Litigation and Arbitration: A Step by Step Comparison

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While Australian court litigation and international arbitration have much in common, there are significant differences. These differences are explored in the table below through the prism of a typical dispute, covering its full life-cycle, from the establishment of jurisdiction through to the practice and procedural rules that govern the proceedings.

LITIGATION		ARBITRATION
• Jurisdiction may arise by statute or by contract pursuant to a governing law clause.	**JURISDICTION (SOURCE OF)**	• Arbitration is dependent upon party consent, which can be provided before or after a dispute has arisen.
• Litigation will be conducted in accordance with the procedural rules and regulations of the jurisdiction invoked.	**REGISTRY / FORUM / INSTITUTION**	• Arbitration can be either conducted under the auspices of an institution (e.g. ACICA) or ad hoc (in which the parties craft their own procedure). • The choice of institution (or ad hoc) is made at time of an agreement to arbitrate. • For an outline of the advantages of ACICA as an arbitral institution, see this link.
• Judges or tribunal members are allocated by the Registry or Chief Judge. If the forum has a specialist list, then the judge or tribunal member will be appointed from the list (for example the Commercial, technology & Construction List in the Supreme Court of NSW). The parties cannot influence the appointment of the judicial officer.	**DECISION MAKER(S) – JUDGES AND ARBITRATORS**	• One of the principal benefits of arbitration is that the parties can influence the selection of the tribunal. Typically, for a three-person tribunal, each party can select one arbitrator and the third (and presiding) arbitrator can be chosen jointly by the parties, the party-appointed arbitrators, or, failing which, the arbitral institution. • If a sole arbitrator is to be appointed, he or she could be selected by the parties jointly or, failing which, the appointing authority. • Parties can specify an appointment clause any specific attributes of arbitrators (e.g. expertise, nationality etc).
• The procedural rules are those of the jurisdiction. For instance the Uniform Civil Procedure Rules apply to all state courts.	**RULES**	• An arbitration may be subject to certain 'hard rules', derived from the arbitration agreement, the applicable arbitration rules (such as those of ACICA) and any rules prescribed by the tribunal in the form of a Procedural Order. • Additionally, the tribunal and parties may be subject to 'soft rules' which provide non-mandatory guidance as to how the arbitration should be conducted, such as the IBA rules and institutional guidance notes - like those issued by ACICA: see this link. • Alternatively, an arbitration can be 'ad hoc' in the sense there is no arbitral institution with power to supervise the arbitration. In such circumstances, the parties are at liberty to determine what rules should apply to the arbitration or could adopt, for example, the UNCITRAL Rules.

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• Practitioners appearing must abide by the professional rules applicable to that jurisdiction and their duties to the court override those to the client.	**ETHICS AND CONDUCT**	• Not standardised internationally and presently unsettled as to which ethical rules apply to an international arbitration. Possibilities include the ethical rules applicable to the particular counsel or those in effect at the seat of arbitration. • Soft law is being developed, including the IBA Guidelines on Party Representation in International Arbitration.
• Parties can choose their legal representation subject to the constraint that they must be admitted in the jurisdiction.	**RIGHT OF REPRESENTATION**	• Parties usually have an unfettered choice when selecting their representative (see e.g. ACICA Rules 2021, Article 9). The representative ordinarily does not need to be qualified in the jurisdiction in which the arbitration is held (although there are exceptions) and does not even have to be a lawyer (although that is usually preferred)[1].
• Depending on the jurisdiction, proceedings are commenced either by pleading all material facts and circumstances and the cause of action (i.e. Statement of Claim) or an initiating application (e.g. Summons) together with an affidavit setting out material facts upon which the claim is founded. • Payment of filing fee. • Service in accordance with domestic rules and/or applicable legislation for service internationally. • Some jurisdictions require a pre-action protocol to be followed prior to a claim being filed.	**COMMENCEMENT**	• Arbitration commences with the filing of a notice of arbitration (e.g. ACICA Rules 2021, Art 6). • Nominal filing fee (e.g. AUD 2,500 plus GST for ACICA arbitrations as of 2021). • Flexible rules of service in accordance with parties' agreement or institutional rules. Strict rules of service do not usually apply. • No mandatory pre-action protocol imposed by law; but parties may agree pre-arbitration steps, which should ordinarily be followed.
• Written submissions are filed at the direction of the Court after all witness evidence has been filed/served – generally shortly before the hearing. Depending on the jurisdiction, length of submissions may be prescribed. If not, it is a matter for the party.	**WRITTEN PHASE (SUBMISSIONS/ PLEADINGS)**	• Arbitration is characterised by a high degree of party autonomy. This includes the ability to agree with the tribunal what type and number of written submissions should be filed. • Parties can limit the number and length of their submissions in order to reduce costs. • Parties can decide in consultation with the tribunal whether to have post-hearing written submissions or rely on oral closings. • Parties can decide in consultation with the tribunal whether to submit 'memorial' or 'pleading' styles of submissions including whether evidence (including lay and expert) should be submitted at the same time as submissions. For the differences between the memorial and the pleadings approach to the drafting of written submissions, see this link.

