THE ARBITRATION RULES OF THE AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION

Björn Gehle*

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1 INTRODUCTION

In July 2005, the Australian Centre for International Commercial Arbitration (ACICA) officially launched the ACICA Arbitration Rules ('ACICA Rules' or 'Rules')[1]. The launch was an important milestone for ACICA and a vital step to position itself amongst the ever growing number of arbitral institutions around the world. Prior to the launch of the ACICA Rules its primary role was as an appointing authority and administering body of *ad hoc* arbitrations under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

Today, more than four years after their inauguration the ACICA Rules have attained broad acceptance, particularly in Australasia, a region which is experiencing rapid growth in the number of international arbitrations. As a result, the number of arbitrations conducted under the ACICA Rules has increased steadily and considering the characteristic lag between the time of the launch of a new set of rules, the time when they find their way into arbitration agreements and the time disputes are finally

* Björn Gehle, Special Counsel, Clayton Utz, Sydney, Australia; solicitor of the Supreme Court (NSW), High Court (Australia); Rechtsanwalt (Germany); Special Associate of the Australian Centre For International Commercial Arbitration (ACICA) and member of the drafting committee for the ACICA Arbitration Rules and the ACICA Expedited Arbitration Rules; Past-President and member of the Advisory Board of the Alumni Association of the Willem C Vis International Commercial Arbitration Moot.

1 The ACICA Rules were officially launched by Sir Laurence Street, Chairman of the International Legal Services Advisory Committee on 12 July 2006 in Sydney.

referred to arbitration, the number of ACICA arbitrations is expected to grow significantly over the next few years.

A key factor for the broad acceptance and success of the ACICA Rules has been for the drafters to analyse some widespread problems which arise under many of the arbitration rules, institutional as well as *ad hoc* and to then address these particular problems within the Rules. The outcome is a set of modern, progressive and commercial arbitration rules[2] in a clear language incorporating procedures which lend a strong hand to the arbitrator against inefficiencies and potential delay tactics by the parties.

The aim of this article is to provide a general overview of ACICA, the ACICA Rules, its main features and some of the very innovative provisions which have been incorporated into the Rules. Where appropriate this article will offer guidance and interpretation, especially in relation to those provisions which in practice have exposed some deficiency or lack of clarity. However, this article does not attempt to provide a comprehensive analysis of every aspect of the Rules. For those purposes one is better suited with the *Commentary on the ACICA Arbitration Rules*[3]. For all other purposes you are invited to read on!

2 *THE AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION*

2.1 BACKGROUND

ACICA was established in 1985 as a non-for-profit public company. Its primary objectives include the support and facilitation of international arbitration and mediation and to promote Sydney and Australia as a venue for both.[4]

ACICA operates from three offices in Australia, with its head office in Sydney and satellite offices in Melbourne and in Perth. There exist a large number of co-operative arrangements which ACICA has entered into with other international arbitral institutions around the world such as the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the Stockholm Chamber of Commerce - Arbitration Institute (SCC) and the American Arbitration Association (AAA)[5]. It is also a founding member of the Asia Pacific Regional

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2 Greenberg, S., "ACICA's New International Arbitration Rules", (2006) *Journal of International Arbitration* 23(2), 189.

3 Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", available at <http://www.acica.org.au>.

4 Article 2 of ACICA's Constitution.

5 Other cooperation partners include: Arbitration Centre of Sri Lanka, Arbitration Centre of Mexico (CAM), Chamber of National and International Arbitration of Milan, Channel Islands Arbitration Centre, China Maritime Arbitration Commission, Commercial Arbitration Association of the Republic of China (Taiwan), Court of Arbitration at the Polish Chamber of Commerce, Dubai International

Arbitration Group (APRAG) which was established in 2004 as a regional federation of over 30 arbitration associations with the aim to improve standards and knowledge of international arbitration within the Asia-Pacific. In addition, ACICA is the nominated Australian contact for proceedings under the International Centre for the Settlement of Investment Disputes (ICSID) in Australia.

ACICA's board of directors is made up of prominent international arbitrators and arbitration practitioners who are appointed by various industry bodies including the Law Council of Australia, the Australian Bar Association, the Chartered Institute of Arbitrators, the Institute of Arbitrators and Mediators Australia, the International Chamber of Commerce Australia, the Attorney-General of the Commonwealth of Australia and the Attorney-General of New South Wales. Additional directors are appointed by the corporate members of ACICA or are nominees of the ACICA Board.

ACICA's Executive (i.e. its office-bearers) comprises the president, three vice-presidents and the treasurer. The Executive will, with few exceptions, consider and render decisions with respect to the appointment and challenge of arbitrators under the ACICA Rules[6].

In addition to administering arbitrations conducted under its own Rules, ACICA is also a statutory appointing authority under State and Territory legislation including the *Water Management Act 1999* (Tasmania), the *Water Industry Act 1994* (Victoria) and the *Construction Industry Long Service Leave Act 1997* (Victoria).

2.2 *ACICA'S ROLE UNDER THE RULES*

ACICA is the administrating body for arbitrations conducted under its Rules. The Rules set out in detail the specific roles which ACICA shall perform throughout the arbitration process. In broad terms these include[7]:

- extending certain periods of time imposed by the Rules or ACICA;[8]
- determining the number of arbitrators if such is not agreed between the parties;[9]

Arbitration Centre, FICCI Arbitration and Conciliation Tribunal (FACT), Foreign Trade Arbitration Court- Yugoslavia (FTAC), German Institute of Arbitration, Greek Arbitration Association, Hungarian Chamber of Commerce Court of Arbitration, Indonesian National Board of Arbitration, International Commercial Arbitration Court of Azerbaijan (ICAC), Japan Commercial Arbitration Association, Korean Commercial Arbitration Board, Kuala Lumpur Regional Centre for Arbitration, Netherlands Arbitration Institute, Permanent Arbitration Court of the Mauritius Chamber of Commerce and Industry, Regional Centre for Arbitration at Cairo, Scottish Council for Arbitration (SCA), Swiss Arbitration Centre, International Arbitral Centre of the Austrian Federal Economic Chamber, Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Western Australian Institute of Dispute Management.

