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SALZBURG CONFERENCE

International Commercial and
Construction Arbitration

DISCOVERY IN
INTERNATIONAL ARBITRATION

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International arbitration produces a relatively efficient and cost effective remedy for international trade disputes by eliminating many of the jurisdictional conflicts associated with multinational litigation. However, the international arbitration process poses significant challenges. More often than not the attorneys representing the disputing parties come from different legal systems. The arbitral panel itself may also have diverse legal backgrounds. These participants come to the arbitration table with expectations and biases concerning the methods they will be using to sort out complex factual issues. The uncertainty of whether the parties will be allowed to discover and exchange evidence before the hearing can be disquieting.

This paper will attempt to (1) explain some of the reasons why the prehearing discovery of evidence is such an ideological issue in international arbitration; (2) identify some of the benefits of both the common and civil law approaches to gathering and presenting evidence; (3) suggest discovery guidelines which homogenize the common and civil law approaches; and (4) discuss briefly the ways in which the arbitral forum affects the arbitrants' ability to conduct discovery.

THE DISCOVERY DEBATE

Europeans generally do not share the American enthusiasm for litigation. They often view the American advocacy system as a hostile, aggressive environment. In particular, the size of American jury verdicts, sometimes inflated by treble and punitive damages, and contingency fee attorney contracts, offend European sensibilities.

Many European attorneys view the American discovery process--often referred to as a "fishing expedition"--as the root cause of all they find distasteful about American litigation. This prejudice is understandable when one acknowledges the fundamentally different ways evidence is gathered and presented in common and civil law systems.¹ In civil law countries it is solely within the province of the judge

¹ The European bias against discovery, however, is not limited to civil law practitioners. The English also, do not share the American zest for uncovering facts after filing suit. They generally disapprove both of our method of deposition taking and the breadth of our document requests. For example, the English courts view particularly described documents as the only ones suitable for document requests. General words in a request for "any memoranda, correspondence or other documents" are deemed far too broad. The request must be for actual documents shown by evidence to have existed as opposed to conjectural documents, which may or may not exist. See Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. A.C. 547 (1978); In re Asbestos Ins. Coverage Cases, 1 W.L.R. 331 (1985).

to gather the evidence. Civil law practitioners, therefore, find the proactive behavior of the American litigator, charged with the responsibility for gathering evidence, strange and inappropriately aggressive. Furthermore, civil law attorneys do not appreciate the perceived need that American litigators have to organize their evidentiary presentations and anticipate opposing evidence before the hearing begins. Unlike the common law system, civil law cases are often tried in installments, and evidence gathering by the inquisitorial judge becomes a part of the trial process itself.

Attorneys from the common law tradition, on the other hand, have the responsibility of gathering, organizing, and presenting evidence at trial. They are accustomed to the benefits of previewing opposing evidence so that they can prepare a defense. In fact, they consider the absence of discovery to be trial by ambush.

THE DISCOVERY RULES IN INTERNATIONAL ARBITRATION

All of the leading arbitral institutional rules contain provisions that enable the arbitrators to allow the parties to engage in prehearing discovery. Some institutional rules are more explicit than others. Under the rules of the American Arbitration Association (International Rules) and UNCITRAL, arbitral panels may order a party to deliver to the panel and to the other party a summary of the documents and other evidence. At any time during the proceeding, the panel may order a party to produce documents, exhibits or other evidence that they deem necessary or appropriate, AAA Int'l Arb. R., art. 20 (2-3); UNCITRAL R., art. 24. The AAA Rules further permit the panel, when authorized by applicable law, to issue subpoenas requiring production of witnesses or documents. AAA Int'l Arb. R., art. 31. Under the London Court of International Arbitration Rules, a tribunal may require a party to give notice of the identity of its witnesses, the subject matter of the testimony, and may order the parties to make property and relevant documents available for inspection. LCIA R., art. 11 & 13.