1 ACICA encourages all users to seek legal advice on legal questions.

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• Case management or directions hearings are generally held within 4 weeks of filing the originating application or pleading.
• Common steps include:
  • further and better particulars of pleadings;
  • discovery or notices to produce documents by the parties;
  • leave to issue subpoenas to non-parties (if required by the procedural rules);
  • timetable for the filing and service of witness evidence including expert reports if relevant.
	PRE-TRIAL STAGE	• Parties have the ability to agree on pre-hearing procedures, failing which the tribunal will decide. Common steps include a Case Management Conference to determine procedural and logistical issues; exchange of witness statements and expert reports; and preparation of necessary materials for the hearing (e.g. an agreed list of issues, hearing bundles, dramatis personae, chronology).
		• In contrast to litigation, there are usually no formal pre-hearing stages such as interrogatories or further & better particulars.
		• Even prior to COVID-19 often such 'hearings' were conducted in a 'virtual' environment, by teleconference or videoconference.

• Interlocutory applications may be filed seeking various forms of relief including for example: injunctions, summary dismissal, and striking out pleaded claims or allegations. • Contested interlocutory applications will generally be heard in open court.	**INTERLOCUTORY HEARINGS**	• Interlocutory applications relating to procedural matters are generally conducted on the papers only, without undue formality.
• Interlocutory applications may be filed seeking various forms of relief including injunctions, freezing orders, suppression or non-publication orders.	**INTERIM REMEDIES**	• Parties can seek interim relief from the tribunal or a court of competent jurisdiction. Remedies available are similar to those that can be granted by a court, such as injunctions or an order for specific performance.
• Formal rules of evidence of the relevant jurisdiction apply.	**RULES OF EVIDENCE**	• There are no formal rules of evidence that mandatorily apply in international arbitration. Any such rules can be agreed by the parties or determined by the tribunal in consultation with the parties (which is often done in the form of a procedural order). • Guidance may be taken from the IBA Rules on the Taking of Evidence in International Arbitration (see this link).

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• Witness evidence is generally given by affidavit and ordinarily comes after document production (by discovery or subpoena), if it has been ordered. The deponent may be required for cross-examination. • Expert evidence may be given by a single court appointed expert or by experts retained by the parties. If the latter, experts will be expected to confer and draft a joint report setting out the matters upon which they agree and disagree. In most jurisdictions expert evidence at a hearing is given concurrently (i.e. hot tub). • To be admissible, evidence must comply with the laws of evidence of the jurisdiction and objections may be taken to evidence that does not comply. • The court will assess the admissibility and weight to be given to the evidence.	**WITNESS EVIDENCE**	• Witness evidence is usually presented in the form of written statements with the deponent then subject to cross-examination at the hearing by opposing counsel and, often, questions from the tribunal. • Some civil law jurisdictions do not use written witness statements in court, which in turn can influence arbitration practice in those countries, e.g. Switzerland. • The form of the written statement is usually guided by the parties or the IBA Guidelines on the Taking of Evidence in International Arbitration. This means formal requirements such as witness signature on each page, specific language in relation to each exhibit are usually not required. • The tribunal determines the weight and relevance of witness testimony, and domestic rules of evidence are usually excluded.
• If facts in issue can only be proved by expert opinion then evidence by a qualified expert may be given on that issue. • Experts, whether court appointed or retained by the parties, have a primary duty to assist the court and must not be 'advocates' for the party that retained them.	**ROLE OF EXPERTS**	• Parties can submit expert evidence to address relevant technical issues. Tribunals occasionally appoint their own expert. • Expert evidence can be made more efficient through an agreed list of issues, expert witness conferencing (where all experts are heard together), and the preparation of a joint report by the experts on issues on which they agree or disagree. • At the hearing, experts are often heard concurrently (i.e. in a so-called hot tub) usually after they have been examined individually by the parties and the tribunal.
• Relevant categories of documents may be produced *inter partes* either by orders for discovery or notices to produce. • It is common now to have mandated electronic document production protocols in some jurisdictions to deal with the issue of substantial volumes of data and information (which are considered to be documents) across multiple platforms.	**DOCUMENT PRODUCTION**	• There is no 'discovery' per se in international arbitration. Rather, each party is expected to submit the evidence upon which they rely. • This may be supplemented by document production requests for specific documents or categories of documents which are demonstrated to be relevant and material to the outcome of the dispute. This is usually regulated by the agreed rules, procedural orders, 'soft law' or the arbitration agreement itself. Absent that, there is no general right to require document production and some arbitrations proceed without it. • The document production process can be assisted through the use of a 'Redfern' Schedule or other schedule of document requests. • The IBA Rules on the Taking of Evidence in International Arbitration provide guidance on factors that a tribunal could consider when determining a document production request.

