

# Checklist for Preliminary Meeting and Procedural Orders

This checklist has been prepared to assist parties and tribunals in preparing for the first procedural meeting as well as subsequent procedural meetings. The approach taken will depend on the size of the matter and the issues in dispute. Topics in bold are those identified as being the highest priority for the first procedural meeting. While it may also be desirable to deal with some of the other topics in the first procedural meeting (depending on the matter at hand), others may appropriately be dealt with in subsequent procedural meetings. Parties and the tribunal should consider the requirements of an individual case carefully.

## Primary matters

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### JURISDICTION AND ADMISSIBILITY

- Reservations as to the tribunal's jurisdiction
  - Compliance with prerequisites to commencement of arbitration (ie expiry of moratorium, mediation, service of notices etc)
  - Jurisdictional challenge (and should this be determined as preliminary issue?)
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### THE ARBITRATION AGREEMENT

- Whether the following topics have been agreed and, if not, the parties' position on:
    - Parties
    - Seat
    - Language
    - Governing law
    - Arbitration rules
    - Other bespoke features relating to the dispute or parties
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### OTHER RULES AND 'SOFT LAW' TO APPLY

- Application of the ACICA Rules expedited procedure<sup>1</sup>
- Rules of evidence:
  - whether the International Bar Association Rules on the Taking of Evidence in International Arbitration are adopted<sup>2</sup>
  - whether the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration are adopted
  - whether any other rules of evidence are adopted
- Consider whether, and extent to which, the parties and tribunal should have regard to any codes of conduct, including:
  - for expert witnesses (eg CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration); and
  - for tribunal members (eg IBA Guidelines on Conflicts of Interest in International Arbitration)<sup>3</sup>
  - for party representatives (eg IBA Guidelines on Party Representation in International Arbitration)<sup>4</sup>

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1 See ACICA Arbitration Rules 2021 (ACICA Rules), Article 8.

2 See ACICA Rules, Article 35.2, which makes express reference to this.

3 See ACICA Rules, Article 35.3.

4 See ACICA Rules, Article 9.2.

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## PARTY REPRESENTATION AND AUTHORITY

- Power of attorney or other authority for counsel/other party representatives<sup>5</sup>
- If the seat is outside of Australia, consider whether the parties' representatives are permitted to represent their client in arbitral proceedings under the applicable mandatory law of the seat

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## PROCEDURE AND AGENDA FOR THE PRELIMINARY MEETING

- Agenda to be set by the tribunal in consultation with the parties' representatives in advance
- Whether any substantive preliminary issues, such as jurisdiction, are to be determined (if so, a procedure for the exchange of submissions in advance will be necessary)
- Whether the preliminary meeting will be transcribed or recorded
- Advance notice of participants
- Mode (in person or via other means), and venue if in person

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## CO-OPERATION AND THE OVERRIDING OBJECTIVE

- Whether the parties will be required to affirm adherence to the overriding objective<sup>6</sup> at the preliminary meeting and in procedural order 1

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## APPLICATION OF MEDIATION OR OTHER ADR

- Raise for discussion with the parties the possibility of mediation or other ADR<sup>7</sup>

## Preliminary issues for advance determination

- Whether there are any issues in the case that are suitable for determination in advance as preliminary issues, for example:
  - Jurisdictional challenge (see above)
  - Interim measures applications
  - Consolidation and/or joinder applications
  - Security for costs application
- Whether any preliminary issues will be determined at the preliminary meeting or afterwards<sup>8</sup>
- Consider the procedure for the preliminary measures application (including exchange of evidence and submissions in advance), and form of the determination (interim or partial award, or order)
- Whether a party is seeking an award granting early dismissal or termination of any claim, defence or counterclaim, the subject of the arbitration

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<sup>5</sup> See ACICA Rules, Article 9.

<sup>6</sup> See ACICA Rules, Article 3.

<sup>7</sup> See ACICA Rules, Article 55.1.

<sup>8</sup> See ACICA Rules, Article 25.3. The preliminary meeting must take place as soon as practicable after the tribunal has been appointed. This may make it impractical for substantive applications to be determined at the initial meeting.

