Chapter 5

ACICA's Expedited Arbitration Rules

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I Introduction

In 2005 the Australian Centre for International Commercial Arbitration (ACICA) released its Arbitration Rules (ACICA Rules).[1] While the ACICA Rules were well received by the business community, there is growing worldwide concern about increased delays and costs in international commercial arbitration.[2] In response to the need of businesspeople to have smaller disputes resolved more quickly and efficiently, ACICA decided to adapt the ACICA Rules and thereby develop the ACICA Expedited Arbitration Rules (Expedited Rules). ACICA adopted the Expedited Rules in 2008. In July 2010, the ACICA Arbitration Rules Committee agreed on a few revisions, largely approved in September 2010 by the ACICA Board. It also began a review of some further issues in parallel with its review of the generic ACICA Rules of 2005.[3]

This chapter discusses the changes made to the ACICA Rules in creating the Expedited Rules. Appendix I adds a Guidance Note aimed more specifically at arbitrators and legal advisors.[4] Appendix II provides a table comparing the time limits imposed under the Expedited Rules with those imposed under the ACICA Arbitration Rules, the LMAA Small Claims Procedure, the IAMA Fast-Track Procedure and the Supplementary Rules of the German Institution of Arbitration (DIS). Appendix II of Chapter 1 in this volume compares article headings of the ACICA Rules and the Expedited Rules to further highlight the major differences.

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1 See Greenberg et al, Chapter 4 of this volume.

2 See Nottage and Garnett, Chapter 1 of this volume, Part I.B; Nottage and Garnett, Chapter 8; Nottage and Miles, Chapter 10, Part I.

3 ACICA's Expedited Arbitration Rules of 2008 and of 2010 are available via <www.acica.org.au/expedited_rules.html> accessed 21 April 2010. This chapter identifies the few revisions agreed in mid 2010. The ACICA Arbitration Rules Committee responsible for the 2010 revisions and ongoing review comprises the present authors, except for (now Justice) Clyde Croft, together with Malcolm Holmes QC (the new Chair), Dr Christopher Kee, Khory McCormick and Danielle Sirmai.

4 Drafted by the present authors (as members of the ACICA Arbitration Rules Committee that drafted the Expedited Rules of 2008) and reproduced, with permission, from <www.acica.org.au> accessed 24 June 2010.

II General Approach

ACICA's Expedited Rules were prepared with the intention that they be used for relatively straightforward disputes where the amount in dispute does not exceed AU$250,000. Accordingly, the Expedited Rules were drafted to be as 'expedited' as possible, with specific and short time limits and very few opportunities for recalcitrant parties to delay proceedings.

This means that the Expedited Rules may not be appropriate for complex, multi-party or multi-issue disputes, regardless of the amount in dispute. Nonetheless, parties generally remain free to agree in writing to variations on specific provisions in these Rules (Art 2.1), tailoring them to meet their particular needs. Expedited arbitration proceedings may be suitable even for somewhat more complex disputes in fields such as construction, mergers and acquisitions, banking and financial markets,[5] shipping,[6] or intellectual property.[7]

Due to the fact that expedited arbitration proceedings may not be suitable for all disputes, ACICA adopted an opt-in approach for these Expedited Rules, requiring parties to select them (rather than the ACICA Arbitration Rules) in an original or subsequent arbitration agreement. This is in contrast to the fast-track rules of some other institutions, which instead provide that expedited procedures will apply to certain types of disputes unless the parties expressly opt-out by choosing other rules.[8] Social psychology (especially the 'status quo' bias) suggests that parties will tend to adopt the set of rules that the arbitration centre has set as the default.[9] For that reason ACICA considered that adopting an opt-out approach may risk imposing an expedited procedure on disputes not suited to resolution in that manner. For example, having a rule that disputes under a certain value are automatically brought under a fast-track regime risks capturing unsuitable disputes if it does not take into account exchange rate fluctuations or the disputes' complexity.[10] ACICA intends to monitor how often and in which situations parties opt-in to its own

5 See Berger KP, 'The Need for Speed in International Arbitration: Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration (DIS)' (2008) 25(5) *Journal of International Arbitration* 595 at 607.

6 The Expedited Rules have been adapted for use by the Australian Maritime and Transport Arbitration Commission (AMTAC). The adaptations are minor and generally relate to AMTAC's fees and providing for AMTAC to be the appointing authority. The AMTAC Rules can be found at <www.amtac.org.au/rules.html> accessed 26 June 2010.

7 See also, for example, *WIPO Expedited Arbitration Rules* <www.wipo.int/amc/en/arbitration/expedited-rules/> accessed 21 April 2010.

8 See, for example, Arts 59-97 of the Japan Commercial Arbitration Association (JCAA) Commercial Arbitration Rules (compared more generally by Nottage and Miles, Chapter 10 of this volume); and Art 42(2) of the 2006 Swiss Rules of International Arbitration (available via <www.sccam.org> accessed 21 April 2010).

