Arbitration Scheduling & Case Management Order *(draft)*

ABC Inc. v. XYZ Corporation, Case No. 12-345-6789. **Date of this order**: [DATE].
Arbitrator: D. C. Toedt III, dc@toedt.com, 713-364-6545, duly appointed in accordance with the parties' agreement. **Case Administrator:** Richard Roe [email address] of [ORGANIZATION, e.g., the American Arbitration Association]. **Counsel for Claimant:** [FILL IN]. **Counsel for Respondent:** [FILL IN].

Please review this draft order before the preliminary hearing.

1. **Scheduling-Call agenda**

The following matters were discussed at the preliminary-hearing conference call on [DATE] (the **"Scheduling Call"**):

AGENDA ITEM FOR DISCUSSION	*[Brackets indicate arbitrator suggestions]*
1.1. Who participated in the Scheduling Call? *(NOTE: **Each party is requested to have an "in-house" representative** participating in the Scheduling Call.[1])*	
1.2. What **facts** does each party intend to prove, and **how** do they intend to prove them? *(NOTE that discovery is not automatically available in arbitration,[2] but **informal discovery** might be used as described below.)*	*(NOTE: Footnote 21 below cites supporting authority for getting "into the weeds" at this early stage of the process.)*

[1] Client participation in the preliminary hearing is strongly recommended by a task force of the prestigious College of Commercial Arbitrators, which notes that this is "the ideal time for client representatives to appreciate how costly and protracted a 'scorched earth' campaign will be" and urges that "arbitrators should ***insist*** that senior client representatives (business executives or in-house counsel) attend …." COLLEGE OF COMMERCIAL ARBITRATORS, PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION 71 (Thomas J. Stipanowich, Curtis E. von Kann, and Deborah Rothman, eds, 2010), http://goo.gl/VcQdXg (thecca.net) (hereafter, "CCA PROTOCOLS") (emphasis added).

[2] *See, e.g.,* CCA Protocols, supra note 1, at 72, *and* Rule R-22(a) of AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2013) ("AAA Commercial Rules"). That rule provides in part that "*The arbitrator* shall manage any necessary exchange of information …." (emphasis added). ¶ One of the principal sources of *client* dissatisfaction with arbitration is the failure of counsel and arbitrators to rein in the discovery process. *See, e.g.,* CCA Protocols, supra note 1, at 6-8, 26, 45-46.

AGENDA ITEM FOR DISCUSSION	*[Brackets indicate arbitrator suggestions]*
1.3. Is there any dispute about arbitrability, law, or rules?	[No]
1.4. Have any other necessary individuals or organizations not been joined and/or not appeared?	To be discussed
1.5. Is this case mainly about disputed *facts*, or about disputed contract interpretation or other legal-type issues?	To be discussed
1.6. Should any specific issues be addressed early on motion?	To be discussed
HEARING SCHEDULE	
1.7. Hearing start date: [3] *(NOTE: Dates in this draft order are determined by working backwards from the hearing start date.)*	[Tuesday, DATE] ("**Week 12**")
1.8. Hearing location:	To be discussed
DISCOVERY PLAN – DOCUMENTS	
1.9. Deadline(s) for mandatory initial exchange of documents expected to be relied on at the hearing, per the arbitration rules: [4] *(NOTE: Preferably, documents produced will be page-numbered, with page numbering prefixed by (for example) the producing party's initials or by the first two or three letters of the party's name, e.g., ABC-0001.)*	[Tuesday of Week 3], with updating per paragraph 1.20 below.

[3] The AAA arbitration rules require the parties to "be cooperative in scheduling the earliest practicable date" for the hearing. AAA Commercial Rule R-24. Setting an early date is also suggested in CCA PROTOCOLS, *supra* note 1, at 55.

[4] *See* AAA Commercial Rule R-22(b).

