ACICA
Australian Centre for International Commercial Arbitration

Conducting Efficient Arbitration Under The ACICA Arbitration Rules

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1. Introduction

Arbitration is considered to be a flexible, cost-effective procedure for the resolution of commercial disputes. When compared with conventional court proceedings, it provides greater autonomy to parties and tribunals to conduct proceedings in a manner suitable to the circumstances of the case. The Australian Centre for International Commercial Arbitration (ACICA) is Australia's premier international arbitral institution. ACICA strives to ensure that arbitration procedures in Australia include these advantages.

Recent years have witnessed Australia taking great strides forward, with an increasing acceptance of arbitration as a dispute resolution mechanism and a sharp increase in the use of Australian seats by international parties. This has coincided with reforms to both the ACICA Arbitration Rules (ACICA Rules) and Australian arbitration legislation to reinforce the benefits of arbitration; ensuring the expediency and neutrality of the process and the enforceability of the outcome. Australia is now recognised as providing a safe, neutral seat for arbitration, supported by a modern, transparent legal framework, an independent judiciary and highly experienced legal practitioners and arbitrators.

This article briefly reviews key provisions of the current Australian arbitration legislation and the ACICA Rules and considers how both may be used to ensure an efficient and suitable arbitration procedure.

2. Legislative reform in Australia

Commercial arbitration in Australia is governed by two statutory regimes: a Federal regime regulating international arbitration and State-based regimes regulating domestic arbitration. In June 2010, the Commonwealth Parliament amended the *International Arbitration Act 1974* (Cth) (IAA) to increase the effectiveness, efficiency and affordability of international commercial arbitration. In a parallel reform process that year the Standing Committee of the Attorneys' General agreed to implement a Model Commercial Arbitration Bill (Model Bill) to apply to domestic arbitration. The Model Bill included reforms aiming to harmonise domestic arbitration law throughout Australia and to ensure uniformity with the laws applying to international arbitration. The

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first State to implement the Model Bill was NSW, which passed the *Commercial Arbitration Act* 2010 (NSW). The majority of other States and Territories have now enacted similar Commercial Arbitration Acts (CAAs)[3].

2.1 International arbitration in Australia

The IAA gives force of law and effect to the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (Model Law)[4] and to Australia's obligations under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[5]. Key amendments to the IAA introduced in 2010 are outlined below.

a) The Model Law as the Procedural Law

Prior to 2010, parties to an arbitration seated in Australia were able, by express or implied agreement, to 'opt-out' of the Model Law as the law governing the conduct of their international arbitration[6]. Prior to the reforms, it was not uncommon for parties to an international arbitration to agree to the application of the domestic regime, which had allowed a broader right of appeal against arbitration awards than the IAA.[7]

The amended IAA eliminates this possibility by designating the Model Law as the exclusive, mandatory procedural law for all international arbitrations seated in Australia[7].

b) Confidentiality

Arbitral proceedings are, by their nature, private but not necessarily confidential. In 1995 the Australian High Court ruled in *Esso Australia Resources Ltd v Plowman*[8] that a general obligation of confidence in arbitration proceedings did not arise by way of implication in Australia. The express agreement of the parties, including by incorporating reference to procedural rules containing confidentiality provisions, was required. Section 22(3)(a) of the IAA now provides the parties with the option to agree to a statutory duty of confidence (imposed under section 23C). If parties opt in to this regime, they are required to refrain from disclosing confidential information except in the limited circumstances set out in the IAA[9].

As noted later in the article, the ACICA Rules provide a comprehensive confidentiality regime such that in practice the confidentiality of proceedings can be assured by adopting those rules.

c) Limitation of the grounds to refuse enforcement

The enforcement of arbitral awards made in Australia ('non foreign awards')[10] is now governed by Articles 35 and 36 of the Model Law which limit the grounds on which a party may seek to resist enforcement. Further, section 8(3A) of the IAA clarifies that the court has no residual discretion to refuse enforcement of a foreign arbitral award on

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[3] See *Commercial Arbitration Act 2010* (NSW) (CAA NSW), *Commercial Arbitration Act 2011* (SA) (CAA SA), *Commercial Arbitration (National Uniform Legislation)* Act 2011 (NT) (CAA NT), *Commercial Arbitration Act 2011* (Tas) (CAA TAS), *Commercial Arbitration Act 2012* (WA) (CAA WA), *Commercial Arbitration Act 2011* (Vic) (CAA VIC) and *Commercial Arbitration Act 2013* (Qld) (CAA QLD).

[4] See s 16(1). The Model Law is set out in schedule 2 to the IAA.