9 See Nottage and Garnett, Chapter 8 of this volume (with further references).

10 Like ACICA's Expedited Rules, the 2008 DIS Supplementary Rules eschew the opt-out approach.

Expedited Rules over the coming years, and to compare the application of similar Rules by other institutions. ACICA will then use that experience and research to decide whether to move to an opt-out system and, if so, how to implement such a system.

It is of course possible for parties to replace an existing 'traditional' (that is, non-expedited) arbitration clause with a submission to arbitration under the Expedited Rules. Once a dispute has arisen it might be clear that it is appropriate for resolution via an expedited procedure. This option might be particularly useful if the parties to a dispute are able to settle the major issues in dispute but not one or more minor issues. In that case they may wish to resolve those minor issues in accordance with the Expedited Rules. However, advisors must take care in planning and drafting if parties wish to commence arbitration under ACICA's generic Rules but then, even with consent of the arbitrator(s) and ACICA as the administering institution, continue under the Expedited Rules.[11]

As noted above, the Expedited Rules will not be appropriate for all disputes and are not designed for universal application. Nonetheless, it is hoped that there will be concepts or even specific provisions in the Expedited Rules that prove useful enough for parties to wish to incorporate them into the ACICA Arbitration Rules (expressly permitted under Art 2.1 of the latter, if variations are agreed in writing[12]) when using those Rules in respect of smaller-value or less complex disputes.

III Key Changes in the Expedited Rules

ACICA adopted the approach of most other institutions in developing and publishing a separate and complete set of Expedited Rules, even though most provisions mirror those in its generic Arbitration Rules.[13] This is primarily for the convenience of users, who can work through the set in deciding whether to adopt the Expedited Rules or when actually applying them to resolve disputes, rather than moving back and forth between two sets of provisions. To further assist users, the rest of this chapter sets out which articles have been added to the Expedited Rules or which have undergone the most changes compared to the existing ACICA Arbitration Rules.

A Overriding Objective (Art 3)

Article 3 provides as follows:

11 In light of such uncertainties the DIS Supplementary Rules regime is intended to apply only prior to commencement of any arbitral proceedings, although Berger (2008, above n 5) acknowledges that the problem remains there that 'the parties have the authority to modify the time limits' (and other provisions) under that regime.

12 See Greenberg et al, Chapter 4 of this volume.

13 Compare the DIS Supplementary Rules, an annexure to the DIS Arbitration Rules of 1988 which only displays those provisions modifying the latter Rules.

> The overriding objective of these Rules is to provide arbitration that is quick, cost-effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved.

The purpose behind this provision is to help the arbitrator justify refusals to extend time limits, allow discovery or hold an oral hearing, and so on, with a greater confidence of not being subjected to challenge for failing to accord procedural fairness (preserved under Art 13.1, discussed below).

The arbitrator is specifically directed to consider this Objective in timetabling the proceedings (Art 22.2) and deciding whether to allow amendments to pleadings (Art 18, both discussed further below). It should also provide guidance when making other decisions under the Expedited Rules.

Similar provisions to this are contained, for example, in the IAMA Fast Track Rules[14] and the DIS Supplementary Rules.[15] Other versions even found their way into the English *Arbitration Act* of 1996, influencing the review of Australia's *International Arbitration Act 1974* (Cth) (IAA) which resulted in significant amendments in June 2010.[16] More recently, this approach has found its way into the domestic arbitration law in Australia (the Uniform *Commercial Arbitration Acts* of the States and Territories). Section 1C(1) of the *CAA* (NSW), as amended in 2010, provides:[17]

> (1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense.

B Commencement of Arbitration (Art 5)

The major change reflected in Art 5 is as follows:

> The Notice of Arbitration shall include the following: ...
> (g) the Statement of Claim referred to in Article 17, which may be attached as a separate document.

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14 Rule 1, which provides as follows:

> The Overriding Objective of these Rules is that the arbitration is conducted:
> a. fairly, expeditiously and cost effectively; and
> b. in a manner which is proportionate to:
> i. the amount of money involved;
> ii. the complexity of the issues; and
> iii. any other relevant matter.

15 See especially s 1.4 of the DIS Supplementary Rules for Expedited Proceedings, discussed in Berger (2008) above n 5 at 603.

16 See s 39(2)(b) of the amended IAA; also Garnett and Nottage, Chapter 1 of this volume, Parts I.B and II; Nottage and Garnett, Chapter 8, Part V.B.

17 Section 1C(2)-(3) elaborates this object by emphasising party autonomy (subject to safeguards necessary for the public interest) and the provision of 'arbitration procedures that enable commercial disputes to be resolved in a *cost effective manner, informally and quickly*' (emphasis added). On the CAA regime and its reform, see also Nottage and Garnett, Chapter 1 of this volume, Part I.B; Nottage and Garnett, Chapter 8, Part IV.E.

