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ACICA Online Arbitration Guidance Note

Purpose: The purpose of this Guidance Notice is to raise a range of matters that need to be addressed in advance of an arbitration being conducted on an online platform, with numerous parties each participating from different physical locations. This Guidance Note takes the form of a checklist of relevant considerations for parties to take into account in preparing for an online arbitration. The Guidance Note does not constitute legal advice and is not intended to be exhaustive, but rather to serve as a prompt of the key matters to be addressed¹.

A. Choosing the most suitable platform

There are a range of videoconferencing platforms available. Some of the available platforms are Microsoft Teams, Modron, BlueJeans, Skype for Business, Cisco WebEx, Zoom and GoToMeeting and Adobe Connect². The parties will need to consider the most suitable video conferencing platform for the particular arbitration.

In considering which platform will best suit the needs of the parties and the particular arbitration, consideration should be given to the functionality that is required. For example:

- Will the platform be capable of showing the full image of persons involved? Is there clear audio of participants? Can you switch between speaker view and grid view if necessary?
- Will screen sharing be required (e.g. to display exhibits and other documents, or for a PowerPoint presentation in the form of an oral outline of submissions)?
- Relatedly, how will demonstrative exhibits be submitted and shown in the online environment? For example, does it permit Whiteboard Mark-up / Interactive tools? Is Share control permitted?
- What limits are there on the number of persons?
- Will online break-out rooms (including for the Tribunal) be used? If so, is that feature password-protected so as to prevent one party joining another's break out session?

¹ ACICA recognises the assistance of Danielle Forrester, Banco Chambers and Gitanjali Bajaj, DLA Piper, in the preparation of this guidance note.

² ACICA does not advocate the use of any particular platform or service. The list provided is by way of guidance only.

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- What security protections and level of encryption does the platform offer to address privacy and confidentiality concerns? For example, does the platform offer password protected meetings?
- Is the platform approved in every jurisdiction that is expected to participate? And the jurisdictions where enforcement will likely occur?
- Will a chat or messaging function be required as part of the platform as a separate open mode of communication with the tribunal and/or a private/secure mode of communication between team members, and a secure mode of communication between tribunal members?
- Will all parties be able to speak? Is it useful to have a platform where a moderator is able to mute parties as needed?
- Will counsel want to use multiple screens for online pleadings and the presentation of evidence?
- Will interpretation and/or live transcription and recording be required?
- Are Toll free numbers needed?

B. Determining whether a third party online arbitration provider is necessary or desirable

Some relevant third party providers of online arbitration services include:

- ADC Virtual (powered by Modron) <https://www.disputescentre.com.au/adc-virtual/>
- Arbitration Place Virtual (APV) www.arbitrationplace.com
- Epiq www.epiqglobal.com
- Opus 2 <https://www.opus2.com/en-sg/connecting-law-firms-in-a-digital-world-opus-2>
- Law in Order www.lawinorder.com.au³

One advantage of engaging a third party provider is that the arbitrator and the legal representatives of the parties do not need to be distracted by the technical requirements of the proceedings, and can outsource the oversight of those matters to a third party. This will not be necessary in every case, including where the proceeding will be fairly straightforward and there is a level of technical proficiency among the participants. Parties will need to assess the need for a third party provider on a case by case basis, having regard to all the relevant circumstances.

Some relevant matters to consider include the following:

- Does the provider give holistic support? For example, do they have an IT help desk or other form of on-the-spot assistance? Do they offer an integrated document management system? Can they facilitate separate audio feeds and transcriptions services?

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- If a third party is engaged, consider how the costs will be borne. By the parties equally? By the prevailing party?

Whether or not a third party provider is engaged, an external troubleshooting resource should be available to assist with technical matters at short notice during the hearing. Consider the appropriate protocol for reporting a technical problem to the tribunal at any stage during the hearing. If the arbitration is administered by an institution or a tribunal secretary is being used by the Tribunal, inquire whether personnel at the institution or the tribunal secretary may be able to assist with this role.