AGENDA ITEM FOR DISCUSSION	*[Brackets indicate arbitrator suggestions]*
1.10. What if any other documents are to be produced by agreement or by direction of the arbitrator, and when?	***(NOTE: Please be prepared to discuss at the Scheduling Call.)***
1.11. Target date for finalizing agreements for production of requested (non-exchanged) documents:	[Tuesday of Week 8]
1.12. Agreed turnaround time for other agreed- or arbitrator-approved document requests: [5]	[Five] business days
DISCOVERY PLAN – DEPOSITIONS & DEPOSITION SUBSTITUTES	
1.13. What individuals are currently thought likely to be most knowledgeable about particular disputed factual issues? [6]	***(NOTE: Please be prepared to discuss at the Scheduling Call)***
1.14. Can informal telephone interviews be used for some witnesses (by agreement) in lieu of depositions? *(See paragraph 5.)*	To be discussed
1.15. To what extent can written statements be used for direct testimony, with oral recap testimony and cross-examination? [7] *(This could obviate the need for some discovery depositions.)*	To be discussed

[5] Counsel are encouraged to use the "Redfern Schedule" format for propounding and responding to document requests; see https://goo.gl/E2S0kJ at ICSID.WorldBank.org.

[6] Hat tip: This item was inspired by Stephen J. O'Neil, *Managing Depositions in Arbitration to Minimize Cost and Maximize Value,* 69 DISP. RES. J. 14, 19 (2014).

[7] See AAA Commercial Rule R-35. Using written statements for most direct testimony can save time for all concerned and reduce the need for depositions. This approach is increasingly used in federal-court bench trials and is very common in international arbitrations.

AGENDA ITEM FOR DISCUSSION	*[Brackets indicate arbitrator suggestions]*
1.16. What if any depositions are currently thought to be cost-justifiable? *(NOTE: Depositions are not automatically available in arbitration.*[8] *Given that each deposition generally costs each party thousands of dollars, I reserve the right to require that any agreement of of the parties' counsel to take depositions be jointly approved by the parties themselves.)*	To be discussed
1.17. Might any 30(b)(6)-type discovery depositions be useful?	To be discussed
1.18. Can any depositions be scheduled for "sprint weeks"? [9]	[Weeks X and Y]
OTHER ITEMS FOR DISCUSSION	
1.19. Do the parties wish me to enter a confidentiality order? If so, should it contain a "claw-back" agreement covering inadvertent production of privileged documents?	To be discussed
1.20. On the following schedule, the parties should submit proposed revisions to the master exhibit list *(see paragraph 3)*, and the Arbitrator's Notebook, if any *(see paragraph 11(b)):*	[Mondays of Weeks 4, 8, and 11, by 5:00 p.m. Central time]

[8] The AAA Commercial Rules do not provide for depositions except in large, complex cases — and *even in such cases, those rules tightly limit the availability of depositions:* "**In exceptional cases,** at the discretion of the arbitrator, **upon good cause shown** and consistent with the expedited nature of arbitration, the arbitrator **may** order depositions to obtain the testimony of a person who may possess information **determined by the arbitrator** to be relevant and material to the outcome of the case. **The arbitrator may allocate the cost** of taking such a deposition." AAA Commercial Rule L-3 (emphasis added).

[9] Hat tip: Scheduling depositions in "sprint weeks" is based on a suggestion by Houston arbitrator David Waddell.

AGENDA ITEM FOR DISCUSSION	*[Brackets indicate arbitrator suggestions]*
1.21. On the following schedule, **additional case-management conference calls** will be conducted to update and review the Arbitrator's Notebook, if any *(see paragraph 11(b))*; to plan the next steps; and to address any pending issues, especially whether any additional facts can be stipulated:	[Tuesdays of Weeks 4, 8, and 11, each at 1:00 p.m. Central time]
1.22. **Mediation** is scheduled as called for by AAA Commercial Rule R-9 *(possibly conducted as a mini-trial to the parties' senior management per AAA procedures if so agreed):*	[Thursday of Week 9] at [LOCATION]
1.23. Deadline for serving written expert reports *(preferably joint reports if so agreed):*	[Tuesday of Week 10]
1.24. Deadline for serving witness lists:	[Wednesday of Week 11]
1.25. Should we conduct separate hearing sessions for particular issues? *(Some such sessions might be feasible by laptop-computer video conferences instead of in person.)*	For discussion, possibly in a future conference call
1.26. Do the parties wish to agree to "baseball" arbitration for any particular issues, to create an incentive for compromise? [10]	[Yes – for all damages computations]
POST-HEARING MATTERS	
1.27. Do the parties wish to agree that I will retain jurisdiction for implementation of the remedy (if any) and/or remand (if any)?	[Yes]
1.28. Do the parties wish to agree that either party can elect "appellate" arbitration before a *three*-arbitrator panel per AAA rules?	[No]

[10] The parties may wish to agree to the procedure set forth at http://www.CommonDraft.org/#BaseballProtocol or alternatively to a "high-low" bracketing of damages.