The purpose of this change is to dispense with the separate procedural steps of a Notice of Arbitration and an Answer to Notice of Arbitration (see also Arts 17-21 below). The Rules Subcommittee considered these steps to be unnecessary because the majority of the items to be included in the Notice of Arbitration merely summarise the substance of the claim. In view of the overriding objective of the Expedited Rules, it was considered appropriate that the claimant provide full details of the claim (that is, its Statement of Claim) at the outset.

The question then was whether the respondent should be required to provide an Answer to the Notice of Arbitration separately to its Statement of Defence and Counterclaim. A separate Answer would be beneficial where there were matters relating to the appointment of the arbitral tribunal to decide. Such matters would include agreeing on the number of arbitrators (where not already agreed), exchanging proposals as to the identity of the sole arbitrator or notifying of the appointment of party-appointed arbitrators (where there will be three arbitrators). However the Expedited Rules provide for a sole arbitrator appointed by ACICA (see Art 8 below). This means that matters regarding the constitution of the tribunal, which would otherwise have been determined in the Notice of Arbitration and Answer to Notice of Arbitration, no longer require formal input from the parties. Accordingly the Rules Subcommittee considered it preferable to dispense with the Answer to Notice of Arbitration and require the respondent to provide details of its case in its Statement of Defence and Counterclaim only.

C Sole Arbitrator (Art 8)

To reduce the scope for delay, Art 8 provides that all cases will be decided by a sole arbitrator and that the arbitrator will be appointed by ACICA. While the appointment will be made by ACICA, the Guidance Note states that ACICA expects to consult with all parties when making the appointment so that they have some input into the choice. However the Note also states that this too will be subject to the overriding objective of securing quick, cost-effective and fair arbitration.

In any event, parties are free to provide a different mechanism for appointment if they wish to have more input into the decision. As indicated in Appendix II of Chapter 1 in this volume, Arts 8-12 of the ACICA Arbitration Rules could provide one set of alternatives. However, as in any amendments to the Expedited Rules regime, care will need to be taken to ensure that the time limits otherwise set by the Expedited Rules remain achievable (see Art 22 below).

Article 8.6 of the Expedited Rules provides that in appointments, and any subsequent challenges (under Arts 9 and 10), the arbitrator, the parties and ACICA may have regard to the International Bar Association's *Guidelines on*

Conflicts of Interest in International Arbitration. This is similar to Art 23.3 which, as is the case under the ACICA Rules, provides the arbitrator shall also have regard to, but is not bound to apply, the IBA's *Rules on the Taking of Evidence in International Arbitration* (see Part III.H below).

The purpose of this provision is to promote an approach to conflicts of interest that is consistent with world's best practice.

D Arbitral Proceedings: General Provisions and No Oral Hearing (Art 13)

Article 13 of the Expedited Rules departs from the equivalent provisions of the ACICA Rules in a number of respects. For that reason it is worth reproducing the new rule in full:

> 13 General Provisions
>
> 13.1 Subject to these Rules, including the overriding objective in Article 3, the Arbitrator may conduct the arbitration in such manner as he or she considers appropriate, provided that the parties are treated equally and that each party is given a reasonable opportunity of presenting its case.
>
> 13.2 There shall be no hearing unless:
>
> (a) exceptional circumstances exist, as determined by the Arbitrator; and
>
> (b) either the Arbitrator or the parties require a hearing to take place.
>
> 13.3 Any hearing shall be no longer than one working day, unless the arbitrator decides otherwise. The arbitrator shall allocate the available time to the parties in such manner that each party shall have an equal opportunity to present its case.
>
> 13.4 All documents or information supplied to the Arbitrator by one party shall at the same time be communicated by that party to the other party.

Article 17.1 of the ACICA Rules (based on the 1976 UNCITRAL Arbitration Rules) provides that the parties would be given a 'full' opportunity of presenting their cases. By contrast, Art 13.1 of the Expedited Rules provides the parties with a 'reasonable' opportunity of presenting their cases. ACICA considered this to be more in line with the expedited nature of the proceedings. This may increase the risk of an award being challenged, as it could be seen to justify a lower burden on the arbitrator than Art 18 of the UNCITRAL Model Law. The latter is a mandatory provision mirroring the UNCITRAL Rules in requiring a 'full' opportunity.[18] On the other hand, courts interpreting mandatory provisions may nonetheless take into account circumstances

18 See Greenberg S, Kee C and Weeramantry R, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, Melbourne, 2010), para 2.140.

such as the type of dispute involved. Furthermore, even ML jurisdictions may expressly set a lower burden. Indeed, by amendment enacted in June 2010, s 18C of the IAA states that: '[F]or the purposes of Art 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case'.