The Rules of the International Chamber of Commerce are less explicit about discovery. There the arbitrators have the authority simply to "establish the facts of the case by all appropriate means." ICC R. of Int'l. Comm. Arb., art 20(1) (1998). The authority to order production of documents is generally thought to be implicit in this broad mandate.

Thus, the leading arbitral institutions permit discovery at the discretion of the arbitrators, without providing guidelines as to the scope or type of discovery that is permitted. Consequently, when the parties cannot agree on the appropriateness or extent of discovery, the question of whether to allow discovery, its scope, and the

methods that will be utilized will turn on the arbitrators' personal views and preferences and their legal backgrounds.

International arbitration has evolved to the point where attorneys and arbitrators with international experience generally recognize the benefits of a prehearing exchange of the evidence that the parties will rely on to make their case. For a number of reasons, this exchange is generally viewed as a time saving measure, in view of the factual complexity usually associated with international arbitration. It is generally agreed that, where parties have access to documents relevant to the case prior to the hearing, the parties can present their evidence in documentary, rather than verbal, form which can expedite the hearing. Furthermore, the production of documents directly relevant to the case can be less expensive than live testimony where value is applied to witness time and travel. Additionally, discovery enables the opposing parties to objectively evaluate the relative strengths and weaknesses of each other's case prior to the hearing. Statistics suggest a correlation between an increase in information acquired through discovery and an increase in the rate of cases that are settled. Finally, discovery enables the arbitrators to render a fairer and more just decision because they have the opportunity to familiarize themselves with the evidence in advance of the hearing.

Nevertheless, without an express clause in an agreement, the issues of whether to allow discovery, its scope, and the discovery methods allowed are totally dependent on the arbitrators' discretion. The results can be unpredictable, and an aggrieved party is not likely to find support from courts. See, for example, Foremost Yarn Mills, Inc. v. Rose Mills, Inc., 25 F.R.D. 9 (E.D. PA. 1960) (neither the Federal Arbitration Act nor the Federal Rules of Civil Procedure make available to the parties the discovery procedures provided in the FRCP) Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359 (S.D.N.Y. 1957) (court considers pretrial discovery superfluous and utterly incompatible with arbitration, refusing to compel the taking of depositions of party employees pursuant the Federal Rules of Civil Procedure).

DRAFTING THE ARBITRATION CLAUSE

Given the legal cultural clash between attorneys from different legal traditions (and even within arbitral panels), and the uncertainties attendant with institutional rules that permit, but do not prescribe, discovery procedures, contracting parties may find it advisable to address the issue of discovery in the arbitration clause. Without the benefit of hindsight as to the issues to be arbitrated, one cannot anticipate precisely the benefits or the downsides of discovery to one's client. Nevertheless, the following general considerations may be helpful guidelines in determining whether, and the extent to which, one should provide for discovery in an arbitration agreement:

- Will the client more likely be making or defending a claim?
Respondents typically need discovery more than claimants. Persons receiving money under a contract may be more likely to make a claim.
- Who is likely to have more documents and or witnesses to examine?
If it is the other party, that is a point in favor of adding a discovery provision.
- Will the client have to disclose sensitive or confidential information that it does not want the other side or third parties to see?
A confidentiality agreement can protect documents from third parties.
- Is the client a United States party contracting with a non-US party?
Non U.S. companies may be less than thorough in producing documents, and their non-U.S. attorneys are often not bound by local ethical rules requiring that their clients comply with discovery requests. Non-U.S. courts are less willing than U.S. courts to enforce discovery orders issued by arbitrators.

The situs of the arbitration determines the national law that governs the arbitration proceedings as well as the court system that the parties will rely on should the arbitral process fail in any respect. Therefore, when drafting the arbitration clause one should give careful consideration, from a discovery perspective, to the law of the situs of the arbitration. The procedural laws of that country will determine what assistance one may receive from the courts in compelling reluctant witnesses to comply with discovery requests; e.g., see Section V. below.

