

Jane C. Demaray
MEDIATOR/ ARBITRATOR

This Agreement made this ___ th day of _____, 20 ___;

B E T W E E N:

AAAA (“AAAA”)

- and -

BBBB (“BBBB”)

ARBITRATION AGREEMENT

1. Waiver of Rights to Litigate in Court

- (a) Subject only to their rights under the Ontario *Arbitration Act, 1991*, AAAA and BBBB (“the Parties”) hereby waive any right to litigate or further litigate the issues listed in paragraph 3, below, pursuant to any statute or law, in any Court.
- (b) Nothing in this Agreement impairs any enforcement rights that a Party may have through the courts or otherwise.

2. Arbitrator’s Jurisdiction: [NB: MAY BE ONE, SOME OR ALL OF THE FOLLOWING]

Pursuant to –

- (a) an Agreement between AAAA and BBBB, dated the ___ day of _____, 20___ (“the XXXX Agreement”);
- (b) the Ontario *Arbitration Act, 1991* (the “Act”);
- (c) the Judgment of the Honourable _____, dated the ___ day of _____, 20 ___, made at _____ in an Application to the Ontario Superior Court of Justice, bearing Court File No. _____ (“the Judgment”); and
- (d) the consent of the Parties;

the Arbitrator appointed to serve in this matter is Ms. Jane C. Demaray (“the Arbitrator”).

3. Matters for Arbitration:

(a) Pursuant to the Judgment and consent of the Parties, the matters submitted to Arbitration are as follows:

- (i) THESE SUBPARAGRAPH(S) DEFINE ALL ISSUES FOR ARBITRATION
- (ii)
- (iii)
- ;

(b) Costs: The Parties further agree that all issues relating to costs are submitted to the Arbitrator, and that she shall have the power, in her discretion, to award costs of the Arbitration, including fees and H.S.T. paid and payable to the Arbitrator, costs of the Hearing premises, transcription costs, if any, and other disbursements, as well as legal fees and disbursements incurred by the Parties, and she may fix the amount of all such costs or reserve them for assessment, all as provided in s.54 of the *Act*;

(c) Interest: The Parties further agree that all issues relating to prejudgment and post-judgment interest are submitted to the Arbitrator, and that she shall have the power, in her discretion, to award such interest in accordance with s.57 of the *Act* (incorporating by reference ss. 127 to 130 of the *Courts of Justice Act* (Ontario), with such modifications as are necessary for an arbitration).

4. Applicable Law:

(a) By Clause _____ of the XXXX Agreement, the Parties have agreed that the validity of the said Agreement and the interpretation and performance of all its terms shall be construed and enforced in accordance with the laws of the Province of Ontario and the laws of Canada as they relate to _____;

(b) By Clause _____ of the XXXX Agreement, the Parties have agreed that the Arbitration shall be governed by the substantive law of Ontario.

5. Confidentiality:

(a) AAAA and BBBB agree that they will keep and treat as confidential all communications, meetings, documents disclosed or produced in the proceeding, party and non-party evidence disclosed both before and during the Hearing, all aspects of the Hearing itself and all directions, Orders, Awards and Supplementary Awards of the Arbitrator (together, “the Confidential Information”), except for disclosure to a professional advisor such as a lawyer or accountant, or to an insurer or an auditor, and then only to the extent necessary to obtain advice or to meet obligations for provision of pertinent information to such a party; and

(b) The Parties agree that they shall use the Confidential Information solely for the purposes of arbitration under this Agreement, and that they shall not use it or allow it to be used for any other purpose, unless the Parties agree otherwise in writing, or are required to do so by law.

6. Communications:

(a) The Parties acknowledge that *ex parte* communications with the Arbitrator should be limited to minor administrative matters. It is agreed that any telephone communications between the Parties and the Arbitrator shall be scheduled and conducted as conference calls in which both Parties are represented;

(b) All written communications transmitted by either Party to the Arbitrator are to be copied to the other Party;

(c) The Arbitrator may deliver notices, directions and awards, and convene with the Parties and generally conduct all other communications with them by ordinary mail, delivery or e-mail;

(d) The Parties may communicate with the Arbitrator by ordinary mail, delivery or e-mail – the Arbitrator does not have fax.