## Case management and procedure

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### STATEMENT OF CLAIM, STATEMENT OF DEFENCE AND OTHER WRITTEN SUBMISSIONS

- Memorial or pleading style submissions
- Sequential or simultaneous exchange
- Consider time limits for the service of Statement of Claim, Statement of Defence and other written submissions
- Whether reply, rejoinder or further submissions are necessary
- Mode of service – whether hard copy or original copies will be required and whether electronic documents need to be in native file format or provided by secure file transfer
- The technology platform to be used for electronic documents
- Whether all documents relied upon must be served with submissions
- Consider page or word limits
- Consider using schedules or other similar drafting tools to provide concise submissions
- File naming conventions for submissions and documentary exhibits, and logistics concerning pagination and identification within electronic exhibits
- Whether there will be a hard deadline for any application to amend the Statement of Claim or Defence
- See below regarding further considerations for the use of technology and AI

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### IDENTIFICATION OF ISSUES IN DISPUTE

- Whether these are identified and recorded separately in:
  - Terms of reference
  - Draft list of issues
  - Final list of issues
- Whether the parties prepare and agree upon these, or whether the tribunal should prepare a draft for comment by the parties

## EXPERT WITNESS EVIDENCE

- Whether expert witness evidence is necessary
- The time limits for the provision of expert reports, and any other activities to be performed by expert witnesses
- Whether there should be full party autonomy or should the tribunal be given the opportunity to rule on which topics or issues require expert evidence<sup>9</sup>
- Whether there should be party-appointed experts, and on which issues
- Whether the parties should be required to disclose the identity of their experts and the issues on which they are to opine at an early stage<sup>10</sup>
- Whether there should be common instructions (and whether they should be approved by the tribunal)
- Whether there should be a tribunal expert in addition to, or in lieu of, party-appointed experts<sup>11</sup>
- Whether experts should be required to comply with a 'soft law' protocol or guidance such as the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration
- Whether expert witness conclaves are required and if so, the basis upon which they are conducted, attendees and how the outcome should be documented
- Protocols for legal representatives' contact with experts (recognising different professional practice rules in different jurisdictions)
- Whether there should be site visits, re-enactments, experiments; if so, consider procedures for them and who should be present to witness them
- Whether modelling or other empirical forensic procedures are required
- Whether an information sharing protocol is required for party-appointed experts
- The form in which expert reports are to be presented (is paper necessary)
- Whether reply expert reports are necessary, and whether a joint expert report (statement of agreed issues and remaining areas of disagreement) would be helpful to the tribunal and parties
- The identification and provision of supporting documents which underpin the expert reports

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9 See ACICA Rules, Article 25.2. Significant costs are wasted in cases where irrelevant expert evidence is adduced, and answered, by the parties. An experienced tribunal with expertise in the relevant field has the ability to avoid such unnecessary delay or expense.

10 See above footnote. This can avoid unnecessary delay and expense.

11 See ACICA Rules, Article 36.

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## FACT WITNESS EVIDENCE

- Whether it is necessary to adduce fact witness evidence
- The time limits for the service of witness evidence
- Whether it is necessary to introduce documents via witness evidence
- Whether lists of witnesses (and/or outlines of evidence) should be exchanged at an early stage
- Whether fact witness evidence should be presented in witness statements, and whether statements should be sworn or unsworn)
- The language(s) in which each fact witness statement will be (and whether the witness will be required to testify in the same language at hearing)
- Whether oaths are to be administered and, if so, under which faith. Consider also the procedure for administering a valid oath.
- Whether any or all fact witnesses are required to attend the evidentiary hearing to be examined by the opposing party or the tribunal
- Whether the fact witnesses will be allowed to be present in the hearing room before/during/after the opening submissions and/or testimony of other witnesses
- Whether, if the fact witness is not a national or resident of the State where the evidentiary hearing is to take place, they can obtain a visa to attend the hearing. If it is not possible for them to attend in person, whether they can participate remotely from another location

