

Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration

S R Luttrell* & G A Moens**

Introduction

The Australian Centre for International Commercial Arbitration (ACICA) was established in 1985.¹ ACICA is a not-for-profit public company. The objects of ACICA are (1) to support and facilitate international arbitration and (2) to promote Sydney specifically, and Australia generally, as a venue for the conduct of international commercial arbitrations. ACICA is seated in Sydney, New South Wales, but has registries in Victoria and Western Australia. ACICA maintains a panel of international arbitrators and a list of experienced arbitration practitioners. ACICA provides information on international arbitration and is involved in education through the provision of seminars. ACICA is the statutory appointing authority under the *Water Management Act* 1999 (Tas), the *Water Industry Act* 1994 (Vic) and the *Construction Industry Long Service Leave Act* 1997 (Vic). ACICA has cooperation agreements with over thirty arbitral institutions, including the International Centre for the Settlement of Investment Disputes (ICSID), the Stockholm Chamber of Commerce (SCC) and the American Arbitration Association (AAA). The official website of ACICA is located at www.acica.org.au. ACICA is also a founding Member of the Asia Pacific Regional Arbitration Group (APRAG), the website of which is located at www.aprag.org.

This annotation is the officially endorsed Commentary to the ACICA Arbitration Rules. The ACICA Arbitration Rules (**Rules**) were adopted by ACICA in July 2005. These Rules are the general rules for international commercial arbitration at ACICA.² The ACICA Rules draw on a wide range of national and international laws, as well as the rules of other leading arbitral

* Samuel Ross Luttrell, LLB, BA (Hons) *UWA*, PhD *Murd.*, Lawyer, Allens Arthur Robinson.

** Gabriël Adelin Moens, JD *Leuven*, LLM *Northwestern*, PhD *Syd.*, GCEd *Qld.*, MBA *Murd.*, FCI Arb, Dean and Professor of Law, Murdoch University; Honorary Professor, The University of Queensland; Adjunct Professor of Law, City University of Hong Kong; Deputy Secretary-General of ACICA.

¹ Commenting on the establishment of ACICA, Simon Greenberg stated that, “Although ACICA was formed in the mid-1980s as Australia’s international arbitration institution, ACICA’s former role in administering arbitrations was mainly limited to the appointment of arbitrators and the holding of cost deposits for *ad hoc* arbitrations under the UNCITRAL Arbitration Rules.” Greenberg, S., ‘ACICA’s New International Arbitration Rules’, 23(2) *Journal of International Arbitration*, 2006, 189. Greenberg was a member of the ACICA Subcommittee that drafted the 2005 Rules, along with Dr Clyde Croft SC, Björn Gehle, Professor Richard Garnett, Associate Professor Luke Nottage, Associate Professor Romesh Weeramantry.

² ACICA also has Expedited Arbitration Rules which were adopted in 2008, as well as Mediation Rules. These Rules are outside the scope of this Commentary. But comparing the Expedited Rules may assist in highlighting particular features of the generic ACICA Rules. Those Rules are accompanied by a Guidance Note prepared by the Subcommittee that drafted them, comprising Jonathon DeBoos, Dr Clyde Croft SC, Björn Gehle, Professor Richard Garnett, and Associate Professor Luke Nottage.

institutions, especially the 2004 Swiss Rules of International Arbitration of the Swiss Chambers of Commerce (**Swiss Rules**) and the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (**UNCITRAL Arbitration Rules**). This Commentary will identify similarities between the ACICA rules and other instruments. Where there is strong similarity between a provision of the ACICA Rules and a rule of another arbitral institution, the doctrine and case law of the other institution will be referred to because the similarity of the two provisions makes the foreign jurisprudence persuasive.³ Significant attention will be paid to the UNCITRAL *Model Law on International Commercial Arbitration* (1985) (**Model Law**)⁴ throughout this Commentary. This attention is justified on two grounds: firstly, as a uniform international arbitration law in force in many states, the Model Law is a convenient point of reference for any comparative study of arbitration; secondly, the Model Law is the law of international arbitration in Australia, ACICA's seat.

The provisions that make up the ACICA Arbitration Rules fall into two broad categories: the first category is comprised of provisions drawn from (either verbatim or with cosmetic changes) the UNCITRAL Arbitration Rules and the Swiss Rules; the second category includes the bespoke provisions. In this Commentary, the heading of each Article of the ACICA Rules is in bold and underlined; the text of the article is provided immediately below in bold, and the Commentary follows. Equivalent rules and persuasive decisions are identified in italics, as are the relevant national laws of other states.

MODEL ARBITRATION CLAUSE

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].

Like all leading international arbitral institutions, ACICA has a model arbitration clause. Model arbitration clauses provide credibility and security of interpretation: the more they are used, the safer they become. The ACICA Model Arbitration Clause seats the tribunal in Sydney, unless the parties agree otherwise. If no contrary election is made, the effect of the Model Clause will be that the arbitration is subject to Australian law. Australia has a Federal (or 'Commonwealth') *International Arbitration Act 1974* (Cth) (**IAA**) which is based on the 1985 text of the Model Law. The Model Law forms Schedule 3 to the IAA, and has the force

³ Whilst arbitral tribunals exist outside any municipal judicial hierarchy, arbitrators are often guided by the decisions of other arbitral tribunals and institutions. As was noted in ICC Award No. 4131, "the decisions of [arbitral] panels progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce".

⁴ The Model Law is not a treaty, and is not binding in international law. It merely provides a template which may be used by countries for the purpose of drafting their own national laws regarding international commercial arbitration. The Model Law has been implemented in many jurisdictions, including Australia, Canada, Hong Kong, Malaysia, Singapore, New Zealand, India and Ireland. A full list of the countries that UNCITRAL considers to be 'Model Law states' is available at:

www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

of law in Australia by virtue of Part III of the Act.⁵ Australia is, therefore, a Model Law state.⁶

The ACICA Model Arbitration Clause is drafted to ensure that pre-contractual disputes such as allegations of misrepresentation, misleading or deceptive conduct in pre-contractual negotiations and statutory torts relating to the contract, are capable of settlement by ACICA Rules arbitration. The breadth of the ACICA Model Arbitration Clause is complimented by the pro-arbitration jurisprudence of Common Law states, the most recent instances of which are *Fiona Trust*⁷ (England) and *Comandate Marine*⁸ (Australia).

SECTION I: INTRODUCTORY RULES

ARTICLE 1 - ACICA Arbitration Rules

These rules ("Rules") are the rules of arbitration of the Australian Centre for International Commercial Arbitration ("ACICA") and may be referred to as the "ACICA Arbitration Rules".

Article 1 establishes the official acronym 'ACICA' and the official title of the 'ACICA Arbitration Rules'. The official status and meaning of either (or both) of the expressions 'ACICA' and 'ACICA Arbitration Rules' may be relevant in determining the jurisdiction of ACICA where the arbitration clause is vague (or 'pathological'), or the reference to the Rules is otherwise imperfect for the purposes of Article 2.1.

The acronym 'ACICA' includes words ('international' and 'commercial') that have implications for the scope of the Rules. Although Article 1 does not define either term, the Model Law does. Under Article 1(3)(a) Model Law, an arbitration is an 'international' arbitration if the parties to the arbitration agreement had their places of business in different states at the time the agreement was made. An arbitration of a dispute may also be an international one even if both parties have their places of business in the same state. This will be the case

- (i) if the place of arbitration is in a different State;
- (ii) if a substantial part of the obligations under the parties' commercial relationship are to be carried out in a different state;⁹
- (iii) if the subject matter of the parties' dispute is 'most closely connected' with a different state; or

⁵ Section 17(1) IAA provides that UNCITRAL documents may be consulted for the purpose of interpreting the Model Law. See on the Model Law: John Trone and Gabriël Moens, 'The *International Arbitration Act 1974* (Cth) as a Foundation for International Commercial Arbitration in Australia', Vol. 4 *Macquarie Journal of Business Law* (2007), 295-324.

⁶ At the time of writing, the Australian Federal Parliament is considering amending the IAA to give effect to the 2006 text of the Model Law. ACICA has been consulted throughout the IAA review process. For information on the Commonwealth Attorney General's review of the IAA, go to <http://www.ag.gov.au/internationalarbitration>.

⁷ *Fiona Trust & Holding Corporation & Ors v Yuri Privalov and Ors* [2007] EWCA Civ 20.

⁸ *Pan Australia Shipping Pty Ltd v The Ship 'Comandate' (No 2)* (2006) 234 ALR 483, [81]; [2006] FCA 1112.

⁹ See for example *Fung Sang Trading Ltd. v Kai Sun Sea Products and Food Co Ltd* [1992] 1 HKLR 40, where a payment-based 'place of obligations' argument against internationality failed.

(iv) if the arbitration agreement expressly provides that its subject matter concerns more than one country.¹⁰

A footnote in the Model Law states that the word *commercial* “should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not”.¹¹ In characterising disputes as ‘commercial’ in such wide terms, the scope of the Model Law is significantly increased. This language seeks to incorporate modern pro-arbitrability jurisprudence, sometimes referred to as the ‘*Mitsubishi Doctrine*’,¹² which prefers a broad understanding of what disputes are capable of settlement by arbitration.

ARTICLE 2 - Scope of Application

2.1 Where 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.

This Article achieves two things: (1) it establishes an ‘in writing’ requirement for agreements to arbitrate under the ACICA Rules; and (2) it establishes and ranks the broad power of the parties to modify the ACICA Rules.

The ‘in writing’ requirement contained in the first arm of Article 2.1 ACICA Rules, accords with Article 7 Model Law. The mandatory language (*‘shall’*) of Article 7 Model Law has led courts and commentators to the conclusion that the ‘in writing’ requirement is non-derogable. Article 2.1 ACICA Rules reflects the mandatory nature of the Model Law ‘in writing’ requirement of the IAA. Similarly, the ‘in writing’ requirement is consistent with Article II(2) of the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,¹³ to which Australia is a party.¹⁴ The second arm of Article 2.1 ACICA Rules confirms the operation of the Doctrine of Party Autonomy (which, it is worth noting, is a recognized feature of Australian arbitration law)¹⁵ in that it ranks the will of the parties above the words of the Rules.

2.2 These Rules shall govern the arbitration except that where any of these Rules are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

This Article confirms that wherever the ACICA Rules are used, their use and force is subject to the mandatory laws of the seat. The expression ‘cannot derogate’ is a reference to mandatory provisions of the applicable arbitration law. The second arm of Article 2.2 ACICA Rules is of no effect for an ACICA tribunal seated in a Model Law state because the ACICA Rules do not offend the mandatory provisions of the Model Law. But in non-Model Law

¹⁰ Model Law, Article 1(3)(b).

¹¹ Model Law, Footnote to Article 1(1).

¹² This doctrine takes its name from the landmark United States Supreme Court decision in *Mitsubishi v Soler Chrysler-Plymouth*, 473 US 614 (1985).

¹³ Hereinafter referred to as the ‘New York Convention’.

¹⁴ The New York Convention forms Schedule 1 of the IAA.

¹⁵ *Comandate Marine Corp v Pan Australian Shipping Pty Ltd* (2006) 238 ALR 457 per Allsop J at [237]. This obiter is to be contrasted with the dicta of earlier decisions, including *American Diagnostica Inc v Gradipore Ltd* [1998] 44 NSWLR 312, where Chief Justice Giles suggested that party autonomy is limited, as the parties’ choice of law means that certain provisions of statutes will govern the arbitration, and these statutes cannot be excluded by agreement of the parties.

seats, an ACICA tribunal *may* be required to give way to national laws in certain situations, and the extent to which the Rules must defer to the applicable arbitration law will depend on where the tribunal is seated. When other jurisdictions are considered, the parties must take into account that non-Model Law states vary considerably in their approaches to the question of which rules of their *lex arbitri* are mandatory and which rules can be excluded by agreement of the parties.

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

This provision has a mixed Australian and Singaporean heritage. It is known as the ‘*Eisenwerk* Clause’: in *Eisenwerk* the Queensland Supreme Court held that, by agreeing to ICC Rules arbitration in Australia, the parties had exercised their IAA right to exclude the UNCITRAL Model Law.¹⁶ Section 21 IAA allows the parties to an arbitration agreement to opt out of the Model Law by an agreement in writing that their dispute will be settled otherwise than in accordance with the Model Law. The *Eisenwerk* decision was widely criticised in Australia, and the ACICA Rules reflect this. Article 2.3 is similar to Section 15(2) *Singapore International Arbitration Act* (2002), a ‘Model Law Plus’ provision enacted to reverse the decision of the Singapore High Court in *John Holland v Toyo Engineering*.¹⁷ Article 2.3 ACICA Rules has the effect that, where the ACICA Rules are chosen, section 21 IAA is not triggered and the Model Law is not excluded by the choice of the ACICA Rules. It is important to note that, in an arbitration governed by Australian law, where the parties *do* expressly contract out of the Model Law under s.21 IAA, the mandatory provisions of the Model Law and the IAA will still stand. Australian jurisprudence does not recognise ‘Delocalisation Theory’: arbitral proceedings in Australia cannot be *totally* disconnected from Australian law.¹⁸ Indeed, this is the position in most countries.¹⁹ When the Model Law is expressly excluded, it will only be excluded in favour of the applicable State *Commercial Arbitration Act*.²⁰

ARTICLE 3 – Notice, Calculation of Periods of Time

3.1 For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or to the addressee's residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then to the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

¹⁶ *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461.

¹⁷ *John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262; s.17(2) of the *Singapore International Arbitration Act* 2002 provides that, “for the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned”.

¹⁸ *American Diagnostica Inc v Gradipore* (1998) 44 NSWLR 312, following the dicta of Kerr LJ in *Bank Mellat v Helliniki Techniki SA* [1983] 3 All ER 428 (CA).

¹⁹ Petrichilos, G., *Procedural Law in International Arbitration*, Oxford University Press 2004, 87.

²⁰ The state Commercial Arbitration Acts (1984-5) are uniform (but not identical) statutes based on the English *Arbitration Act* 1979. In April 2009, the State and Territory Attorneys-General agreed to propose bills for new domestic Commercial Arbitration Acts based on the Model Law. Assuming these bills are passed, Australia will become a monist Model Law State (i.e. a country where substantially the same law applies to domestic and international arbitrations).

Article 3.1 is not expressed as being ‘subject to the agreement of the parties’, and although the ACICA Rules are *generally* capable of modification, it may be that when the ACICA Rules are used the principles of service and receipt will defeat any inconsistent provisions in the contract. Article 3.1 adopts Article 2(1) Swiss Rules, and is a close approximation of Article 3 Model Law (Receipt of Written Communications) and Article 2(1) UNCITRAL Arbitration Rules. Article 4 London Court of International Arbitration (LCIA) Rules is also similar.²¹ Article 3.1 ACICA Rules creates three rules: (1) an actual service and receipt rule, (2) a deemed substitute service/receipt rule, and (3) a timing of receipt rule. The third rule incorporates Article 3(1)(b) Model Law. As for mode of notice, if the arbitration is being held in Australia, it is important to note that Australia has enacted a law based on the UNCITRAL Model Law on Electronic Commerce (1996),²² and as such, electronic communications under rule (2) would seem to be valid at Australian law by operation of Article 5 UMLEC.²³ Where electronic communications are used in an ACICA proceeding, dispatch and receipt of messages will be governed by Article 15 UMLEC, with the general rule being that an electronic message will be received when it enters the information system of the addressee. With respect to hard copy, Australia is in the process of acceding to the *Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters* (1965),²⁴ and if the assistance of the courts is sought by the parties or the tribunal, then this Convention may be applicable to the service of the court documents that follow (e.g. subpoenas, injunctions) depending upon the location of the Respondents and the witnesses.