7. Time:

(a) The Parties acknowledge that Counsel and the Arbitrator have consulted as to the amount of time likely to be required for the Arbitration Hearing, and it is estimated that ____ days will be required;

(b) The Parties acknowledge that the Arbitrator has set a preliminary Timetable to govern the conduct of this Arbitration, after consultation with Counsel (“the Timetable”). A copy of the Timetable is attached to this Agreement as Appendix “A”;

(c) Dates for hearing of the Arbitration have not yet been set. The Parties agree that dates for the Arbitration Hearing will be fixed by consent of the Parties through their Counsel, or, failing such consent, by the Arbitrator, when production of witness statements has been completed.

8. Place of Arbitration:

(a) After consultation with Counsel, The Arbitrator has directed that the Hearing of this Arbitration be conducted at [PLACE] , at [ADDRESS] in [CITY] ;

(b) The facilities for this Arbitration at [PLACE] shall be comprised of one Hearing Room large enough to accommodate spacious working tables for the Arbitrator and for Counsel for each Party, as well as a table for the use of the witnesses;

(c) In addition to the Hearing Room, The Arbitrator is to be provided with the use of a separate room to which she may withdraw during breaks and in order to review the case, study and write. No special features are required in connection with this room, except that it contain a table and chair and that it be reserved exclusively for the use of the Arbitrator during the Hearing;

(d) Once the Hearing Date has been fixed, Counsel for the Parties will book the necessary facilities at _____ [PLACE] _____, and direct that all invoices relating to those facilities be forwarded to them, or either of them, directly, without the involvement of the Arbitrator in those arrangements.

9. Conduct of the Arbitration:

The procedure by which the Arbitration is to be conducted has been determined in consultation with Counsel by the Arbitrator, and is as follows:

(a) Statements:

(i) The Parties will prepare and deliver documents in the nature of pleadings:
 - a "Claim" by AAAA, as "Claimant",
 - a "Defence" by BBBB, as "Respondent",
 - and a "Reply" by AAAA if so advised,
 upon the schedule provided by the Timetable;

(ii) It is agreed that AAAA may elect not to deliver a Reply, in which event it shall be deemed to have denied all allegations in the Defence;

(iii) A copy of each of the Statements will be served upon the Arbitrator;

(b) Documentary Production:

(i) As provided in the Timetable, each of the Parties will prepare an Affidavit of Documents, together with copies of the documents produced, and will serve these materials upon the opposite Party;

(ii) The Affidavits of Documents are not to be served on the Arbitrator, nor are copies of any documentary productions;

(c) Pre-Hearing Testimony:

(i) The Parties agree that there are to be no *viva voce* pre-trial examinations ("discovery") in this proceeding;

(ii) Each of the Parties will prepare and serve sworn Statements of the evidence to be given by all of the witnesses it intends to call at the Hearing, both party and non-party;

(iii) If a witness refers to a document in his or her Statement, a copy of that document is to be appended as a sworn exhibit to the Statement;

(iv) At this pre-hearing disclosure stage, such Statements will be delivered first by AAAA, then by BBBB, and then by AAAA by way of reply, if any, all as provided in the Timetable;

(v) No copy of any such Statement is to be served upon the Arbitrator;

(d) Motions to Arbitrator:

(i) Counsel for the Parties may consult with the Arbitrator informally as to any issue or dispute that may arise in respect of pre-hearing matters by an exchange of e-mails to which they are all parties, or by scheduling a conference call at a time convenient to them and to her;

(ii) In the event that any such issue or dispute cannot be resolved through such consultation, it will be decided by The Arbitrator on motion by either party;

(e) Conduct of the Arbitration Hearing:

(i) Privacy: The Arbitration Hearing shall be held in private and no persons, except the Parties, their representatives and the witnesses to the proceeding, shall be present unless authorized by the Arbitrator;

(ii) No Reporter: There will be no Reporter at the Hearing of this Arbitration;

(iii) Evidence: After consultation with Counsel, the Arbitrator has directed that there be a full *viva voce* hearing of this Arbitration, comprised of both evidence and submissions by Counsel. In furtherance of that direction, it is agreed that –