6 For the appointment of arbitrators, see *infra* Part 3.6.

7 Greenberg, S., "ACICA's New International Arbitration Rules", *supra* fn 2, at p. 189.

8 ACICA Rules, Arts. 3.4.

- appointing arbitrators upon default of a party nomination or upon default of a joint party or joint co-arbitrator nomination;[10]
- deciding challenges of arbitrators;[11]
- verifying the basic requirements of the notice of arbitration;[12]
- determining the fee rate of the arbitrator(s) in case of a disagreement;[13] and
- handling and holding of advance deposits of the arbitration costs.[14]

Article 43.1 of the Rules offers some clarification as to who or which body within ACICA is responsible for rendering certain decisions. Article 43.1 states that:

> *Decisions made by ACICA will be made by the ACICA Board of Directors, or by any person(s) to whom the Board of Directors has delegated decision making authority.*

However, decisions concerning the appointment of arbitrators have been delegated to the ACICA Executive comprising ACICA's President, the Vice Presidents and the Treasurer. Any decisions made by ACICA are conclusive and binding for the parties as well as the tribunal and are not required to contain reasons.[15]

Overall, the Rules present a good balance between the provision of essential services and supervision by the institution on the one hand and maintaining flexibility and party autonomy on the other.[16] ACICA's primary role is to provide the necessary support and services required throughout all stages of the arbitration. The level of supervision of the tribunal and the proceedings by ACICA is, however, moderate. Most of its involvement takes place at the early stages of the arbitration, when support is most needed to get the arbitration off to a good start. This comprises, for example, assisting the parties in the appointment or challenge of arbitrators, but also includes general administrative assistance throughout the arbitration such as the administration of deposits[17] or the arranging of hearing facilities. Unlike few other institutions,[18] ACICA does not scrutinise the award before it is rendered by the tribunal. However,

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9 *Ibid.*, Art. 8.

10 *Ibid.*, Arts. 9-11.

11 *Ibid.*, Art. 14.

12 *Ibid.*, Arts. 21-2.

13 *Ibid.*, Art. 40.

14 *Ibid.*, Art. 42.5.

15 *Ibid.*, Art. 43.2.

16 Jones, D. and Gehle, B., "Rules and Practices of the Australian Centre for International Commercial Arbitration", in Mistelis, L. and Shore, L. (eds), *World Arbitration Reporter* (2. ed), 2010, Juris Publishing, at p. 2.

17 ACICA Rules, Art. 42.5.

18 For example under the ICC Arbitration Rules, Art. 27.

the tribunal is not permitted to communicate the award to the parties until ACICA has certified that there are no monies due to it.[19]

In addition to the administration of arbitration proceedings, the Rules specifically provide that ACICA, at the request of a party or the tribunal, shall arrange for or make available such facilities and assistance as may be required for the conduct of arbitral proceedings, including secretarial assistance and interpretation facilities.[20]

2.3 *LIABILITY*

Since the decision in *SNF v Cyte* by the Paris Court of Appeal[21] the extent to which arbitral institutions can validly exclude their liability is questionable. In that decision, the Court held that the exclusion of liability clause contained in the 1998 version of the ICC Arbitration Rules[22] was unenforceable, at least under French law.

The ACICA Rules contain a similar exclusion clause[23] to that in the ICC Rules, as well as a waiver clause[24] by which the parties shall be taken to have waived any right of appeal or review in respect of any decision ACICA has made. It remains to be seen whether the exclusion and waiver clauses can effectively prevent any recourse or liability of ACICA.

3 *PROCEDURE UNDER THE ACICA RULES*

3.1 *OVERVIEW*

The basic structure of the ACICA Rules follows that of the UNCITRAL Arbitration Rules (UNCITRAL Rules). This makes the Rules more recognisable, predictable and, as such, more user-friendly.[25] One can easily recognise influences from other arbitration rules such as the Swiss Rules of International Arbitration (Swiss Rules) the arbitration rules of the International Chamber of Commerce (ICC Rules) as well as the arbitration rules of the London Court of International Arbitration (LCIA Rules). In preparation for the drafting of the Rules, the drafting committee undertook a comparative analysis of a range of arbitration rules from across the globe. The findings were used to identify what is considered to be best practice in international arbitration and to overcome typical problems which arise under many of those rules. It is therefore not surprising that there are some provisions in the Rules which appear to be similar or identical to those in other arbitration rules.

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19 ACICA Rules, Art. 33.6.

20 Article 7 of the ACICA Rules specifically refers to these services.

21 Paris Court of Appeal, First Section C, January 22 2009, 07-19492.

22 ICC Rules, Art. 34.

23 ACICA Rules, Art. 43.4.

24 *Ibid.*, Art. 43.3.

25 Greenberg, S., "ACICA's New International Arbitration Rules", *supra* fn 2, at p. 190.

But, while it is tempting to construe a particular provision in the ACICA Rules by reference to commentary, case law or other relevant material on a similarly worded provision in other arbitration rules one should bear in mind that the operation and meaning of a particular provision has to be interpreted in the context of and in connection with the all other provision of those rules. Therefore, a provision in the ACICA Rules may require to be interpreted differently from a similar or even identical provision in other arbitration rules. Nevertheless, while similarly worded provisions in other arbitration rules may sometimes provide guidance as to the possible interpretation or operation of the ACICA Rules, they should not be relied upon in a strict manner.

As stated before, the ACICA Rules contain a number of innovative and sometimes atypical provisions. The primary objective of the Rules is to allow the arbitration to proceed efficiently and to provide for better guidance to the parties and the tribunal.[26] Some of the provisions have been drafted with particular court decisions in mind. For example Art. 2.3 of the Rules states that:

> *By selecting the Rules the parties do not intend to exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration.*

The provision has its origins in the Queensland Supreme Court decision in *Eisenwerk*[27] and the decision of the Singapore High Court in *John Holland v Toyo Engineering*[28]. In both cases it was held that by agreeing on a set of arbitration rules the parties had opted out of the application of the UNCITRAL Model Law on International Commercial Arbitration (Model Law), which is possible under both the Australian *International Arbitration Act 1974* (Cth)[29] and the Singapore *International Arbitration Act* (CAP 143A)[30]. While the Singaporean Act was amended soon after to avoid any similar interpretation in the future, the *Eisenwerk* decision officially stands as law. However, the *Eisenwerk* decision is now generally considered as bad law and the revision of the Australian Act is expected to address this unfortunate interpretation. Article 2.3 of the Rules should therefore be interpreted against this background.

Other noteworthy provisions in the Rules which differ significantly from those in other arbitration rules are, for example, those dealing with confidentiality,[31] interim

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26 Jones, D. and Gehle, B., "Rules and Practices of the Australian Centre for International Commercial Arbitration", *supra* fn 16.