For American practitioners, it may be tempting to incorporate the Federal Rules of Civil Procedure² into the discovery provision of the arbitration clause, simply because these rules are familiar. However, as arbitration is usually chosen over litigation, at least in part, to save time and money, these rules may be too broad. Furthermore, the FRCP are likely to offend arbitrators from other cultures as well as the local jurisdiction that will be enforcing them, if it is one other than the United States.

² Under the United States Federal Rules of Civil Procedure (FRCP), parties may “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Fed. R. Civ. P. 26 (b). These rules do not require that the evidence sought be admissible, so long as it “appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Furthermore these rules allow a party to take the testimony of any person, including a party, by deposition upon oral examination, without leave of court, except under limited circumstances. Fed. R. Civ. P. 30(a)(1).

THE RULES OF THE INTERNATIONAL BAR ASSOCIATION ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION

On June 1, 1999, the International Bar Association adopted by resolution the Rules of the International Bar Association on the Taking of Evidence in International Commercial Arbitration (“IBA Rules”), replacing the rules of the IBA originally issued in 1983. The IBA Rules provide mechanisms for the presentation of documents, fact witnesses, expert witnesses, site inspections, and for the conduct of evidentiary hearings. The IBA Rules are designed to be used in conjunction, and adopted together, with institutional or ad hoc rules governing international commercial arbitrations.

The IBA Rules represent a consensus and utilization of the strengths of the civil and common law systems. In accordance with the civil law tradition, these rules allow witness statements and permit the arbitral panel to be proactive in gathering evidence. They co-opt from the common law tradition the fundamental principle that a party is entitled to know in advance of the hearing, the evidence that will be relied upon by opposing counsel. Additionally, they anticipate the need for cross examination. As such, they represent a compromise in which participants from relatively diverse legal cultures can find efficiency and fairness. Furthermore, the IBA Rules honor one of the founding precepts of arbitration--that dispute resolution be relatively quick and cost effective.

The IBA Rules operate under the principle that “each Party shall be entitled to know, reasonably in advance of any evidentiary hearing, the evidence on which the other parties will rely.” IBA R. Evid., preamble (4). The IBA Rules, generally, empower the arbitral panel with discretion to allow the parties to utilize four different methods of discovery: the document request, the witness statement, the site inspection, and the expert opinion.

The IBA Rules do not, however, contemplate the use of depositions. This considered omission can perhaps be explained by appreciating the European bias against depositions and discovery, as reflected in the words of an English Magistrate from the English High Court of Justice, Queen’s Bench Division.

These examinations [referring to depositions] are often what we would regard as fishing expeditions . . . In cases where we had made orders for examination, the American lawyers have wasted a great deal of time thrashing around, asking blind questions, without a clue what the answer is going to be, often of marginal relevance to any pleaded issue, in the macawberish hope that something might turn up that would advance their case at trial. This exercise, it was suggested, is a waste of everybody’s time . . . There is often a venal

and sinister purpose to these requests for examination. This relates to costs. Often a rich party seeks to depose enormous numbers of witnesses in an American Civil Proceeding simply to run costs up. If it is a little jolly outing to go to Houston or Los Angeles to examine witnesses, it is even more fun to go -- at the client's expense -- to London or Sydney.

Therefore, if one can anticipate the need for depositions at the contract drafting stage, one might want to add a clause permitting the limited use of depositions in arbitral proceedings.

An arbitration discovery clause incorporating the IBA Rules of Evidence might look something like this: "In addition to the [institutional or ad hoc rules chosen by the parties], the parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence and that limited depositions may be taken at the request of either party, subject to the approval of the arbitral panel."

On the other hand, if the contracting parties fail to address discovery in the arbitration agreement, the parties and the arbitral panel may adopt the IBA Rules of Evidence, in whole or in part, at the planning conference.

The pertinent provisions of the IBA Rules are briefly summarized in Appendix A, attached hereto.