(A) all witnesses shall be sworn under oath or affirmed and shall be subject to cross-examination and re-examination;

(B) except where filed by consent of the Parties, all documentary evidence will be subject to proof;

(C) the admissibility, relevance and weight of all evidence tendered at the Hearing will be determined by the Arbitrator, having reference to the rules of evidence as laid down by applicable statutory and common law;

(D) consent exhibits: The Parties agree to review documents and consult with one another in order to identify documents that can be admitted on consent. Upon concluding that process, the Parties will cooperate in the preparation of a volume of the documents they agree to admit, such volume to include a Table of Contents and to be bound, indexed and entitled “Exhibit 1 to the Arbitration Hearing”. This volume is to be filed at the outset of the Hearing, with copies for the Arbitrator and both Counsel, and a copy for use by the witnesses;

(E) documents subject to proof: As for documents that cannot be admitted on consent, each of the Parties will prepare a separate volume of such documents upon which they intend to rely. These volumes are to be bound, indexed and marked “Documents of the[PARTY] Filed for Identification at Hearing”. The documents within these volumes will each be subject to proof, and any such document not proven will not be received in evidence. Each of these volumes is to be filed at the outset of the Hearing, with copies for the Arbitrator and both Counsel, and a copy for use by the witnesses;

(iv) Order of Hearing: The order of Hearing will be as follows:

- (A) Preliminary matters;
- (B) Opening statements of Counsel
(Counsel for BBBB may wait until opening its case);
- (C) The evidentiary case of AAAA, in which each of its witnesses
 - will be called and sworn or required to give affirmation, and
 - will be examined in chief, cross-examined and examined in reply;
- (D) Opening of Counsel for BBBB (if not given at the outset);
- (E) The evidentiary case of BBBB, in which each of its witnesses
 - will be called and sworn or required to give affirmation, and
 - will be examined in chief, cross-examined and examined in reply;
- (F) Any reply evidence is then to be led on the same basis;
- (G) Upon the conclusion of the evidence –
 - Submissions for AAAA;
 - Submissions for BBBB; and
 - Submissions in Reply, if any, for AAAA;

(v) Written Argument: The Parties are under no obligation to deliver written argument. In the event that a Party should decide to do so, it must give 5 days’ written notice to the other of its intention to do so, in order to afford the other a fair opportunity to do likewise if it so wishes. The arguments need not be responsive to one another unless the Parties so decide. Written arguments, if any, may not be delivered to the Arbitrator until the beginning of argument at the Hearing;

(vi) Authorities: At the beginning of argument at the Hearing, Counsel will provide to one another and to the Arbitrator copies of all authorities to which reference will be made in argument.

10. The Award:

- (a) By Clause _____ of the XXXX Agreement, the Parties have agreed that the Arbitrator shall deliver her Award with respect to all issues submitted for arbitration within 30 days of the Parties' final submissions to the Arbitrator;
- (b) Pursuant to s.38(1) of the *Act*, the Award shall be made in writing, with reasons, unless it is made on consent of the Parties.

11. The Supplementary Award:

- (a) The Parties agree that the Arbitrator shall call in her Award for further submissions as to interest and costs, and that her Award shall stipulate the time or times within which such submissions are to be delivered;
- (b) The Parties agree that they will make such further submissions to the Arbitrator in writing within the time or times so stated;
- (c) The Parties agree that the Arbitrator is to release a Supplementary Award as to interest and costs, in writing and with reasons, within 7 days of receipt of their submissions on these issues.

12. Offers to Settle:

Each of the Parties states that it does not wish to contract out of the operation of s.54(5) of the *Act* as to offers to settle.

13. Finality, Appeal & Enforcement:

- (a) By Clause _____ of the XXXX Agreement, the Parties have agreed that the Arbitration Award shall be final and binding and that there shall be no appeal from the said Award;
- (b) Subject to s.46(1) of the *Act* as to review of the Arbitration Award and Supplementary Award in the nature of judicial review, the Parties agree that the Award or Supplementary Award of the Arbitrator, or both, may be enforced upon application to the Court;
- (c) Subject to the *Act*, once the Arbitrator has made a final Award with respect to each of the issues submitted for arbitration, her jurisdiction is terminated.