AGENDA ITEM FOR DISCUSSION	*[Brackets indicate arbitrator suggestions]*
1.29. Do the parties wish to agree that the final award will be temporarily non-binding to create a window for *partial* retrial in court, with the challenging party normally bearing all expenses? [11]	[No]
1.30. Do the parties wish to agree to expanded judicial-appeal rights? [12]	[No]

2. **Rules of procedure and evidence:**
   (a) We will conduct this arbitration in accordance with the parties' agreement to arbitrate; the agreed arbitration rules; the applicable law; and this scheduling order.
   (b) To the extent consistent with the expedited nature of arbitration, we will also be *generally* guided by familiar principles reflected in courtroom rules such as (for example) the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

3. **Agreed variations:** The parties are free to vary any of the terms of this scheduling order by written agreement (any such agreement should be copied to me), except that if it appears to me that the agreement might delay the hearing or significantly increase the cost of the arbitration, then I may in my discretion require that the parties themselves (as opposed to the parties' outside counsel) approve the agreement in writing before I give effect to it. [13]

[11] The parties may wish to agree to the procedure set forth at http://www.CommonDraft.org/#ArbChallenge for *partial* court retrial of the award with fee-shifting analogous to Fed. R. Civ. P. 68 and various state statutes.

[12] Expanded appeal rights by agreement might be available under state arbitration law but likely are not available under the Federal Arbitration Act. See generally http://www.CommonDraft.org/#ArbEnhancedAppealCls.

[13] For a similar suggestion, see CCA PROTOCOLS, *supra* note 1, at 52-53.

4. **Discovery – running master list of exhibit-designated documents:** To help keep overall costs down, beginning immediately, the parties are requested to work together (with the claimant "having the typewriter") to create and maintain a running list of documents designated for possible use as exhibits under AAA Commercial Rule R-22(b), in roughly the following format:

MASTER EXHIBIT LIST, version [DATE + TIME] [a]					
DOC. DATE [b]	TITLE / DESCR.	EXHIBIT NO. [c]	PRODUC-TION NOS.	DESIGNATED BY [d]	STIPULATED AUTHEN.? [e] [f]

   (a) To help avoid confusion, each version of the list that the claimant provides to the other party or parties should include a version date and time.
   (b) To the extent practicable, the list of documents should preferably be sorted into **chronological** order.
   (c) Exhibit numbers normally should <u>not</u> be assigned until the exhibit list is finalized for the hearing, so that the exhibits, when arranged in order of exhibit number, will be roughly in chronological order.
   (d) The exhibit list should identify all parties intending to rely on any particular document.
   (e) The parties are encouraged to stipulate to the authenticity of documents where possible.
   (f) All timely-produced exhibits will be received *en masse* at the start of the hearing, except for any that are privileged or genuinely challenged as to authenticity. [14] *The parties are reminded, though, that **the more documents they introduce as exhibits, the costlier this arbitration will be**, because I will necessarily spend — and bill for — more time in reviewing the exhibits.*
   (g) The parties should discuss whether it would be feasible to keep the master exhibit list "in the cloud" (e.g., in a password-protected shared folder on Dropbox or Google Docs) for easy access.

5. **Discovery — option for conference-call interviews of opposing-party witnesses (when so agreed):**
   (a) Each party ("defending party") is encouraged to allow the opposing party to conduct reasonable, electronically-recorded, conference-call discovery interviews with individuals employed by the defending party. *(This can reduce the perceived need to formally depose the individual — but on the other hand, in some situations it might* confirm *the need for a deposition.)*
   (b) Each individual who is questioned in such a discovery interview, in his or her sole discretion, on advice of counsel or otherwise, may decline to answer, during the interview, any particular question.