3.2 For the purposes of calculating a period of time under the Rules, such period shall begin to run on the day following the day when a notice, notification, proposal or other communication is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

ACICA uses a ‘*from service, plus one day*’ rule for calculation of time limits. This approach is very common in international arbitration. This Article of the ACICA Rules is based on Article 2(2) Swiss Rules, and closely corresponds to Article 3(4) ICC Rules and Article 4.6 LCIA Rules. Article 3(2) ACICA Rules is also the same as Article 4(e) Arbitration Rules of the World Intellectual Property Organisation (WIPO). As such, the jurisprudence of these institutions should be persuasive when an ACICA tribunal interprets time limits and periods under Article 3.2 ACICA Rules.

3.3 Unless the parties agree otherwise in writing any reference to time shall be deemed to be a reference to the time at the seat of the arbitration.

Where the seat of the ACICA tribunal is Sydney, Australian Eastern Standard time will be the presumed time zone of the tribunal. Depending on daylight saving (November to March), Sydney is three hours ahead of Singapore time; two hours ahead of Hong Kong, seven hours ahead of Paris; eight hours ahead of London; and twelve hours ahead of New York.

²¹ Article 4.1 LCIA Rules requires that all communication or notice is to be delivered by “registered post or courier service or transmitted by facsimile, telex, email or any other means of telecommunication that provide a record of transmission.”

²² Hereinafter referred to as ‘UMLEC’, enacted in Australia as the *Electronic Transactions Act 1999* (Cth).

²³ Article 5 UMLEC provides: “Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.”

²⁴ Hereinafter referred to as the ‘Hague Convention on Service Abroad’.

3.4 Any period of time imposed by these Rules or ACICA in respect of the Notice of Arbitration, the Answer to Notice of Arbitration and the composition of the Arbitral Tribunal may be extended by ACICA.

This Article gives ACICA discretionary power (*'may'*) to extend time limits for the filing of Notices and Answers to Notices of Arbitration, as well as correspondence on the composition of the tribunal. This Article of the ACICA Rules is similar to Article 2(3) Swiss Rules (lacking only the Swiss reference to *'if the circumstances so justify'*). A similar provision is found in Article 4.7 LCIA Rules. However, under the LCIA Rules the tribunal has the power to extend the time period prescribed even when the time period has expired. There is a similar power available under Article 32(2) of the ICC Rules, although the ICC power is limited to extension of periods which have been previously shortened by agreement of the parties. The ACICA Rules do not limit the extension power to time periods agreed or not yet expired. Accordingly, there is nothing on the face of Article 3.4 ACICA Rules to prevent an ACICA tribunal from extending a deadline that has come and gone. However, fairness would dictate that the applicant for the extension of time would need to show good reasons for their failure to act within the specified time frame.

It is notable that under the ACICA Rules, the parties are not given the *express* power to deprive ACICA of its discretion to extend time limits under Article 3.4. The ACICA discretion is also broad in that it applies to time limits imposed by *'these Rules or ACICA'* (emphasis added), meaning ACICA can extend periods it has already extended under Article 3.4 ACICA Rules. Whilst fairness may require an extension of time, efficiency would normally go against any more than one extension, with the result that the power to extend again will rarely be exercised by ACICA.

The power to extend time limits for correspondence on matters relating to the *'composition of the arbitral tribunal'* would seem to cover the appointment of arbitrators, as well as the filings of notices and submissions on challenges. In this sense, Article 3.4 ACICA Rules limits the power of the parties to agree on a challenge procedure under Article 13(1) Model Law. When the ACICA Rules are used in a Model Law seat, the parties will still be able to agree on *who* will decide the challenge to arbitrators, as well as *how* the challenge will be heard, but questions of time will be for ACICA alone. This means that ACICA may extend the 15 day time limit for challenge set by Article 14.1 ACICA Rules. When extensions are granted under this rule, the 45 day maximum contemplated in Article 26 ACICA Rules should inform the determination.

ARTICLE 4 – Notice of Arbitration

4.1 The party initiating recourse to arbitration (hereinafter called the "Claimant") shall give to ACICA a Notice of Arbitration in two copies or such additional number as ACICA directs. The Claimant shall at the same time pay ACICA's registration fee as specified in Appendix A.

This Article of the ACICA Rules is very similar to Article 3(1) Swiss Rules, and is effectively the same as Article 4(4) ICC Rules. The ACICA process of initiating the arbitration is different to the process used by other arbitral institutions in that the Claimant does not send the Notice of Arbitration to the Respondent, but rather only to ACICA. Notices of Arbitration may be filed at any ACICA registry, including the Western Australian Institute

of Dispute Management (**WAIDM**), and the Melbourne office of the Centre. The office addresses and contact details of ACICA registries are listed in Annexure B to the Rules.

4.2 Subject to Article 4.5, the arbitral proceedings shall be deemed to commence on the date on which the Notice of Arbitration or the registration fee is received by ACICA, whichever is the later.

This Article is substantially the same as Article 3(2) Swiss Rules, and has an equivalent at Article 4(2) ICC Rules. A fees-based approach is taken in certain other rules, such as the LCIA Rules.²⁵ By using the ACICA Rules, the parties opt out of the Model Law Article 21 commencement date rule.²⁶ The key point is that under the ACICA Rules the arbitration starts when the Notice of Arbitration is received by the *registry*, not the Respondent. The LCIA and ICC Rules take the same approach: the purpose is to avoid the situation (possible under the UNCITRAL Arbitration Rules) where the Respondent avoids service or cannot be found, and the proceedings cannot be formally commenced.

The question of when a proceeding commenced is often an important one: it can have both substantive and procedural implications. It may bear on the law of the merits under Article 34 (if, for example, the governing law chosen does not say ‘as presently in force’ and there are amendments or changes to the laws chosen). Procedurally, changes to the *lex arbitri* may or may not affect the tribunal depending upon the start date of the arbitration. The procedural rights of the parties will be affected by commencement of arbitration. Limitation periods for actions in state courts often stop running while the arbitration is on foot, and this is the case at Australian law. Whether or not a party has complied with a time limit set by *the contract* is another question, and the start date of the proceedings will be important in this context as well.²⁷ Finally, the start date will be relevant to the determination of costs (under Articles 39 and 41 ACICA Rules) and interest on the award.²⁸

The Article 4.2 ACICA Rules ‘deemed start date’ rule is subject to ACICA being satisfied that (1) there are enough copies of the Notice and (2) the Notice is not incomplete. With respect to the first consideration, the ACICA Rules do not take the number of copies rule any further. Under the Swiss Rules, the number of copies required will be determined by the number of parties and the number of arbitrators: each arbitrator must have at least one copy (preferably at least one original of the Notice) and the relevant Chamber must have one copy also; each party must have one original.²⁹ Under Article 1.2 LCIA Rules the date on which the Registrar received the Request for arbitration shall be treated as the date the arbitration has commenced for all purposes. The Request should be submitted to the Registrar in two copies where a sole arbitrator should be appointed, or, in four copies if the parties have

²⁵ Article 1.1(f) LCIA Rules requires that a valid Request to commence arbitration ‘shall’ be accompanied by the registration fee prescribed in the Schedule of Costs. Without such a fee the Request shall be treated as not having been received by the Registrar and for all purposes the arbitration as not having been commenced.

²⁶ Article 21 Model Law provides: ‘Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent’.

²⁷ For example, the FIDIC ‘Red Book’ General Conditions of Subcontract for Works of Civil Engineering Construction (1987) sets a contractual time limit for the commencement of claims. Time limits are especially common in maritime and commodity arbitration, and the parties must take care that they do not become engaged in a ‘battle of the forms’ on the issue of time limits.

²⁸ At English law, for example, interest is accrued on the award from the date proceedings are commenced unless agreed otherwise. The position is similar under German law (see BGB s.291). The Model Law does not deal expressly with this issue.

²⁹ Swiss Rules, Article 3(3).

agreed or the Claimant considers that three arbitrators should be appointed. It can be presumed from the selective adoption of Article 3 Swiss Rules that the drafters of the ACICA Rules intended similar rules for copies. With respect to the second consideration, the elements of a complete Notice are derived from Article 4.3 ACICA Rules.

4.3 The Notice of Arbitration shall include the following:

- (a) a demand that the dispute be referred to arbitration;**
- (b) the names, postal addresses, telephone and facsimile numbers and email addresses (if any) of the parties and their counsel;**
- (c) a copy of the arbitration clause or the separate arbitration agreement that is invoked;**
- (d) a reference to the contract out of, relating to or in connection with which the dispute arises;**
- (e) the general nature of the claim and an indication of the amount involved, if any;**
- (f) the relief or remedy sought; and**
- (g) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.**

The ‘shall’-type content requirements established by this Article of the ACICA Rules must be complied with or else the Notice of Arbitration will be incomplete for the purposes of Articles 4.2 and 4.5.³⁰ Under the ACICA Rules, the elements of a valid and complete Notice of Arbitration are the same as under Article 3(3) UNCITRAL Arbitration Rules. They also mirror Article 3(3) Swiss Rules, minus sub-article (h) (payment of registration fee). Article 4(3)(f) ACICA Rules is represented in Article 23(1) Model Law. Like the Model Law, the LCIA Rules³¹ and the ICC Rules,³² the ACICA Rules require that the Notice of Arbitration include a summary of the facts giving rise to the claim. This requirement is derived from the expression ‘general nature of the claim’ at Article 4(3)(e) ACICA Rules.

4.4 The Notice of Arbitration may also include:

- (a) the Claimant's proposal for the appointment of a sole arbitrator in accordance with Article 9.1;**
- (b) the notification of the appointment of an arbitrator referred to in Article 10.1; and**
- (c) the Statement of Claim referred to in Article 21.**

This provision of the ACICA Rules is *mutatis mutandis* the same as Article 3(4) UNCITRAL Arbitration Rules and Article 3(4) Swiss Rules. The word ‘may’ has the effect of rendering these elements optional, meaning that a failure to include any of the things listed under Article 4.4 will not render the Notice incomplete or defective for the purposes of Article 4.5 ACICA Rules. The most important optional element is the Statement of Claim (Article 4.4(c)). Under Article 4.5, ACICA has discretion to request additional information from the Claimant, and may defer commencement of the arbitration until the requested additional materials are provided.

³⁰ Similar requirements are found under Article 1.1(a)-(e) LCIA Rules.

³¹ Article 1.1(c) LCIA Rules requires “a brief statement describing the nature and circumstances of the dispute, and specifying the claims advanced by the Claimant against another party to the arbitration” (‘the Respondent’).

³² ICC Rules, Article 4(3)(b).

4.5 If the Notice of Arbitration is incomplete or is not submitted in the required number ACICA may request the Claimant to remedy the defect within an appropriate period of time and may delay the date of commencement of the arbitral proceedings until such defect is remedied.

This Article draws on the first half of Article 3(5) Swiss Rules,³³ and is similar to Article 4(4) ICC Rules.³⁴ It confers on ACICA the discretion (derived from the word ‘may’) to extend the time limit for filing of the Notice of Arbitration, so long as a defective Notice has been filed in time. Some contracts, such as the FIDIC Red Book (1987), set time limits for bringing claims, and the Article 4.5 ACICA Rules power may conflict with such a limitation period. If a time limit is set in the contract, and in the same contract the ACICA Rules are chosen in the dispute resolution clause, then the selection of the ACICA Rules will override the contractual time limit term. The discretionary power to set a period of time for remedy of the defect in the Notice of Arbitration is subject to Article 3.4 ACICA Rules, meaning ACICA can extend the period of time it sets for the Claimant to correct the Notice of Arbitration. If the contract does set a time limit for claims, then ACICA will be guided by this time limit when it determines what is ‘appropriate’ as a period for re-submission of the Notice. The time limit will also inform the exercise of the discretionary power to grant an extension of time under Article 3.4 ACICA Rules.

4.6 Subject to Article 4.5, upon receipt of the Notice of Arbitration ACICA shall communicate the Notice of Arbitration to the other party referred to in Article 4.3(b).

This Article of the ACICA Rules is similar to Article 4(5) ICC Rules. Unlike Article 3(6) Swiss Rules, it does not use the words ‘without delay’, and does not create a ‘manifest lack of jurisdiction’ exception to the requirement that the Respondent be served. If, however, the agreement to arbitrate (provided to ACICA as part of the Notice of Arbitration in accordance with 4.3(c)) clearly does not designate ACICA or the ACICA Rules, then ACICA will decline to communicate the Notice to the Respondent. The word ‘communicate’ contemplates digital forms of service upon the Respondent, as does the reference to ‘email addresses’ in Article 4.3(b) ACICA Rules. In Australia, digital service by ACICA is governed by UMLEC.

ARTICLE 5 - Answer to Notice of Arbitration

5.1 Within 30 days after receipt of the Notice of Arbitration from ACICA each party against whom the Claimant seeks relief ("Respondent" or "Respondents") shall submit an Answer to Notice of Arbitration to ACICA. It shall be submitted in two copies or such additional number as ACICA directs.

This Article draws on the first paragraph of Article 3(7) Swiss Rules. The thirty day time limit for the Answer is common to the ICC Rules³⁵ and the LCIA Rules.³⁶ Significantly, the UNCITRAL Arbitration Rules do not contain rules for the Answer to the Notice of

³³ The Article 3(3) Swiss Rules power to require translation of the Notice of Arbitration is omitted, as the ACICA Rules presume that English will be the language of the arbitration.

³⁴ ICC tribunals tend to treat non-fulfilment of a formal requirement for the Notice as no bar to the commencement of the arbitration: see Final Award ICC Case No.6784 (1990) ICC Bulletin 53 (1997). This jurisprudence informs the discretionary power at Article 4.5 ACICA Rules, in that formal defects are considered *de minimis* so long as they are curable.

³⁵ ICC Rules, Article 5(1).

³⁶ LCIA Rules, Article 2.1.

Arbitration. The thirty day time limit is, however, common, as are short extensions. In a Model Law seat, the Article 18 ‘equal treatment’ provision (which is mandatory) will function to require that any extension of time given to the Claimant in the filing of the Notice of Arbitration be taken into account when the Respondent’s compliance with the thirty day time limit is considered. It may be that an extension of time is required as a matter of fairness, and ACICA has the express discretionary power to do this under Article 3.4 ACICA Rules. The express reference to *Respondents* covers multi-party proceedings, and extends the Answer requirements to all parties named in the Claimant’s Notice of Arbitration.

If the Respondent does not file an Answer, then ACICA may constitute a tribunal in their absence. The default appearance procedure under the ACICA Rules is substantially the same as under the Swiss Rules: if a party has been duly notified and fails to appear without showing good cause, the tribunal may proceed in their absence. In such circumstances, the absent party’s arbitrator(s) will be appointed by ACICA in accordance with the procedure specified by Articles 9, 10 or 11 ACICA Rules (whichever may be applicable). The Claimant must still prove their case, and so long as they do, the tribunal may render an award against the absent party (or parties) based upon the evidence. Natural justice is of paramount importance in arbitration, and default proceedings are hazardous in this regard. The tribunal must satisfy itself that notice has been effected (or is deemed effected under Article 3.1), and that compliance with *audi alterem partem* (the right to be heard) is impossible or has been waived by the absent party.

5.2 The Answer to Notice of Arbitration shall include the following:

- (a) the names, postal addresses, telephone and facsimile numbers and email addresses (if any) of the Respondent and its counsel;**
- (b) any plea that an Arbitral Tribunal constituted under these Rules does not have jurisdiction;**
- (c) the Respondent's comments on the particulars set forth in the Notice of Arbitration;**
- (d) the Respondent's answer to the relief or remedy sought in the Notice of Arbitration;**
- and**
- (e) the Respondent's proposal as to the number of arbitrators if the parties have not previously agreed thereon.**

These are the requirements of an Answer to the Notice of Arbitration under the ACICA Rules. They are substantially the same as under Article 3(7) Swiss Rules. They are similar to Article 5(1) ICC Rules, the principal difference being that the ACICA Rules do not *require* that the Respondent comment on the applicable law, seat or language of the arbitration. The LCIA Rules take a similar, but less thorough, approach to the Answer. Articles 2.1(a)-(e) LCIA Rules set out the requirements of the Respondent’s written response to the Request. These are: (a) confirmation or denial of all or part of the claims advanced by the Claimant, (b) a brief statement describing the nature and circumstance of any counter-claims advanced by the Respondent, and (d) a confirmation to the Registrar that copies of the Response have been served on all other parties to the arbitration. Article 2.1(c) LCIA Rules is therefore different to Article 5.2 ACICA Rules, but is directed at achieving a preliminary ventilation of the Respondent’s position on key issues.³⁷

³⁷ Article 2.1(c) LCIA Rules requires the Respondent to comment on the statement made by the Claimant in its Request, as required under Article 1(d) LCIA Rules, on matters such as the seat or language(s) of the arbitration, or the number of arbitrators, or their qualifications or identities.