[5] The IAA also gives force to Australia's obligations under the 2006 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

[6] See *Australian Granites Ltd v Eisenwork Hensel Bayreuth Dip-Ing Burkhardt GmbH* [2001] 1 Qd R 461.

[7] See ss 16(1) and 21 of the IAA.

[8] (1995) 183 CLR 10.

[9] See ss 23C to 23G of the IAA.

[10] Under the IAA, the enforcement provisions of the Model Law also apply to awards made in countries that are not signatories to the New York Convention. By comparison, Part II of the IAA is concerned with foreign awards made in New York Convention countries other than Australia.

any grounds other than those provided in ss 8(5) and 8(7) of the IAA, which in effect reproduce the grounds established in Article 5 of the New York Convention.

A challenge to the constitutionality of the IAA was recently brought before the High Court of Australia by a Chinese company seeking to resist enforcement of an award under Article 36. It argued, *inter alia*, that the IAA impairs the institutional integrity of the courts and impermissibly vests judicial power in tribunals because it does not include a right to appeal an award on the grounds of error of law . The High Court unanimously rejected the challenge, sending a strong message of support for arbitration and the new legislative regime in Australia.

d) Optional provisions

The IAA framework places a strong emphasis on party autonomy by providing a suite of optional provisions[12]. These include provisions on confidentiality and consolidation of proceedings which may be agreed to by parties. Other provisions with respect to, for example, tribunal powers to award costs and security for costs, to continue proceedings notwithstanding party default and to order interest on an award, will apply unless the parties agree to exclude them.

These simple 'opt in' and 'opt out' provisions offer parties the flexibility to adapt their procedure to suit relevant circumstances.

e) Limits to and guidance on judicial intervention

The IAA provides guidance and limits to the exercise of judicial power in relation to arbitrations. When performing functions or exercising powers under the IAA or the Model Law, courts are required by section 39 of the IAA, to have regard to its objects[13] and the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and that awards are intended to provide certainty and finality.

The IAA also sets out the specific circumstances when, and the bases on which, courts may act. Similarly, the Model Law provides that in matters governed by it, no court shall intervene except where provided in that law.

Recent cases[14] in Australia have demonstrated a keen appreciation by the courts of the objectives sought to be achieved, and the pro-enforcement approach that has been facilitated, by the amendments to the legislation and the growing focus on arbitration in Australia as a dispute resolution mechanism.

2.2 Domestic arbitration in Australia

Similarly to the IAA, the Model Bill and the subsequent CAAs incorporate much of the 2006 Model Law, with necessary modifications to adapt the legislation to the Australia's domestic setting[15]. The result is a high level of uniformity of arbitration legislation at both a domestic and international level in Australia. Some of the key developments at a domestic level, which reflect the attitudinal shift towards greater acceptance of arbitration, are outlined below.

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[11] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

[12] See ss 22 to 27 of the IAA.

[13] See s 2D of the IAA. The objects of the Act include facilitation of international trade and commerce by encouraging the use of arbitration, facilitation of the use of arbitration agreements made in relation international trade and commerce and facilitation of the recognition and enforcement of arbitral awards made in relation to international trade and commerce.

[14] See, for example, *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; Traxys *Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; *ESCO Corporate v Bradken Resources Pty Ltd* [2011] FCA 905; *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109

[15] While the Model Law provides uniform standards for international commercial arbitration, it is also applicable to domestic arbitration. See UNCITRAL, Analytical Commentary on Draft of a Model Law on International Commercial Arbitration. UN Doc A/CN.9/264, (3-21 June 1985) [22].

a) Procedural requirements for the conduct of arbitrations

The CAAs provide greater flexibility and autonomy with respect to the arbitration process. The paramount objective of the CAAs is 'to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense'[16]. In order to achieve this objective, parties are entitled to agree to how their dispute will be resolved[17]. In the absence of such an agreement, the arbitral tribunal has the power to conduct the arbitration in such manner as it considers appropriate[18]. The functions of the tribunal must however be exercised so that (as far as practicable), the paramount objective of the Act is achieved[19]. This places greater emphasis on the need for tribunals to make certain that the procedures applied produce an efficient and cost-effective process.

b) Power of an arbitral tribunal to order interim measures

The power to order interim measures is expressly defined and regulated by the CAAs, conferring concurrent jurisdiction upon the tribunal and the courts[20]. The CAAs provide a non-exhaustive list of measures that the arbitral tribunal may grant, clarifying tribunal powers that were previously only impliedly granted. The CAAs also now allow the tribunal to make orders for security of costs[21]. Importantly, interim orders of the tribunal are also now enforceable on application to the court, with limited grounds for refusal[22].