27 *Australian Granites Limited v. Eisenwerk Hensel Bayreuth* (2001) 1 Qd. R 461.

28 *John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* (2001) 2 SLR 262.

29 Section 21 of the *International Arbitration Act 1974 (Cth).*

30 Section 15(1)(a) of the *Singapore International Arbitration Act.*

31 ACICA Rules, Art. 18; see in detail *infra* Part 0.

measures of protection,[32] the taking of evidence[33] and the remuneration of arbitrators[34]. These will be examined in more detail later on.

3.2 *TIME AND PERIODS OF TIME*

It is important to note that most time limits under the ACICA Rules are shorter than under many of the other institutional arbitration rules. The reason for this is that the Rules were drafted with a view to providing a stricter framework under which arbitration can proceed more expeditiously and to avoid room for delaying tactics as much as possible without limiting party autonomy. Thus, most procedural steps under the Rules either include a particular time limit within which an action has to be taken or, where a time limit is within the discretion of the arbitrator, contain guidance as to what is considered to be a reasonable time or time period.

For example, the Rules do not specify a particular time within which the written statements, such as the Statement of Claim and the Statement of Defence, have to be submitted by the parties. Instead, the statements shall be communicated 'within a period of time to be determined by the Arbitral Tribunal'[35]. However, the tribunal's discretion to fix the period of time is influenced by Art. 26 of the Rules which states that:

> *The periods of time fixed by the Arbitral Tribunal for the communication of written statements (including the Statement of Claim and the Statement of Defence) should not exceed 45 days. However, the Arbitral Tribunal may extend the periods of time if it concludes that an extension is justified.*

Although Art. 26 does not strictly limit the tribunal's discretion to allow periods of time for the communication of written statements which are greater than a period of 45 days, there is clear intention in the Rules that the tribunal should not exceed this time limit unless an extension of time is justified and necessary in the interest of justice.[36]

Further, the Rules are silent on the issue whether the tribunal may generally extend periods of time specified in the Rules, especially those which relate to the correction of awards[37] and the rendering of additional awards[38]. However, there is nothing in the Rules which suggests that the tribunal cannot extend such time periods. ACICA may

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32 *Ibid.*, at Art. 28; see in detail *infra* Part 3.7.

33 *Ibid.*, at Art. 27; see in detail *infra* Part 3.8.

34 *Ibid.*, at Art. 40; see in detail *infra* Part 4.3.

35 *Ibid.*, at Arts. 21.1 and 22.1.

36 Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 26.

37 *Ibid.*, at Art. 37.

38 *Ibid.*, at Art. 38.

also extend periods of time imposed by it or the Rules insofar as these relate to the composition of the tribunal or the commencement of the arbitration proceedings.[39]

In addition, Arts. 3.1, 3.2 and 3.3 of the Rules include some useful guidance as to the time when notice is received and how time periods are calculated. Most importantly, Art. 3.2 clarifies that if the last day of the time period falls on an official holiday or non-business day at the residence of the addressee, the time period is extended to the next business day. This is a useful clarification which is left out in some international arbitration rules.[40]

3.3 SCOPE AND APPLICATION OF THE ACICA RULES

ACICA's recommended wording of the model arbitration clause is as follows:

> *Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on Article 8 of the ACICA Arbitration Rules].*[41]

The wording of the model arbitration clause is kept sufficiently broad so as to afford the arbitration agreement the widest scope possible. This is a remainder of the times when some courts interpreted a narrower wording of arbitration clauses (e.g. wording such as disputes 'arising out of or under' the contract) to mean that statutory claims, pre-contractual or quasi-contractual claims were excluded from the scope of the arbitration agreement.[42] Courts now tend to take a more liberal approach to construing arbitration clauses. However, it is still recommended to use or incorporate the wording recommended in the model arbitration clauses to ensure that potential disputes, whether contractual, pre-contractual or quasi-contractual fall within the scope of the arbitration agreement and can be validly referred to arbitration.[43]

The principle of party autonomy is deeply embedded in the ACICA Rules. Article 2.1 expressly reinforces this by stating that:

> *[...] disputes shall be resolved in accordance with these Rules subject to such modification as the parties may agree in writing.*

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39 Article 3.4 specifies that this only applies in relation to periods of time 'in respect of the Notice of Arbitration, the Answer to Notice of Arbitration and the composition of the Arbitral Tribunal'.

40 See for example Art. 2.3 of the SIAC Rules which only refers to an 'official holiday'.

41 ACICA Rules, Model Arbitration Clause.

42 See for example *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc. (no.5)* (1999) 2 Lloyd's Rep 739; *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102.

43 See Greenberg, S., "ACICA's New International Arbitration Rules", *supra* fn 2, at p. 191.

One can find a number of express references throughout the Rules that the parties can derogate from a particular provision. In most cases the words 'unless agreed otherwise' are used to indicate this.[44] However, it does not mean that parties are not allowed to derogate from other provisions not 'ear-marked' in this way. The principle of party-autonomy, which is paramount to the ACICA Rules, would otherwise be defeated. This is clearly not what the ACICA Rules contemplated, as is obvious from the wording of Art. 2.1. The only exception to that is where a particular provision would otherwise be in conflict with a mandatory provision of the applicable law to the arbitration. This is what is referred to in Art. 2.2 of the Rules which states that the Rules apply subject to any provision of the law applicable to the arbitration from which the parties cannot derogate.[45] The words 'cannot derogate' are a reference to any mandatory provisions of law. However, it is important to note that the ACICA Rules are consistent with the operation of the Model Law and as such there should be no conflict between the Rules and any mandatory provisions of law so long as the arbitration is seated in a Model Law jurisdiction.[46]

3.4 CONFIDENTIALITY

There has been much discussion about the nature and scope of confidentiality in arbitration since the infamous decision of the High Court of Australia in *Esso Australia Resources Ltd. v Plowman*[47]. In that decision the Court held that there is no duty to confidentiality arising from an agreement to arbitrate, unless such a duty has been expressly agreed between the parties. It is therefore not much surprise that the ACICA Rules deal with this aspect in significant detail.[48]

Firstly, Art. 18.1 of the Rules deals with the privacy of the hearing. Accordingly, unless the parties agree otherwise, all hearings shall take place in private. It is followed by Art. 18.2 which incorporates a general duty of confidentiality together with a number of specific exceptions to that duty. Accordingly all matters relating to the arbitration (including the existence of the arbitration), the award, any material created for the purpose of the arbitration and documents produced by another party in the proceedings (which are not in the public domain) shall be treated as confidential and shall not be disclosed to a third party without the prior written consent from all parties. Importantly, the duty of confidentiality specifically applies to the parties, as well as to the tribunal and ACICA.