5.3 The Answer to Notice of Arbitration may also include:

- (a) the Respondent's proposal for the appointment of a sole arbitrator in accordance with Article 9.1;**
- (b) the notification of the appointment of an arbitrator referred to in Article 10.1;**
- (c) the Statement of Defence referred to in Article 22; and**
- (d) any counterclaim or claim for the purpose of a set-off, arising out of, relating to or in connection with the contract. (The provisions of Article 4.3 will apply to any such counterclaim or set-off.)**

The first three optional elements of Article 5.3 ACICA Rules are drawn from Article 3(4) Swiss Rules. The fourth optional element (set-off or counterclaim) is an approximation of Article 3(9) Swiss Rules. The Swiss Rules provide that “any counterclaim or set-off defence *shall in principle* be raised with the Respondent’s Answer”.³⁸ In Swiss Rules arbitrations, questions have arisen as to whether this provision creates a binding rule, or is simply a statement of best practice.³⁹ The somewhat awkward language of Article 3(9) Swiss Rules was not adopted by ACICA. Instead, the inclusion of a counterclaim or set-off is *expressly* optional under the ACICA Rules. Failure does not amount to waiver: if the option to include a counterclaim or set-off is not taken in the Answer, Article 22(3) ACICA Rules gives the tribunal discretion to allow the Respondent to bring such claims later in the proceedings if the tribunal is satisfied that delay in bringing the counterclaim or set-off was justified in the circumstances of the case. Best practice is to put the Claimant on notice of any possible counterclaim or set-off as soon as possible, preferably in the Answer.

The provisions of Article 4.3 ACICA Rules apply to the counterclaim or set-off, meaning the counterclaim or set-off must be expressly submitted to arbitration along with the Claimant’s other pleas, the type of relief sought must be clearly identified, and the amount must be stated. The parties should be aware that the inclusion of a counterclaim or set-off in the Answer may have costs implications. Under Appendix A (Article 2.2(a) ACICA Rules), if there is a counterclaim or set-off, then the sum in dispute will increase by the amount of the counterclaim or set-off. This may take the total amount in dispute into a higher Administration Fee bracket under Appendix A to the ACICA Rules.

5.4 ACICA shall provide a copy of the Answer to Notice of Arbitration and of any exhibits included therewith to the Claimant.

This Article is the same as Article 3(11) Swiss Rules, and Article 4(5) ICC Rules. The word ‘exhibits’ refers to *evidence*, and as such the understanding of that term under Article 27.2 ACICA Rules may be relevant (and with it, the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (**IBA Rules**)). The proper exchange of pleadings and evidence is central to procedural fairness, and a failure by ACICA to provide the Answer and exhibits to the Claimant will be grounds for extensions of time and, if the proceedings are well advanced, an adjournment of the relevant hearing. If, despite breaches of notice rules, the tribunal proceeds to render an award, then the aggrieved party may apply for *vacatur* in the courts of the seat, or resist enforcement abroad under Article V of the New York Convention.

³⁸ Swiss Rules, Article 3(9) (emphasis added).

³⁹ The problem with Article 3(9) Swiss Rules is that the word ‘*shall*’ prefaces the expression ‘in principle’.

5.5 Once the registration fee has been paid and all arbitrators have been confirmed, ACICA shall transmit the file to the Arbitral Tribunal.

This Article is critical to the chronology of the proceedings, as it introduces the Tribunal to the merits. Article 5.5 ACICA Rules creates two conditions precedent to the transmission of the matter to the arbitrators: (1) payment of the Registration Fee (which is to be distinguished from the Administration Fee), and (2) confirmation of all the arbitrators appointed. These conditions are the same as under Article 3(12) Swiss Rules and Article 13 ICC Rules. Like the ICC Rules⁴⁰ (and the LCIA Rules⁴¹), but in much less detail, the ACICA Rules include a ‘confirmation’ system for arbitrators. ACICA will only confirm the appointment of arbitrators who possess the capacity for independent and impartial judgment, and the expertise required to render a reasoned award. Although the ACICA Rules do not contain provisions which expressly identify relevant considerations for confirmation, the relevance of impartiality, independence and expertise can be distilled from the language of other rules (such as the challenge and appointment provisions of the ACICA Rules). The confirmation jurisprudence of the ICC and the LCIA also supports the relevance of these matters. In practice, international arbitral institutions rarely refuse confirmation,⁴² and it will only be where the proposed arbitrator manifestly lacks these essential qualities that the will of their appointing party will be defeated by a refusal to confirm.

ARTICLE 6 - Representation and Assistance

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party and ACICA.

Article 6 ACICA Rules is similar to Article 4 UNCITRAL Arbitration Rules, and is the same as Article 3(13) Swiss Rules, save that the ACICA version does not distinguish between notice of persons assisting and persons representing a party. Article 21(4) ICC Rules is also similar to Article 6 ACICA Rules, although the ICC Rules use the word ‘adviser’. The LCIA Rules are also similar, but unlike the ACICA Rules the LCIA Rules expressly permit lay representation.⁴³ The power to appoint non-legally qualified representatives is, instead, implied in the ACICA Rules by virtue of their silence on the issue of legal qualifications.

In arbitral proceedings subject to Australian law, the parties have unrestricted choice in who represents them at the arbitration.⁴⁴ Section 29(1) IAA provides that a party may represent himself at oral hearings before the tribunal. A party may also be represented by a legal practitioner from any jurisdiction or by any other person they may choose.⁴⁵ In practice, in ACICA Rules arbitration, the parties usually appear by legal counsel. In choice of counsel, the parties are equally free: under the Model Law Plus provisions of the IAA, foreign lawyers may appear before international arbitral tribunals seated in Australia.⁴⁶ It is also notable that,

⁴⁰ ICC Rules, Article 7(2).

⁴¹ LCIA Rules, Article 7(2).

⁴² For example, the ICC confirmed 95% of arbitrators nominated in 2004; see *2004 Statistical Report* 16(1) ICC Ct. Bull 8 (2005).

⁴³ Article 18.1 of the LCIA Rules provides that, “Any party may be represented by legal practitioners or any other representatives”; Article 18.2 obliges the representatives to furnish the tribunal with proofs of authority.

⁴⁴ IAA, s.29(1).

⁴⁵ IAA, s.29(1), s.29(2).

⁴⁶ IAA, s.29(3).

unlike other rules (such as the LCIA Rules), the ACICA Rules do not expressly require powers of attorney be provided to the tribunal at the commencement of proceedings. Rather, the obligation to provide powers of attorney is implied in Article 6 ACICA Rules. Best practice is for all representatives to provide letters of appointment at the first sitting of the tribunal, and for any changes in representation to be promptly brought to the attention of ACICA throughout the proceedings.

ARTICLE 7 - ACICA Facilities and Assistance

ACICA shall, at the request of the Arbitral Tribunal or either party, make available, or arrange for, such facilities and assistance for the conduct of the arbitral proceedings as may be required, including suitable accommodation for sittings of the Arbitral Tribunal, secretarial assistance and interpretation facilities.

This Article establishes the institutional obligations of ACICA *vis-à-vis* the parties and the tribunal; it is similar to Rule 4 Kuala Lumpur Regional Centre for Arbitration (KLRCA) Arbitration Rules. The key feature is that ACICA's obligation to provide assistance is conditional upon the request of one or more parties.

SECTION II: COMPOSITION OF THE ARBITRAL TRIBUNAL

ARTICLE 8 - Number of Arbitrators

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the Respondent of the Notice of Arbitration the parties cannot agree, ACICA shall determine the number of arbitrators taking into account all relevant circumstances.

Under Article 10(1) Model Law, the parties are free to determine the number of arbitrators; there is no 'odd number' principle in the Model Law, but in the absence of agreement the number of arbitrators will be three.⁴⁷ The ACICA Rules do not deprive the parties of their freedom under Article 10(1) Model Law: the ACICA Rules simply give the parties a limited time to come to an agreement. The power given to ACICA under Article 8 is similar to the power conferred on the Chambers of Commerce and Industry under Article 6(1) Swiss Rules. The 15 day time limit is a feature of the ICC Rules,⁴⁸ and the UNCITRAL Arbitration Rules.⁴⁹ In line with Article 3.4 ACICA Rules, ACICA may extend the 15 day time limit in order for consensus on the numbers of arbitrators to be achieved.

Under Article 8 ACICA Rules, there is no presumption in favour of a sole arbitrator. The dominant purpose of Article 8 is to allow the decision as to the number of arbitrators to be deferred to a time when the scope of the dispute can be better assessed, rather than stipulating the number of arbitrators in the arbitration agreement. The number of arbitrators is firstly a matter for the parties, and secondly a matter for ACICA. The reference to 'one or three' implies an odd number rule, and this is consistent with the rules of leading arbitral institutions.⁵⁰ But Article 8 does not prevent ACICA constituting a tribunal with more than

⁴⁷ Model Law, Article 10(2).

⁴⁸ ICC Rules, Article 8(1).

⁴⁹ UNCITRAL Arbitration Rules, Article 5.

⁵⁰ For example, Article 5.4 LCIA Rules provides that the LCIA Court shall appoint the arbitrators as soon as practicable after the receipt by the Registrar of the Response or after the expiration of 30 days following service

three arbitrators: if the ‘relevant circumstances’ are those of a high value, multi-party dispute, then a five member tribunal may be appropriate. Although five member tribunals are rare, they are sometimes used in disputes involving state entities, such as matters before the Iran-United States Claims Tribunal (**IUSCT**).

Very few institutional rules elucidate what must be considered in determining the number of arbitrators for a dispute. Most institutional rules stop at “taking into account all relevant circumstances”⁵¹ and the ACICA Rules are no different. In practice, the ‘relevant circumstances’ for the determination of the number of arbitrators under Article 8 ACICA Rules include:

- (1) the complexity of the dispute;
- (2) the amount in dispute;
- (3) the number of parties;
- (4) the preferences of the parties; and
- (5) the status of the parties (private or sovereign).⁵²

Other matters, such as ‘the nature of the transaction’ and the nationalities of the parties, may also be relevant.⁵³ As a rule of thumb, disputes over less than AUD\$1 million will usually be handled by a sole arbitrator, disputes over AUD\$10 million warrant three arbitrators. Complex technical disputes, such as engineering and technology matters, often justify the appointment of an expert arbitrator, and as such three member tribunals are recommended. When a state (or state entity) is involved, a three member tribunal will be similarly justified, in order to account properly for the political and macro-economic policy considerations that bear on the dispute. ICSID tribunals, for example, are nearly always made up of three arbitrators.⁵⁴

ARTICLE 9 - Appointment of a Sole Arbitrator

9.1 If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator.

This Rule draws on Article 6(1) UNCITRAL Arbitration Rules, save that the UNCITRAL Arbitration Rules alternative of nominating an appointing authority is omitted in the ACICA version. The proposal process under Article 9.1 ACICA Rules usually takes the form of an exchange of letters in which the candidates are eliminated by objection. When the parties encounter difficulty early, they may request a list of suitable persons from ACICA. Much like under the ICC Rules, ACICA’s power to provide a list is arguably implied in the Article 9.2 ACICA Rules default appointment power. If the list procedure is used, then custom suggests that something like the process outlined in Article 6(3) UNCITRAL Arbitration Rules will be followed: lists of names will be circulated amongst the parties, and the parties will strike

of the Request. The LCIA Rules provide that a sole arbitrator shall be appointed unless the parties have agreed otherwise in writing, or unless the LCIA Court determines, in view of all circumstances of the case, that a three member tribunal is appropriate.

⁵¹ See, for example, Article 6(1), Swiss Rules; Article 5.4, LCIA Rules.

⁵² These factors are recognised in ICC jurisprudence, and are listed under Article 12(2) of the Arbitration Rules of the Netherlands Arbitration Institute.

⁵³ The nature of the transaction and the nationality of the parties are relevant considerations under Article 5.5, LCIA Rules.

⁵⁴ ICSID Arbitration Rules, Rule 3.

through the names to which they object and number the rest in accordance with their preferences.

9.2 If within 30 days after receipt by a party of a proposal made in accordance with Article 9.1 the parties have not reached agreement on the choice of a sole arbitrator and provided written evidence of their agreement to ACICA, the sole arbitrator shall be appointed by ACICA.

This Article of the ACICA Rules is similar to the regime of Article 7 Swiss Rules. The thirty day time limit for appointment by agreement is a feature of the Swiss Rules⁵⁵ and the UNCITRAL Arbitration Rules.⁵⁶ Under Article 9.2 ACICA Rules, ACICA effectively has a reserve power to appoint the sole arbitrator, and it is only where, within thirty days, the parties both agree *and* provide written evidence of their agreement that ACICA will refrain from exercising its appointment power. This means that, even if the parties have reached an agreement, if they fail to provide ACICA with evidence of their agreement, *strictu sensu* ACICA may appoint a different sole arbitrator. In practice, however, if the parties have agreed but have not provided written evidence of their agreement, ACICA will invoke its Article 3.4 power to extend the thirty day time limit and give notice to the parties that evidence of their appointment is required forthwith.

9.3 In making the appointment, ACICA shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Although it does use particular language which suggests relation to Article 9.2 ACICA Rules alone (*‘the appointment’*), this Article applies to *any* appointment function performed by ACICA, including appointments of arbitrators to three member panels under Article 10.2. At the very least, the matters which ACICA must take into account when appointing an arbitrator are, in order of importance:

- (1) the candidate’s impartiality and independence (*vis-à-vis* the parties and the subject matter of the dispute); and
- (2) the candidate’s nationality (and the nationalities or places of domicile of the parties).

The ACICA Rules draw on Article 12 Model Law, which requires that arbitrators be impartial and independent. This is the preference of most national law, but some states use one or the other: the English *Arbitration Act* 1996, for example, speaks only of ‘impartiality’;⁵⁷ the French *New Code of Civil Procedure*, on the other hand, refers only to ‘independence’.⁵⁸ The ACICA wording ‘as well’ suggests that nationality is a subordinate consideration to impartiality and independence. This ranking is supported by the fact that impartiality and independence are the *only* considerations expressly outlined under Article 10.2 ACICA Rules.

⁵⁵ Swiss Rules, Article 7.

⁵⁶ UNCITRAL Arbitration Rules, Article 6(2).

⁵⁷ *English Arbitration Act* 1996. s.24(a) and s.33(a).

⁵⁸ NCCP, Article 341.

Nationality is an express consideration for the appointment of arbitrators under Article 9(1) ICC Rules and Article 5.5 LCIA Rules. Additionally, Article 6(1) LCIA Rules provides that where the parties to the dispute are of different nationalities, a sole arbitrator or chairman “shall not” have the same nationality as any party, “unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise.” The LCIA Rules further define the concept of nationality as including that of controlling shareholders or interests.⁵⁹ Thus, a sole arbitrator or chairperson may not be of the same nationality as the controlling shareholder of a company that is party to the dispute, regardless of the company’s nationality. Although Australian jurisprudence seems to prefer the notion of an arbitrator who does not ‘share a passport’ with either party,⁶⁰ there is no ‘common nationality prohibition’ in the Model Law or the Model Law Plus provisions of the IAA.⁶¹ Like the Model Law (and the UNCITRAL Arbitration Rules), the ACICA nationality rule is ‘soft’: ACICA is bound to *consider* nationality but there is no flat *prohibition* against the appointment of an arbitrator who shares the nationality of a party. However, in practice, in general commercial disputes it will only be where other factors – namely complexity and expertise in the subject matter of the dispute – significantly outweigh the undesirability of common nationality that a sole arbitrator from the same country as a party will be appointed by ACICA. The appearance of impartiality is, after all, paramount.