Regarding oral hearings, ACICA decided that due to the delays and costs associated with them, the general rule would be that there is no oral hearing, other than in exceptional circumstances (as determined by the arbitrator) and either the parties require or the arbitrator requires a hearing (Art 13.2). Further, ACICA sought to guide the arbitrator towards minimising the length of a hearing by providing that it would generally be no longer than one working day (Art 13.3). In comparison, the Stockholm Chamber of Commerce's Expedited Rules also contain a default position of no oral hearing, but allow one if a party requests it and the arbitrator agrees it is 'necessary'. The practical experience under those provisions is that an oral hearing occurs in almost all cases, with half of the awards being rendered within four to six months instead of the three months envisaged from when the case is provided to the arbitrator.[19]

Because the Expedited Rules envisage no oral hearing, there is no specific provision corresponding to ACICA Arbitration Rule Art 30 on the closure of hearings.

E Seat of Arbitration (Art 15)

ACICA has removed the opportunity for the parties to decide the seat of arbitration after the arbitration has been commenced. Article 15 provides that if the parties have not specified a seat, then the seat will be Sydney, as under the ACICA Rules. This has been done to reduce the number of matters that must be decided after the arbitration has commenced, and in turn to further expedite proceedings.

F Statements of Claim and Defence, and Further Written Statements (Arts 17-21)

Article 18 provides that after receiving the combined Notice of Arbitration and Statement of Claim, the respondent shall provide its full Statement of Defence within 28 days. This is a similar time limit to those imposed under the LMAA and IAMA Rules. ACICA considered it to be an appropriate length of time because, for example, shorter time limits encourage parties to

19 See Schöldström P, 'Fast Track Arbitration: The Swedish Experience for Reducing Costs and Delays', paper presented at the TELFA Seminar on International Arbitration, Istanbul, 23 November 2007 (available via <www.sccinstitute.se/scc/Newsletter/scc%20newsletter%2001-2008.htm> accessed 21 April 2010).

rely on only their best arguments. This may also focus the arbitrator's mind on facilitating settlement during the proceedings.[20]

Amendments to a claim or defence can only be made if the arbitrator considers it appropriate (Art 19), bearing in mind the overriding objective of the Expedited Rules. In contrast, Art 23 of the ACICA Rules instead allows amendments, unless the arbitrator considers it to be inappropriate.

G Time Periods (Art 22)

Article 22 provides as follows:

> 22.1 Any times fixed under these Rules may be varied by agreement among the Arbitrator and the parties.
>
> 22.2 Notwithstanding Article 22.1 the Arbitrator, in exceptional circumstances as determined by the Arbitrator, may vary the times fixed:
>
> (a) to give effect to the overriding objective set out in Article 3;
>
> (b) if the Arbitrator is satisfied that a variation of any fixed time or times is required in the interests of justice;
>
> (c) on such terms as to costs or otherwise as the Arbitrator considers reasonable in the circumstances;
>
> (d) to a maximum total period of 14 days to the total time fixed under these Rules for actions by each party; and
>
> (e) to a maximum total period of 30 days for actions by the Arbitrator.

Article 22.1 provides that the parties by agreement with the arbitrator may vary any time limits. This is the case in any event, by virtue of Art 2.1 and the parties' contractual relationship with the arbitrator once appointed.[21]

Otherwise, the arbitrator is empowered to extend periods of time but only to give effect to the overriding objective (Art 3, above), in exceptional circumstances and to a maximum total period of 14 days for actions by the parties and 30 days for actions by the arbitrator.

This is perhaps the most controversial aspect of the Expedited Rules. The rationale behind restricting the arbitrator's power to extend time in this way is that the parties will know going into the arbitration that the time limits will remain tight. This will reduce a party's scope for later alleging that the arbitrator failed to provide procedural fairness (discussed under Art 17 above) by not acceding to its unilateral demands to extend time limits.

However, this restriction on the arbitrator's power to extend deadlines means that the Expedited Rules are not suited for complex disputes or disputes requiring substantial expert evidence. It is not always clear to parties,

20 See Nottage and Garnett, Chapter 8 of this volume, Part IV.E (referring, for example, to suggestions by David Rivkin about arbitrators pro-actively sequencing and testing issues and examination of factual evidence in order to expedite proceedings).

21 See also Berger (2008) above n 5 at 597-598 (discussing also Art 32 of the ICC Arbitration Rules), and at 602 (discussing s 6.1 of the DIS Supplementary Rules).

at the time they agree on a dispute resolution procedure, just what sort of disputes may arise. For that reason, where parties apprehend the possibility of high value or complex disputes arising, it is recommended that they ameliorate the strictness of this rule by increasing the maximum extensions allowed or removing the restriction altogether.