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44 For example, ACICA Rules, Arts. 3.3, 18.1, 28.1 and 33.3.

45 ACICA Rules, Art. 2.2.

46 Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 2.2.

47 *Esso Australia Resources Ltd. & Ors. v The Honourable Sidney J Plowman (Minster for Energy & Minerals) & Ors* (1995) 128 ALR 391.

48 Jones, D. and Gehle, B., "Rules and Practices of the Australian Centre for International Commercial Arbitration", *supra* fn 16.

The scope of confidentially is very broad and includes all documents produced by another party in the proceeding. This appears to be directed at the findings in *Esso*[49], in which the Court expressed the view that documents voluntarily produced by a party cease to be confidential.[50]

The exceptions listed in Art. 18.2 refer to the particular circumstances when information in respect of the arbitration may be disclosed without the prior written consent of all parties. However, the party planning to make a disclosure in accordance with one of the exceptions must give notice to the other parties, the tribunal and ACICA prior to the intended disclosure.[51] This is to allow the other parties to validate that the reasons for the disclosure are circumstances which are justified and fall within one of the exemption rules.

The exemptions are very similar to those under the SIAC Rules[52] and allow the disclosure:

- for the purpose of making an application to any competent court;
- for the purpose of making an application to the courts of any State to enforce the award;
- pursuant to the order of a court of competent jurisdiction;
- if required by the law of any State which is binding on the party making the disclosure; or
- if required to do so by any regulatory body.[53]

An important expansion of the duty of confidentiality is included in Art. 18.4 of the Rules which requires that the party calling a witness is responsible for the witness to maintain the same degree of confidentiality as is required by that party.[54] Therefore, a party whose witness has breached its confidentiality obligations may be liable to the other party for any damages caused as a result of the witness's actions.

3.5 THE COMMENCEMENT OF THE ARBITRATION

The commencement of the arbitration under the ACICA Rules follows similar steps to those required under the UNCITRAL Rules. The party initiating the arbitration has to

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49 Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 2.2.

50 *Ibid.*, at Art. 18.2.

51 ACICA Rules, Art. 18.3.

52 SIAC Rules, Art. 34.2. Article 34.2(b) of the SIAC Rules includes an exception for the purposes of challenging an award, an exception which is not specifically mentioned in the ACICA Rules. However, Art. 18.2 of the ACICA Rules is sufficiently broad to cover disclosure for those purposes as well.

53 ACICA Rules, Art. 18.2.

54 ACICA Rules, Art. 18.4 provides that: '[t]o the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party'.

provide two copies of the notice of arbitration to ACICA[55] which will communicate the notice to the respondent(s).[56]

The notice of arbitration has to include all the information that is commonly required for the commencement of arbitration proceedings, including the formal request to refer the dispute to arbitration, details of the parties, a copy of the arbitration clause, a reference to the contract in relation to which a dispute arises, a description of the general nature of the claim, the relief which the claimant is seeking as well as a proposal for the number of arbitrators if this has not been agreed.[57]

One of the noteworthy attributes of the Rules in relation to the commencement of the arbitration is the option for the claimant to include a statement of claim with the notice of arbitration.[58] Article 5.3(c) of the Rules includes a corresponding provision for the respondent in relation to the answer to the notice of arbitration and the statement of defence. However, there is no obligation for the respondent to include the statement of defence with the answer to the notice of arbitration if the claimant has opted to include the statement of claim with the notice of arbitration. The inclusion of the statement of claim (or defence) with the notice of arbitration (or answer) has nevertheless significant potential for time and costs savings, at least in that the claimant does not require any additional time to file the statement of claim after the commencement of the arbitration and once the tribunal has been established.[59] In addition to the formal requirements for the notice of arbitration the claimant is also required to pay ACICA's registration fee of $2500 AUD[60] at the time of submitting the notice of arbitration.[61]

The arbitration proceedings are deemed to commence upon receipt of the notice of arbitration or receipt of the registration fee by ACICA, whichever is the later.[62] Making the commencement of the arbitration subject to the payment of the registration fee is different to, for example, the ICC Rules[63] or the Swiss Rules[64]. Both of those rules provide that the arbitration proceedings commence on the date when the institution receives the notice of arbitration, not when the registration fee is paid However, the case file or the notice of arbitration will not be transferred to the

55 *Ibid.*, at Art. 4.1.

56 *Ibid.*, at Art. 4.6.

57 *Ibid.*, at Art. 4.3.

58 *Ibid.*, at Art. 4.4(c).

59 Jones, D. and Gehle, B., "Rules and Practices of the Australian Centre for International Commercial Arbitration", *supra* fn 16.

60 Further information on the structure and method of calculating ACICA's fees are *infra* Part 4.1..

61 ACICA Rules, Art. 4.1.

62 *Ibid.*, at Art. 4.2.

63 ICC Rules, Art. 4(2).

64 Swiss Rules, Art. 3(2).

respondent(s) until payment of the registration fee has been received.[65] The difference in those approaches is particularly significant in circumstances when a limitation period is about to expire and the claimant needs to commence the arbitration proceedings before the limitation period has expired. Under the ACICA Rules the claimant will have to meet both requirements prior to the expiry of the limitation period, namely receipt by ACICA of both the notice of arbitration and the registration fee, whereas under the ICC Rules or the Swiss Rules the claimant would only be required to send the notice. Especially in circumstances where cross-border payments are difficult and slow, any delay could have serious consequences.

In so far as the Model Law applies to the arbitration proceedings, by choosing the ACICA Rules the parties will have opted out of Art. 21 of the Model Law which provides that the arbitration commences on the date on which the request for arbitration is received by the respondent.[66]

The Claimant may also notify the respondent of the appointment of an arbitrator (in case of a three member tribunal) or submit a proposal for the appointment of a sole arbitrator together with the notice of arbitration.[67]

3.6 CONSTITUTION OF THE ARBITRAL TRIBUNAL

Although ACICA maintains a panel of arbitrators, the parties are free to appoint any arbitrator of their choice. There is no requirement that an arbitrator has to be on the ACICA panel. While the same applies for arbitrators appointed by ACICA, in practice the list of panel arbitrators is ACICA's first resort for the selection of an appropriate arbitrator.[68] There is no requirement in the Rules that an arbitrator has to have a particular qualification, unless a particular qualification has been designated by the parties.