ACICA treats investor-state arbitration as a special case in which the soft law of Article 9.3 ‘hardens’: in ACICA Rules proceedings between investors and host states subject to the *Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965),⁶² a common nationality prohibition will be observed in the appointment phase. This is due to the operation of Article 38 of the Washington Convention. A similar custom is usually observed in other forms of investor-state arbitration, where the fundamental expectations of the parties are that their judges will be ‘neutral’ nationals. It can fairly be assumed that ACICA will take into account these posited laws and customs when it appoints an arbitrator in a case involving a host state that is not subject to the Washington Convention. Following Article 6.2 LCIA Rules, ACICA considers the nationality of a corporate entity to be the same as the nationality of its controlling shareholder. In the case of arbitrators from European countries, parties should note that international arbitral rules often treat citizens of the European Union (EU) as nationals of their respective member states, rather than as nationals of the EU.⁶³ This means that there will usually be no basis for a nationality challenge where a party from an EU member state appoints an arbitrator from another EU state.

The considerations identified at Article 9.3 ACICA Rules are binding on ACICA: failure to consider these matters will invalidate the appointment, and entitle any aggrieved party to object to the arbitrator before the commencement of the hearing. In an ACICA arbitration seated in Australia, the Model Law provisions on challenge and replacement of arbitrators

⁵⁹ LCIA Rules, Article 6.2.

⁶⁰ See for example *Westrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894, per Barrett J (*in obiter*) where His Honour commented on the differences between domestic arbitration and international arbitration in New South Wales.

⁶¹ Article 11(1) of the Model Law states expressly that, “No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties”; Article 11(5) Model Law requires that the appointing authority “take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties”.

⁶² The Washington Convention was submitted for signature and ratification on 18 March 1965. The Convention entered into force on 14 October 1966.

⁶³ See, for example, LCIA Rules, Article 6.3.

(Articles 12 and 13) will be relevant at this point. The challenge must first be made to ACICA, and only when the ACICA challenge process has been completed will the challenging party have recourse to Australian courts.

ARTICLE 10 - Appointment of Three Arbitrators

10.1 If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the Chairperson of the Tribunal.

This Article is the same as Article 7(1) UNCITRAL Arbitration Rules, save that the title ‘Chairperson’ is used instead of ‘President’. In accordance with Articles 4.4(b) and 5.3(b) ACICA Rules, the parties *may* appoint their arbitrators in the Notice and Answer, but they are not bound to do so. If they do not, then the appointments must be made in subsequent correspondence, and this is what Article 10.1 contemplates.

The ACICA party-appointment model is direct and unsupervised. Unlike the arbitration rules of the ICC and the LCIA,⁶⁴ which include detailed rules for the confirmation of arbitrators, the ACICA Rules do not include a true confirmation system: the party appointments stand, and ACICA has no power to prevent a party’s nominee from entering onto the reference unless there is a manifest lack of the capacity for impartial and independent evaluation of the claim. In this regard, the ACICA Rules (and the UNCITRAL Arbitration Rules) are towards the middle of the control spectrum of institutional control (the ICC and LCIA Rules are at the maximum control end). The principal outcome of this is that any objections to arbitrators must be made in a separate procedure, rather than during the appointment phase proper.

Once the parties have appointed their arbitrators, then appointment of the third arbitrator (the ‘Chairperson’) becomes a matter for the two member tribunal. A similar approach is taken under the arbitration rules of the German Arbitration Institute (**DIS**) and the Geneva Rules.⁶⁵ As under these rules, under the ACICA Rules, the parties have no *direct* influence in the appointment of the Chairperson. However, the parties may still have some *indirect* influence over the selection of a Chairperson by virtue of their influence over their appointed arbitrators. It is important to note that, unlike American and Swiss law,⁶⁶ Australian law does not distinguish between the obligations of independence owed by party appointed arbitrators and ‘neutral’ arbitrators: the American ‘*Sunkist* distinction’⁶⁷ is not a part of ACICA or Australian jurisprudence. Whilst it is customary for the arbitrators to consult the parties that appointed them, both arbitrators are free in their positions. They must be – and *appear* to be – independent of the party that appointed them at all stages of the proceedings. This means that any indirect influence the parties may have over the appointment of the Chairperson is limited by the requirement that the appearance of impartiality and independence be maintained.

⁶⁴ Under Article 5.5 LCIA Rules, the LCIA Court alone is empowered to appoint arbitrators. In selecting arbitrators the LCIA Court considers the particular method or criteria agreed by the parties in writing, the nature of the transaction, the circumstances of the dispute, the nationality, location and languages of the parties and the number of parties.

⁶⁵ DIS Rules, Article 12(2); Geneva Rules, Article 12(2).

⁶⁶ See BG decision 9 February 1998 [1998] Bull ASA 634; BG decision 30 June 1994 [1997] Bull ASA 99.

⁶⁷ See *Sunkist Softdrinks v Sunkist Growers*, 10 F 3d 753 (11th Cir. 93).

In international arbitration, the function of the Chairperson is quite different to the function of the party-appointee. The Chairperson has been described as a ‘steward’ of the tribunal and the proceedings.⁶⁸ Their duties include presiding over the tribunal generally, conducting and maintaining the order of hearings, overseeing the other arbitrators during their deliberations, and drafting the tribunal’s orders and awards. Given the significance of the Chairperson’s role, parties should take great care to select an experienced arbitrator who has the combination of ‘management skills and diplomacy’⁶⁹ necessary to execute his or her office.

10.2 If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request ACICA to appoint the second arbitrator. In making the appointment, ACICA shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

This Article is similar to Article 11(5) Model Law; the second sentence of Article 10.2 ACICA Rules is drawn from Article 6(4) UNCITRAL Arbitration Rules. As with all of the time limits set in Section II of the ACICA Rules, the thirty day time limit for appointment may be extended by ACICA in the exercise of its Article 3.4 power.

ACICA’s power to appoint is only activated where (1) thirty days have lapsed since notice was given of the appointment of the first arbitrator, and (2) the other party is in actual or deemed receipt of the notice of appointment, and (3) the other party has not given notice of its appointment. These are compound elements, and all three must be satisfied before ACICA has the power to appoint. With respect to the second element, actual or deemed receipt is governed by Article 3.1 ACICA Rules, and UMLEC. The third element caters for two possible situations, the first being where the Respondent has appointed an arbitrator but has not given notice to the other side; the second being where the Respondent has neither appointed an arbitrator nor given notice. Both situations will satisfy the third element of Article 10.2, and ACICA will have the power to appoint the relevant party’s arbitrator.

When ACICA is seized of jurisdiction to appoint an arbitrator under Article 10.2, ACICA is bound to rank impartiality and independence above all other considerations in the selection process. This does not mean, however, that ACICA may not take into account other matters - nationality *may* be relevant, but this is a matter for ACICA. Other considerations which may be taken into account in the appointment of an arbitrator under Article 10.2 include the languages spoken by the parties, the nature of the dispute, and whether the matter is technical in the sense that it may require non-legal expertise.

10.3 If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the Chairperson, the Chairperson shall be appointed by ACICA.

This Article of the ACICA Rules is the same as Article 7(3) UNCITRAL Arbitration Rules, save that the title ‘Chairperson’ is used in the place of ‘presiding arbitrator’. The Swiss Rules create a similar arrangement, with the same thirty day time limit.⁷⁰ Article 10.3 does not distinguish between party appointments and default appointments: however they were appointed, the two arbitrators have thirty days to settle on a Chairperson, and if this has not

⁶⁸ Born, G., *International Commercial Arbitration*, Kluwer 2009, 1666.

⁶⁹ *Ibid*, 1665.

⁷⁰ Swiss Rules, Article 8(2).

happened on the 31st day following the appointment of the second arbitrator, ACICA will make the appointment. The considerations that guide ACICA in the appointment of the Chairperson are the same as those that apply to appointments of sole arbitrators under Article 9.3 and Article 10.2, being (1) impartiality and independence, and (2) nationality. The Chairperson *must be* impartial and independent, and *should be* a national of a state unrepresented in the dispute.

ARTICLE 11 - Appointment of Arbitrators in Multi-Party Disputes

11.1 For the purposes of Articles 9 and 10, the acts of multiple parties, whether as multiple Claimants or multiple Respondents, shall have no effect, unless the multiple Claimants or multiple Respondents have acted jointly and provided written evidence of their agreement to ACICA.

This Article of the ACICA Rules is similar to Article 10(1) ICC Rules,⁷¹ and has a close relation to the LCIA Rules.⁷² Provisions of this type are sometimes called ‘*Pertamina Clauses*’.⁷³ They are directed at preventing situations where there are more than two parties, and there is confusion as to which parties have the power to appoint arbitrators and how many arbitrators there will be. In effect, Article 11.1 ACICA Rules requires that the parties form two sides – and two sides *only* – for the purposes of appointing arbitrators. This guarantees a three member tribunal, and limits the prospect of the award being rendered unenforceable for improper constitution of the tribunal under Article 5(1)(d) New York Convention.

In a multi-party dispute, an appointment can only be made by a group of parties acting in concert: unilateral appointments are invalid under Article 11.1 ACICA Rules. When an appointment is made by a group of parties, it will only be valid if ACICA is furnished with written proof that the relevant parties have agreed to appoint in concert. Article 11.1 ACICA Rules presumes that no such agreement will be reached, and this is why written evidence is a precondition for the validity of the appointment. In this sense, the ACICA Rules establish a special confirmation system for arbitrators in multi-party disputes: it is only where there is written evidence that the parties have formed sides for appointment that their nominations will be confirmed by ACICA.

11.2 If three arbitrators are to be appointed and the multiple Claimants or multiple Respondents do not act jointly in appointing an arbitrator, ACICA shall appoint each member of the Arbitral Tribunal and shall designate one of them to act as Chairperson,

⁷¹ It is also similar in effect to Article 8.1 LCIA Rules, and Article 17(3)(c) of the Arbitration Law of the Dubai International Finance Centre.

⁷² Article 8 LCIA Rules operates similarly in multi-party disputes: it provides that the LCIA Court shall appoint the arbitral tribunal without regard for the parties’ nominations if the multiple parties (more than two) have not agreed in writing that they represent two separate sides for the formation of the dispute as Claimant and Respondent. In such circumstances where no agreement can be reached, Article 6.2 LCIA provides that the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the appointment of the Arbitral Tribunal by the LCIA Court.

⁷³ *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*. The *Pertamina* case involved a dispute over a geothermal energy project in Indonesia. The proceedings were consolidated, and a single arbitrator was appointed for the two Respondents in default. They later argued before the Geneva court that, because the appointment process had not been conducted in accordance with the terms of the arbitration agreement, the tribunal was improperly constituted for the purposes of Article V(1)(d) of the New York Convention. Arbitral and related court proceedings went on in seven countries for more than a decade. .

unless all parties agree in writing on a different method for the constitution of the Arbitral Tribunal and provide written evidence of their agreement to ACICA.

This Article gives ACICA the power to constitute the tribunal in its entirety. ACICA may only exercise this power where (1) the arbitration agreement specifies a three member tribunal, and (2) there are more than two parties, and (3) the parties have not formed two sides, proven this to ACICA, and appointed two arbitrators in concert in accordance with Article 11.1 ACICA Rules. This provision reflects the reasoning of the French Court of Cassation in the *Dutco* case,⁷⁴ in that ACICA's power to appoint is conditional upon there being a lack of agreement between the Respondents. The parties may agree to opt-out of this Article of the ACICA Rules, meaning that even where the conditions of Article 11.2 are satisfied, ACICA may only appoint the full tribunal where the parties have not agreed otherwise in writing. This condition is less significant than it seems. In practice, it is very rare for the parties to opt out of Article 11.2 ACICA Rules: if they cannot agree on forming sides to carry out the simple function of appointing arbitrators, then they will usually be unable to reach an agreement on precluding ACICA from exercising its appointment power under Article 11.2.

ARTICLE 12 - Information about Arbitrators

12.1 Where the names of one or more persons are proposed for appointment as arbitrators, their names, postal addresses, telephone and facsimile numbers and email addresses (if any) shall be provided and their nationalities shall be indicated, together with a description of their qualifications.

Under this rule, all proposed arbitrators must provide a copy of their *curriculum vitae* to ACICA. This Article expands on Article 8(2) UNCITRAL Arbitration Rules by adding telephone, fax and email contact details. This implies that the parties may correspond with the arbitrator wholly electronically, or via any of the means specified in Article 12.1 ACICA Rules.

12.2 When ACICA is requested to appoint an arbitrator pursuant to Articles 9 to 11, ACICA may require from either party such information as it deems necessary to fulfil its function.

This Article of the ACICA Rules is a shorter form of Article 8(1) UNCITRAL Arbitration Rules. It creates a broader power to request information than the power conferred under Article 12.1 ACICA Rules (which is only applicable to party appointees). When ACICA requests information from a party, the purpose of the request is to ensure that the arbitrator ACICA appoints is not a national of the same state as the party in default, and that there are no links between that party and the candidate arbitrator that might found a challenge under Article 13 ACICA Rules. To that end, ACICA may request a description of the party's business and corporate structure, a list of their major shareholders and subsidiaries, and a list of their directors and officers. Information provided to ACICA under Article 12.2 is subject to the confidentiality rules enunciated at Article 18 ACICA Rules.

⁷⁴ *BKMI and Siemens v Dutco*, French Court of Cassation, 7 January 1992. In *Dutco*, the Court of Cassation held that an order of an ICC tribunal requiring two German Respondents with divergent interests to appoint a single arbitrator between them was a violation of equal treatment.

ARTICLE 13 - Challenge of Arbitrators

13.1 A prospective arbitrator shall in writing disclose to those who approach him or her in connection with his or her possible appointment any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An 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 of these circumstances. A copy of any written disclosures provided to a party by a prospective arbitrator or arbitrator shall be sent to ACICA.

This Article adopts the language of Article 9 UNCITRAL Arbitration Rules and Article 9(2) Swiss Rules. The expression “circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence” is the language of Article 12 Model Law, and is also used in General Standard 2 of the International Bar Association (**IBA**) Guidelines on Conflicts of Interest in International Arbitration (**IBA Guidelines**). The LCIA Rules use similar language.⁷⁵ The ACICA form makes an institutional addition to the text of Article 9(2) UNCITRAL Arbitration Rules, requiring that disclosure be made to ACICA as well as the parties. This provision of the ACICA Rules may imply an obligation to investigate potential conflicts of interest – if the arbitrator was under no such obligation, there might be an argument that the disclosure obligation would be rendered ineffective. However, if the arbitration is subject to Australian law, it is important to note that there is as yet no binding authority for the proposition that an arbitrator is under such a duty. The position is similar in Hong Kong where, in the *China Harbour* case, the Court of Appeal held that the arbitrator was under no duty to check his files for potential conflicts of interest.⁷⁶ The position may be slightly different in England, where there is some authority for the position that arbitrators are under a limited duty to investigate potential conflicts of interest, but that this limited duty ends once the proceedings start.⁷⁷

As under the UNCITRAL Arbitration Rules and Article 5.3 LCIA Rules (and Article 12 Model Law), the ACICA Rules disclosure obligation is *ongoing*, meaning that if new circumstances arise after the arbitrator has entered onto the reference, then the arbitrator must give fresh disclosure of the same. A failure to do so will constitute a procedural irregularity, and may constitute grounds for challenge under Article 13.2 ACICA Rules.