C. Ensuring all participants are familiar with the chosen platform

The parties will need to consider if all the relevant parties are familiar with the chosen platform, and can access the platform, and, if not, how this can best be achieved. For example, consideration could be given to the following:

- Consider arranging a pre-hearing conference and multiple “dry-runs” for the parties, witnesses, arbitrator, any translator and transcription service to test the technology in advance.
- Considering the need for separate tutorials, including by third party providers, for participants who are not familiar with the technology, platform, applications and/or equipment to be used in the hearing.
- Identify any organisational IT limitations that may prevent or impede access to the platform.

Other matters that may be considered to ensure that the platform operates smoothly during the course of the online arbitration may include the following:

- Ensure that all participants will have reliable internet connectivity. Consider having back-up connections for key participants, including Hot-spotting or internet fobs.
- Plan ahead for the need for short adjournments if there are internet issues that need to be resolved in order to ensure a fair proceeding.
- Agree in advance upon a back-up plan if the internet connection fails (e.g. having a teleconference established, ready for participants to dial in to if required, and an email communication or instant messaging communication to notify parties that the alternative arrangement is to be initiated).
- A secondary video conferencing platform might also be arranged, with details to be circulated in advance of the hearing in the event that a change becomes necessary.
- In the event one of the parties loses connectivity during the hearing, decide in advance on a mechanism for this to be immediately reported to the rest of the attendees using a designated messaging system.

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- Similarly, consider a mechanism to inform parties if they are on/not on mute.
- Consider whether any amendments or extensions to the allocated time for the hearing should be made if there are any technical difficulties experienced.
- Consider requiring parties and witnesses to appear from a device with a sufficiently large screen (i.e. not from a smart phone).
- Consider whether participants may need two or more screens: one for the display of the videoconference and others for the display of exhibits, real-time transcripts and other documents.
- Consider whether the tribunal, parties and the arbitrator should all use headphones.
- Consider usage of name and role identifiers (eg. in user names) in cases with multiple participants who may not already be familiar with all participants.
- Clarify in advance expectations as to etiquette (e.g. identification of lead speakers, refraining from interruption, muting of microphones when not speaking, minimisation of interfering equipment, business attire etc).
- Consider how to deal with urgent, unexpected communications – whether the parties will be able to communicate informally with the tribunal or with a tribunal secretary,
- Consider agreeing upon a time, in advance of the proceeding, by which all participants should log on (e.g. 10 minutes prior to the commencement time). This may assist in minimising delays and identifying any technical issues.

The parties should consider requiring written statements from each party and their legal representatives to the effect that the chosen platform and the technology to be used in the online arbitration has been tested and is adequate.

D. Transcription

The parties will need to consider what arrangements are required to be made in relation to transcription services. This may involve:

- Enquiring whether the relevant reporting service can provide transcription services via the chosen online platform.
- Enquiring whether access to live transcription is possible, if required.
- Considering whether participants will need an additional screen or an additional device in order to view live transcription, while being logged in to the video conference.
- Consider an agreed procedure such that, at the outset of each day of the hearing, all participants at each participating venue are identified.

Consideration will also need to be given to whether there will be a recording of *both* the audio and the visual of the arbitration. In doing so, parties will need to consider, and agree upon, the use that

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legal representatives and the tribunal can make of the recording(s) during the course of the hearing and subsequently.

E. Translator

The parties will need to consider, if required, how translation services will be accommodated, noting that many translators can provide services remotely. Consideration might be given to the following matters:

- Consider whether simultaneous or consecutive translation is required.
- If *simultaneous* translation (including in multiple languages) is required, consider the number of audio feeds that will be required. Some platforms, for example, allow the “host” to assign interpreter roles to certain participants, allowing them to see a different interface.
- In the case of *sequential* translation, consider what arrangements might be agreed to minimise the witness, interpreter, and examining counsel speaking over each other.
- Consider the need for each audio feed to be recorded.
- Consider how separate interpreters – engaged by a party for verification - can be accommodated as part of the online hearing.
- Consider the need to allocate extra hearing time to allow for the translation.