H Evidence and Hearings (Art 23)

As mentioned in the discussion regarding Art 13 in Part II.D above, the Expedited Rules generally envisage a documents-only procedure, with no oral hearings. To further expedite matters, in contrast to Anglo-Commonwealth and especially American court procedures, the Expedited Rules provide that, as a general rule, there shall be no discovery in the common law sense. This is set out in Arts 23.4 and 23.5, which were adapted from the LMAA Small Claims procedure:[22]

> 23.4 There shall be no discovery.
> 23.5 The Arbitrator may order a party to produce such particular documents as he or she may believe to be relevant. If the Arbitrator believes that a party has failed to produce any relevant document without good reason, he or she may draw an adverse inference from that party's failure to produce.

The provision in Art 23.4 that there is to be no discovery must be seen in the context of the general burden on a person seeking to establish a claim or a defence to provide the necessary evidence in support, including the production of any relevant document. This general burden does not, however, connote or require the imposition of a process of discovery except in the very limited sense of a requirement to produce a document on the order of the arbitrator under Art 23.5. Article 23.5 reflects current practice in international arbitration, particularly in the civil law tradition,[23] whereby an arbitrator can order production of document if he or she believes a party has not disclosed a relevant document and draw adverse inferences from any non-disclosure.

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22 This Article was revised in the 2010 edition of the Expedited Rules. The 2008 edition of this Article provided:

> 23.4 There shall be no discovery other than in accordance with Article 23.5.
> 23.5 If the Arbitrator believes a party has failed to produce any relevant document, he or she may:
> (a) order that document's production; and
> (b) draw an adverse inference if the party fails to produce the document without good reason.

The purpose of this change was to express more clearly the drafters' intention to limit the scope of general discovery.

23 See, for example, Berger KP, 'The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction – A German Perspective' (2009) 25(2) *Arbitration International* 217 at 227-229.

Article 23.3 of the original (2008) version of the Expedited Rules also retained the provision from the ACICA Rules stipulating that the arbitrator may have regard to, but is not bound to apply, the *International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration*. Those Rules also have provisions encouraging expeditious proceedings (and even settlement), such as para 3 of the Preamble urging the tribunal to 'identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate'.[24]

In 2010, the IBA approved the revised and renamed *International Bar Association Rules on the Taking of Evidence in International Arbitration*.[25] 'Commercial' was omitted from the title in the hope of encouraging their usage in investor-state arbitrations.[26] Thus, these new Rules must be specified by separate agreement in writing to apply to ACICA Expedited Rules arbitrations commenced before the 2010 IBA Rules were approved. However, for arbitrations commenced subsequently, the 2010 IBA Rules should apply because Art 23.3 of the 2008 Expedited Rules specified that the arbitrator should have regard to the '*International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration* in the version current at the commencement of the arbitration'. Nonetheless, to highlight for users the most recent set of IBA Rules, in 2010 ACICA removed the word 'Commercial' from Art 23.3 in the Expedited Rules of 2010.

One change bought about by the 2010 IBA Rules is found in Art 2(1), which states (emphasis added): 'The Arbitral Tribunal *shall* consult the Parties at the *earliest appropriate time* in the proceedings and invite them to consult each other with a view to agreeing on an *efficient, economical and fair process* for the taking of evidence'. Paragraph 3 of the new Preamble also states that 'each Party shall act in good faith and be entitled to know, reasonably in advance … the evidence on which the other Parties rely', with Art 9.7 allowing the tribunal to take bad faith into account in assessing costs. The 2010 IBA Rules also contain new provisions on e-disclosure (less important for ACICA Expedited Arbitration given the narrow scope of discovery, but still potentially significant), video-conferencing and appearances of witnesses

24 Available via <www.ibanet.org> accessed 10 July 2010. See also the adaptation of this paragraph found in s 5.3 of the DIS Supplementary Rules, discussed in Berger (2008) above n 5 at 604-605. On arbitrators encouraging settlement (Arb-Med), see also Nottage and Garnett, Chapter 8 of this volume, Part IV.E.

25 These 2010 Rules are also available via <www.ibanet.org> accessed 10 July 2010. See the succinct comparison by Gehle B and Gillard M, 'IBA Revises Rules for the Taking of Evidence in International Arbitration' (18 June 2010) International Arbitration Insights <www.claytonutz.com/publications/newsletters/international_arbitration_insights/20100618/iba_revises_rules_for_the_taking_of_evidence_in_international_arbitration.page> accessed 24 June 2010.

26 See generally Mangan, Chapter 9 of this volume; Nottage and Miles, Chapter 10.

(again, less important given that hearings are only available in exceptional circumstances), greater confidentiality regarding certain documents disclosed, more transparency regarding expert reports and more guidance on legal impediment or privilege.