THE IMPACT OF NATIONAL LAWS ON DISCOVERY IN INTERNATIONAL ARBITRATION

A. The Law Of The Situs Will Govern The Discovery Process.

Even after the attorneys for the parties and the arbitral panel have agreed on a discovery plan, enforcement of that plan can be troublesome. National laws can limit the arbitrators' power to order discovery, even when the parties have agreed otherwise. For example, the German Civil Procedure Code forbids arbitrators from ordering parties to disclose information. German law does, however, permit a party seeking discovery to apply to a court of competent jurisdiction for an order to enforce disclosure.

Additionally, arbitrators must rely on the courts at the situs of the arbitration to compel discovery, particularly when it is directed to third parties. Under United States and many European procedural laws, an arbitral panel may seek judicial assistance in obtaining discovery. However, some jurisdictions may not be so accommodating. Therefore, one should consult the law of the situs of the arbitration hearing to determine whether the courts will intervene in arbitral discovery disputes before making a final decision on the arbitral venue.

National laws can also affect the manner in which discovery is conducted. For example, it is illegal in Greece to interview and prepare a witness for a hearing. Outside the United States, court reporters are not certified under American standards; in Japan the court reporter will need a work visa, and the attorney will need a special visa for taking a deposition. Furthermore, certain local procedural rules may affect the taking of depositions. For example, under Japanese rules, one must reserve a room in the U.S. embassy for taking depositions or otherwise be subject to arrest.

B. Recent United States Decisions Have Not Supported Arbitral Discovery.

The United States is generally perceived to be a favorable forum for discovery in arbitration. Section 7 of the Federal Arbitration Act (FAA), 9 U.S.C § 7, allows arbitrators to decide the need for and scope of disclosure by parties. This code section gives arbitrators the power to summon witnesses and documents which may be deemed relevant and material as evidence in the case, and gives the United States Courts in the district in which the arbitrator is sitting the power to compel attendance or punish for contempt.

The FAA, Section 7, historically has been relied upon by American courts to support arbitrators who order third party discovery. See, for example, Koch Fuel International, Inc. v. M/V South Star, 118 F.R.D. 318 (E.D.N.Y. 1987). There the Court relied on the United States' strong federal policy favoring arbitration to allow the plaintiff to take brief depositions from a limited number of crew members who were alleged to be the only persons possessing first-hand knowledge of material facts. The crew members were preparing to depart the United States and would have, therefore, been unavailable to provide testimony in the hearing in London under English law. Nevertheless, the Court found unpersuasive the opposing party's argument that the depositions were an "anathema" to the method of dispute resolution in England, finding instead that the depositions would be an aid to the arbitration.

However, a recent United States Court of Appeals decision held that, in domestic cases arising under the Federal Arbitration Act, the FAA does not authorize an arbitrator to subpoena third parties during prehearing discovery. In Comsat Corp. v. National Science Foundation, 190 F.3d 269 (4th Cir. 1999) a dispute arose between a contractor and owner for cost overruns in connection with the construction of a radio telescope. The arbitrator issued a subpoena to the National Science Foundation (NSF), requiring the agency to produce all documents related to the telescope. The NSF objected in part on the legal ground that the FAA does not grant an arbitrator the authority to subpoena third parties for pre-arbitration discovery. The Fourth Circuit agreed, reading the statute narrowly as a grant of power to compel non-parties to testify at the arbitration hearing, not the power to compel discovery. The Court reasoned that a hallmark of arbitration is a limited discovery process and

rejected the argument that in a complex case the fairness of arbitration will be sacrificing if parties are unable to review and digest relevant evidence prior to the arbitration hearing. The Court did, however, leave the door open for a different outcome upon showing of “special need,” which the Court refused to define, except to say that the information must be otherwise unavailable.³

Until the Comsort decision, U.S. district courts had enforced prehearing document discovery, but were split on compelling non-party depositions. C.F., Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fla. 1988) (rejecting plaintiffs’ contention that § 7 of the Arbitration Act only permits arbitrators to compel witnesses at the hearing, and permitting subpoenas requiring production of documents); Koch Fuel International, Inc. v. M/V South Star, *supra* (allowing third party depositions); Integrity Ins. Co. v. American Centennial Ins. Co., 885 F. Supp. 69, 71-73 (S.D. N.Y. 1995) (quashing subpoena, insofar as it sought non-party deposition).