F. Internal communications within a legal team

Consider how your legal team will be able to communicate efficiently and privately during the arbitration hearing. For example:

- Consider whether a WhatsApp, Skype, Facetime, WeChat (or other service) chat, group text message or similar service can be used to communicate within the legal team, especially in circumstances where individuals are each participating from different physical locations.
- Consider whether short breaks may be needed to confer offline from time to time, and whether this is something to be raised with the arbitrator at the outset of the hearing, or in advance, in order to have an agreed procedure in place for such short adjournments.
- Be mindful of the likelihood of accidental communications – consider using separate devices or other clearly separate modes of communication to minimise the possibility of an accidental cut and paste or other inadvertent sending of information.

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G. Witnesses

The parties will need to consider and agree upon the manner in which witnesses will participate and give their evidence in the online arbitration. Again, these considerations are not exhaustive. Some relevant matters to be addressed include the following:

- Consider how oaths can be validly administered by videoconferencing (if oaths are a requirement under the laws of the seat).
- Have arrangements in place so that the witness will be positioned close enough to the camera to gauge facial expressions and other silent cues, but also so that the witness' upper body is in view.
- Ensure that the witness confirms that he or she can clearly hear and see counsel and the tribunal.
- Decide upon mechanisms to ensure the reliability of witness testimony to guard against the risk of a witness being coached or prompted off-screen, either by a person or other materials. For example, possible safeguards may include:

- requiring witnesses to affirm that they are alone, that they will not look at email or smartphones during the examination and to confirm that the witness is not receiving communications of any sort during the course of his or her testimony;
- if hard copy documents are to be sent to the witnesses before they testify, sending the documents in a sealed package and having the witness open the package on camera in the presence of the tribunal and counsel immediately before giving evidence;
- having a "whole-of-room" camera or 360° view of the room in which the witness is sitting;
- requiring the witness not to use a "virtual background".

With expert witnesses, consider whether hot-tubbing is appropriate and, if so, how the hot-tubbing of experts in multiple location will be managed through flexibility, including, for example, switching between concurrent evidence for some issues and individual cross-examination for others.

H. Further matters to be agreed prior to the online arbitration

In addition to the matters already canvassed, there are a number of other issues that need to be agreed upon before the online arbitration. These matters should be included in a detailed procedural order issued by the Tribunal, covering matters like the arbitration schedule, the exchange of exhibits, pre- and post-hearing deadlines, and other relevant logistical matters. For example, such a procedural order could address the following:

- the duration and daily timetable, taking into account the different time zones;

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- the nature and content of access and confidentiality undertakings that will bind all participants (keeping in mind that complete confidentiality cannot be guaranteed by any platform);
- the parties' agreement on proceeding with an online hearing as the means for conducting the arbitral hearing;
- outlining the agreement of the parties to cooperate on technical matters prior to and during the online hearing;
- the parties' agreement that the fact that the arbitration is being conducted online will not be used as a ground to challenge the ultimate result and that chosen online method constitutes an acceptable means of communication permitted by the applicable rules, including those at the juridical seat of the arbitration;
- the need to ensure that the physical room used by a party or participant joining the online hearing is separate from any non-participating individuals;
- how and when the parties will exchange documents, including the storage of, and access to, those documents and the means for providing exhibits to be used during cross-examination to witnesses, opposing counsel, the Tribunal, and the transcription service, as well as the distribution of a list of documents to be presented by each party in the course of the online arbitration;
- the circulation between the parties and the Tribunal, prior to the hearing, of a full list of the names and roles of all participants to the online hearing;
- the parties' agreement to an ongoing obligation, during the course of the arbitration, to advise the tribunal if any additional persons join or are present at the location from which the participant is based.