13.2 Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

This Article adopts the first arm of Article 12(2) Model Law, with the notable exception that the Model Law word ‘only’ is cut out in the ACICA version. The Swiss Rules⁷⁸ and the UNCITRAL Arbitration Rules⁷⁹ take the same approach. The second arm of Article 12(2) Model Law – challenge for lack of necessary qualifications – is also not taken up in Article 13.2 ACICA Rules. However, the exclusion of the word ‘only’ arguably casts an inclusive

⁷⁵ Under Article 5.3 LCIA Rules, each arbitrator is obliged (*‘shall’*), before their appointment by the LCIA Court, to sign a declaration that there are no circumstances known to them that are likely to give rise to any justified doubts about their impartiality or independence. As has been observed, this is different to the position under the *Arbitration Act* 1996, which does not expressly require disclosure, and speaks only of ‘impartiality’.

⁷⁶ *Suen Wah Ling v China Harbour Engineering Co.* [2007] BLR 435 HK CA.

⁷⁷ *Locabail (UK) Ltd & Waldorf Investment Corp. & Ors* [2000] 1 All ER 65 per Lord Woolf at para 481.

⁷⁸ Swiss Rules, Article 10(1).

⁷⁹ UNCITRAL Arbitration Rules, Article 10(1).

light on Article 13.2 ACICA Rules, with the result that an arbitrator may be challenged for reasons *other* than a lack of impartiality and independence (including, presumably, lack of necessary qualifications) where the circumstances of the case justify the challenge. Similarly, under Article 10.3 LCIA Rules a party may challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence.

The requirements of impartiality and independence are fundamental and, certainly in an ACICA Rules arbitration taking place in a Model Law seat, cannot be excluded by agreement of the parties – this is because Article 18 Model Law (equal treatment of parties) is a mandatory provision. The arbitrator must be impartial and independent *vis-à-vis* the parties, and when an arbitrator lacks either essential quality they will be biased. Actual bias will always result in the removal of an arbitrator, or the setting aside of their award.⁸⁰ Actual bias is very rare, but neither the ACICA Rules nor the Model Law require that the arbitrator *actually* lack impartiality and independence before they are removed: the President of ACICA, Professor Doug Jones AM, has confirmed that “appearances, not facts, are the touchstone”.⁸¹ It is settled in Australian and English law that it is of fundamental importance in arbitration that justice be done *and be seen to be done*.⁸² Indeed, a global *jurisprudence constante* has emerged in this regard.

In international arbitration, the most widely used test for apparent bias is “whether a fair minded lay observer might reasonably apprehend that the judge [or arbitrator] might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide”.⁸³ With the exception of Malaysia, this test prevails in all of the Anglo-Model Law states of the Asia-Pacific.⁸⁴ The ‘reasonable apprehension’ test has two arms: (1) the vantage point of a reasonable third person, and (2) a reasonable apprehension of bias; it is consistent with the test for bias applied by the European Court of Human Rights at Strasbourg, and tests applied by all Model Law seats except Malaysia (where a higher ‘real danger’ second arm remains in force).⁸⁵ The effect of this drafting uniformity is that decisions on bias challenges from other seats may carry persuasive weight in an ACICA challenge. It is notable that the United States applies what is probably a higher standard of ‘evident partiality’ to allegations of arbitrator bias, with the result that US decisions may be distinguishable in an ACICA challenge proceeding.⁸⁶

⁸⁰ *Re the Owners of the Steamship ‘Catalina’ and the Owners of the Steamship ‘Norma’* [1938] 61 LIL Rep 362-3, where in an arbitration between a Norwegian and a Portuguese ship owner, the award was set aside for actual bias after the arbitrator said words to the effect that all Portuguese people are liars.

⁸¹ Jones, D., ‘Conflicts of Interest: Intellectual Corruption – the IBA Guidelines and *Telekom Malaysia*’, Presentation at IPBA 15th Annual Meeting and Conference, Bali 3-7 May 2005.

⁸² This maxim comes from the judgment of Lord Hewart in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 356 (at 259); Lord Hewart’s dictum was approved in the context of arbitration in *Gascor v Ellicott* [1997] 1 VR 332, per Tagdell AJ at 340 and Ormiston AJ at 348-52, cited with approval by the High Court in *Sea Containers*; followed by the Supreme Court of Western Australia in *Pindan Pty Ltd v Uniseal Pty Ltd* [2003] WASC 168.

⁸³ *ICT Pty Ltd v Sea Containers Ltd* [2002] NSWSC 77 (22 February 2002) per Gzell J (at 27).

⁸⁴ Luttrell, S.R., ‘Go Back to *Gough*: An Argument for the ‘Real Danger’ Test for Arbitrator Bias in the Common Law Seats of the Asia Pacific’, (2008) 16 APLR 2.

⁸⁵ *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] MLJ 1; followed in *Dato’ Tan Heng Chew v Tan Kim Hor & Anor* [2006] FC (Civ. Ap. No. 02-6-2005(w)).

⁸⁶ See *Commonwealth Coatings Corp v Continental Casualty Co.* 393 US 145, 149 (1968) where the Supreme Court commented (in *obiter*) that, “we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review.”

Justifiable doubts will necessarily arise where the arbitrator has a pecuniary interest in the cause. In Common Law systems, the principle of disqualification for pecuniary interest in the cause is known as ‘the Rule in *Dimes*’.⁸⁷ Under Australian law, the Rule in *Dimes* is separate from the rule of disqualification for apparent bias,⁸⁸ but is actionable under the same Article of the ACICA Rules. The Rule in *Dimes* is subject only to *de minimis*: the arbitrator will not be removed if their interest in the cause is trifling or trivial.⁸⁹ In the determination of whether a pecuniary interest is actionable or not, the IBA Guidelines will hold persuasive weight.⁹⁰ Confirming this is the fact that the ACICA Expedited Arbitration Rules make express provision for regard to the IBA Guidelines in arbitrator challenges,⁹¹ and the fact that the IBA Guidelines are enjoying increasing acceptance in national courts⁹² and investor-state arbitration.⁹³

13.3 A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

This Article is the same as Article 10(2) UNCITRAL Arbitration Rules, Article 10(2) Swiss Rules and Article 10.3 LCIA Rules.⁹⁴ Its function is to deem the appointing party to be aware of all matters that may give rise to justifiable doubts as to the arbitrator’s impartiality or independence at the time the appointment is made. These matters are deemed known and waived – they cannot be brought up in subsequent challenges *unless* there has been defective disclosure under Article 13.1 ACICA Rules. In such a case, the matter which was not disclosed would still need to be material and non *de minimis*, such that the arbitrator would reasonably be expected to have known of the matter at the time he failed to give full disclosure of it to the parties. Although Australian law does not impose a duty to investigate potential conflicts of interest, it is probably reasonable to conclude that the Article 13.1 ACICA Rules express obligation to disclose carries with it an implied obligation to conduct a one-off, limited investigation into potential conflicts of interest. Arbitrators who fail to do so,

⁸⁷ *Dimes v Grand Junction Canal Co Proprietors* (1852) 3 HLC 759.

⁸⁸ *Ebner v The Official Trustee in Bankruptcy; Clanae Pty Ltd and Ors v Australia and New Zealand Banking Group Ltd* (2000) HCA 63, (2000) 205 CLR 337.

⁸⁹ *Locabail (UK) Ltd & Waldorf Investment Corp. & Ors* [2000] 1 All ER 65; see also *AT&T Corporation v Saudi Cable Company* [2000] BLR 29.

⁹⁰ It is worth noting that the President of ACICA, Professor Doug Jones AM, was a member of the IBA Working Party that drafted the IBA Guidelines.

⁹¹ ACICA Expedited Arbitration Rules, Article 8.6.

⁹² See for example *Telekom Malaysia v Ghana*, District Court of The Hague, 18 October 2004, (Challenge No. 13/2004; Petition No. HA/RK/2004.667); *Anders Jilkén v. Ericsson AB*, Swedish Supreme Court, Case No. T2448-06; *Eureko B.V. v Republic of Poland*, Brussels Court of Appeal, R.G. 2006/1542/A; *X v. Y*, Higher Regional Court of Central Frankfurt, 4 October 2007; Decision of Swiss Federal Supreme Court, 20 March 2008 (4A_506/2007); *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] APP.L.R. 10/19; *Positive Software Solutions, Inc v New Century Mortgage Corporation*, 476 F.3d 278 (5th Cir. 2007) *Cert.denied* S.Ct., 2007 WL 1090443 (U.S.); *Applied Industrial Material Corp (AIMCOR) v Ovalar Makine Ticaret ve Sanayi, A.S.*, 492 F.3d 132 (2d. cir 2007); *HSN Capital LLC (USA) & Ors v. Productora y Comercializador de Television SA de CV (Mexico)*, 5 July 2006 (US District Court, M.D., Florida); *New Regency Productions Inc. v. Nippon Herald Films, Inc.*, No. 05-55224 DC No. CV-04-09951-AHM Opinion (September 2007).

⁹³ See for example *National Grid v. Argentina*, LCIA Case No. UN7949; *EDF International SA & Ors v. Argentina* (Re Arbitrator Kaufmann-Kohler), ICSID Case ARB/03/23; Challenge Decision dated 25 June 2008; *Hrvatska Elektroprivreda dd v. Slovenia*, ICSID Case ARB/05/24 (Decision Regarding the Participation of David Milton QC).

⁹⁴ Article 10.3 LCIA Rules provides: “A party may challenge an arbitrator it has nominated, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.”

and then fail to disclose, will not be shielded from challenge. Indeed, the dual failure to investigate and disclose may well be probative of the appearance of bias.

ARTICLE 14 - Procedure for the Challenge of Arbitrators

14.1 A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after being notified of the appointment of that arbitrator or within 15 days after becoming aware of the circumstances mentioned in Article 13.

This Article of the ACICA Rules is substantially the same as Article 11(1) UNCITRAL Arbitration Rules; the default position in the Model Law is the same. The parties have fifteen days to challenge the arbitrator, and if they do not bring their challenge in this period they will be out of time. The same position is adopted under Article 10(4) LCIA Rules which provides that parties have 15 days from the formation of the tribunal, or after becoming aware of any circumstances referred to in Articles 10.1, 10.2 or 10.3, to challenge the appointment of an arbitrator.

It is important to note that, because challenge is linked to the constitution of the tribunal (i.e. if the challenge succeeds, the constitution of the tribunal will change because an arbitrator will need to be replaced under Article 15 ACICA Rules), ACICA's Article 3.4 discretionary power to extend time limits is alive in a challenge proceeding. This means that a party may, if it shows good cause, challenge an arbitrator out of time in ACICA arbitration.

14.2 The challenge shall be notified to the other party, to the arbitrator who is challenged, to the other members of the Arbitral Tribunal and to ACICA. The notification shall be in writing and shall state the reasons for the challenge.

With some cosmetic changes, this Article constitutes a verbatim adoption of Article 11(2) UNCITRAL Arbitration Rules. The Model Law also requires written notice direct to the tribunal. This is consistent with the practice of other arbitral institutions, such as the LCIA.⁹⁵ The jurisprudential basis of the obligation to give written notice to the challenged arbitrator lies in procedural fairness: the arbitrator must be given a chance to respond to the allegations before any determination of the matter may take place.

14.3 When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, resign. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in Articles 9 to 13 shall be used for the appointment of a substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise its right to appoint or to participate in the appointment.

This Article is *mutatis mutandis* the same as Article 11(3) UNCITRAL Arbitration Rules. The LCIA Rules take a less detailed approach in that they do not include a 'no concession' rule.⁹⁶ Article 14.3 ACICA Rules allows for the challenge to be dealt with by consent of the parties which is, in practice, often what happens: many arbitrators prefer to withdraw once

⁹⁵ Article 10(4) LCIA Rules obliges parties who challenge the appointment to send a written statement of the reasons for its challenge to the LCIA Court, the arbitral tribunal and all other parties.

⁹⁶ Article 10(4) LCIA Rules provides that the LCIA Court shall decide the challenge to the appointment of an arbitrator unless the arbitrator withdraws or all other parties agree to the challenge within 15 days of the receipt of the written statement.

they sense that a party has lost confidence in them, rather than argue the propriety of their actions in a challenge proceeding. The other party is, however, less likely to surrender to the challenge, as it will usually be in their interest to maintain the constitution of the tribunal. This is why Article 14.3 provides that the arbitrator's withdrawal is without prejudice to the other party's right to defend the challenge, and *vice versa*.

14.4 If the other party does not agree to the challenge and the challenged arbitrator does not resign, the decision on the challenge shall be made by ACICA.

ACICA has exclusive first instance jurisdiction over the challenge. There are three conditions for the exercise of this jurisdiction: (1) that a challenge has been made in accordance with the procedure specified in Articles 14.1 and 14.2, and (2) that the parties have not agreed to the challenge, and (3) that the arbitrator has not withdrawn voluntarily. Once these conditions are met, the matter must go to ACICA. Unlike the Swiss Rules,⁹⁷ the influence of which is otherwise clear in the ACICA system, the ACICA Rules do *not* identify the Centre's decision of the challenge as 'final'. The implication of this silence is that ACICA's decision is subject to review in the competent courts of the seat.⁹⁸ However, Article 43.2 ACICA Rules broadly declares that decisions made by ACICA concerning "all matters relating to the arbitration" are "conclusive and binding", and Article 43.3 states that the parties have waived their rights to appeal from ACICA decisions to state courts. If, as it seems, the language of these provisions is broad enough to capture decisions of ACICA on challenges to arbitrators, then ACICA challenge decisions are (at least in principle) final and not subject to *any* form of review. It remains to be seen whether this 'no appeal' rule would function to prevent judicial review by a state court with inherent supervisory jurisdiction. The decision of the English Court of Appeal in *AT&T v Saudi Cable*⁹⁹ (discussed below) suggests that the answer may well be in the negative.

The ACICA Rules do not oblige ACICA to give reasons for its decision, but given the very real prospect of judicial review, it is likely that reasons will be given when a challenge decision is made by ACICA. There is a trend towards providing reasons,¹⁰⁰ and if reasons are given by ACICA, they will be subject to the confidentiality rule set by Article 18 ACICA Rules (although if judicial review were sought by the challenger the decision could be disclosed to the court under the exception at Article 18.2(a) ACICA Rules).¹⁰¹ Given that leading institutions are increasingly leaning towards the sanitised (or 'blind') publication of challenge decisions, it is likely that ACICA would give reasons as a matter of transparency.

14.5 If ACICA sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in Articles 9 to 13.

This Article is an institutional modification of Article 12(2) UNCITRAL Arbitration Rules. The full appointment and challenge procedure is applicable from the date the challenge is sustained, meaning the time limits run from the date ACICA removes the arbitrator.

⁹⁷ Article 11(2) Swiss Rules sends the challenge to a Special Committee, and identifies its decision as final.

⁹⁸ In Australia, the appeal is to the Supreme Court of the state where the arbitration is seated (i.e. the Supreme Court of New South Wales if the tribunal is seated in Sydney).

⁹⁹ *AT&T Corporation and Lucent Technologies Inc v Saudi Cable Company* [2000] All ER (Comm) 625.

¹⁰⁰ For example, the LCIA has recently commenced publishing its challenge decisions.

¹⁰¹ Article 18.2(a) ACICA Rules provides that the award and related materials may be disclosed for the purposes of making an application to a competent court.

ACICA's Article 3.4 discretionary power to extend time limits is enlivened again at this stage. If the challenger applies to a court for review of the challenge decision, then it will be a matter for ACICA whether the replacement should be made immediately or the arbitration should be suspended whilst the challenge is on foot in state courts. In practice, the arbitration is usually suspended.

ARTICLE 15 - Replacement of an Arbitrator

15.1 In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 9 to 13 that was applicable to the appointment or choice of the arbitrator being replaced.

This Article of the ACICA Rules adopts Article 13(1) UNCITRAL Arbitration Rules. It is also close in effect to Article 15 Model Law. The first observation to make on this Article of the ACICA Rules is that it uses strong language ('shall be appointed') to require that any arbitrator who stands down or is removed must be replaced. The corollary of this rule is that truncated tribunals are not allowed in ACICA Rules arbitration. This prohibition can be contrasted with the position under the ICC Rules,¹⁰² which provide for the two remaining arbitrators to continue.