Another U.S. federal law, 28 U.S.C. § 1782 authorizes a district court in which a person resides or is found to order that person to give testimony or to produce documents for use in a proceeding before a foreign or international tribunal. Historically, Section 1782 has been considered a resource for compelling discovery in aid of international arbitration. *See, In re Technostroyexport*, 853 F. Supp. 695, 697-98 (S.D. N.Y. 1994) (foreign arbitrator’s ruling that discovery should take place is sufficient to seek order compelling discovery pursuant to 28 U.S. C. § 1782). However, for the second time since January 1999, a U.S. appeals court has ruled that 28 U.S.C. § 1782 does not apply to private arbitration proceedings. *See, Application of the Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880, (5th Cir. 1999) (“Empowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process.”); NBC v. Bear Stearns & Co., 165 F.3d 184 (2nd Cir. 1999), (“Statute does not apply to proceedings before private arbitral panels.”) A recent commentary on these two decisions suggests that some state law codes may be a resource for compelling discovery in international arbitration. *See, Brian M. Cogan and David A. Sifre, United States Federal Courts: No Longer Available to Compel Discovery in Connection with Non-United States Arbitrations*, 10 Am. Rev. Int’l Arb. 19 (1999).

SUMMARY

³ In a subsequent opinion, the Fourth Circuit fleshed out the “special need” justification for compelling an arbitrator’s discovery order, describing it as evidence necessary to the arbitration claim that, if not preserved, would disappear or be materially altered. Deiulemar Compagnia D. Navigazione S.p.A. for the Perpetuation of Certain Evidence v. M/V Allegra, 198 F.3d 473, 481 (4th Cir. 1999).

Seeking an accommodation of the differences between the civil and common law systems, international arbitration seems to be evolving into a blend of inquisition and adversarial procedures. The last ten years have evidenced the benefits of gathering and synthesizing complex factual information in advance of the evidentiary hearing while honoring one of the reasons parties agree to arbitrate -- to avoid the expense and delay of protracted discovery. Nevertheless, without an agreement among the parties, the availability and scope of discovery is significantly influenced by the background of the arbitrators. Arbitrators from civil law nations drawing from inquisitorial traditions, where party-initiated discovery is not common, may be reluctant to allow parties much leeway in conducting discovery. On the other hand, arbitrators and advocates steeped in common law traditions will likely be amenable to at least some limited pre-hearing discovery.

Generally, however, one can expect to get more discovery in international arbitration than one could in a European court, but less than in a U.S. court. As the IBA Rules reflect, there is a trend toward use of document production, witness affidavits, site inspections, and expert opinions. Depositions are typically not utilized to a significant degree, but might be allowed depending on a showing of exceptional circumstances.

Because of the lack of support in some jurisdictions for enforcing an arbitrator's subpoena powers, gathering evidence from unwilling parties and strangers to the dispute will be a procedural challenge. Most tribunals are hesitant to issue discovery orders, in part because they lack the direct authority to sanction disobedience and the resources to supervise the process. There is an inherent sanction, however, with respect to parties who refuse to comply with a discovery plan requested by the arbitrators. As reflected in the IBA Rules, if the arbitral panel orders discovery and a party does not comply, the arbitrators may draw an inference against that party. IBA R. Evid., art. 9(4).

The law of the situs of the arbitration will affect the authority of the arbitrators to order discovery and the enforcement of arbitral discovery orders. Recent decisions in certain United States circuit courts have called into question the formerly held view that international arbitrants could find support in the United States for discovery against non-parties in aid of arbitration.