14. Termination of Arbitration by reason of Settlement:

- (a) The Parties agree that, if they reach a settlement that resolves all issues between them, the Arbitrator shall terminate the Arbitration and, if a party so requests, may record the settlement in the form of an Award;
- (b) The Parties agree that, if they settle some, but not all, of the matters submitted for arbitration, the Arbitrator will proceed to arbitrate the remaining issues. In this event, the Arbitrator may record the partial settlement by way of a Partial Award, if a party requests that she do so.

15. Withdrawal from Arbitration:

- (a) The Parties acknowledge that neither of them may unilaterally withdraw from or terminate the arbitration process, and that, subject to s.43(2) of the *Act*, the Arbitrator is empowered to proceed with the Arbitration in accordance with this Agreement, even where one party no longer wishes to participate;
- (b) At any time before the Arbitrator releases an Award, the Parties may withdraw from the Arbitrator the issues submitted for arbitration, by giving the Arbitrator notice of such withdrawal and their consent to it, in writing.

16. Arbitrator's Power to Terminate the Arbitration:

- (a) The Parties acknowledge that s.43(2) of the *Act* provides that the Arbitrator shall make an order terminating the arbitration if the Claimant withdraws the Claim, unless the Respondent objects to the termination and the Arbitrator agrees that the Respondent is entitled to obtain a final settlement of the dispute;
- (b) The Parties acknowledge that the Arbitrator is empowered to terminate the Arbitration in the event that the Claimant fails to submit its Claim, make documentary production, or provide sworn statements of the testimony of its witnesses, all as provided in s.43(1) of the *Act*;
- (c) The Parties acknowledge that the Arbitrator is empowered to terminate the Arbitration if she finds that its continuation has become unnecessary or impossible, pursuant to s.43(3)(b) of the *Act*.

17. Resignation of the Arbitrator:

The Parties agree that The Arbitrator may resign from her role as Arbitrator at any time, by providing written notice of such resignation to the Parties.

18. Arbitrator's materials are her own:

The Parties agree that the Arbitrator's personal notes and file prepared before, during and after the Arbitration Hearing, remain the personal property of the Arbitrator, even though some or all of those materials may be considered to be part of the Record of the proceeding. Neither party shall request that the Arbitrator produce her notes or file, whether or not there is a Court reporter present at the Hearing.

19. Arbitrator's Compensation:**(a) Hourly Rate:**

The Parties agree that the Arbitrator's fees for services as Arbitrator will be charged on an hourly basis, at the rate of \$ _____ per hour, plus H.S.T.;

(b) Joint Liability:

The Parties agree that they are liable on a joint and several basis for payment of the Arbitrator's fees, plus her reasonable disbursements incurred, and the H.S.T. payable upon both, all as billed and billable from time to time by the Arbitrator;

(c) Retainer:

(i) The Parties agree that each of them shall provide to the Arbitrator a retainer in the sum of \$ _____ by the close of business on _____ day, _____, 20____, and that they may be required to refresh these retainers from time to time as the Arbitrator may direct;

(ii) The Parties agree that the retainers, and any payments to refresh the retainers, are to be held by the Arbitrator as security for payment of her fees, disbursements and H.S.T., and applied on account of same from time to time, pursuant to her Acceptance and Undertaking in that regard;

(d) Default in payment:

The Parties further agree that, should one of them fail or refuse to pay to the Arbitrator its share of an account for fees, disbursements and H.S.T., or a retainer or payment required to refresh a retainer, the Arbitrator may require and accept payment of the defaulting Party's share from the other Party, and may make such direction as to reimbursement of that payment to the paying Party by the defaulting Party as she may consider proper;

(e) Accounting:

The Parties agree that the Arbitrator will render itemized bills from time to time for her services rendered and disbursements incurred, and that she will account for all retainers received, both as to monies applied in payment or reduction of such billings, and as to monies she may continue to hold as security, if any;

(f) Award may be withheld:

The Parties agree that the Arbitrator may withhold her Award and/or Supplementary Award until all outstanding fees, disbursements, H.S.T. or retainers owing to her have been paid.