c) Obligation of confidentiality

The CAAs impose a duty upon the parties and tribunals not to disclose confidential information in relation to the proceedings, except in limited circumstances[23]. This requirement applies unless the parties agree otherwise.

d) Limited grounds for challenging an arbitrator

The grounds previously available for challenges are restricted under the CAAs, such that an arbitrator may only be challenged in cases of justifiable doubt[24] as to their impartiality or independence, or where they do not possess the qualifications agreed to by the parties[25]. These provisions operate to restrict parties' ability to bring arbitrator challenges as a means of delaying proceedings.

e) Mandatory stay of proceedings

Under the CAAs courts must stay proceedings and refer a matter to arbitration where an arbitration agreement exists, unless the agreement is found to be null and void, inoperative or incapable of being performed[26].

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16 See s 1C(1) of CAAs NSW, SA, NT, TAS, and WA, and s 1AC(1) of CAAs VIC and QLD.

17 See ss 1C(2)(a) & 19(1) of CAAs NSW, SA, NT, TAS and WA and ss 1AC(2)(a) & 19(1) of CAAs VIC and QLD.

18 See s 19(2) of CAAs NSW, VIC, SA, NT, TAS, WA and QLD.

19 See s 1C(3) of CAAs NSW, SA, NT, TAS and WA, and s 1AC(3) of CAAs VIC and QLD.

20 See Part 4A of CAAs NSW, VIC, SA, TAS, WA, NT and QLD.

21 See s 17(3)(a) of CAAs NSW, VIC, SA, NT, TAS, QLD and WA.

22 See ss 17H and 17I of CAAs NSW, VIC, SA, NT, TAS, QLD and WA.

23 See ss 27E to 27I of CAAs NSW, VIC, SA, NT, TAS, QLD and WA.

24 Justifiable doubts arise only if there is a real danger of bias on the part of the proposed or appointed arbitrator (s 12(6) of CAAs NSW, VIC, SA, NT, TAS, WLD and WA).

25 See s 12(3) of CAAs NSW, VIC, SA, NT, TAS, QLD and WA.

26 See s 8(1) of CAAs NSW, VIC, SA, NT, TAS, QLD and WA.

f) Narrowed recourse against an award

The CAAs limit the available recourse to the courts, adopting the provisions of Article 34(2) of the Model Law such that an award may be set aside only for procedural defects, where the tribunal lacks jurisdiction or upon public policy grounds[27].

The right to appeal an award for an error of law is an 'opt in' provision, taking effect only if the parties have agreed to its application within three months of the award being issued *and* the court grants leave (itself subject to strict criteria)[28].

3. ACICA and the development of its arbitration rules

3.1 Background

Established in 1985 as a not-for-profit public company, ACICA's mission is to educate, promote and encourage the use of commercial arbitration as a means of dispute resolution within Australia and the Asia Pacific region. ACICA also seeks to promote Australia as a venue for the conduct of international commercial arbitrations.

ACICA is headquartered at the Australian International Disputes Centre (AIDC) in Sydney, and has registries in Melbourne and Perth. It provides a full range of administrative and other services to assist international arbitrations conducted in Australia and in the region[29]. The ACICA Board, Executive and Secretariat that oversee these cases are comprised of experienced and well known arbitral practitioners.

ACICA works closely with AIDC and its training and case management operation, the Australian Commercial Disputes Centre (ACDC). While ACICA deals primarily with international arbitration, ACDC focuses on domestic disputes. ACICA also established the Australian Maritime and Transport Arbitration Commission (AMTAC), a commission of ACICA which supports and facilitates the conduct of international arbitration in respect of maritime and transport disputes.

Over the course of the last few years and since the opening of the AIDC in 2010 in particular, ACICA has administered a steadily increasing case load. Current cases demonstrate a developing trend towards the use of the ACICA Rules and Australian seats by international parties, particularly those trading in the Asia Pacific region. By way of example, in two thirds of the cases filed in 2013 both parties were international opting for an Australian seat.

3.2 Development of the ACICA Rules & Procedures

Having first launched its Arbitration Rules in 2005[30], ACICA introduced the revised ACICA Rules on 1 August 2011[31]. The ACICA Rules reflect current international best practice and address key issues such as mandatory confidentiality in arbitration proceedings. The ACICA Rules also incorporate Emergency Arbitrator Provisions. Designed to aid an accelerated resolution of international commercial disputes, this innovation provides parties with the option to seek urgent interim measures of protection from an emergency arbitrator before the tribunal is constituted.