APPENDIX A

OUTLINE OF THE DISCOVERY PROVISIONS OF THE IBA RULES ON THE TAKING OF EVIDENCE

The Document Request Provisions:

- Empower the Arbitral Tribunal to direct another party to produce documents;
- Allow the parties the opportunity to review, in advance of the hearing, the documents that the opposing side will rely on, including public documents and those in the public domain;
- Allow the parties to submit to the Tribunal and to the other side additional document requests, to which the non-submitting side can object on the grounds that (1) the documents requested are irrelevant or nonmaterial; (2) the request is unreasonably burdensome; (3) the request is subject to legal or ethical privilege as determined by the Tribunal;¹ or (4) the request violates confidentiality;
- Allow the Tribunal to appoint an independent and impartial expert, bound to confidentiality, to review and report on the objections, prior to the panel's determination;
- Allow discovery to third parties and empower the Arbitral Tribunal to take whatever steps are legally available to obtain the requested documents;
- Empower the Arbitral Tribunal on its own initiative to request a party to produce documents that it believes to be relevant and material to the outcome of the case;
- Allow parties to request additional documents as a consequences of the issues raised in document productions, witness statements, site inspections, or expert reports; and
- Protect the confidentiality of documents produced.

The Witness Provisions:

¹ Civil law systems do not recognize the attorney-client privilege for in-house corporate attorneys. Therefore, in house and external communications by/to/from European General Counsel generally are not legally protected from discovery.

- Require parties to identify the witnesses whose testimony will be relied upon and to describe the subject matter of the testimony;
- Allow parties, their officers, employees, legal advisors or others to interview witnesses or potential witnesses; and
- Empower the Arbitral Tribunal to order parties to submit sworn written statements by each witness on whose testimony the parties will rely, containing the witness's background and qualifications and a full and detailed description of the facts and source of information relied upon.²

The Site Inspection Provision:

- Empowers the Arbitral Tribunal, at the request of the parties or on its own initiative, to inspect any site, products, or process that it deems appropriate; and
- Allows attendance by the parties, their representatives and/or the tribunal expert at the site inspection.

The Expert Opinion Provisions:

- Recognize the right of parties and the Tribunal to rely on experts;
- Require parties to submit Expert Reports prior to the hearing;
- Empower the Tribunal to request opposing experts to meet and confer and attempt to reach agreement on issues on which they differ;
- Require party appointed experts to appear for testimony at the evidentiary hearing, unless parties and the Tribunal otherwise agree;

² The use of witness statements at the hearing is a departure from the common law tradition and initially may seem repugnant to American practitioners, who recognize that the demeanor of a live witness offers insight into his credibility. Furthermore, unless the witness is compelled to be present at trial, he cannot be cross examined about his written testimony. However, civil law attorneys, who are much more accustomed to this method of presenting factual evidence, can attest to its cost effectiveness in saving travel costs and hearing time. Furthermore, written witness statements submitted prior to the hearing can allow arbitrators to acquaint themselves in greater detail with the facts of the case, early in the proceedings, thus allowing them to focus on the factual disputes at the hearing.

- Require the Tribunal to disregard the Expert Report if the party appointed expert is not present;
- Empower the Tribunal to appoint an independent expert, giving the parties the right to object to the expert's independence;
- Empower the Tribunal Expert to request a party to provide relevant and material information, access to documents, property or site for inspection;
- Require the Tribunal Expert to report his findings in writing and give the parties the right to respond;
- Require the Tribunal Expert to be present at the evidentiary hearing, if requested by a party or the Tribunal; and
- Give the Tribunal the discretion to determine how the fees and expenses of the Tribunal Expert will be paid.