I Interim Measures (Art 24)

These provisions mirror the innovative and comprehensive Art 28 of the ACICA Arbitration Rules. However under the Expedited Rules the arbitrator may issue interim measures only 'in appropriate circumstances'. The arbitrator, and the parties requesting or disputing interim measures, should consider the overriding objective of the Expedited Rules, especially whether such measures will promote a speedy or cost-effective resolution of the substantive dispute.

J The Award: Deadline, Reasons and Applicable Law (Arts 27-29)

The arbitrator must make a final award within four months of appointment if no counterclaim (or claim relied on for the purpose of a set-off) is made or otherwise within five months (Art 27). The appointment of the arbitrator must be made within 15 days of the Notice of Arbitration (Art 8.2).

These combined time limits are significantly shorter than those under the LMAA Rules, IAMA Rules and DIS Supplementary Rules (see Appendix II). For example, s 2.1 of the latter sets deadlines of six months (in the case of a sole arbitrator) or nine months (three-member tribunal) after the filing of the statement of claim.[27] And s 6.2 states that if this timeframe cannot be met, 'the arbitral tribunal shall inform the DIS Main Secretariat and the parties of the reasons in writing' and 'the competence of the arbitral tribunal shall remain unaffected'. By contrast, ACICA puts the onus on the parties and the arbitrator to reach further agreement(s) if the set time limits are exceeded, in order to retain competence (see also Appendix I under 'Managing Time Limits').

Tighter time limits are also becoming evident in generic arbitration rules. Even under regular ICC Rules, for example, arbitrators must provide their award within six months of the Terms of Reference (although those can often take months to be finalised even after the tribunal is appointed).[28]

Article 28.3 of the ACICA Expedited Rules requires the arbitrator to 'state the reasons upon which the award is based in summary form, unless the parties agree that no reasons are to be given'. This provision was partly in response to a Victorian judgment in 2007 and contrasts with Art 33.3 of the

27 This timeframe therefore generally allows two more months than ACICA's Expedited Rules, as counterclaims and set-offs are only admissible with the consent of all parties and the arbitral tribunal (s 4.4). However, the DIS Supplementary Rules decided to allow for one oral hearing (s 5.2).

28 See generally Greenberg, Chapter 6 of this volume.

ACICA Arbitration Rules of 2005, which refer to 'reasons'.[29] The purpose of the Expedited Rules provision is to minimise parties' scope to argue that the arbitrator's reasons are inadequate. However, it would not preclude the arbitrator from providing as detailed reasons as he or she wishes (and can manage within the time limits demanded), provided the reasons remain 'summary' in nature or written agreement is reached with parties (pursuant to Art 2.1) to have more elaborate reasons.[30]

Article 29.1 of the Expedited Rules of 2008 provided (emphasis added):

> The Arbitrator shall apply *the law* designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Arbitrator shall apply the *rules of law* which he or she considers applicable.

In the 2010 Expedited Rules, ACICA changed 'the law' (now widely understood to refer to the law of a state) in the first sentence to 'rules of law' (encompassing also the broader lex mercatoria, such as the UNIDROIT Principles of International Commercial Contracts). This was to emphasise party autonomy in their choice of applicable law, consistently with other major sets of arbitration rules including the revised UNCITRAL Rules of 2010.[31]

K Applicable Rules (Art 2)

One other interesting difference from the generic Rules should be noted. Article 2.1 of the latter is based on the original UNCITRAL Rules and states that '[w]here parties agree in writing that disputes shall be referred to arbitration under the ACICA Arbitration Rules then such disputes shall be resolved in accordance with these Rules subject to such modification as the parties may agree in writing'. In light of UNCITRAL deliberations underway in 2008 about revising the UNCITRAL Rules as well as provisions such as Art 6.1 of the ICC Rules relating to which Rules are intended to apply if subsequent versions come into existence, Art 2.1 of ACICA's Expedited Rules added after 'these Rules' the words 'as in effect on the date of commencement of the arbitration'. While courts world-wide have tended to develop a presumption that

29 *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255, not followed in *Gordian Runoff Ltd v Westport Insurance Corp* [2010] NSWCA 57; and see *Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2010] VSC 139 (Croft J) where *Oil Basins* was distinguished and the approach in *Gordian Runoff* applied. See Nottage and Garnett, Chapter 8 of this volume, Part IV.F.

30 Parties wishing to vary this requirement in the Expedited Rules might also consider the option provided in s 7 of the DIS Supplementary Rules, which gives the tribunal discretion to omit a statement of the facts in the award.

