



- I. **Introduction.** The preliminary hearing provides an opportunity for the arbitrator or arbitrators (the “tribunal”) and the parties to shape the course of the arbitration. The American Arbitration Association (the “AAA”) Commercial Rules¹ contemplate “holding a preliminary hearing as early in the process as possible.” P-1(a). In large complex cases, such hearings are mandatory. L-3(b). The tribunal will almost always want to schedule a preliminary hearing as soon as practicable after appointment. R-21(a). Section IV (below) provides suggestions on how to make the most of the opportunity that a preliminary conference or hearing provides to the parties and the tribunal to craft a just, fair, and cost-effective arbitration procedure.

What topics should be addressed at the preliminary hearing and the depth of discussion will depend on the needs of the parties and circumstances of the dispute. But many of the questions that should be posed and discussed at the preliminary hearing will be the same for most large complex commercial cases. The Commercial Rules provide a helpful checklist of topics that can operate as a baseline and be used as an agenda at the preliminary hearing. This Practice Guide provides annotations to the checklist to help guide the parties and the tribunal effectively through the process.

- II. **Timing of the Preliminary Hearing.** Rule 21 instructs that the preliminary hearing should ideally be convened “as soon as practicable after the [tribunal] has been appointed,” while affording parties adequate time to prepare. As discussed in Section IV below, the parties should “meet and confer” in advance, to discuss and attempt to agree on as many issues as they can **before** the actual preliminary hearing.

The hearing should also be set at a time when all parties and the tribunal can devote sufficient time in advance of the hearing to become familiar with important topics that will need to be addressed at the hearing. If the scheduled time proves insufficient to complete the hearing, a continuation of the preliminary hearing should be set in the near future before adjournment.

- III. **Who should participate and how?** It is imperative to have informed decision makers participate in the preliminary hearing. Clients should be entitled and encouraged (but not required) to participate because decisions will be made that will affect the course, scope, and cost of the arbitration. Expectations will be set. This is an opportunity for the tribunal to be sure that client expectations (typically for efficiency and speed) are in line with those of their advocates (who may believe more time is needed for discovery). Lead counsel for all parties should participate.

Preliminary hearings may be conducted via conference telephone call (or videoconference) or in person. Telephone calls are most common as they are less costly and time-consuming for all concerned. There may be some circumstances where an in

¹ Commercial Arbitration Rules (the “Rules,” cited herein as R-1 *et seq.*) of the AAA, together with the Preliminary Hearing Procedures (the “Preliminary Procedures,” cited herein as P-1 *et seq.*) and the Procedures for Large, Complex Disputes (the “Large Case Procedures,” cited herein as L-1 *et seq.*) each address the Preliminary Hearing.



person meeting is desirable, especially if all can convene in one place without significant travel or in the situation where there is a Pro Se party.

- IV. **Agenda for the Preliminary Hearing (Items to be discussed by the parties before the Preliminary Hearing).** In advance of the preliminary hearing the parties are to discuss and attempt to agree on as many issues as practicable. The Commercial Rules provides a fairly extensive “checklist” of suggested subjects that the parties and the tribunal may wish to address at the hearing. *See* P-2. Rule 21(b) instructs that “the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute.” To prepare, the parties should meet and confer in advance, ideally with lead counsel, and review the checklist. They should decide which topics should be addressed at the hearing, reaching agreements wherever possible.

The list is not intended to be exhaustive and the parties are encouraged to consider additional topics that may be important to their specific arbitration. Ideally before the hearing, if time permits, the tribunal should annotate or revise the checklist to reflect prior experience and preferences, as well as the specific needs and issues raised from an examination of the case file. An arbitrator may wish to develop and reuse a preferred form of checklist incorporating best practices learned from multiple arbitrations, each time updating and improving it based on what has worked well in the past (and what did not). The checklist should be distributed to the parties in advance of their meeting.

Counsel and parties should review the checklist in advance of their meeting with the other party or parties. The Commercial Rules are explicit that the items to be addressed at the preliminary hearing will depend on the size, subject matter and complexity of the dispute and ultimately the topics addressed at the hearing will be at the discretion of the tribunal. P-2. The following are suggested topics listed in Rule P-2(a), with annotations added in boxes to help guide the parties and the tribunal most effectively through the process:

- (i) the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
- (ii) whether all necessary or appropriate parties are included in the arbitration;
- (iii) whether a party will seek a more detailed statement of claims, counterclaims or defenses;
- (iv) whether there are any anticipated amendments to the parties’ claims, counterclaims, or defenses;

Practice Guide Annotation: In addition to these preliminary topics, any issues regarding confirmation of the appointment of the tribunal, questions about any disclosures by an arbitrator, including any undisclosed information known by a party or counsel, and the existence of any parallel or related proceedings that might have an impact on the arbitration should be explored where appropriate.



