include all the evidence that party seeks to put forward through its witnesses on all issues which have been identified by any party prior to the delivery of the witness statements.

[5] Witness statements submitted by a party shall attach or be accompanied by all the documents on which that party intends to rely.

[6] All exhibits and documents produced in the arbitration shall be given a unique, identifying number. Claimant document numbers shall be preceded by the letter "C" Respondent document numbers shall be preceded by the letter "R". All multi-document productions shall be tabbed or digitally bookmarked for the component documents.

[7] On or before [Day 30] the Claimant shall deliver its witness statements and documents.

[8] On or before [Day 60] the Respondent shall deliver its responding witness statements and documents.

[9] On or before [Day 90] the Claimant shall deliver its reply witness statements and documents, if any. Reply witness statements and documents shall be limited to responding to new issues or evidence of which the Claimant was not previously aware and of which the Claimant had no prior opportunity to address. 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 [Day 30].

[10] Any witness statement or document a party wishes to file in response to disclosure of documents, information, or a witness statement from another party that the party did not have a reasonable opportunity to address, may be filed by agreement of the parties or, failing agreement, pursuant to tribunal direction. No further witness statements or documents shall be delivered prior to the hearing without agreement of the parties or leave of the tribunal.

[11] Any expert’s report upon which a party wishes to rely (an “Initial Expert Report”) shall be delivered on or before [Day 135] 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 provided to the expert by the party that retained the expert’s services; and
- c. A statement that the expert has performed, and will perform, the expert’s role in an independent and impartial manner with an overriding objective of assisting the tribunal in arriving at an informed and justified conclusion.

[12] Any responding expert’s report which a party wishes to deliver in response to an Initial Expert Report (a “Responding Expert Report”) shall be delivered on or before [Day 165]. Any Responding Expert Report shall be limited to comments regarding the Initial Expert Report and shall not include new opinions, analysis, or conclusions which the expert could have included in an Initial Expert Report.

[13] A Responding Expert Report shall list, explain, justify, and quantify differences in assumptions and conclusions between the expert delivering the Responding Report and the other expert.

[14] 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 tribunal will receive submissions regarding any objection and provide a ruling.

[15] Optional: [On or before [Day 195] 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.]

[16] All witness statements, expert reports and documents shall be delivered by sending a copy by email to the other party and the tribunal, by 5 pm Mountain Time of the day in question.

Disclosure Requests

[17] A party may, at any time, request in writing information or documents from another party relevant to the issues raised by the Pleadings or the witness statements. Such requests should specify the documents or information sought and be confined to relevant and material 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.

[18] Unreasonable delay in making a request for information or documents may result in denial of the request if:

- a. Granting the request would cause unjustified delay in the arbitration schedule;
- b. The resources, cost or effort required to find or produce the documents would be dis-proportionate to the relevance or materiality of the documents; or
- c. The documents are available to the requesting party to the same extent as they are available to the party of whom the request was made.

[19] Requests for information or documents shall be responded to promptly as they are received.

[20] Disputes regarding information or document requests, which counsel are unable to resolve shall be raised with the tribunal by email and may be dealt with without a formal motion unless so directed by the tribunal. The tribunal may direct that requests be dealt with in a summary manner using a table format.

[21] Requests for further information or documents may include requests to conduct examinations of witnesses before the hearing. However, unless consented to by the other party, requests for pre-hearing witness examinations will only be granted if it is demonstrated that there is a need for specified, further information before the hearing which the requesting party has been unable to obtain by other means.

[22] In the absence of extraordinary circumstances, no requests for information, documents or pre-hearing examination of witnesses shall be made after [Day 105].

[23] On or before [Day 135] each party shall notify the other of the documents or other information exchanged in the arbitration which it intends to use or place in evidence at the hearing and the witnesses from another party it requires to be produced at the hearing for cross-examination.