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• Relevant documents held by third parties may be produced under subpoena. In some jurisdictions leave is required before a subpoena can be issued.	**SUBPOENAS**	• An arbitrator does not have the power to compel non-parties to produce documents or testify in arbitration proceedings. • However, under some national arbitration regimes, such as the English Arbitration Act (section 43), a party can approach the court to issue subpoenas in support of arbitration. The relevant court would be either that of the arbitral seat or of the country in which the desired documents or person are situated.
• Documents that are subject to a claim of legal professional privilege need not be produced to the requesting party. Procedural rules determine how privilege claims are to be made. • Privileged documents to be discovered are generally listed in a separate schedule to the list of documents answering the discovery categories. • Privileged documents to be produced subject to a subpoena are generally marked as such and produced in a sealed envelope to the court.	**PRIVILEGE**	• The common law concept of legal professional privilege is not universally recognised in all jurisdictions (but nor is forced document disclosure common in those jurisdictions). • There is no prescribed set of arbitration rules with respect to privilege. • A privilege claim will be decided by the tribunal in accordance with the law it considers appropriate, which may be the law of the contract; the seat of the arbitration; the jurisdiction(s) of the parties or their counsel; or the jurisdiction(s) where the communication was made or document created. If the IBA Guidelines on the Taking of Evidence in International Arbitration are incorporated, then this will provide guidance to the tribunal as per the above. • In practice, tribunals tend to take a risk-averse approach, often adopting whichever privilege rule is most favourable to the party claiming privilege.
• Related proceedings may be consolidated and additional parties may be joined if necessary.	**CONSOLIDATION AND JOINDER**	• Under the ACICA Rules 2021, ACICA may consolidate two or more related arbitrations into one proceeding (Articles 16 and 18) and an ACICA tribunal can allow an additional party to be joined to the proceedings in certain circumstances (Article 17) to facilitate the efficient resolution of disputes. If an ad hoc arbitration, then consent of all parties is required for consolidation and/or joinder.

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• Unless, on application by a party, the court has ordered that a preliminary question on a legal issue is warranted or an application for summary dismissal/judgment has been made, hearings are on the merits. • While the length of the hearing is a matter for the court, in practice it is determined by agreement between the parties. • Hearings are ordinarily in person in open court. Evidence of witnesses outside the jurisdiction may be heard by audio visual link (AVL) if the court considers it appropriate in the circumstances. Since the COVID-19 pandemic struck, hearings have been conducted entirely by AVL. • Hearings ordinarily commence with an opening statement by the applicant followed by the hearing of the applicant's evidence. The respondent then opens its case and may (but generally doesn't) make an opening statement. Closing submissions are then made by the parties after completion of the evidence. In longer hearings, the parties are expected to agree on a fair allocation of time between them.	**MERITS HEARING**	• Arbitration is generally characterised by shorter hearings relative to a litigation trial. As a consequence, parties are usually expected to focus on the most relevant points at issue and are not constrained by domestic rules of evidence which require every contentious point to be put to each witness. • Typically, a hearing will begin with brief opening statements followed by the examination of witnesses and experts. A tribunal may adopt the 'chess clock' method, whereby each party has a specific (and usually equal) amount of time to make submissions and examine witnesses and experts. • The venue could be a dedicated hearing centre, a hotel conference room, or in law firm offices. Many hearings are being conducted remotely during the COVID-19 pandemic.
• The applicable laws of procedure will be determined by the domestic law of the jurisdiction (*lex fori*). • The applicable substantive law (including those that bear upon the existence and enforceability of rights, obligations and remedies) will be governed by the law agreed by the parties in the contract (*lex causae*).	**APPLICABLE LAW**	• A further manifestation of party autonomy is that the parties can choose both the substantive and procedural law which governs the dispute. This allows parties to choose a 'neutral' system of law if so desired. • For example, under the ACICA Rules 2021 (Article 43.1), the tribunal shall apply the law designated by the parties, failing which the tribunal shall apply the law which it considers applicable. • Arbitration proceedings usually have a 'seat' or legal home. The seat of the arbitration (i.e. *lex arbitri*) provides the procedural law and the court with the power to supervise the arbitration and consider any challenges to the tribunal's decisions is determined by the parties' choice of seat for the arbitration. • It is best practice to specify in the contract the law applicable to the arbitration agreement. This avoids debates as to whether the interpretation and application of the arbitration clause is governed by the law applicable to the contract in which the (separable) arbitration clause sits or the law of the seat of arbitration.