[14] Adapted from the CCA PROTOCOLS, *supra* note 1, at 75 (fourth bullet point)

(c) A party's right, if any, to question a witness in a deposition or at the hearing will be neither limited nor expanded solely (i) by that party's participation or non-participation in a discovery interview of that witness, nor (ii) by the witness's refusal, during such an interview, to answer a particular question.

6. **Discovery — option for written questions in advance of depositions / interviews:** To save time, each party conducting a discovery interview or an oral deposition is strongly encouraged to provide the witness, in advance, with neutrally-stated written questions, especially concerning subjects expected not to be in dispute such as (for example) questions about work history, dates, participants in meetings, etc.
   (a) Whether or not to respond in writing to any particular written question is within the sole discretion of the witness, on advice of counsel or otherwise.
   (b) The parties are encouraged to agree to a procedure for accepting written answers to particular questions, if any, in lieu of orally posing those questions to the witness.
   (c) A witness's written answer to, or failure to answer, a particular written question will not in itself limit or expand the questioner's right, if any, to ask the same question again orally at a deposition or at the hearing.

7. **Discovery — third-party subpoenas:** Any third-party *discovery* subpoena that a party wishes me to sign is to include a prominent citation of my legal authority to do so — assuming that I have such authority [15] — mainly to help educate the third party and its counsel.

8. **Motion practice is to be streamlined and fast-tracked:**
   (a) To reduce costs and save time, the parties are strongly encouraged to check with me by email (copying the other side, of course) before submitting any motion.[16] *(NOTE: The arbitration rules might expressly require this for some motions, e.g., dispositive motions.)* I do not mind having at least some back-and-forth email "conversation" in lieu of traditional formal briefing, analogous to oral argument of motions made in open court.

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[15] For a survey of case law concerning arbitrators' authority to issue third-party discovery subpoenas, see generally Liz Kramer, *Document subpoenas to third parties,* at http://goo.gl/esq7C (ArbitrationNation.com 2012).

[16] By analogy: Under the 2015 amendments to the Federal Rules of Civil Procedure, Rule 16(b)(3)(B)(v) now provides that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court[.]" The committee notes state that "Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case."

(b) To reduce expense, motions and responses should refer, where possible, to the relevant portions of the Arbitrator's Notebook (see paragraph 11(b)), in preference to stand-alone briefing.

(c) In motion practice, documents should preferably be referred to by production numbers and not by exhibit numbers (which under paragraph 4(c) will preferably not be assigned until the hearing).

(d) I will often defer motions *in limine* about factual-type evidence until the hearing. My normal practice is not to *exclude* such evidence in response to traditional objections (hearsay, foundation, etc.), but instead to consider how much weight to give to the evidence. This practice can help protect the award from subsequent challenges that the arbitrator engaged in "misconduct in refusing to hear evidence pertinent and material to the controversy," which is one of the few grounds for vacatur provided in the Federal Arbitration Act.[17] Where evidence is disputed, counsel should "focus on the probativeness of the evidence, not its admissibility."[18]

(e) In the interest of reducing expense, the parties are encouraged to bring timely *Daubert*-type motions about expert witnesses.

9. **Option for "hot-tubbing" of witnesses:**

(a) To save time and provide a better picture of the evidence, if two or more witnesses are expected to testify about the same general subject matter, then the parties should confer about whether to have those witnesses testify, at least in part, in a conference-style format, so that they can identify and explain their points of agreement and disagreement. *(NOTE: I have found this to be an effective way of streamlining witness testimony.)*

(b) For expert-witness testimony, I may in my discretion direct such a witness-conference format. [19]

10. **Option to lead one's own witness:** To save time in oral direct examination, counsel may ask leading questions (within reason) to establish uncontroverted, evidentiary-type facts.[20]

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[17] *See* 9 U.S.C. § 10(a)(3).

[18] CCA PROTOCOLS, *supra* note 1, at 75 (first bullet point).

[19] See, e.g., *Expert Witnesses in Arbitration* 8-9 (2012), http://goo.gl/Cw0R5q (Skadden.com)

[20] Reminder: An *argumentative* leading question is likely to diminish the weight given to the witness's response; also, in some circumstances, a non-leading question might result in a more-persuasive response.

