

DRAFT PROCEDURAL ORDER FOR USE OF ONLINE DISPUTE RESOLUTION TECHNOLOGIES IN ACICA RULES ARBITRATIONS

Introduction

1. Online dispute resolution (**ODR**) technologies have exciting potential. Some examples of the ODR technologies available are the use of video conferencing and the use of the commercially available Cisco WebEx Meeting Center online product (**WebEx**).¹
2. In cross-border arbitration, both video conferencing and WebEx are particularly effective for **preliminary conferences**. WebEx is accessed more easily and has more functionality in terms of instant document transfer and collaboration. Video conferencing gives a clearer picture of the participants, so is more suited to where non verbal communication cues and assessment of demeanour are important.
3. Both video conferencing and WebEx can be used effectively for (interim and final) arbitration hearings. WebEx has more functionality for instant access, viewing and transfer of documents by all participants, and in allowing documents to be amended collaboratively. When using both technologies, access to more numerous and bulky documents can be had via a file server system. Video conferencing gives a clearer picture of the participants and may be more useful if the assessment of witnesses' credibility is involved.

¹ WebEx “offers a rich, real-time collaborative web meeting experience with a powerful feature set for productive and efficient meetings anytime, anywhere on any device”: see more details at <http://www.cisco.com/en/US/products/ps10409/index.html#~two>

Draft Procedural Order (with Commentary)

This draft procedural order can be used (with any necessary amendments or adaptation) if the parties wish to use ODR technologies in an arbitration governed by the standard or expedited Arbitration Rules of the Australian Centre for International Commercial Arbitration (ACICA Rules)² and heard in Australia.³

This draft order covers some of the matters raised by the National Alternative Dispute Resolution Advisory Council (NADRAC) draft guidelines on Dispute Resolution and Information Technology Principles for Good Practice (Draft) March 2002 (NADRAC Guidelines)⁴ and the issues raised by s6 of the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA)

It is assumed that the seat or place of the arbitration and hence the procedural law governing the arbitration has already been agreed by the parties and specified. If not, then this should be agreed before online technologies are used to avoid uncertainty as to the procedural law governing the hearing.

1. The parties have requested the use of the online dispute resolution technology known as **[insert technology description]** in the arbitration and in particular, have agreed that it be used for the **[preliminary conference/interim hearing/hearing]** in this arbitration to be held on **[date/time]**. The parties agree that any such hearing shall be a ‘hearing’ for the purposes of the applicable ACICA Rules.

Suggestions: identify the technology which has been agreed to be used specifically if appropriate (eg. CISCO WebEx Meeting Center, video conferencing etc) and identify the type of hearing for which it is to be used – preliminary conference, a final arbitration hearing, an interim hearing for the taking of evidence from specific witnesses etc.

2. The parties acknowledge that they have made their own enquiries as to the suitability and adequacy of **[insert technology description]** for its proposed use in the **[preliminary conference/interim hearing/hearing]** and of any risks in using **[insert technology description]**, including any risks in relation to its security, privacy or confidentiality, and request the tribunal to proceed with the use of **[insert technology description]**.

The inclusion of a provision along these lines is in line with the NADRAC Guidelines.

3. The parties agree that the costs of using **[insert technology description]** for the **[preliminary conference/interim hearing/hearing]** will in the first instance be borne equally between them. For the avoidance of doubt, the parties agree that those costs are included in the costs of the arbitration, as specified in the applicable ACICA Rules. **[or insert as agreed]**

As a practical matter the question of costs should be dealt with.

² However, that ACICA’s Expedited Arbitration Rules only provide for a hearing in exceptional circumstances or upon separate agreement.

³ Although ACICA Rules are worded to allow for the seat of the arbitration to be outside Australia, and for the hearings to be conducted outside Australia, additional care may be required in conducting arbitration overseas that incorporate ODR technologies.

⁴ Available at

<http://www.nadrac.gov.au/publications/PublicationsByDate/Documents/Dispute%20Resolution%20and%20Information%20Technology%20-%20Principles%20for%20Good%20Practice.pdf>

4. The parties agree that they will inform the tribunal and each other in advance of the **[preliminary conference/interim hearing/hearing]** of the names of all persons attending, participating or who are able to hear any communications in the hearing using **[insert technology description]** and agree that no persons will attend, participate or be allowed to listen in on the **[preliminary conference/interim hearing/hearing]** without the prior consent of all parties and the tribunal.

This paragraph addresses the fact that it may not always be possible to see everyone who is within earshot of the screen and ensure that the parties are aware of all who are participating or within earshot. Consideration should be given to whether any additional confidentiality obligations need to be imposed on such persons.

5. The parties and their legal advisors agree that they will not record or permit the recording of the **[preliminary conference/interim hearing/hearing]** without the consent of all parties and the tribunal. The parties will procure that each additional attendee at the **[preliminary conference/interim hearing/hearing]** for which that party is responsible also acknowledges and agrees to this.

This paragraph addresses the fact that given the ease of recording these sessions and as some technologies may allow recording without the knowledge of other participants⁵, that the parties expressly agree that any recording of the hearing should only be done with the consent of all parties. The ACICA Rules already provide that parties calling witnesses must ensure the latter abide by the same confidentiality obligations as those assumed by the parties.

6. The parties, their legal advisors and the tribunal acknowledge and agree for the purposes of s6 of the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA) **[insert here reference to any other similar mandatory provision that may apply under another system of law]** that their communications at the **[preliminary conference/interim hearing/hearing]** can be and will be listened to by each other **[and recorded – if this is agreed to be the case]**. The parties will procure that each additional attendee at the **[preliminary conference/interim hearing/hearing]** for which that party is responsible also acknowledges and agrees to this.

This paragraph addresses the requirement in s6 of the TIA (or similar mandatory requirement under another applicable system of law) that where a communication is listened to or recorded over a telecommunications system, it must be with the knowledge of the person making the communication. The NADRAC Guidelines at 17 refer to this as an issue to be addressed. Expand to cover witnesses and other attendees if relevant.

7. The **[preliminary conference/interim hearing/hearing]** using **[insert technology description]** on **[date]** will continue until terminated by the tribunal.
8. **[insert any other matters]**

For example, if the parties are using CISCO WebEx Meeting Center technology it should expressly provide here that the tribunal is to 'host' the meeting, as this gives the tribunal maximum control over the process.

9. This procedural order is made with the consent of the parties.

⁵ Cf CISCO WebEx Meeting Center technology, which only allows the 'host' to record.

This draft procedural order is intended to summarise potential matters that can be included and does not constitute legal advice. Readers should not act on the basis of any matter contained in this draft procedural order without first obtaining legal advice.

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With assistance from the ACICA Rules Committee