The Rules do not specify any particular number of arbitrators as a default if the parties fail to agree on the number of arbitrators in their arbitration agreement. Instead, they provide that if the arbitration agreement does not specify the number of arbitrators and the parties cannot agree on the number of arbitrators within 15 days after receipt of the notice of arbitration, ACICA shall determine the number of arbitrators taking into account all relevant circumstances.[69] This offers some great benefit for the parties as it allows the number of arbitrators to be determined (or agreed) at a time when the relevant information concerning the value and complexity of a dispute has

65 ICC Rules, Art. 5(4) and Swiss Rules, Art. 3(12).

66 Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 4.2.

67 ACICA Rules, Art. 4.4.

68 Jones, D. and Gehle, B., "Rules and Practices of the Australian Centre for International Commercial Arbitration", *supra* fn 16.

69 ACICA Rules, Art. 8.

crystallised, and an informed decision on the appropriate number of arbitrators can be made either by the parties or ACICA. This is a sensible approach and can ultimately lead to significant cost savings for the parties.

Although some institutional rules have incorporated similar provisions,[70] they commonly do not provide any particular guidance as to the circumstances which the institution should consider in determining the number of arbitrators. Instead, most institutional arbitration rules, such as the ICC Rules for example, appear to favour the rule that a sole-arbitrator shall be appointed unless circumstances warrant otherwise.[71]

The process for the selection and appointment of arbitrators under the ACICA Rules is nearly identical to that under the UNCITRAL Rules, and in principle not too different from most institutional arbitration rules.

For the appointment of a sole arbitrator the parties are, in the first instance, asked to agree on an arbitrator. The Rules recommend that either party may propose to the other the names of one or more persons.[72] This is usually done in the form of an exchange of letters in which one party proposes a number of candidates and submits that list to the other party. The other party may then object to any of the candidates proposed by the other side and eliminate those names from the list.[73] If the parties encounter difficulties in this process they may request ACICA to provide a list of suitable arbitrators from which each party can strike out the names of those candidates to which they object and rank the remaining names according to their preferences.[74]

If within 30 days from a proposal being received the parties do not reach agreement on the sole arbitrator, a sole arbitrator will be appointed by ACICA.[75] Article 9.3 of the Rules offers some useful guidance as to the matters ACICA ought to consider in appointing the arbitrator. That provision also includes a direction to ACICA[76] that the arbitrator ought to be of a nationality other than the nationality of the parties. Although Art. 9.3 is found under the section of the Rules entitled 'Appointment of a Sole Arbitrator' the broad wording of the provision suggests that it applies to any

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70 For example, Art. 8(2) of the ICC Rules provides for a sole arbitrator as a general rule unless the ICC Court determines 'that the dispute is such to warrant the appointment of three arbitrators'.

71 The UNCITRAL Arbitration Rules on the other hand have a default provision of three arbitrators if the parties cannot agree on the number of arbitrators within 15 days after the receipt of the notice of arbitration (Art. 5).

72 ACICA Rules, Art. 9.1.

73 Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 9.1.

74 Jones, D. and Gehle, B., "Rules and Practices of the Australian Centre for International Commercial Arbitration", *supra* fn 16.

75 ACICA Rules, Art. 9.2.

76 The wording of Art. 9.3 merely refers to 'the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties'.

appointment function which is exercised by ACICA,[77] including appointments in relation to three member tribunals[78] and the appointment of arbitrators in multi-party disputes.[79]

The appointment process for a three member tribunal is as well nearly identical to that under the UNCITRAL Rules. The parties may include the appointment of each of the party appointed arbitrators in the notice of arbitration (or the answer to the notice of arbitration), but they are not bound to do so.[80] If they do not, then the appointments have to be made after the commencement of the arbitration, as is contemplated by Art. 10.1 of the Rules. Accordingly, each party is to appoint one arbitrator and the two arbitrators thus appointed shall choose the third arbitrator who will act as the chairperson of the tribunal.[81]

The constitution of the tribunal can be initiated by either party by appointing an arbitrator and notifying the other party of the appointment. In practice, however, it will usually be the claimant who has the most interest in constituting the tribunal as quickly as possible. Once the other party has received a notification of the appointment of the arbitrator it has 30 days to appoint its arbitrator. If within 30 days of the notification of the appointment of the first arbitrator the other party has not notified the first party about who it has appointed as an arbitrator, the first party may request ACICA to appoint the arbitrator for the other side.[82] Similarly, if the two party appointed arbitrators have not agreed on the choice of a chairperson of the tribunal within 30 days of the second arbitrator being appointed, the chairperson will be appointed by ACICA.[83]

There appears to be a minor ambiguity in the wording of the Rules as to whether the parties directly appoint the arbitrator(s) or whether they merely nominate an arbitrator with the appointment being subject to confirmation by ACICA.[84] The reason for this ambiguity arises from the wording of Art. 12.1 which states that '[w]here the names of one or more persons are proposed for appointment as arbitrators' information about the qualification of the arbitrator shall be provided. The wording does not appear to limit the operation of Art. 12.1 to circumstances in which ACICA is to appoint an arbitrator upon default of the parties. The wording in Art. 12.1 is different to that used in Arts. 9 and 11 which provides that the appointment of the party-appointed arbitrator is direct and unsupervised. The direct appointment is different to the appointment

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77 So at least Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 9.1.

78 ACICA Rules, Arts. 10.2 and 10.3.

79 *Ibid.*, at Arts. 11.2.

80 *Ibid.*, at Arts. 4.4 and 5.3.

81 *Ibid.*, at Art. 10.1.

82 *Ibid.*, at Art. 10.2.

83 *Ibid.*, at Art. 10.3.

84 Jones, D. and Gehle, B., "Rules and Practices of the Australian Centre for International Commercial Arbitration", *supra* fn 16.

process under the ICC Rules[85] and the LCIA Rules[86] according to which the party nominated arbitrators are to be confirmed or appointed by the institution.

As with most modern arbitration rules, the ACICA Rules contain special provisions for the appointment of arbitrators in a multi-party dispute.[87] The Rules expressly state that acts of multiple parties (i.e. multiple claimants or multiple respondents) shall have no effect, unless the multiple claimants or multiple respondents act jointly and provide written evidence of their joint agreement onto the appointment of the arbitrator.[88] If a three member tribunal is to be appointed and the multiple claimants or multiple respondents are unable to jointly agree on the appointment of their party appointed arbitrator all three tribunal members will be appointed by ACICA.[89] The parties may of course agree in writing on a different method for the constitution of the tribunal and provide written evidence of their agreement to ACICA.