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## DOCUMENT PRODUCTION

- Whether document production is necessary
- If document production is required, whether:
  - Requests for documents should be by description, document categories and relevance
  - Reasons for the documents requested should be provided including reasons as to their relevance and materiality to the outcome of the case
  - Document requests (and responses to them) should take the form of a schedule
  - A time or other limit should be imposed on the scope and number of requests
  - A list of documents should be produced by the party making disclosure
  - Document production should occur in one or multiple tranches, with a fixed time limit, or on an ongoing basis<sup>12</sup>
  - Documents should be disclosed by making them available for inspection or providing copies, and whether copies should be paper or electronic
  - An electronic (web based) document management system should be utilised for production of electronic documents
  - A protocol for e-discovery should be adopted, and whether document searches should be limited by agreement to specific search terms or other parameters
  - Documents produced should be subject to any formal authentication requirements
  - A protocol is required for dealing with the redaction of confidential or privileged information or data within the produced documents

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<sup>12</sup> Failure to adhere to established time limits means that the Arbitral Tribunal may make the award on the evidence before it if: see ACICA Rules, Article 38.3.

- Whether the tribunal should be able to draw adverse inferences if the requested documents are not produced<sup>13</sup>
- The appropriate rules to be applied by the tribunal in adjudicating on any claims to resist production of documents, for example due to the assertion of a claim for client legal privilege

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## PROCEDURAL ORDER 1 AND THE PROCEDURAL TIMETABLE

- The parties should attempt to agree upon the procedural timetable in advance, and circulate what is agreed, and not agreed, to the tribunal in advance of the preliminary meeting
- The agreed, or directed, procedure should be recorded in the procedural timetable to be issued with Procedural Order 1
- If there is a time limit for rendering the award imposed on the tribunal, this should be extended by agreement, if necessary
- The tribunal may ask the parties to countersign Procedural Order 1 to demonstrate their agreement to it

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## FURTHER APPLICATIONS

- Where there is more than one arbitrator, whether all applications must be determined:**
  - **by the full tribunal at all times**
  - **by the full tribunal, after consultation with the other tribunal members, unless urgency makes such consultation impracticable in the circumstances**
  - **by the tribunal Chairperson alone**
- Whether the tribunal or the parties should determine whether applications may be decided by the tribunal on the papers alone
- Other procedural considerations for applications:
  - Notice period applicable to applications made before a scheduled procedural meeting or evidentiary hearing
  - Urgent applications
  - Form of the application
  - Documents required to support an application

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## ADDITIONAL PROCEDURAL MEETINGS

- Additional meetings should be scheduled into the Procedural Timetable**
- Date for pre-hearing conference to be assigned at the outset
- Other meetings to be ad hoc, as required and/or regular for the tribunal to check in on the Parties' preparation
- Specify the agreed medium for procedural meetings, i.e. all by phone/online video platform/in person
- Consider whether it should be a requirement that all Parties are to use the same medium
- Specify an agreed notice period for any ad hoc procedural meetings

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<sup>13</sup> See Article 9(6) of the IBA Rules on the Taking of Evidence in International Arbitration 2020.

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## TECHNOLOGY AND AI

- Consider the use of an electronic case-management platform
- Consider whether the parties, their representatives and the tribunal members have sufficient data security measures in place to maintain confidentiality of the arbitral process<sup>14</sup>
- Use of electronic case management system:
  - Identify the hosting organisation and technology platform
  - Single source of truth, document numbering and identification protocol
  - Responsibility for management and updating
  - Costs
  - Security, confidentiality and data privacy concerns
- Consider the adoption of protocols that apply to electronic exchange of documents

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## PROTOCOL FOR COMMUNICATIONS

- Confirmation of email addresses
- All communications to the tribunal or tribunal secretary to be copied to all parties
- Without consent of parties, third parties are not to be copied to correspondence with tribunal (noting that 'third parties' does not include the ACICA Secretariat, which should be copied on all correspondence)
- Agreement as to time zone to apply to all temporal deadlines
- Agreement as to deemed receipt of communications to the tribunal
- Requests for non-parties to be included in correspondence
- Tribunal not to be copied into inter partes correspondence unrelated to an application or compliance with the procedural timetable