The second observation is that Article 15.1 ACICA Rules requires that replacement arbitrators be appointed in the same way their predecessors were appointed. This means that, in most cases, the strict appointment procedure outlined at Articles 9 to 13 will apply *telle quelle* to the replacement process. Whilst they certainly protect the right to nominate and challenge, rules like Article 15.1 ACICA Rules often have the negative outcome of causing delays, because the appointment process must 'start from scratch'. Some arbitral institutions have rules directed at avoiding this situation. Article 11(1) LCIA Rules, for example, provides that in the event that the LCIA Court determines that any nominee is not suitable, or independent, or impartial or if any appointed arbitrator is to be replaced for any reason, the LCIA Court shall have complete discretion to decide whether to follow the original nominating process under Articles 5, 7, 8 and 9 LCIA Rules.¹⁰³ Rules like this ensure that the process of replacing an arbitrator does not unnecessarily delay the arbitration and, given the increasing willingness of parties to challenge arbitrators simply to delay proceedings,¹⁰⁴ also make 'obstructionist tactics'¹⁰⁵ less effective. It is, however, a fine line – a party would have an incentive to challenge the other party's nominee if they knew that the arbitrator would be replaced in a procedure that did not include re-nomination, but only institutional appointment. Most national laws, therefore, take a similar approach to the ACICA Rules, requiring the same party-driven process for replacement arbitrators as that which was used to appoint the arbitrators that came before them.

15.2 In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of him or her performing his or her functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding Articles shall apply.

¹⁰² ICC Rules, Article 12(5).

¹⁰³ LCIA Rules, Article 11.2.

¹⁰⁴ Redfern, A., Hunter, M., Blackaby, N., Partasides, C., *Law and Practice of International Commercial Arbitration*, Thomson 2004, 294.

¹⁰⁵ Born, above note 68, 1583.

This Article of the ACICA Rules is a gender-neutral adoption of Article 13(2) UNCITRAL Arbitration Rules. The *de jure/de facto* impossibility distinction is common to Article 14 Model Law. An obvious example of a *de jure* impossibility is where the law bars the arbitrator from entering onto the reference due to a successful challenge to their impartiality or independence; ‘*de facto* impossibility’ to act is a broad expression intended to cover vicissitudes of the proceedings not caused by operation of law. Illness is an example.

ARTICLE 16 - Repetition of Hearings if Arbitrator Replaced

Once 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.

This Article creates a discretionary power to re-hear which is similar to the power given to *ad hoc* tribunals under Article 14 UNCITRAL Arbitration Rules. Similar provisions can be found at Article 14 Swiss Rules and Section 16 SIAC Rules. As has been noted, the ACICA Rules require that all arbitrators be replaced, with the result that truncated tribunals are not allowed. In so far as they presume reconstitution, the opening words of Article 16 (‘*Once reconstituted*’) support the Article 15.1 prohibition against truncated tribunals.

SECTION III: ARBITRAL PROCEEDINGS

ARTICLE 17 - General Provisions

17.1 Subject to these Rules, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated equally and that each party is given a full opportunity of presenting its case.

Article 17.1 ACICA Rules is an amalgamation of Articles 18 and 19 Model Law.¹⁰⁶ Article 18 Model Law states that, “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” Article 19(2) Model Law provides that the arbitral tribunal “may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.”¹⁰⁷ Thus, under the Model Law the tribunal has ‘considerable latitude’ in deciding upon procedural rules.¹⁰⁸ Article 17.1 ACICA Rules is a close approximation to both Article 15(1) ICC Rules and Article 15(1) UNCITRAL Arbitration Rules. It differs, however, from Article 15(1) ICC Rules. Whereas Article 17.1 ACICA Rules gives the tribunal the power to conduct the proceedings as it deems appropriate, Article 15(1) ICC Rules mandates that the arbitral tribunal shall conduct proceedings in accordance with the ICC Rules, and, where the ICC Rules are silent, in accordance with agreement of the parties. It follows that it is only when the ICC Rules are silent and the parties fail to agree on a procedure to be followed that the tribunal can decide which rules to apply to the conduct of proceedings. As such, Article 17.1 ACICA Rules gives

¹⁰⁶ Article 17.1 ACICA Rules is similar to Article 15(1) Swiss Rules which states that, “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard.”

¹⁰⁷ Article 19(1) Model Law stipulates that the tribunal’s power to conduct itself in a manner that it considers appropriate is subject to the parties’ right “to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”

¹⁰⁸ *Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc* (2006) 380 AR 121, [28]; 264 DLR (4th) 358; 2006 ABCA 18.

a greater discretionary power to the arbitral tribunal than Article 15(1) ICC Rules. The LCIA Rules take a slightly different approach again.¹⁰⁹

Article 17.1 ACICA Rules essentially contains three components: (1) a declaration that the tribunal may conduct the arbitration as it considers appropriate, (2) an obligation imposed on arbitrators to treat the parties equally, and (3) an obligation imposed on arbitrators to ensure that each party is given a full opportunity of presenting its case. These components are subject to the ACICA Rules. Naturally, these obligations do not shield a party from its own strategic mistakes in the proceedings.¹¹⁰ The third component imposed on arbitrators by virtue of Article 17.1 ACICA Rules is essentially a restatement of the ‘hearing rule’, which requires that a person whose legal rights will be affected by the decision be given an opportunity to be heard.¹¹¹

17.2 If either party so requests, the Arbitral Tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the Arbitral Tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

Article 17(2) ACICA Rules is based on Article 15(2) UNCITRAL Arbitration Rules. It is also similar to Article 20(2) ICC Rules, in that it provides that the Arbitral Tribunal must schedule a hearing at the request of either party, or, failing such a request, the tribunal can decide for itself whether to hold hearings or conduct the matter as a ‘desk arbitration’. However, Article 20(2) ICC Rules differs from Article 17.2 ACICA Rules in that it expressly requires the Arbitral Tribunal to study the written submissions, and all the documents which the parties have relied on, before any hearings take place. There is no such requirement in the ACICA Rules although an obligation of due diligence is certainly implied in the arbitration agreement. Article 15(2) Swiss Rules differs from Article 17.2 ACICA Rules in that it allows the Arbitral Tribunal to hold hearings at any stage of the proceedings. Under Article 15(2) Swiss Rules, the tribunal may decide to conduct proceedings based on the documents only after having consulted the parties.¹¹² This is also the position under Article 24(1) Model Law.¹¹³

¹⁰⁹ Article 14(1) LCIA Rules - which deals with the conduct of the proceedings - gives the parties the opportunity to agree on the conduct of their arbitral proceedings provided that it is consistent with the tribunal’s general duties (i) to act fairly and impartially, giving each party a reasonable opportunity of putting their case and dealing with that of their opponent; and (ii) to adopt suitable procedures to avoid unnecessary delay or expense, so as to provide for a fair and efficient means for the parties to resolve their dispute. Article 14(2) provides that if the parties do not reach such an agreement, the arbitral tribunal shall have the widest discretion to discharge its duties allowed under such laws or rules of law as the tribunal deems applicable. Additionally, if no agreement is reached between the parties, the parties have a general duty to take measures to ensure the fair, efficient and expeditious conduct of the arbitration.

¹¹⁰ *Corporacion Transnacional de Inversiones v STET International* (1999) 45 OR (3d) 183, 204; affirmed (2000) 49 OR (3rd) 414.

¹¹¹ The hearing rule is a tenet of natural justice. The essentiality of natural justice was confirmed in *Kioa v. West* (1985) 159 CLR 550, 584 where Mason J stated that the “law has now developed to a point where it may be accepted that there is a Common Law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of contrary statutory intention.”

¹¹² Swiss Rules, Article 15(2).

¹¹³ Under this provision of the Model Law, the Arbitral Tribunal may decide whether to hear oral argument or evidence, or whether to decide the matter on written materials alone as ‘desk’ arbitration. If a party asks that oral hearings be held, the tribunal shall hold them unless the parties agreed that no oral proceedings would be held.

17.3 Questions of procedure may be decided by the Chairperson alone, or if the Arbitral Tribunal so authorises, any other member of the Arbitral Tribunal. Any such decision is subject to revision, if any, by the Arbitral Tribunal as a whole.

Article 17.3 ACICA Rules is different from most other arbitration rules because it authorises the Chairperson to decide questions of procedure without first consulting the other arbitrators or seeking their consent,¹¹⁴ and if the Arbitral Tribunal so authorises, “any other member of the Arbitral Tribunal” may be given the authority to decide on questions of procedure. This provision is very useful in circumstances where the schedule of the Chairperson is demanding. It can be seen as a response to the shared experiences of arbitrators and arbitration lawyers: three member tribunals often take longer to make decisions because their members are often in different time zones. In allowing a member other than the Chairperson to make procedural directions, the arbitration is not slowed down - the parties can get answers to their questions quickly. A similar expediency is achieved under Article 14.3 LCIA Rules, on which basis the Chairperson may make rulings on procedural matters with the prior consent of the other two members of the arbitral tribunal.¹¹⁵ Article 17(3) SIAC Rules and Article 31(2) Swiss Rules confer similar procedural powers.

17.3 All documents or information supplied to the Arbitral Tribunal by one party shall at the same time be communicated by that party to the other party.

This Article adopts Article 15(3) UNCITRAL Arbitration Rules and Article 15(3) Swiss Rules. It speaks to a rule of natural justice that is non-derogable in international arbitration, namely that the parties must be treated equally at all times by the tribunal. It is well settled that *ex parte* (or ‘unilateral’) communications with the tribunal constitute a procedural irregularity which may, depending upon the circumstances of the communication and its content, entitle the excluded party to challenge the relevant arbitrator or apply for *vacatur*.¹¹⁶ In practice, *ex parte* communications relating to scheduling or logistics are permitted,¹¹⁷ but great caution should be taken by arbitrators and counsel to avoid crossover into the merits.

ARTICLE 18 - Confidentiality

18.1 Unless the parties agree otherwise in writing, all hearings shall take place in private.

This provision creates an ‘opt-out’ rule of privacy for arbitral hearings – it does not create a rule of confidentiality for ACICA Rules arbitration generally. Documents created for the dispute are not covered by this provision. This is because Article 18.1 ACICA Rules speaks only to *privacy*, not confidentiality. Privacy and confidentiality are different qualities of arbitration; the former being more often associated with the exclusion of the public from the actual hearings; and the latter with a duty not to disclose the content of the dispute or documents relating to it to third parties. Under Article 18.1, privacy is the rule, and any agreement by the parties to the contrary is the exception. Article 18.1 ACICA Rules reflects Article 25(4) Swiss Rules, which provides that “hearings shall be held *in camera* unless the

¹¹⁴ According to Greenberg, “Article 17(3) ACICA Rules reflects the reality of the decision-making in most cases anyway ... but dispensing with the need to seek prior authorization from the co-arbitrators.”: See Greenberg, above note 1, 195.

¹¹⁵ LCIA Rules, Article 14.3.

¹¹⁶ See for example the decision of the Supreme Court of Western Australia in *Pindan Pty Ltd v Uniseal Pty Ltd* [2003] WASC 168.

¹¹⁷ Canon III(B)(5) of the American Arbitration Association/American Bar Association Code of Ethics confirms that unilateral communications on these limited matters are permitted.

parties have agreed otherwise”.¹¹⁸ A similar approach is taken by the ICC Rules, Article 21 of which creates a specific duty of confidentiality with respect to hearings.

Australian Common law has attracted a good deal of attention for its approach to confidentiality in arbitration. Article 18 ACICA Rules is informed by the decision of the High Court of Australia in *Esso Australia Resources Ltd & Ors v The Honourable Sidney J Plowman (Minister for Energy & Minerals) & Ors*.¹¹⁹ In this case, the High Court of Australia held that arbitral proceedings are private but not confidential, and allowed disclosure of certain documents created in the arbitration. The first Australian decision to apply the rule in *Esso* was *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*.¹²⁰ The ratio in *Esso* is to be contrasted with the decision of the English Court of Appeal in *Ali Shipping v Shipyard Trogir*,¹²¹ where the court held that there is an implied duty of confidentiality in arbitral proceedings. The *Esso* shift towards non-confidentiality can, on one view, be seen as part of a broader trend towards greater transparency in international arbitration. Decisions similar to *Esso* have been made in other jurisdictions, including the United States¹²² and Sweden;¹²³ and ICSID hearings are increasingly public.¹²⁴

18.2 The parties, the Arbitral Tribunal and ACICA shall treat as confidential and shall not disclose to a third party without prior written consent from the parties all matters relating to the arbitration (including the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain except:

- (a) for the purpose of making an application to any competent court;**
- (b) for the purpose of making an application to the courts of any State to enforce the award;**
- (c) pursuant to the order of a court of competent jurisdiction;**
- (d) if required by the law of any State which is binding on the party making the disclosure; or**
- (e) if required to do so by any regulatory body.**

Article 18.2 ACICA Rules imposes an obligation on the Arbitral Tribunal and ACICA (1) to treat as confidential all matters relating to the arbitration, the award, materials created for the purpose of the arbitration and documents produced by another party, (2) provides for parties to waive confidentiality by writing, and (3) lists five circumstances where confidentiality cannot be enforced. With regard to the first arm of Article 18.2 ACICA Rules, confidentiality could relate to (i) the fact that the parties are actually entering into arbitration, (ii) any matters

¹¹⁸ Article 25(4), Swiss Rules.

¹¹⁹ (1995) 128 ALR 391.

¹²⁰ (1994) 35 NSWLR 704. For commentary on this decision see Rogers, A. and Miller, D., ‘Non-Confidential Arbitration Proceedings’, (1997) ALJ 436.

¹²¹ [1999] 1 WLR 314.

¹²² *US v Panhandle Eastern Corp.* (D. Delaware, 1988) 118 F.R.D. 346.

¹²³ *Bulgarian Foreign Trade Bank Ltd v AL Trade Finance Inc* (Swedish Supreme Court decision, 27 October 2000).

¹²⁴ For example, the December 2005 hearings were open to the public in the NAFTA/ICSID Additional Facility case *United Parcel Service of America, Inc. v Government of Canada*.

disclosed between the parties in the course of arbitration; and (iii) the outcome of arbitration. It is similar to Rule 43.1 DIS.

In requiring that the parties to arbitration shall treat as confidential “materials created for the purpose of the arbitration and documents produced by another party in the proceedings” Article 18.2 ACICA Rules effectively neutralises that part of the ratio in *Esso* where the High Court held that documents voluntarily produced by a party are not automatically confidential (even though the hearings themselves are conducted in private).¹²⁵ Acknowledging the Doctrine of Party Autonomy, the High Court held that the parties to arbitration may agree that such documents will be kept confidential, but concluded that such an agreement is not implied in the submission to arbitration. The High Court also decided that documents, produced under a procedural order issued by the arbitral tribunal are confidential and may, therefore, only be used outside the arbitration with the prior consent of the party to whom the documents belong. Other institutional rules take a more lenient approach to confidentiality: the ACICA Rules confidentiality arrangement is much more stringent, for example, than Section 34(6) SIAC Rules, Article 43 Swiss Rules and Article 30 LCIA Rules.

18.3 Any party planning to make disclosure under Article 18.2 must within a reasonable time prior to the intended disclosure notify the Arbitral Tribunal, ACICA and the other parties (if during the arbitration) or ACICA and the other parties (if the disclosure takes place after the conclusion of the arbitration) and furnish details of the disclosure and an explanation of the reason for it.

This Article creates an additional notice barrier to disclosure which, in turn, gives effect to the intention of the drafters to limit the operation of the rule in *Esso*. The word ‘must’ suggests that this requirement is absolute, and that disclosures made in breach of it will be actionable by the affected parties. The prospects of claiming damages for a breach of this provision will vary depending upon the state in which the proceedings are brought. In Australia at least, the decision in *Esso* suggests that it would likely make for a significant public policy obstacle.