Although the Rules allow the parties to opt-out of the prescribed appointment process, there are certain limitations to this as a consequence of the landmark decision in *BKMI and Siemens v. Dutco*[90]. Foremost, the principle of equality, between the parties which is sought to be warranted by the multi-party appointment process, cannot be validly waived until after the dispute has arisen. Therefore, it is questionable whether a different appointment process for multi-party disputes which has been incorporated into the arbitration agreement will suffice to constitute a valid waiver of rights with regard to the appointment process established by Art. 11.2 of the Rules.

Article 13.1 of the Rules requires a prospective arbitrator to disclose in writing (to those who approach him or her in connection with a potential appointment) any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The article adopts the same language as Art. 9 of the UNCITRAL Rules with the only difference that a copy of any disclosure is to be submitted to ACICA. The disclosure obligation is an ongoing requirement throughout the arbitration.[91]

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85 ICC Rules, Art. 9.

86 LCIA Rules, Art. 5.5, which states that only the 'LCIA Court alone is empowered to appoint arbitrators'.

87 Most arbitration rules have amended the appointed process for multi-party disputes following the landmark decision by the French Cour de Cassation in *BKMI and Siemens v. Dutco,* 7 January 1992, in which the Court held that the particular appointment process breached the principles of equality of the parties. The rules in that case (an earlier version of the ICC Rules) required the two respondents who had diverging interests to nominate an arbitrator jointly, whereas the claimant was allowed to choose its arbitrator.

88 ACICA Rules, Art. 11.1.

89 *Ibid.*, at Art. 11.2.

90 *BKMI and Siemens v. Dutco,* French Cour de Cassation, 7 January 1992.

91 ACICA Rules, Art. 13.1 provides that '[a]n arbitrator, once appointed or chosen, shall immediately in writing disclose such circumstances to the parties unless he or she has already informed them in writing'.

Articles 13 and 14 of the Rules deal with the challenge to an arbitrator. Although relevant standards and requirements for the arbitrator's impartiality and independence are the subject to the applicable arbitration law at the seat of the arbitration, Art. 13.2 of the Rules applies the justifiable doubts test in determining whether the arbitrator is held to be impartial and independent. The requirement for disclosure by and the challenge to arbitrators accords in general with the tests under the IBA Guidelines on Conflicts of Interest in International Arbitration.

The language of Art. 13.2 is very similar to that in Art. 12(2) of the Model Law with the notable difference that the word 'only' has been omitted from the ACICA Rules[92]. This suggests that the arbitrator may be challenged for reasons other than his or her lack of impartiality and independence,[93] for example where a challenge is justified due to a lack of qualification, prolonged unavailability or bare incompetence of the arbitrator.

A party may challenge an arbitrator appointed by it only for reasons of which it becomes aware after the appointment.[94] Should a party decide to challenge an arbitrator it needs to submit a notice of challenge to the other party or parties, to any other members of the tribunal and to ACICA within 15 days of the appointment or within 15 days after it became aware of the circumstances giving rise to the challenge.[95] If the other party does not agree to the challenge and the challenged arbitrator does not resign, ACICA will make a decision on the challenge.[96] Once the arbitrator has been successfully challenged (or the arbitrator has resigned) a new arbitrator is then appointed in accordance with the general procedures for the appointment of arbitrators.

The Rules also address the particular situation where the arbitrator has been replaced (i.e. where an arbitrator has been successfully challenged or has resigned) and a decision has to be made whether all or part of the hearing has to be repeated.[97] Article 16 of the Rules states that:

> *[o]nce reconstituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted Arbitral Tribunal.*

The ACICA Rules take a very flexible approach on this issue and allow the tribunal to decide whether or not to repeat any part of the proceedings taking into account the particular circumstances, and, even more importantly, after giving the parties an

92 Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 13.2.

93 *Ibid.*

94 ACICA Rules, Art. 13.3.

95 *Ibid.*, at Art. 14.1.

96 *Ibid.*, at Art. 14.4.

97 *Ibid.*, at Art. 16.

opportunity to comment. In contrast the ICC Rules and the LCIA Rules, for example[98], are silent on this issue and instead allow the tribunal to continue as a truncated tribunal, an option that is not available under the ACICA Rules.[99]

3.7 INTERIM MEASURES

Some of the most noticeable differences between the ACICA Rules and other arbitration rules relate to interim measures of protection. Article 28 of the Rules has been commended by many arbitration experts for its clear and progressive approach with regard to interim measures of protection.[100] Interim measures can be essential to protecting the rights of a party, especially in circumstances where the other party attempts to dissipate of evidence or assets or tries to jeopardise the other party's position in any way.[101] The Rules set out clearly that the power of the arbitral tribunal to order interim measures does not prejudice a party's right to apply to any competent court or judicial authority for interim measures.[102] This is important, because the most effective and sometimes only way to get quick and enforceable interim relief is through the courts, at least until more countries amend their legislation to recognise the enforcement of interim measures of protection granted by arbitral tribunals.[103]

Unlike many other arbitration rules which simply give the arbitral tribunal the power to order interim measures, or at most offer a very limited definition of interim measures[104] Art. 28 provides a clear and comprehensive description of which 'interim measures' are available under the Rules and the requirements a party has to meet to obtain them.[105] According to the definition of interim measures included in Art. 28, they include any temporary measures by which the arbitral tribunal orders a party to:

- maintain or restore the status quo pending determination of the dispute;[106]
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;[107]

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98 It should, however, be noted that Art. 14 of the Swiss Rules and article 16 of the SIAC Rules contain a similar provision to that in Article 16 of the ACICA Rules.

99 Greenberg, S., "ACICA's New International Arbitration Rules", *supra* fn 2, at p. 194.

100 *Ibid.*, at p. 197.

101 Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 13.2.

102 ACICA Rules, Art. 28.8.

103 Pursuant to s. 20 of the *International Arbitration Act 1974* (Cth) in Australia, for example, parties can opt-in to have interim measures issued by arbitral tribunal enforced under Chapter VIII of the Model Law.

104 For example, Art. 25 of the LCIA Rules.

105 Greenberg, S., "ACICA's New International Arbitration Rules", *supra* fn 2, at p. 197.

106 ACICA Rules, Art. 28.2(a).

107 *Ibid.*, at Art. 28.2(b).