[24] Any issue as to the authenticity or admissibility of a document that a party indicates it intends to use or place in evidence at the hearing must be raised without undue delay and, in any event, on or before [Day 165]. Where the authenticity or admissibility 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 [Day 210] the parties shall provide to the tribunal in digital form an arbitration record containing:

- a. all pleadings,
- b. all orders and directions of the Tribunal,
- c. copies of witness statements exchanged between the parties,
- d. copies of expert reports exchanged between the parties,
- e. a joint brief containing all exhibits to witness statements and documents of which a party has provided notice that it intends to use or place in evidence at the hearing, in chronological order, indexed and tabbed,
- f. disclosure of information or documents from one party which another party intends to refer to or rely upon at the hearing, and
- g. a hearing schedule setting out the proposed order of proceeding at the hearing, including any preliminary motions, closing statements, the order in which 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, they must initiate a conference with the tribunal to resolve the issue.

[27] Anything in the arbitration record containing more than one document shall include, or be accompanied by, a hyperlinked table of contents and bookmarks for each document. Bookmarks shall contain information that describes the document, i.e. not just tab numbers.

[28] Written submissions should, where possible, include hyperlinks to referenced documents, e.g. exhibits or legal authorities.

[29] On or before [Day 250] the parties shall deliver any pre-hearing written submission that they wish to submit, along with copies of any key cases or other authorities with important passages highlighted and tabbed.

Privacy and Security Regarding Evidence

[30] Each party and its counsel are responsible to ensure 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 tribunal is made aware of any steps that the tribunal needs to take in that regard.

The Hearing (260)

[31] The hearing shall take place on weekdays from [Day 260 to Day 265].

[32] If the parties agree, or if the tribunal so directs after hearing submissions, some or all of the hearing may be conducted virtually.

[33] The hearing shall be held in private. Attendance at the hearing shall be restricted to those whose presence has been agreed by the parties or allowed by the tribunal.

[34] Closing submissions may be made:

- orally at the conclusion of the evidentiary portion of the hearing, or
- in writing at such time as the parties agree or the tribunal directs.

[35] The hearing shall be at any location upon which the parties agree, or as the tribunal directs. Costs relating to the hearing facility shall be borne equally by the parties, subject to reallocation among the parties pursuant to any cost order made by the tribunal.

[36] The hearing shall be transcribed and or recorded, if requested by any party, or if directed by the tribunal after hearing submissions from the parties. If the parties do not agree regarding transcription and the tribunal has made no direction, costs relating to the transcripts shall be borne by the party requesting the transcript, subject to any tribunal direction after hearing submissions and subject to reallocation among the parties pursuant to any cost order made by the tribunal.

[37] 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 otherwise agreed. If a witness is unavailable for cross-examination, the admission into evidence and the weight to be attached to the statement shall be in the discretion of the tribunal.

[38] A witness may be briefly examined-in-chief 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 15 minutes and may be followed by cross-examination of the witness by other parties, re-examination if requested, and examination by the tribunal if desired.

[39] By party agreement or tribunal direction, 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 tribunal shall be present, in person or by video, at any such cross-examination.

[40] No document that has not been placed on the arbitration record may be put to a witness in cross-examination unless:

- a. it is among the documents produced in the arbitration by; and
- b. notice of the intention to put the document to the witness has been given to opposing counsel by no later than 5:00 pm on the day before the witness is expected to testify; or
- c. leave is obtained from the tribunal.

[41] Information presented in the arbitration shall not be excluded based on legal rules of evidence (including the rules relating to hearsay and the "Rule in Browne v Dunn"). The law of privilege will apply. The tribunal 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.

Communication with Tribunal

[42] No issue should be raised with the tribunal before it has been discussed between counsel. All communications with the tribunal shall be copied to other parties. However, it is not necessary to obtain prior approval of other parties for the content of any communication to the tribunal.

[43] All witness statements, expert reports, documents, briefs, and submissions provided to the tribunal must be as unrestricted and searchable PDFs unless the content logically requires some other format.

Further Directions

[44] Further directions may be given by or sought from the tribunal at any time.