APPENDIX B

[ARBITRAL INSTITUTION]

_____)
Claimant,)
and) CASE NO. _____
_____)
Respondent [and Counterclaimant.])
_____)

**STIPULATION FOR PRE-ARBITRATION
AND ARBITRATION PROCEDURES**

The Parties, _____, as Claimant, and
_____, as Respondent, stipulate and agree to the
following procedures and guidelines in order to facilitate the scheduling and resolution of
this arbitration proceeding. This stipulation shall supplement and supersede (in the event
of conflict) the contractually specified _____ Rules of
the [Arbitral Institution].

I.

PRE-ARBITRATION MATTERS

(A) General Administrative Procedures:

If and to the extent issues or disputes arise between the parties regarding pre-hearing procedures, the following steps shall be expeditiously taken in order to minimize the potential for delay or disruption of the arbitration hearing:

- (a) Counsel will first confer, personally or by telephone, to discuss resolution of the issues or disputes.
- (b) All unresolved disputes shall be addressed by a conference call among counsel and the Arbitrators. The conference call will be scheduled by the [Arbitral Institution], at the request of any party, at a mutually agreeable time, as soon as practicable after the dispute arises.
- (c) During the conference call, counsel for the parties may make their arguments relative to the dispute. The Arbitrators (or their designated representative) shall then issue a decision regarding the dispute.

(B) Pre-Hearing Disclosure

(1) Exchange of Relevant Documents:

On or before _____, each of the parties will provide access to the other of all non-privileged documents that relate or refer to the matters at issue and which are in each parties' possession, custody, or control. Each party will be allowed to inspect the

other party's documents and designate documents for copying at the requesting party's expense. This obligation to produce documents will be deemed as continuing so as to require notification to the opposing party or counsel that continued inspection and copying of any additional documents relating or referring to the matters at issue coming into a parties' possession, custody, or control after the initial production will be permitted pursuant to this Stipulation.

(2) **Subpoenas Directed Towards Third Parties:**

On or before _____, each of the parties will determine the identities of any known third parties to whom it requests the Arbitrators to issue subpoenas for testimony and/or production of documents. Subpoenas for documents or subpoenas for personal attendance at a deposition or hearing may be requested after _____, with notice to opposing counsel.

(3) **Exchange Of Tentative Witness Lists:**

On or before _____, each party shall provide the other with a tentative list of anticipated witnesses;

- (a) With regard to "fact" witnesses, the list shall provide the witness' name, address and telephone number, together with a general synopsis of the anticipated testimony; and
- (b) With regard to "expert" witnesses, the list shall include the identity of each anticipated expert witness and a general statement of the

subject matter and a general statement of the opinions to which the expert is expected to testify; and

- (c) Note: These lists are subject to later revision and refinement (See, e.g. part D, below) upon reasonable advance notice to the other side prior to the arbitration hearing.

(4) Preliminary Statement of Claims and Defenses:

On or before _____, the parties shall exchange: (1) a concise written summary of their claims or counterclaims (including claims of offset), and defenses, stating with reasonable particularity concerning each claim or defense, an explanation of the claim or defense and a breakdown of all damages or other relief sought in this Arbitration; and (2) a concise summary on their legal and factual arguments underlying each claim, counterclaim or defense that each party intends to raise at the arbitration hearing. Each party shall be allowed to reply to the other's brief on or before _____.

(5) Depositions of Key Witnesses:

On or before _____, the parties will be allowed to depose ___ (__) witnesses (e.g., experts and party representatives). No deposition shall exceed a total time (for each deposed party) of ___ (__) hours in length.

(6) Stipulation of Uncontested Facts:

- (a) The parties shall exchange proposed stipulations of undisputed facts on or before _____.

- (b) Each party shall give written notice of objections, if any, to stipulations proposed by any other party by _____.
- (c) On or before _____, the parties' counsel shall then confer by conference call (to be initiated by counsel for the Claimant) to review proposed stipulations to which objections have been made to attempt to come to agreement regarding such stipulations.