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[27] See s 34 of CAAs NSW, VIC, SA, NT, TAS, QLD and WA.

[28] See s 34A of CAAs NSW, VIC, SA, NT, TAS, QLD and WA.

[29] ACICA also manages and facilitates mediation under the ACICA Mediation Rules.

[30] ACICA also first adopted the ACICA Expedited Arbitration Rules in 2008 and the ACICA Mediation Rules in 2007.

[31] ACICA Arbitration Rules: *http://acica.org.au/acica-services/acica-arbitration-rules.*

ACICA also revised its Expedited Arbitration Rules[32] (Expedited Rules) in 2011. The Expedited Rules have the overriding objective to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved[33]. The Expedited Rules provide a simplified procedure whereby ACICA appoints a sole arbitrator who determines the matter based on documents.

In early 2011, the Australian government appointed ACICA as the sole default appointing authority competent to perform the arbitrator appointment functions under the IAA[34]. To give effect to this, ACICA developed the Appointment of Arbitrators Rules 2011[35] (Appointment Rules) which establish a streamlined process for the appointment of an arbitrator to a dispute seated in Australia in circumstances where the arbitration is not being conducted under the ACICA Rules or the Expedited Rules. The Appointment Rules apply to the appointment of arbitrators pursuant to an *ad hoc* agreement, the UNCITRAL Arbitration Rules, Model Law and statutory powers granted by the IAA.

Under the auspices of AMTAC, specific rules for the resolution of maritime and transport disputes have also been developed (AMTAC Arbitration Rules). In addition, AMTAC provides a Rocket Docket procedure for expedited, documents-only arbitration to be completed within three months of commencement[36].

In order to support and encourage the harmonisation of arbitration law and procedure as well as its application in the Federal and State courts of Australia, ACICA has also worked with key judicial officers to establish the ACICA Judicial Liaison Committee, led by the former Chief Justice of the High Court, the Honourable Murray Gleeson AC as Chairman.

4. How the ACICA rules, in combination with the new legislation, can be used to parties' best advantages

Legislative amendments, together with improvements to the ACICA Rules, create a favourable environment for the development of best practice in arbitration in Australia. The Australian arbitral regime now offers parties the potential to structure their proceedings in a highly efficient and cost effective manner. The following practices should be considered by parties in order to take advantage of available processes, whilst avoiding costly delays.

4.1 Choosing procedural rules & use of the ACICA Model Clause

The IAA provides parties with the opportunity to choose their own procedural rules and to modify them to suit the particulars of the dispute. ACICA offers a model arbitration clause (Model Clause) for use by parties in either a domestic or international arbitration context, to refer disputes to administration under the ACICA Rules. Use of the Model Clause and an Australian seat allows parties to benefit from the advantages, previously outlined, provided under the framework of the ACICA Rules and the IAA (or relevant CAA in a domestic arbitration) as the applicable procedural law. It also allows for specialist administration of the

32 ACICA Expedited Arbitration Rules: *http://acica.org.au/acica-services/expedited-arbitration-rules*

33 See Article 3(1) of the Expedited Rules.

35 ACICA is also the statutory appointing authority under the *Water Management Act* 1999 (Tas), the *Water Industry Act* 1994 (Vic) and the *Construction Industry Long Service Leave Act* 1997 (Vic).

36 ACICA Appointment of Arbitrators Rules 2011: *http://acica.org.au/assets/media/Rules/ACICA_Appointment_of_Arbitrator_Rules_2.3.11.pdf*

36 *http://www.amtac.org.au/Arbitration-Rules*

37 ACICA Model Arbitration Clause: *http://acica.org.au/acica-services/arbitration-clauses*

arbitration by ACICA, providing the parties with access to the resources of the institution to assist with management of the proceedings. ACICA takes an active role in case management of arbitrations and monitors the timely conduct of cases and the performance of arbitrators.

Importantly, reference to the Model Clause provides a simple method for parties to ensure that they have included key elements in their arbitration agreement, avoiding potential challenges to the agreement or disputes as to its intended effect which can lead to significant time and cost increases.

Depending on the circumstances of the dispute, such as the amount claimed, the urgency of the matter and complexity of the issues, parties may alternatively choose to apply the ACICA Expedited Rules. Under the Expedited Rules no hearing takes place unless the arbitrator determines that exceptional circumstances exist and either the arbitrator or the parties require a hearing[38]. The arbitrator is required to deliver a final award within four months of being appointed if there is no counterclaim or set-off and otherwise within five months[39].