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• Costs are a matter for the court's discretion and may be awarded on a party/party or indemnity basis. The latter will generally only occur where the unsuccessful party has rejected a more favourable settlement offer or has conducted the proceeding in a contumelious manner. • The default position is that the successful party is entitled to their costs on a party/party basis as assessed or agreed. • The manner and quantum of the assessment of costs depends on the jurisdiction. However, the entirety of costs expended on the litigation will not be recoverable even where an indemnity costs order is made. • The court has a discretion to make orders for security for costs against impecunious corporate plaintiffs or plaintiff's resident outside the jurisdiction. • Third party litigation funding is permitted. • Court fees vary according to the jurisdiction, they typically include filing fees for both originating and interlocutory applications and hearing fees.	**COSTS**	• Each party usually bears their own costs during the course of the arbitration (unless a security for costs order has been obtained). Subject to an agreement of the parties otherwise, arbitral tribunals have the power to allocate costs between the parties based on the results of the arbitration (or a particular issue) and the parties' conduct during the proceedings. • The costs of an arbitration comprise: (i) procedural costs consisting of the institutional administrative expenses and the arbitrators' fees and expenses, (ii) party costs consisting of the legal fees and expenses of counsel, costs for witnesses, and (iii) hearing and ancillary expenses (venue hire, transcription, interpreters etc). • In an institutional arbitration, the costs may be determined on an ad valorem basis (i.e. with reference to the amount in dispute), or calculated according to an hourly rate. ACICA, for example, sets an ad valorem cost for the administration of the arbitration (see the ACICA Schedule of Fees), while arbitrator fees, unless otherwise agreed, are to be determined on an hourly rate agreed by the parties or determined by ACICA (ACICA Rules 2021, Article 49.2). The parties usually share the deposit on arbitration costs in equal shares. • Third party funding is expressly allowed in many jurisdictions in which international arbitration is practiced (e.g. Australia and Singapore), while there is a degree of uncertainty in some other jurisdictions (e.g. Thailand and the Philippines). Most institutional rules will require disclosure of the funding arrangement (see ACICA Rules 2021, Article 54).
• The default position in Australia is that all hearings are open to the public and the court's decision is published. • Suppression or non-publication orders can be made in certain limited circumstances (particularly in respect of highly confidential and commercially sensitive evidence).	**PRIVACY**	• Arbitration proceedings usually take place privately (unless otherwise agreed by the tribunal and parties). • Most arbitration awards are not made public, although some institutions do publish redacted extracts of decisions. • Investment treaty claims and sports arbitrations are an exception: they are in the public domain.

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• The default position is that the court's decision and all pleadings and evidence read in court may be accessed by third parties. • If particular evidence is commercially sensitive or confidential, the court has a power to make confidentiality (suppression or non-publication) orders.	**CONFIDENTIALITY**	• Arbitration is traditionally considered to be confidential and unlike court, it can be kept confidential even though some courts have questioned the reach of confidentiality.[2] Thus, in order to ensure confidentiality (if that is desired), it should be expressly agreed by the parties in writing, if not prescribed in the institutional rules or the applicable law.
• Hearings at first instance on the merits are generally appellable as a matter of right. Appeals on interlocutory decisions are only available with leave.	**FINALITY / APPEALS**	• An arbitration award is considered to be final and binding on the parties. There is no general right of appeal. • However, a party can challenge an arbitration award on limited grounds such as breach of due process, breach of public policy, or excess of jurisdiction.[3] • The threshold for setting aside an award is usually quite high in arbitration-friendly jurisdictions, with most applications rejected out of deference to the arbitral tribunal and the parties' choice of a dispute resolution system characterised by efficiency, cost-effectiveness and finality.
• The ability of a party to enforce a foreign judgment in domestic courts depends on the type of and the originating jurisdiction of the judgment. • Australia has agreements with a limited number of other countries for the enforcement of domestic court judgments (for example the United Kingdom, Papua New Guinea), however these agreements may be limited to monetary judgments or certain subject matters.	**ENFORCEMENT IN OTHER JURISDICTIONS**	• An international arbitration award can be recognised and enforced in the 168 jurisdictions which are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (as of March 2021). • For other jurisdictions, the award would need to be recognised as a judgment in accordance with local court procedures.

2 *Esso Australia Resources Ltd v Plowman* [1995] HCA 19.

3 The New York Convention provides an exhaustive list of grounds for refusing recognition and enforcement of foreign arbitral awards. This list has since been reflected in the UNCITRAL Model Rules, which were implemented in Australia through the *International Arbitration Act 1974* (Cth)

The ACICA Practice & Procedures Board is grateful for the assistance of Mr. Bradley Jones, Barrister, Ground Floor Wentworth Chambers, Sydney in the preparation of this explanatory note.