18.4 To 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.

This is an unusual provision which does not have a counterpart in any of the other arbitration rules. It may be partly in response to the statement made in *Esso* by Mason CJ at paragraph 37: “it is common ground between the parties that no obligation of confidence attaches to witnesses who are therefore at liberty to disclose to third parties what they know of the proceedings.” In order to comply with Article 18.4 ACICA Rules, parties intending to call witnesses to give oral or written evidence before ACICA tribunals should ensure that their witnesses sign confidentiality agreements. The terms of the confidentiality agreement must state that the witness generally acknowledges that the arbitral proceedings in which they are called are private and confidential, and that the witness undertakes to be bound by Article 18 of the ACICA Rules as if they were a party to the arbitration agreement. Alternatively, the confidentiality agreement could recite the facts of the proceedings, and then incorporate Article 18 as the operative part of the deed (i.e. with Article 18.2 as the ‘no disclosure’

¹²⁵ Indeed, in *Esso* Mason CJ (at para. 35) noted that there is not an implied term in each agreement to arbitrate that parties to the arbitration will not disclose confidential information received during the process.

provision, and Article 18.3 as the notice rule). The governing law of the confidentiality agreement should be Australian law, and the dispute resolution provision should incorporate the ACICA Model Arbitration Clause.

ARTICLE 19 - Seat of Arbitration

19.1 If the parties have not previously agreed on the seat of the arbitration and if within 15 days after the commencement of the arbitration they cannot agree, the seat of the arbitration shall be Sydney, Australia.

Article 19.1 ACICA Rules is interesting for two reasons. Firstly, it indicates that, if the parties have not previously agreed on the seat of the arbitration, Sydney will be the seat of the arbitration. This Article is incorporated in the Rules because ACICA's goal is to promote Australia in general, and in particular, Sydney as the seat of arbitration. ACICA's intention is to compete with the well-known arbitral centres of Singapore and Hong Kong. This provision seems to prevent the arbitral tribunal from fixing another seat. This Article might potentially be abused "by an Australian party to the arbitration who refuses to agree on a foreign seat."¹²⁶ In any event, the parties, exercising their rights under the Doctrine of Party Autonomy, may agree on the seat of arbitration. There are provisions similar to Article 19.1 ACICA Rules in other arbitration rules (such as Section 18.1 SIAC Rules), but they are usually qualified by the statement that the arbitral tribunal is authorised to fix another or a different arbitration seat "in view of the circumstances". Article 16(1) Swiss Rules and Article 16(1) LCIA Rules are examples of this qualification. Under Article 20(1) Model Law, the parties may agree upon the place of arbitration - if they do not agree, the tribunal will determine the place of arbitration, taking into account "the circumstances of the case, including the convenience of the parties".¹²⁷ Modern jurisprudence confirms that the place (or 'seat') of arbitration must be distinguished from the 'venue of hearing',¹²⁸ and where the parties have agreed upon the seat of arbitration, that seat does not change even though the tribunal conducts all of the hearings in another country.

Secondly, Article 19.1 ACICA Rules does not limit itself to declaring that, subject to a modification by the parties, Sydney will be the seat of arbitration. It goes further by indicating that, when the parties have not previously agreed, the parties have an additional opportunity to agree on a seat other than Sydney. Indeed, parties are given "15 days after the commencement of the arbitration" to decide on a different seat. This technique is also used in Article 8 ACICA Rules in the context of determining the number of arbitrators. This provision is clearly different from other arbitral rules, for example, Article 14 ICC Rules, Article 16 Swiss Rules, and Section 16(1) SIAC Rules.

19.2 The Arbitral Tribunal may decide where the proceedings shall be conducted (at the seat or other venues). In particular, it may hear witnesses and hold meetings for consultation among its members at any venue it deems appropriate, having regard to the circumstances of the arbitration.

Article 19.1 and Article 19.2 ACICA Rules illustrate the well-known difference between the 'seat' of arbitration (which is a legal concept) and the 'venue' of the arbitration (which is a factual concept). The 'seat' of arbitration is a significant legal concept because it will be a

¹²⁶ Greenberg, above note 1, 196.

¹²⁷ Article 20(1), Model Law.

¹²⁸ *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393.

persuasive fact in the determination of the arbitration law applicable to the proceeding – this is known as ‘Seat Theory’.¹²⁹ Article 19.1 and Article 19.2 ACICA Rules closely reflect Article 16(2) Swiss Rules. Both Article 19.2 ACICA Rules and Article 16(2) Swiss Rules provide a clear distinction between the seat and the venue. By way of comparison, Article 14 ICC Rules and Article 16 UNCITRAL Arbitration Rules use the ambiguous word ‘place’. Article 19.2 ACICA Rules confirms that the Arbitral Tribunal has the discretion to conduct proceedings at any venue. If the seat is Sydney, then there will be no problem because the ACICA Rules are compatible with the Model Law.

19.3 The Arbitral Tribunal may meet at any venue it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

This Article is an adoption of Article 16(3) Swiss Rules, Article 16(3) ICC Rules and Article 16(3) UNCITRAL Arbitration Rules. However, whereas the Swiss Rules and the UNCITRAL Arbitration Rules use ‘place’, Article 19.3 ACICA Rules uses the term ‘venue’. Provisions such as these are necessary in circumstances where site-visits by arbitrators are required – they ensure that the tribunal is able to inform itself properly and inspect all material evidence. Significantly, natural justice is preserved in the second arm of this provision.

19.4 The award shall be made at the seat of the arbitration.

There is far more to this neat little provision than one might suspect at first glance. Indeed, this provision could be interpreted to mean that the Arbitral Tribunal must physically *be* at the seat of arbitration when it renders its award. On the other hand, it could be a ‘deemed-law-of-origin’ rule directed at branding the award for the purposes of subsequent challenge and enforcement in the New York Convention system. The ‘deemed-law-of-origin’ interpretation is the better one. Either way, it is certainly different from comparable arbitration rules, which tend to state that awards are *deemed* to have been made at the seat of arbitration: this is the approach taken in Article 25(3) ICC Rules and Article 16(4) Swiss Rules.¹³⁰

ARTICLE 20 - Language

20.1 Subject to an agreement by the parties, the Arbitral Tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the Statement of Claim, the Statement of Defence, any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

Article 20.1 ACICA Rules adopts Article 17(1) Swiss Rules, and Article 17(1) UNCITRAL Arbitration Rules. The parties may opt out of this provision. Notably, if they do not, then the tribunal must decide the language of the proceedings (in their written and oral forms). From the coverage of the second arm of this provision it would appear that the intent of the provision is to fix the language ‘once and for all’. However, if the parties wish to change the

¹²⁹ Seat Theory holds that an arbitration is governed by the law of the place in which it is held (the ‘seat’ or *locus arbitri*). As a doctrine, Seat Theory has its origins in Article 2 of the Geneva Protocol (1923) and the practices of international arbitral tribunals; the doctrine finds modern support in Article V(1)(d) New York Convention. See Redfern & Hunter et al, above note 105, 98-102.

¹³⁰ Both of these provisions state that “the award shall be deemed to be made at the seat of the arbitration”.

language of the proceedings, the prefacing terms “subject to an agreement” suggest that they will be entitled to make this change by consent.

20.2 The Arbitral Tribunal may order that any submissions (written or oral), documents annexed to the Statement of Claim or Statement of Defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation (or be translated) into the language or languages agreed upon by the parties or determined by the Arbitral Tribunal.

This Article is a close approximation to Article 17(2) Swiss Rules, and Article 17(2) UNCITRAL Arbitration Rules. The only difference is that Article 20.2 ACICA Rules also provides that “any submissions (written or oral)” made in their original language shall be translated. In contrast, Article 25(3) Swiss Rules further states that “the arbitral tribunal shall make arrangement for the translation of oral statements made at the hearing ... if deemed necessary by the tribunal under the circumstances of the case”.¹³¹ Under Article 20.2 ACICA Rules, the tribunal has discretion (*‘may’*) to decide whether translations should be procured. In practice, when a witness gives sworn evidence, they usually do so in their mother tongue, and both the original and the translation are then put in evidence as attachments to the Statement of Claim or Defence. This reduces the risk of misunderstandings and errors of fact. The recent LCIA case of *National Grid v Argentina* illustrates some of the problems that can arise out of arbitrators working in their second languages, and the lessons of this case apply to witnesses as well.¹³²

ARTICLE 21 - Statement of Claim

21.1 Unless the Statement of Claim was contained in the Notice of Arbitration, within a period of time to be determined by the Arbitral Tribunal, the Claimant shall communicate its Statement of Claim in writing to the Respondent, each of the arbitrators and ACICA. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

The Claimant must submit a Statement of Claim (and the Respondent must submit a Defence), each within the time limits as determined by the Arbitral Tribunal.¹³³ This Article closely reflects Article 18(1) Swiss Rules and Article 18(1) UNCITRAL Arbitration Rules. The only difference is that Article 21.1 ACICA Rules requires the Claimant to send the Statement of Claim to ACICA as well as to the Respondent and each of the arbitrators.

Under the Model Law, the parties may amend or supplement the Statement of Claim or Defence during the proceedings. However, the tribunal may refuse to allow them to do so if it considers it inappropriate in view of the delay involved.¹³⁴ Under Article 29.1 ACICA Rules, if the Claimant does not file its Statement of Claim, the proceedings will be terminated by order of the tribunal; in logical contrast, if the Respondent does not file a Defence, the proceedings shall continue, and the failure will not be treated as an admission of the Claimant’s case. There is no power to order default judgment in international arbitration. If a party does not appear at the hearing or tender any evidence, the tribunal may render an award on the material before it only after the Claimant has presented its case. The defaulting party

¹³¹ Swiss Rules, Article 25(3).

¹³² *National Grid Plc v The Argentine Republic*, LCIA Case No. UN7949.

¹³³ Model Law, Article 23(1).

¹³⁴ Model Law, Article 23(2).

may show sufficient cause why it did not submit these documents or failed to appear or offer evidence.¹³⁵

21.2 The Statement of Claim shall include the following particulars:

- (a) the names, postal addresses, telephone and facsimile numbers and email addresses (if any) of the parties and their counsel;**
- (b) a statement of the facts supporting the claim;**
- (c) the points at issue; and**
- (d) the relief or remedy sought.**

This Article is a close approximation to Article 18(2) Swiss Rules and Article 18(2) UNCITRAL Arbitration Rules. However, Article 21.2 ACICA Rules imposes the additional requirement that the Statement of Claim must include the telephone, facsimile and email addresses of the parties and their counsel. The strong language of this provision (“shall”) reflects the fundamental rule of international arbitration that all parties are entitled to fair notice of the allegations that will be made against them.

21.3 The Claimant may annex to its Statement of Claim all documents it deems relevant or may add a reference to the documents or other evidence it will submit.

The Claimant’s right to annex to its Statement of Claim “all documents it deems relevant” is based on Article 18(3) Swiss Rules, which provides that “as a rule” the Claimant shall annex its documentary evidence to its Statement of Claim. Similarly, Article 15(6) LCIA Rules and Section 18(6) SIAC Rules provide that “copies (or, if they are especially voluminous, lists) of all essential documents on which the party concerned relies” shall be submitted with the Statement. Article 21.3 ACICA Rules is, however, unusual because it also allows the Claimant to “add a reference to the documents” annexed to the Statement of Claim. In complex technical matters, incorporation by reference may serve the interests of an efficient and fair arbitration, both of which are stated objectives of ACICA.

ARTICLE 22 - Statement of Defence

22.1 Unless the Statement of Defence was contained in the Answer to Notice of Arbitration, within a period of time to be determined by the Arbitral Tribunal, the Respondent shall communicate its Statement of Defence in writing to the Claimant, each of the arbitrators and ACICA.

This Article is a close approximation to Article 19(1) Swiss Rules. Again, as with the Statement of Claim, Article 22.1 ACICA Rules imposes the additional requirement that the Respondent send the Statement of Defence to ACICA as well as to the Claimant and each of the arbitrators. The stated exception to this requirement is where the Statement of Defence has been provided concurrent with the Respondent’s Answer to Notice of Arbitration. This rule is properly exceptional: for tactical reasons, Respondents to arbitral proceedings may wish to provide their Answer and Statement of Defence at separate stages.

¹³⁵ Model Law, Article 25.

22.2 The Statement of Defence shall reply to the particulars (b), (c) and (d) of the Statement of Claim (Article 21.2). The Respondent may annex to its Statement of Defence the documents on which it relies for its defence or may add a reference to the documents or other evidence it will submit.

Apart from some cosmetic changes, this Article adopts Article 19(2) UNCITRAL Arbitration Rules. It also reflects Article 19(2) Swiss Rules. However Article 19(2) Swiss Rules expressly provides that, “If the Respondent has raised an objection to the jurisdiction or to the proper constitution of the arbitral tribunal, the Statement of Defence shall contain the factual and legal basis for such objection.” Article 22.2 ACICA Rules creates a formal requirement that a Statement of Defence contain responses to the allegations of fact (b), points at issue (c) and the request for relief (d) made by the Claimant in the Statement of Claim. These elements are clearly compound (*‘and’*), with the result that the failure to address any one of them will render the Defence incomplete.

22.3 Unless put forward in the Answer to Notice of Arbitration, the Respondent may in its Statement of Defence, or at a later stage in the arbitral proceedings if the Arbitral Tribunal decides that the delay was justified under the circumstances, make a counterclaim or claim for the purpose of a set-off, arising out of, relating to or in connection with the contract.

Article 22.3 ACICA Rules is similar to Article 19(3) UNCITRAL Arbitration Rules. However, unlike its ACICA counterpart, Article 19(3) UNCITRAL Arbitration Rules is not prefaced with the words “Unless put forward in the Answer to Notice of Arbitration.”

The intention of Article 22.3 ACICA Rules is to prevent dilatory or frivolous counter-claims, but still preserve the fundamental procedural right of each party to make its case. To that end, in ACICA Rules arbitration, the Respondent is free to make counterclaims in its Answer to Notice of Arbitration or Statement of Defence. Significantly, the Respondent is free to raise such matters later, but subject to their satisfying the tribunal that their initial failure to do so was “justified under the circumstances”. The words “under the circumstances” capture the facts of the case and the proceedings, and are to be interpreted by the tribunal having regard to the general duty of procedural fairness that informs arbitral proceedings, as well as the specific Article 18 Model Law duty to treat the parties equally. Examples of justifiable delays include delays caused by or attributable to the Claimant’s breach of a procedural rule; delays attributable to the deliberations of the tribunal or state courts supervising it; and delays caused by external events beyond the control of the Respondent. It is worth remembering that the arbitration clause is a contract, and as such is subject to principles of *force majeure*. Delays attributable to war, terrorist acts, strikes, civil unrest and extreme weather events will all be ‘justified’ for the purposes of Article 22.3 ACICA Rules.

22.4 The provisions of Article 21.2 (b) to (d) shall apply to a counterclaim and a claim relied on for the purpose of a set-off.

This Article is identical to Article 19(3) Swiss Rules and Article 19(4) UNCITRAL Arbitration Rules. It operates to require the Respondent to plead out any counterclaims and claims it intends to rely on for set-off. Failure to meet the requirements of Article 21.2 (b) to (d) ACICA Rules will expose the counterclaim to possible dismissal. Article 22.4 ACICA Rules complements the objective of minimising delay, in so far as the tribunal may disregard counterclaims that manifestly lack merit. Such a course will not, however, be taken lightly, and at all times the tribunal must abide by the tenets of natural justice in its management of

the pleadings. Summary dismissal of an arguable counter-claim or set-off will amount to a breach of the right to be heard, and any award rendered in such circumstances will be exposed to *vacatur* or challenge at the enforcement stage.

ARTICLE 23 - Amendments to the Claim or Defence

During the course of the arbitral proceedings either party may amend or supplement its claim or defence unless the Arbitral Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances it considers relevant. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

This Article is based on Article 20(1) Swiss Rules and Article 20 UNCITRAL Arbitration Rules. A party may not amend their claim “in such a manner that the amended claim falls outside the scope of the arbitration clause”. This is important in view of the fact that Article V(c) New York Convention stipulates that enforcement of the award may be refused if the award “deals with a difference not contemplated by or not falling within the terms of the submission to arbitration”.