- provide a means of preserving assets out of which a subsequent award may be satisfied;[108]
- preserve evidence that may be relevant and material to the resolution of the dispute;[109] or
- provide security for legal or other costs of any party.[110]

The Rules also require that the party requesting the interim measure must satisfy the arbitral tribunal that:

- irreparable harm is likely to result if the measure is not ordered;[111]
- such harm substantially outweighs the harm that is likely to result to the party affected by the measure if the measure is granted;[112] and
- there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the liberty of decision of the arbitral tribunal in making any subsequent determination.[113]

It should be noted that an interim measure cannot be granted unless all of these requirements have been satisfied, and even then the arbitral tribunal retains discretion as to whether or not it will grant the interim measure. Should the tribunal decide to grant the interim measure it has to provide reasons to the parties.[114] The tribunal, however, does not have to give reasons if it denies the request for interim measures. Article 28 of the Rules follows closely Arts. 17 to 17G of the UNCITRAL Model Law as amended in 2006, and makes the ACICA Rules one of very few arbitration rules which have adopted the new structure. It is worth pointing out that the very controversial provisions on *ex parte* interim measures and provisional orders which are included in Art. 17 B(2) of the Model Law have not been incorporated in the ACICA Rules.[115]

In addition, the arbitral tribunal can require the party which requested the interim measure to provide appropriate security as a condition for granting the interim

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108 *Ibid.*, at Art. 28.2(c).

109 *Ibid.*, at Art. 28.2(d).

110 *Ibid.*, at Art. 28.2(e).

111 *Ibid.*, at Art. 28.3(a).

112 *Ibid.*, at Art. 28.3(b).

113 *Ibid.*, at Art. 28.3(c).

114 ACICA Rules, Art. 28.1 which states: 'The Arbitral Tribunal may order such measures in the form of an award, or in any other form (such as an order) provided reasons are given, and on such terms as it deems appropriate'.

115 Jones, D. and Gehle, B., "Rules and Practices of the Australian Centre for International Commercial Arbitration", *supra* fn 16.

measure.[116] If the tribunal later determines that the interim measure should not have been granted it may decide that the requesting party is liable for any damages caused to the other party as a consequence of the measures.[117]

3.8 EVIDENCE AND HEARINGS

Arbitration rules rarely provide detailed procedures in relation to the evidentiary aspects of the arbitration process. While this also applies in respect of the ACICA Rules, Art. 27.2 of the Rules includes a useful (and novel) reference to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules). The particular wording which has been adopted reads as follows:

> *The Arbitral Tribunal shall have regard to, but is not bound to apply, the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration in the version current at the commencement of the arbitration.*[118]

Although the IBA Rules are not binding there is a strong proposition that the arbitral tribunal should at least take them into account in respect of the evidentiary matters of the arbitration proceedings. Even if the IBA Rules are not fully adhered to by the tribunal, they at least provide a useful starting point in relation to the evidentiary process and may be a useful gap-filler where certain matters have not been expressly settled between the parties and the tribunal.

Although some provisions in the Rules appear to contemplate a hearing;[119] the tribunal can proceed on a documents only basis without conducting an oral hearing. This is confirmed in Art. 17.2 of the Rules. Nonetheless, if at least one party requests a hearing the tribunal is required to hold a hearing for the presentation of evidence and oral arguments.

3.9 SEAT AND GOVERNING LAW

The ACICA Rules contain a default provision for the seat of the arbitration if the parties have not specified such in the arbitration agreement and have failed to agree on a seat within 15 days after the commencement of the arbitration.[120] In those circumstances the Rules provide that the seat of the arbitration is Sydney, Australia.

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116 ACICA Rules, Art. 28.4.

117 *Ibid.*, at Art. 28.8.

118 *Ibid.*, at Art. 27.2.

119 For example in ACICA Rules, Arts. 29.2 and 30.

120 ACICA Rules, Art. 19.1.

However, the arbitrators are free to conduct the proceedings either at the seat or at any venue they deem appropriate.[121]

In addition to the applicable procedural law which is primarily determined by way of the seat of the arbitration, Art. 34.1 sets out the rules which the tribunal shall apply to determine the substantive law of the dispute. The particular wording of Art. 34.1 of the Rules raises some interesting questions. Article 34.1 of the Rules is similar, though not identical, to the wording of Art. 33(1) of the UNCITRAL Arbitration Rules. Article 34.1 of the Rules reads as follows:

> *The Arbitral Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Arbitral Tribunal shall apply the rules of law which it considers applicable.*

In contrast, Art. 33.1 of the UNCITRAL Rules states that the tribunal is to apply the 'law determined by the conflict of law rules which it considers applicable'. Accordingly, if the parties have not designated the law applicable[122] to the substance of their dispute, under the ACICA Rules the tribunal will directly apply the 'rules of law' which it considers applicable without resorting to the conflict of law rules as would be the case under the UNCITRAL Rules.

The reason for this particular wording of Art. 34.1 of the Rules was to allow the tribunal to apply national laws as well as customary principles such as the *lex mercatoria*, the UNIDROIT Principles of International Commercial Contract[123], the ICC INCOTERMS 2000 or the ICC Uniform Customs or Practice for Documentary Credits 2007 (UCP 600) which are, strictly speaking, not 'law' but customary 'rules of law' or 'principles of law'.[124] If the tribunal were bound to apply the conflict of law rules, as for example required by the UNCITRAL Arbitration Rules, such 'rules of law' would not be applicable to the substance of the dispute, as the conflict of law rules will in most circumstances only point to the substantive law of a State.

As under most arbitration rules the tribunal may only decide the dispute as *amiable compositeur* or *ex aequo et bono* if expressly authorised by the parties in writing.[125]

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121 *Ibid.*, at Art. 19.2.

122 The term 'law' also includes uniform instruments and conventions such as the *United Nations Convention on Contracts for the International Sale of Goods* (1984); the *Convention on the Carriage of Goods by the Sea* (1978) or the *Chicago Convention in International Civil Aviation* (1944); for further detail please see Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 34.1.

123 Available at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>.

124 See also Luttrell, S. R. and Moens, G. A., "Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration", *supra* fn 3, at Art. 34.1.