(C) **Pre-Hearing Memoranda:**

Pre-hearing Memoranda or briefs may be submitted in order to assist the Arbitrators in focusing upon the central issues giving rise to this dispute. The Memoranda or briefs shall not exceed twenty (20) pages (8½ x 11, double spaced). Such Memoranda shall be submitted to the [Arbitral Institution] for distribution to the Arbitrators on or before _____. The substance of the Pre-Hearing Memoranda shall be limited to the following:

- (1) A summary of the factual contentions;
- (2) A summary of pertinent legal and contractual issues; and
- (3) A final specification of claims, counterclaims (monetary amounts), and defenses.

(D) **Exchange of Exhibits and Witness List:**

On or before _____, the parties shall exchange the following:

- (1) A list of witnesses that may be called by the parties regarding their claims and defenses, with a brief summary of the testimony each witness is expected to offer;
- (a) This list need not include potential witnesses whose testimony would be purely of a “rebuttal” nature;
 - (b) This list may be amended by either party upon reasonable advance notice to the other or with the authorization of the Arbitrators (or its presiding member);
 - (c) With regard to “fact” witnesses, the list shall provide the name, address and telephone number together with a general synopsis of the testimony proposed; and
 - (d) With regard to “expert” witnesses, the list shall include the identity of each proposed expert witness and a general statement of the subject matter and a general statement of the opinions to which the expert is expected to testify;
- (2) A list of the exhibits that may be used by the parties during the hearing;
- (a) This list need not include “rebuttal” evidence; and
 - (b) This list may be amended by either party upon reasonable advance notice (accompanied by immediate production of the exhibit in question to the other parties) and the authorization of the Arbitrators (or its presiding member).

(E) **Pre-Hearing Consultation of Counsel:**

On or before _____, counsel shall meet or confer as necessary in order to accomplish:

- (1) An exchange (or to provide access to) all proposed documentary exhibits and witness information;
- (2) Compliance with all other hearing procedures;
- (3) Finalization of any stipulations of undisputed fact; and
- (4) Approximate sequencing and scheduling of witnesses during the hearing.

Claimant's counsel shall have the responsibility to schedule and coordinate this conference.

II.

ARBITRATION HEARING

(A) **Witnesses And Evidence:**

Except for _____ (__) corporate representative(s) for each party, witnesses shall be sequestered, subject to the further decision of the Arbitrators during the course of the hearing. Subject to the discretion and decision of the Arbitrators, and with the exception of "rebuttal" evidence, a party may only offer, and the Arbitrator may only rely upon, evidence and witnesses that have been timely identified and made available to the opposing party prior to the arbitration hearing as required by this Stipulation.

(B) **Arbitration Hearing:**

- (1) The estimated duration of the hearing is ____ (__) days.

(2) Subject to decision by the Arbitrators, the parties suggest that each day's hearing shall run from 9:00 a.m. to 12:30 p.m. and from 1:30 p.m. to 6:00 p.m., with appropriate breaks.

(C) **Time Allocation:**

There is an estimated arbitration hearing time availability of _____ (___) hours. Therefore, unless the parties agree otherwise, this time will be allocated equally (i.e., sixteen (16) hours each) between the parties to use as each party sees fit, subject to the applicable Rules and the discretion of the Arbitrators.

(D) **Transcription:**

The parties have agreed to share equally in the takedown and transcription cost of the hearing.

III.

POST-ARBITRATION MATTERS

(A) **Post-Hearing Brief:**

After the close of the hearing, as determined by the Arbitrators, the parties shall be permitted an appropriate amount of time to submit post-hearing memoranda prior to the close of the evidence, the precise timing, scope, content and length of which shall be determined by the Arbitrators.

(B) **Opinion of the Arbitrator's Award:**

The arbitration award shall be in writing and [shall/shall not] include an explanation together with a breakdown, if any, of the award.

Respectfully submitted, this ____ day of _____, _____.

By: _____

By: _____

[Address]

ATTORNEYS FOR CLAIMANT

By: _____

By: _____

[Address]

ATTORNEYS FOR RESPONDENT