(v) which:

- (a) arbitration rules;
- (b) procedural law; and
- (c) substantive law govern the arbitration;

(vi) whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,

- (a) any preconditions that must be satisfied before proceeding with the arbitration;
- (b) whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
- (c) consolidation of the claims or counterclaims with another arbitration; or
- (d) bifurcation of the proceeding.

Practice Guide Annotation: It is important to know early whether any party contemplates seeking interim or injunctive relief or the filing of a Rule 33 motion, asking for permission to file a dispositive motion. If so, the parties should be ready to address during the preliminary hearing 1) the nature and extent briefing is needed on the merits, and 2) scheduling a hearing if needed.

(vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;

Practice Guide Annotation: E-Discovery is the subject of a separate Practice Guide. It is a topic that must be discussed in advance of, during the preliminary conference and throughout the arbitration process. One recommendation is that the preliminary hearing not be held until the parties have had a sufficiently robust meet and confer to address at least preliminarily E-Discovery topics. It is important to at least issue spot so that areas of significant disagreement are identified and a mechanism for reaching resolution are explored at the preliminary hearing and to confirm that all parties have implemented appropriate litigation holds.

(viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;

(ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;

(x) whether any measures are required to protect confidential information;



Practice Guide Annotation: Data security and privacy issues are increasingly common and challenging in modern commercial transactions. Law and technology are evolving and give rise to a growing list of issues. Confidentiality of the arbitration process is of paramount importance. The parties and the tribunal should therefore keep these concerns top of mind and explore them with the parties at the preliminary hearing. For example, if service by email transmission will be used, is two factor authentication feasible and reliable? How will large documents be transmitted and securely exchanged? Will a third party vendor house or process document productions? Will there be a cloud provider? The AAA case manager can be contacted to take advantage of the AAA technical expertise and experience.

- (xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;
 - (xii) whether, according to a schedule set by the arbitrator, the parties will
 - (a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;
 - (b) exchange and pre-mark documents that each party intends to submit; and
 - (c) exchange pre-hearing submissions, including exhibits;
 - (xiii) the date, time and place of the arbitration hearing;
 - (xiv) whether, at the arbitration hearing,
 - (a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;
 - (b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;
 - (xv) whether any procedure needs to be established for the issuance of subpoenas;
 - (xvi) the identification of any ongoing, related litigation or arbitration;
 - (xvii) whether post-hearing submissions will be filed;
 - (xviii) the form of the arbitration award; and
 - (xix) any other matter a party wishes to raise.
- V. **The Actual Preliminary Hearing.** As noted, the hearing is most typically conducted by teleconference but may be in person when desirable and practicable. The overall goal is



to tailor the arbitration process to meet the needs of the parties and to provide a fair, speedy and cost-effective procedure for resolving their dispute(s).

The checklist can be used as the agenda to be sure all topics are discussed. If agreement cannot be reached on one or more issues during the conference, another date should be set to resume the hearing or to establish a mechanism for resolution of the disagreement.

- VI. **Memorializing The Results of the Prehearing Conference.** Promptly after the conference the tribunal should issue a prehearing conference order setting forth in some detail the agreements made and decisions reached, including an agreed schedule ideally leading to a firm date and place for the hearing. *See* P-2(b). When adjustments to the schedule are required, and agreed to by all parties, the order should be updated and reissued.

Practice Guide Annotation: The tribunal may have a preferred form or template of a scheduling order from which to start. Alternatively, the parties can be tasked with coming up with an agreed-upon form of scheduling order that will be submitted to the tribunal for approval. Each dispute and each tribunal will have differing needs and desires. Consistent with the annotation above, this order may also address the handling of personal information or data to avoid encroaching on anyone's right to privacy. For example, some arbitrators prefer an order that prohibits submitting to the tribunal any sensitive personal identifiers such as social security numbers (or other national identification numbers), dates of birth or financial account numbers. If, due to the nature of the dispute, it is necessary to submit such information or other confidential or commercially sensitive information to the tribunal, the parties can be tasked with finding a workable, mutually acceptable means for redacting the information before submission.

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