11. **Arbitrator questions & notebook:** Throughout this arbitration, to help focus and manage the proceedings and reduce overall cost, I likely will do one or both of the following, in my discretion, subject to the parties' right to overrule me by agreement as stated below:
    (a) I likely will pose questions to the parties from time to time about what specific facts they intend to prove (and why) and how they intend to prove them. [21] I will make such questions and answers available to all parties; that is to say, the questions and answers will not be *ex parte*.
    (b) I likely will provide the parties from time to time with a draft of a detailed, neutrally-stated "**Arbitrator's Notebook**" that sets forth my then-current understanding of some or all of:
        (1) stipulations and disputed factual assertions concerning the parties' claims and defenses;
        (2) the evidence made known to me by the parties;
        (3) the relevant law;
        (4) possibly, one or more questions about some or all of the above.
    (c) Some or all of the final text of the Arbitrator's Notebook is likely to be incorporated into the award; the parties therefore are encouraged to make timely written suggestions for revisions.
    (d) The cost of my preparing the Arbitrator's Notebook should not be an issue, because in writing the award, I will necessarily spend time organizing and drafting a statement of the evidence and the law anyway; my doing some of that work as the case proceeds, and making it available to the parties, will almost certainly be a net plus.
    (e) If the parties or their counsel agree that I should not ask questions (either in general or about a particular subject) or that I should not make the Arbitrator's Notebook available to them, then I will of course abide by that agreement.

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[21] See AAA Commercial Rule R-32(b), which provides that "The arbitrator, exercising his or her discretion, **shall** conduct the proceedings with a view to **expediting** the resolution of the dispute and **may … direct** the parties to focus their presentations on issues the decision of which could dispose of all or part of the case." ¶ See also the arbitrator code of ethics of the American Arbitration Association, which contemplates that arbitrators will "**engage in discourse** with the parties or their counsel, **draw out arguments or contentions** [and] **comment** on the law or evidence …. These activities are integral parts of an arbitration." Commentary, Canon I of the AAA's Code of Ethics for Arbitrators in Commercial Disputes, available at https://goo.gl/kbAmoX (ADR.org). ¶ Similarly, a federal judicial manual recommends that **at the initial pre-trial conference** in complex cases, "the judge should **require the attorneys to describe the material facts they intend to prove and how they intend to prove them**," FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 11.33 at 44 (4th ed. 2004), and that judges "requir[e], with respect to one or more issues, that the parties present **a detailed statement of their contentions, with supporting facts and evidence** …." *Id.* at 46. *(in the above quotations, all emphasis is mine — DCT.)*

12. **Arbitrator's option to circulate draft award:** Unless the parties agree otherwise, I may in my discretion circulate one or more drafts of the award, to give the parties an opportunity to comment.[22]

13. **Reminder: No *ex parte* communications:** All written communications to me by any party are to be contemporaneously copied to each other party; the parties and their counsel are not to communicate orally with me except at oral hearings and during case-management conference calls.

14. **Reminder: Confidentiality:** The confidentiality provisions of the arbitration rules and/or of the parties' agreement to arbitrate will govern unless otherwise agreed.

15. **Party agreement as to limitations of arbitrator's role:** By proceeding with this arbitration with me as the arbitrator, each party specifically acknowledges and agrees that:
    (a) I am not legal counsel for that party (or any other in this case); that party may not and will not rely on anything I say (orally or in writing) or do as a substitute for advice from a licensed attorney; and
    (b) my notes and files *(not including any interim or final awards issued)* are not a record in this case and are not available to any party at any time without my express written consent, which I may grant, withhold, or condition in my sole and unfettered discretion; I reserve the right to destroy some or all of my notes and files at any time.

This scheduling order remains in effect unless and until modified or rescinded in writing.

_____
D. C. Toedt III, arbitrator

_____
Date signed

[22] Because arbitration awards can be appealed only on very-limited grounds, review of a draft award might be a party's last post-hearing opportunity to change the outcome of the case. ¶ Review of a draft award by the parties can also provide many of the benefits of a three-arbitrator panel without the attendant extra expense.