125 ACICA Rules, Art. 34.2.

3.10 THE AWARD

Unless the arbitration is conducted by a sole arbitrator, the award or any decision of the tribunal is made by way of a majority. If there is no majority, the opinion of the chairperson shall prevail.[126]

In terms of the rendering of awards, the ACICA Rules are similar to most other institutional arbitration rules. However, as mentioned in part 2.2 above, ACICA does not scrutinise the draft award before it is issued to the parties as is required under the ICC Rules, for example.[127]

After the award has been signed by the arbitrators, the tribunal shall deliver copies of the award to the parties and ACICA.[128] If any arbitrator refuses or fails to sign the award, the signatures of the majority, or failing a majority, the signature of the chairperson is deemed to be sufficient under the Rules, provided that reasons for the omitted signature are provided in the award.[129] There is no comparable power of the chairperson incorporated in, for example, the UNCITRAL Arbitration Rules[130] or the Swiss Rules.[131]

Before the tribunal communicates the award to the parties, it is required to seek confirmation from ACICA that there are no outstanding monies due to it.[132]

Once the award has been communicated to the parties either party may within 30 days of receipt of the award request from the tribunal an interpretation[133] or correction[134] of the award, or request that an additional award be made as to claims presented during the proceedings but omitted from the award.[135] In case of the latter, the tribunal shall complete the award within 60 days from the request, if it decides that the request is justified and that the omission can be rectified without any further hearings or evidence.[136]

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126 *Ibid.*, at Art. 32.

127 ICC Rules, Art. 27 states: 'Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form'.

128 ACICA Rules, Art. 33.5.

129 *Ibid.*, at Art. 33.4.

130 UNCITRAL Rules, Art. 32(4).

131 Swiss Rules, Art. 32(4).

132 ACICA Rules, Art. 33.6.

133 *Ibid.*, at Art. 36.1.

134 *Ibid.*, at Art. 37.1.

135 *Ibid.*, at Art. 38.1.

136 *Ibid.*, at Art. 38.2.

4 *ARBITRATION COSTS AND ADMINISTRATIVE FEES*

4.1 *COST OF THE ARBITRATION*

The term 'cost of the arbitration' is defined under the Rules and thus avoids the ambiguities which often arise in arbitration proceedings as to what comprises the cost of an arbitration, and the potential impact this may have for the parties with regards to the apportionment of such costs.

Article 39 of the Rules states that the costs of the arbitration include:

- the tribunal fees;
- the travel and other reasonable expenses incurred by the arbitrators;
- the costs of expert advice and of other assistance required by the tribunal;
- the travel and other reasonable expenses of witnesses to the extent such expenses are approved by the tribunal;
- the legal and other costs directly incurred by the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the tribunal determines that the amount of such costs is reasonable;
- ACICA's registration fee and administration fee; and
- fees for facilities and other assistance provided by ACICA.

The definition is exclusive so that costs other than those listed above cannot be included.[137] The tribunal is to fix the costs of the arbitration in the award[138] and in apportioning the costs shall apply the principle that the costs shall be borne by the unsuccessful party.[139] However, Art. 41.2 allows the tribunal to freely determine the apportionment of the legal costs[140] incurred by the parties taking into account the circumstances of the case. One of the reasons behind this exception is to allow the tribunal to penalise unnecessary delays caused by a party during the proceedings. It is, however, not the purpose of this provision to overcome the imbalances which may be caused by so called deep pocket arbitration in which the legal costs incurred by one party can outweigh those by the other party manifold. This is better achieved through the application of Art. 39(e) in so far as the tribunal determines that only a portion of the legal costs was reasonable.

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137 ACICA Rules, Art. 39 states that '[t]he term "costs of the arbitration" includes only [...]'.

138 ACICA Rules, Art. 39.

139 *Ibid.*, at Art. 41.1.

140 See ACICA Rules, Art. 39(e).

4.2 INSTITUTIONAL FEES

ACICA's institutional fees consist of a non-refundable registration fee of $2,500 (Australian dollars), which becomes due with the notice of arbitration, and an administration fee. The administration fee is calculated in accordance with Schedule 1 in Appendix A of the Rules and depends on the amount in dispute (see below for the administrative fees as at 1 August 2009):

Amount in Dispute	**Administrative Fees**
$1 to $500,000	1% of the amount in dispute
$500,001 to $1,000,000	$5,000 plus 0.5% of the amount in dispute above $500,000
$1,000,001 to $10,000,000	$7,500 plus 0.25% of the amount in dispute above $1,000,000
$10,000,001 to $100,000,000	$30,000 plus 0.01% of the amount in dispute above $10,000,000
Over $100,000,000	$39,000 plus 0.02% of the amount in dispute above $100,000,000 up to a maximum of $60,000

In determining the amount in dispute, the amounts of each claim, counterclaim and set-off defence are added, but any claims for interest are excluded. If the amount in dispute is not specified in the pleadings, it will be determined by the arbitral tribunal (Art. 2.2 in Appendix A).

4.3 ARBITRATORS' FEES

Arbitrators are remunerated on a time spent basis (i.e. an hourly rate) rather than a fixed fee or fee range which is calculated on the basis of the amount in dispute, as is the case under many other institutional rules. While this approach has its advantages as well as disadvantages, these are not the subject of the discussion here.[141] The wording of Art. 40.1, '[u]nless agreed otherwise', suggests that the parties may agree with the arbitrator(s) on a different methodology for the remuneration, though in practice this is very uncommon.[142]

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141 Jones, D. and Gehle, B., "Rules and Practices of the Australian Centre for International Commercial Arbitration", *supra* fn 16.

142 *Ibid.*

One of the rather unique and as such noteworthy features of the Rules is that if the arbitrator(s) and the parties cannot agree on a hourly rate for the arbitrator's remuneration, the hourly rate will be set by ACICA taking into account the nature of the dispute, the amount in dispute as well as the standing and experience of the arbitrator.[143]

5 *CONCLUSION*

The ACICA Rules present a welcome and useful addition to the growing pool of institutional arbitration rules. Arbitrators acting under the Rules are given some powerful tools to direct the often slow moving process onto the road of expedition. The Rules contain many innovative provisions which have the potential to expedite arbitration proceedings and to increase efficiency in arbitration.

Since their launch in 2005 the Rules have received great recognition especially in Australia and the Asia-Pacific. The Rules have found their way into many standard form arbitration clauses and commercial agreements. There is no doubt that the ACICA Rules present a good alternative to many of the popular institutional arbitration rules from around the world, and there is no reason why one should not recommend them.

There are, of course, a few provisions which may require refinement in the future.[144] However, most of these problems are minor in nature and should be easy to overcome if one adopts an interpretation which is consistent with the general spirit of the Rules and uses the assistance provided by this and other publications on the ACICA Rules.

143 ACICA Rules, Arts. 40.2 and 40.4.

144 See also Greenberg, S., "ACICA's New International Arbitration Rules", *supra* fn 2, at p. 199.