31 See further Crawford, Chapter 11 of this volume, Part II.C; and Greenberg et al, Chapter 4, Part III.G (but suggesting in regard to Art 34.1 of the 2005 ACICA Arbitration Rules – equivalent to Art 29.1 of the Expedited Rules of 2008 – that parties' written designation of 'rules of law' such as the UNIDROIT Principles might nonetheless be effective if the ML is the *lex arbitri*).

parties impliedly intend the application of the Arbitration Rules of arbitral institutions in force when they commence the arbitration, this is not always the case. For example, recent French case law has suggested the opposite approach.[32] The wording in Art 2.1 of the ACICA Expedited Rules aims to clarify that point for arbitrations administered by ACICA. In particular, the 2010 version of the Expedited Rules (or any subsequent version available when the arbitration is commenced) should apply, unless the parties have agreed in writing to apply an earlier version.

L ACICA's Fees (Appendix A)

Administration fees have been significantly reduced especially for disputes up to $250,000, as shown in these worked examples:

Amount in dispute	Fee payable – Expedited Rules	Fee payable – ACICA Arbitration Rules
A$100,000	$500 (0.5%)	$1000 (1%)
A$250,000	$1250 (0.5%)	$2500 (1%)
A$500,000	$3750 ($1250 + 1% of amount over $250,000)	$5000 (1%)

The registration fee remains unchanged, despite ACICA's extra role in appointing the sole arbitrator under the Expedited Rules.

IV Conclusion

It is still early days for these Expedited Rules, but they hold considerable potential especially for proceedings involving Australian parties, lawyers or arbitrators. The 'no oral hearings' rule can help overcome the tyranny of geography, for example, which remains a major barrier to attracting international arbitration cases to Australian shores. It also remains a distinctive part of the Australian ethos to get things done with a minimum of fuss, although the Expedited Rules (and background arbitration legislation) retain important procedural fairness safeguards.[33]

Already, they have provided support even for a reorientation of arbitration legislation towards speedier proceedings. Much of the philosophy

32 See generally Greenberg S and Mange F, 'Institutional and Ad Hoc Perspectives on the Temporal Conflict of Arbitral Rules' (2010) 27(2) *Journal of International Arbitration* 199.

33 See, contrasting for example Japan's different potential comparative advantage, Nottage L, 'International Investment and Commercial Arbitration in Australia and Japan: Shared Challenges, Different Solutions?' (2009) <http://blogs.usyd.edu.au/japaneselaw/2009/07/international_investment_and_c.html> accessed 21 April 2010.

behind the Expedited Rules has been reflected in the Australian government's amendments to the IAA in 2010, which aim to secure Australia's position as a leading venue for international arbitrations, particularly in the Asia-Pacific region.[34]

Drawing from and now supplementing similar rules by other international arbitration institutions world-wide, ACICA's Expedited Rules also underpin the recently concluded efforts to streamline the UNCITRAL Rules.[35] Their provisions, and the ACICA Arbitration Rules Committee's deliberations that generated the Expedited Rules, will also directly influence the next revisions to ACICA's generic Arbitration Rules. The Committee's review of the latter, commencing in 2010, may in turn lead to some further revisions to the Expedited Rules.

34 Above n 16.

35 See generally Croft and Kee, Chapter 7 of this volume; Crawford, Chapter 11.

Appendix I: Guidance Note (especially for Arbitrators and Legal Advisors)

Managing Time Limits

Due to the short time limits imposed by the Expedited Rules, ACICA recommends that the arbitrator:

- convenes a preliminary conference as soon as possible after he or she is appointed; and
- discusses with the parties the fact that the time limits are very tight and that Art 22 limits the scope for extending them (in the absence of agreement among the parties and the arbitrator).

The time limit for rendering the award is calculated by reference to the date of the arbitrator's appointment. Consequently, each time the parties are granted an extension of time under Art 22, the arbitrator's time for preparing the award is being reduced. As such, where the arbitrator and the parties agree to extend time limits to a greater extent than is provided under Art 22.2, ACICA recommends that the arbitrator also seeks the parties' agreement to an equivalent extension of the time for rendering the award.

Arbitrator Appointment

Article 8.2 of the Expedited Rules provides that ACICA appoints the arbitrator. Article 8.5 gives ACICA the power to obtain from either party information it deems necessary in order to make this appointment. In practice, ACICA expects to liaise with all parties when making the appointment so that they have some input into the choice. However, this too will be subject to the overriding objective of securing quick, cost-effective and fair arbitration.

If parties instead wish to appoint an arbitrator by agreement, then ACICA recommends that they provide as such in their arbitration agreement (as expressly permitted by the proviso to Art 2.1). In drafting such an agreement, provisions in ACICA's generic Arbitration Rules may offer some assistance. However, if parties wish to retain the Expedited Rules for the rest of the arbitration, ACICA recommends that parties set strict time limits for agreeing on appointment of the arbitral tribunal.

Determination of Challenges to the Arbitrator's Jurisdiction

Article 20.4 of the Expedited Rules provides that, in general, the arbitrator should rule on a plea concerning his or her jurisdiction as a preliminary question. However, the arbitrator may proceed with the arbitration and rule on such a plea in his or her final award.