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## FOREIGN LANGUAGE AND TRANSLATION/INTERPRETATION

- Consider whether interpreters are required (competence and neutrality is essential and should be tested in advance of any hearing)
- Process for agreeing the identity of translators in advance, and whether the tribunal should decide in the event of disagreement
- Process for the translation of documents:
  - Qualifications of translator and (if required at the seat) certification of translation
  - Provision of translation with original
  - Process for challenge to a translation
  - The extent to which translation is required – should it be limited to documents relied on or to all documents produced

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<sup>14</sup> See ACICA Rules Art 26.

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## TRIBUNAL SECRETARY

- Whether appointment of a tribunal secretary is required or desired
- Qualifications of the tribunal secretary
- Whether to refer to the [ACICA Guideline on the Use of Tribunal Secretaries<sup>15</sup>](#)
- Costs of the tribunal secretary

## Evidential hearing

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### ISSUES TO BE RESOLVED PRIOR TO COMMENCEMENT OF THE HEARING

- Whether an evidential hearing is necessary
- Duration and dates of the evidential hearing
- Submission of skeleton argument or other pre-hearing submissions
- Hearing schedule
- Hearing bundles and advance provision to the tribunal
- Permitted attendees at the hearing

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### HEARING VENUE AND LOGISTICS

- Whether the hearing will be conducted at the seat or another location<sup>16</sup>
- Whether it will be attended in person or via a virtual hearing platform, or whether it will be a hybrid combination of these<sup>17</sup>
- Select an appropriate hearing venue, or virtual hearing platform, including retiring rooms for the tribunal and parties
- Consider the appropriate technology support required for the hearing (e-documents, video evidence, video conferenced witnesses)
- Consider the physical storage requirements for documents of the Parties' representatives and the tribunal (and the witnesses)
- Whether it is appropriate to appoint a technology manager for the hearing
- Where the hearing is to be virtual or hybrid, consider the impact of different time zones
- Consider appropriate sitting hours
- Make specific arrangements for payment for facilities and ancillary services such as catering, transcript and technology providers

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<sup>15</sup> This guideline will apply to the use of Tribunal Secretaries in ACICA arbitrations.

<sup>16</sup> See ACICA Rules, Article 27.2.

<sup>17</sup> See ACICA Guidance Note for Online Arbitration



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## DURING THE HEARING

- Attendance sheet
- Whether there will be chess clock or other timing (and compliance/record keeping for this)
- Procedure for updating hearing bundles
- Protocol for exclusion of fact witnesses during testimony of others
- Transcript requirements; real-time or same day?<sup>18</sup>
- Consider whether the venue and service providers (eg transcribers) have flexibility to accommodate an extension of sitting hours
- Closure of hearing
- Timetable for closing briefs / post hearing submissions

## Financial matters

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### TRIBUNAL'S FEES AND EXPENSES

- Hourly rate
- Cancellation policy
- Travel (to arrive at a destination and also at the destination) and other expenses, including courier, printing, venue fees, translation fees, etc

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### DEPOSIT OF ADVANCE OF COSTS FOR THE TRIBUNAL<sup>19</sup>

- Timing for making the deposit
- Additional deposits may be required

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### DISCLOSURE OF FUNDING ARRANGEMENTS

- Whether any existing arrangements have been or need to be disclosed<sup>20</sup>, including:
  - Third party funding
  - Conditional contingent fee agreement
  - ATE insurance
- Security for costs

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### COSTS ESTIMATE

- Consider whether the tribunal should request cost estimates from the Parties (at the outset or at any later stage) to monitor proportionality and compliance with the overriding objective

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<sup>18</sup> While usually more expensive, real time transcript can be very helpful where those involved in the hearing do not have the language of the arbitration as their first language.

<sup>19</sup> In cases administered under the ACICA Rules, deposit fixing will be dealt with in accordance with Article 49.

<sup>20</sup> See ACICA Rules, Article 54.