4.2 Obtaining Interim Measures

Each of the IAA, the CAAs and the ACICA Rules provide arbitral tribunals with jurisdiction to order interim measures of protection, including with respect to preserving evidence or preventing assets from being dissipated. As previously noted, the introduction of Emergency Arbitrator provisions in the ACICA Rules also provide parties with the option to obtain such measures prior to the constitution of the tribunal. Orders made will be recognised and enforced in Australian courts with relative ease.

By allowing parties to obtain interlocutory measures directly from the tribunal without having to initiate parallel court proceedings, these provisions promote a more efficient arbitration process.

4.3 Defining the issues and agreeing an appropriate procedure

Focusing on the core issues in dispute early in proceedings assists parties avoid unnecessary time and cost. In this regard, the holding of an early procedural meeting with the tribunal to agree upon a suitable procedure should be encouraged. Doing so provides parties with the opportunity to define reasonable timeframes for the progress of the arbitration.

Needlessly lengthy hearings and unnecessary rounds of pleadings can also retard the arbitration process. Consideration should be given to whether a dispute can be resolved on the basis of written submissions and documentary evidence without the need for an oral hearing. Alternatively, where appropriate, the use of limited time ('stop clock') hearings, jointly retained or tribunal-appointed experts and reliance on succinct factual witness statements directed to the issues rather than oral examination of factual witnesses, are all steps that may be taken to save a considerable amount of hearing time.

Parties may also consider bifurcating proceedings such that issues of particular import are dealt with in a preliminary award by the tribunal. This may provide a basis for early settlement of the remainder of the issues.

In this respect it is open to parties to agree to a set of expedited procedures, such as the Expedited Rules, or to tailor a set of rules to suit the dispute.

[38] Article 13(2) of the Expedited Rules.

[39] Article 27 of the Expedited Rules.

4.4 Minimising document production

A focused document production process prevents unnecessarily cost and delay. Australian legislation and the ACICA Rules encourage parties to submit all evidence on which they intend to rely with their statements of claim and defence. The ACICA Rules provide that the tribunal shall have regard to, but is not bound to apply, the International Bar Association Rules on the Taking of Evidence in International Arbitration[40]. The IBA Rules encourage limited and specific requests for production of relevant documents.

With respect to an expedited proceeding, the Expedited Rules provide that there be no discovery, allowing the tribunal to order only the production of specified relevant documents.

4.5 Choosing experienced arbitrators and counsel

Choice of arbitrator/s may be the most important decision made by parties. The attitude and approach of the tribunal will strongly influence procedure which in turn may have a direct impact on time and cost.

Parties should consider the nature and amount in dispute and whether these matters justify the appointment of more than one arbitrator. If the parties have not previously agreed on the number and are unable to within a specified time period, the ACICA Rules provide that ACICA will determine the number, taking into account all relevant circumstances, to avoid any dead lock to proceedings. ACICA also has powers under the ACICA Rules to make appointments in specific circumstances, if no agreement is reached between the parties or a party fails to make an appointment as required. Appointments may be made from within or outside ACICA's panel[41], which comprises arbitrators with extensive arbitration experience both in Australia and in jurisdictions around the world.

Choice of counsel in arbitration is another important consideration. Experienced counsel will be able to apply best practice to the running of an arbitration, propose or negotiate appropriate procedures and avoid the use of traditional litigation tactics that may not hold much sway with the tribunal. Under Australian legislation and the ACICA Rules, parties may be represented or assisted by persons of their choice[42], regardless of nationality, in arbitral proceedings.

Australia is home to a large number of international arbitration practitioners, who have experience practising in a variety of jurisdictions throughout Asia, the United States, the Middle East and Europe. ACICA provides contact information for practitioners with arbitration specialisation on its website.

5. Conclusion

The advantages of ACICA arbitration are complemented by an advanced legislative regime both domestically and internationally supporting arbitration in Australia. The flexible approach of the new regime allows parties and tribunals to tailor a process according to the facts, circumstances and interests involved in a particular dispute. While tribunals have a pivotal role in keeping proceedings on track, with the support of experienced counsel and the arbitral institution parties can actively participate in the design and achievement of an appropriate and commercial dispute resolution outcome.

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[40] These rules have been developed to provide an efficient, economical and fair process for the taking of evidence in international arbitration (Foreword to the IBA Rules).

[41] ACICA's panel is comprised of ACICA Fellows. ACICA maintains panels of arbitrators and mediators, which may be referred to for case appointments, ensuring that the appointment process occurs efficiently and without undue delay.

[42] See s 24A of CAAs NSW, VIC, SA, NT, TAS, QLD, and WA, s 29 of the IAA and Article 6 of the ACICA Rules.

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