ACICA recommends that an arbitrator rules on a challenge to his or her jurisdiction as a preliminary question in circumstances where:

(a) that question can be decided without a detailed analysis of the substance of the dispute; and
(b) there is a reasonable prospect of its determination leading to an early resolution of the dispute.

However the arbitrator should keep in mind the time limit for rendering his or her award when deciding whether to bifurcate the proceedings in this manner.

Appendix II: Comparison of Timelines Under Various Sets of Rules

Event	ACICA Expedited Arbitration Rules	ACICA Arbitration Rules	LMAA (London Maritime Arbitration Association) Small Claims	DIS (German Institution of Arbitration) Supplementary Rules for Expedited Proceedings	IAMA (Institute of Arbitrators and Mediators Australia) Fast track
Notes:	'Days' includes non-business days Days generally calculated by reference to previous event	'Days' includes non-business days Days generally calculated by reference to previous event	Days generally calculated by reference to previous event	'Days' includes non-business days Days generally calculated by reference to previous event	Days calculated by reference to date of appointment of arbitrator 'Days' only includes business days
Notice of Arbitration including: Proposal as to sole arbitrator; and Proposal as to seat of arbitration (if required).					
Seat decided by appointing authority (AA)	Seat is automatically Sydney if not already agreed	15 days	(not provided for)	(not provided for)	(not provided for)
Answer to Notice of Arbitration due	N/A	30 days	N/A		N/A
Sole arbitrator appointed by Administering Authority (AA)	15 days after Notice of Arbitration	30 days after a proposal is made by one party	Request within 14 days, then AA has 14 days	Upon request by one of the parties (Sole arbitrator is default, but three member tribunal is also provided for)	10 days after Notice of Arbitration, IAMA can be asked to appoint arbitrator within 10 days

Event	ACICA Expedited Arbitration Rules	ACICA Arbitration Rules	LMAA (London Maritime Arbitration Association) Small Claims	DIS (German Institution of Arbitration) Supplementary Rules for Expedited Proceedings	IAMA (Institute of Arbitrators and Mediators Australia) Fast track
Statement of Claim due	At the same time as Notice of Arbitration	(unspecified time)	14 days after appointment of arbitrator (2 weeks overall)	(the proceedings commence with the lodgment of the Statement of Claim)	20 days after appointment of arbitrator
Statement of Defence (and Counterclaim) due Respondent's plea regarding jurisdiction due	28 days after SoC	45 days after SoC (not a hard deadline though)	28 days after SoC (6 weeks overall)	28 days after SoC Counterclaim or set-off only admissible with the consent of all parties and the tribunal	20 days later (40th day)
Defence to Counterclaim due (if applicable) Claimant's plea regarding jurisdiction due	14 days later	45 days later (not a hard deadline though)	28 days after SoD (10 weeks overall)	28 days after SoD (8 weeks overall)	15 days later (55th day)
Reply to Defence to Counterclaim due	(If ordered by arbitrator) 14 days later	(If ordered by arbitrator) 45 days later (not a hard deadline though)	(not provided for)	28 days after previous submission (12 weeks overall)	15 days later (70th day)
Discovery	N/A		28 days after D&C or Defence to Counterclaim (14 weeks overall)	(deadlines not set in the rules)	(not provided for)
Request order for discovery	N/A		14 days after discovery (16 weeks overall)		(not provided for)
Exchange of witness and expert reports	At the same time as written statements		42 days after discovery (20 weeks overall)	(not provided for outside the exchange of written submissions above)	(these are contained in the memorials)
Arbitrator orders joint expert report	N/A		(not provided for)	(not provided for)	15 days later (85th day)

Event	ACICA Expedited Arbitration Rules	ACICA Arbitration Rules	LMAA (London Maritime Arbitration Association) Small Claims	DIS (German Institution of Arbitration) Supplementary Rules for Expedited Proceedings	IAMA (Institute of Arbitrators and Mediators Australia) Fast track
'Final submissions'	N/A		28 days after exchange of witness and expert statements (24 weeks overall)	N/A	(not provided for)
Oral hearing	Only in exceptional circumstances (unspecified deadline by which it must occur)	(unspecified time)	None, unless arbitrator orders one (unspecified deadline by which it must occur)	Within 28 days of final written submission (16 weeks overall)	Completed on or before the 120th day
Award due	Within 4 months of the notice of appointment if there is no counterclaim/set-off, and otherwise within 5 months	(unspecified time)	Within 7 months of notice of appointment (8 if there is a counterclaim) (roughly 30 (or 34) weeks overall)	Within 28 days of oral hearing (20 weeks overall)	Arbitrator and parties can agree. In the absence of agreement, on or before the 150th day (which is about 7 months)
Application for interpretation/correction/ additional award due	7 days after award	(30 days later)	(not provided for)	Within 30 days of receipt of the award	(not provided for)