ARTICLE 24 - Jurisdiction of the Arbitral Tribunal

24.1 The Arbitral Tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

Article 24 ACICA Rules contains the familiar *Kompetenz-Kompetenz* principle, according to which an arbitral tribunal has authority to rule on its own jurisdiction. The *Kompetenz-Kompetenz* principle is codified in Article 16(1) Model Law, which confirms that the arbitral tribunal “may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.” For this purpose, “an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract”: this is known as the ‘Doctrine of Separability’. A consequence of the Doctrine of Separability is that “A decision by the Arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.” The arbitration clause will only be invalid if the defect is such as to render void *ab initio* the entirety of the contract, including the arbitration clause.¹³⁶ In practice, a finding of jurisdiction assumes the status of a preliminary decision, not a decision on the merits. This is the case despite the decision being described as an ‘interim award’.¹³⁷

Article 24 ACICA Rules is identical to Article 21(1)-(4) Swiss Rules, and Article 21(1) UNCITRAL Arbitration Rules. Interestingly, the ACICA Rules do not contain any equivalent of Article 21(5) Swiss Rules according to which the tribunal has “jurisdiction to hear a set-off defence even when the relationship out of which this defense is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause.” This provision of the Swiss Rules has proven controversial, and as such its omission from the ACICA Rules is understandable.

¹³⁶ (1985) 16 *Yearbook of the United Nations Commission on International Trade Law* 121.

¹³⁷ *Incorporated Owners of Tak Tai Building v Leung Yau Building Ltd* [2005] 2 HKLRD D2.

When the arbitral tribunal decides as a preliminary matter that it *does* have jurisdiction, a party may request the competent court to determine the matter.¹³⁸ In an international arbitration subject to Australian law, the IAA provides that the Supreme Court of the State and Territory that is the place of the arbitration is the competent court.¹³⁹ Generally speaking, in Model Law states the reviewing court will be looking to confirm the finding of the tribunal, rather than overturn it. A Canadian court held, for example, that, in reviewing the decision of the arbitral tribunal, the court applies a deferential standard: “one of reasonableness, deference and respect”.¹⁴⁰ The court’s decision is not subject to appeal and the tribunal may continue its proceedings while the court determines the matter.¹⁴¹ While the Model Law provides for an appeal to the competent court where the tribunal decides that it does have jurisdiction, it does not provide for an appeal to the court where the tribunal decides that it does *not* have jurisdiction.¹⁴² This means that, in a Model Law state, a decision of an arbitral tribunal declining jurisdiction is final and not subject to judicial review.

24.2 The Arbitral Tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of this Article 24, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Article 24.2 ACICA Rules is based on Article 21(2) UNCITRAL Arbitration Rules. The purpose of this Article is to posit two related core principles of international arbitral jurisprudence: (1) the *Kompetenz-Kompetenz* principle and (2) the Doctrine of Separability. Both principles are essential for the proper functioning of arbitration, as they ensure that belligerent parties cannot simply oust the tribunal of its jurisdiction by denying the existence of a contract. The rule that “A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause” is consistent with the recent decision of the English Court of Appeal in *Fiona Trust*.¹⁴³

24.3 A plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Statement of Defence referred to in Article 22, or, with respect to a counterclaim, in the reply to the counterclaim.

This Article is identical to Article 21(3) UNCITRAL Arbitration Rules. It is also similar to Article 21(3) Swiss Rules,¹⁴⁴ and consistent with the Model Law requirement that a plea that the tribunal lacks jurisdiction shall be raised not later than the submission of the Statement of Defence.¹⁴⁵ The express obligation that Article 24.3 ACICA Rules creates is supported by the requirement that, in its Statement of Defence, the Respondent must reply to the Claimant’s statement of the facts supporting the claim (Article 21.2(b)) and the points at issue (Article

¹³⁸ Model Law, Article 16(3).

¹³⁹ IAA, s.18, Model Law, Article 6.

¹⁴⁰ *ACE Bermuda Insurance Ltd v Allianz Insurance Co of Canada* (2005) 390 AR 342; see also *Yugraneft Corp v Rexx Management Corp* 2007 ABQB 450.

¹⁴¹ Model Law, Article 16(3).

¹⁴² *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597.

¹⁴³ [2007] EWCA Civ 20; see also *Premium Nafta Products Limited and ors v Fili Shipping Company Limited and ors* [2007] UKHL 40.

¹⁴⁴ Article 21(3) Swiss Rules also provides that, “as a rule, a plea that the tribunal does not have jurisdiction shall be raised in the Answer to the Notice of Arbitration.”

¹⁴⁵ Model Law, Article 16(2).

21.2(c)).¹⁴⁶ Even without the express language of Article 24.3 ACICA Rules, the Article 22.2 ACICA Rules requirement that the Defence address these elements imports an obligation to put the tribunal on notice of an objection to jurisdiction, certainly where the jurisdiction of the tribunal is positively asserted by the Claimant. More broadly, it would be arguable that a request for an award implies a request for a finding of substantive jurisdiction, and as such the Respondent's obligation to reply to item (d) of Article 21.2 ACICA Rules may entail an obligation to give notice of an intention to object to jurisdiction.

The consequences of a failure to give notice of an objection to jurisdiction vary depending on how the failure manifests itself. The Respondent's failure to reply to the Claimant's plea in its Statement of Claim that the tribunal *has* jurisdiction may amount to waiver, with the result that the Respondent may be estopped from denying that the tribunal has jurisdiction. Such a finding would, however, pose an enforcement risk for the award as refusing the Respondent the opportunity to argue its objection to jurisdiction might constitute an actionable denial of the right to be heard under the broad second arm of Article V(1)(b) of the New York Convention.¹⁴⁷

24.4 In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in its final award.

This Article is a verbatim adoption of Article 21(4) Swiss Rules and Article 21(4) UNCITRAL Arbitration Rules. It is a matter for the tribunal how and when the decision on jurisdiction is communicated to the parties. If the tribunal rules on jurisdiction as a preliminary question (as is generally the case in large disputes), the decision may be reserved for subsequent publication (separately or in the broader award) or handed down *ex tempore*. Jurisdictional decisions handed down with the wider award are usually subject to a *de facto* higher standard of reasoning. The guiding considerations for the tribunal will be complexity and cost: complex, legalistic challenges to jurisdiction in high-value disputes will usually be dealt with by way of fully reasoned, reserved preliminary decisions that are handed down during the proceedings as interim awards. More simple objections to jurisdiction will, on the other hand, often be decided *ex tempore* (with limited oral communication of the decision to the parties before the merits begin), with the reasons for the decision handed down concurrent with the final award.

ARTICLE 25 - Further Written Statements

The Arbitral Tribunal shall decide which further written statements, in addition to the Statement of Claim and the Statement of Defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

This Article is a close adoption of Article 22 Swiss Rules. The ostensibly mandatory language of this provision ('*shall decide*' and '*shall be required*') evinces an intention that the question of further statements be decided by the tribunal in all cases, not just situations where there is a clear paucity of documentation. The Swiss origin of this rule is consistent

¹⁴⁶ ACICA Rules, Article 22.1.

¹⁴⁷ Article V(1)(b) New York Convention, which provides that enforcement or recognition of an arbitral award may be refused where "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator of the arbitration proceedings, *or was otherwise unable to present its case*" [emphasis added].

with its Continental character: Article 25 ACICA Rules obliges the tribunal to engage in a limited process of ‘case-making’, in which deficiencies visible on the papers will be pointed out to the parties. In the Common Law tradition of passive judging, the arbitrator is normally under a limited duty to inquire, and much like a judge will usually decide only on the basis of the matters of law and fact presented by the parties.

ARTICLE 26 - Periods of Time

The periods of time fixed by the Arbitral Tribunal for the communication of written statements (including the Statement of Claim and 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.

This Article is the same as Article 23 UNCITRAL Arbitration Rules. It is also very similar to Article 23 Swiss Rules. However, Article 26 ACICA Rules uses the word ‘fixed’ and refers to ‘periods of time’ whereas Article 23 Swiss Rules uses the word ‘set’ and the slightly stronger language ‘time-limits’. The softer language of Article 26 ACICA Rules is consistent with the tribunal’s power to extend time limits for appointment and Answer to the Notice of Arbitration under Article 3.4 ACICA Rules.

When an application for an extension of time is made, the tribunal must have regard to the interests of justice: the request must be ‘justified’. Extensions directed at causing delay will not be granted. Either as a result of its quasi-judicial function, or by operation of the implied terms of the arbitration agreement,¹⁴⁸ the arbitral tribunal has certain limited inherent powers – *Kompetenz-Kompetenz* is an example.¹⁴⁹ The inherent powers of the arbitral tribunal include the power to protect its own processes: applications (whether for extensions of time or otherwise) that constitute abuses of the arbitral process may be refused.¹⁵⁰ In a seat where the Model Law is in force, the wording of Article 17(2)(b) Model Law (2006 Revision) – “imminent harm or prejudice to the arbitral process itself” – expressly confers on the tribunal the power to order interim measures restraining abuses of its processes. At close of the arbitration, abuses of process may be taken into account when the tribunal exercises its broad discretion to apportion costs under Article 41.1 ACICA Rules.

ARTICLE 27 - Evidence and Hearings

27.1 Each party shall have the burden of proving the facts relied upon to support its claim or defence.

¹⁴⁸ If the tribunal does not have inherent powers, the power to restrain abuses of the arbitral process is derived from an implied term in the arbitration agreement. As in most Common Law countries, it is well settled that there is a universal implied term that obliges the parties to refrain from doing anything that impairs the basis of the contract: see *Ansett Transport Industries v Commonwealth* (1977) 139 CLR 54 (per Barwick CJ at 61). When the basis of the contract is a *process* (as is the case in an arbitration agreement), this universal implied term takes the shape of a positive obligation not to frustrate or abuse the arbitral procedure. The tribunal, as a party to the arbitration agreement, may action this breach in the form of a finding of abuse of process.

¹⁴⁹ Redfern, Hunter et al., above note 104, 252.

¹⁵⁰ See for example *E-Systems, Inc. v The Islamic Republic of Iran* (Interim Award No. ITM 13-388 FT, 4 Feb 1983) where the majority held that, “the Tribunal has an inherent power to conserve the respective rights of the parties and to ensure that the Tribunal’s jurisdiction and authority are made fully effective”. See also *RCA Global Communications Disc., Inc v The Islamic Republic of Iran* (Interim Award No. ITM-29-60-1, 31 Jan 1984). Abuse of process was also argued in the *CME v Czech Republic* arbitrations.

Article 27.1 ACICA Rules is a verbatim adoption of Article 24(1) Swiss Rules and Article 24(1) UNCITRAL Arbitration Rules. It draws on the maxim of Roman procedural law *actori incumbit probatio* – ‘the burden of proof of each fact is on the party alleging that fact’s existence’. Adherence to this general principle of proof is central in arbitration conducted under the ACICA Rules; it is supplemented by more specific rules of evidence derived from the Model Law. Under the Model Law, the tribunal may appoint experts to report to it regarding specialist matters. The tribunal may also require a party to provide information to the expert, or to permit the inspection of property by the expert.¹⁵¹ If a party requests, the expert shall appear at an oral hearing so that they may be questioned about their evidence.¹⁵² The use of experts is especially common in engineering and construction arbitrations, where procedures such as ‘Hot-Tubbing’ (a form of expert conclave) are used to inform the tribunal and narrow the technical issues in dispute.

In a Model Law seat such as Australia, the tribunal may request the assistance of a competent court in taking evidence. The court may assist the tribunal as permitted by its jurisdiction and subject to its rules concerning the taking of evidence.¹⁵³ Under this procedure, the assisting court may take discovery evidence from third parties.¹⁵⁴ The grant of a subpoena also falls within this procedure for judicial assistance.¹⁵⁵ If a subpoena is issued in aid of the arbitration by an Australian court, and the person named is in another country, then the Hague Convention on Service Abroad may be applicable depending upon the state in which service will be affected.

Consistent with the prohibition against unilateral communications, all of the information communicated to the tribunal by a party must be given to the other party, and the tribunal is required to give to the parties any expert reports and evidentiary documents that it may rely upon in reaching its decision.¹⁵⁶ According to New Zealand jurisprudence – often treated as persuasive by Australian courts – the evidentiary material that must be disclosed by the tribunal under Article 24(3) Model Law is that which was created by *third parties*, and does not include the research materials prepared by the tribunal in the process of making its decision.¹⁵⁷

27.2 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.

It is common for arbitration rules to provide that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. Article 25(7) Swiss Rules, Article 25(6) UNCITRAL Arbitration Rules, and Article 26(1) SCC Rules all take this approach. However, these rules do not provide the tribunal with any guidance on how to determine these issues. In this regard, Article 27.2 ACICA Rules is a novel and highly useful provision. It stipulates that the arbitral tribunal “shall have regard to, but is not bound to apply, the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* in the version current at the commencement of the arbitration”. The treatment of the IBA Rules as ‘non-binding but relevant’ is consistent with modern international arbitral practice: in

¹⁵¹ Model Law, Article 26(1).

¹⁵² Model Law, Article 26(2).

¹⁵³ Model Law, Article 27.

¹⁵⁴ *Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc* (2006) 380 AR 121.

¹⁵⁵ *Vibroflotation AG v Express Builders Co Ltd* [1995] 1 HKLR 239.

¹⁵⁶ Model Law, Article 24(3).

¹⁵⁷ *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454.

major international disputes, the tribunal will often use the IBA Rules as ‘guidelines’ (or ‘principles to inform’ its decisions) on matters of evidence.¹⁵⁸ Article 27.2 ACICA Rules preserves the traditional flexibility of international arbitration *vis-à-vis* the taking of evidence, whilst also ensuring that the basic principles of evidence are known to the parties and the arbitrators.

The IBA Rules were adopted on 1 June 1999. The Preamble to the IBA Rules states that they are “intended to govern in an efficient and economical manner the taking of evidence in international commercial arbitrations, particularly those between Parties from different legal traditions”.¹⁵⁹ The IBA Rules were designed to supplement institutional and *ad hoc* arbitration rules. The guiding principle upon which the Rules are based is identified in paragraph 4 of the Preamble:

The taking of evidence shall be conducted on the principle that each Party shall be entitled to know, reasonably in advance of any Evidentiary Hearing, the evidence on which the other Parties rely.¹⁶⁰

This paragraph confirms a basic ‘rule of recognition’ for evidence in international arbitration: those rules of evidence which guarantee procedural fairness are to be adhered to; but the tribunal need not follow the more technical rules of evidence which do not directly relate to natural justice. The distinction between ‘fundamental’ and ‘technical’ rules of evidence is not always easy to draw, particularly when the arbitrators and the parties have different notions of curial procedures. Some rules of evidence, however, are widely accepted. An example is the prohibition against unqualified opinion evidence, and the idea of the ‘expert witness’ that comes with it. The IBA Rules pick up on this, contemplating the participation of fact witnesses¹⁶¹ and experts.¹⁶² At its broadest, the system of the IBA Rules is that the parties must provide the tribunal with a written witness statement for each person they intend to call; the other party will then be entitled to cross examine each of those witnesses at an oral hearing. The key features of the IBA Rules are:

- the arbitral tribunal “shall determine the admissibility, relevance, materiality and weight of evidence” (Article 9(1) IBA Rules).
- the arbitral tribunal shall exclude at the request of a Party or on its own motion any document, statement, oral testimony or inspection for seven listed reasons (which include “considerations of fairness or equality of the Parties that the arbitral tribunal determines to be compelling” (Article 9(2) IBA Rules).
- if a party fails without satisfactory explanation to produce any document requested in a Request to Produce to which it has not objected, the arbitral tribunal “may infer that such document would be adverse to the interests of that Party” (Article 9(4) IBA Rules).

27.3 An agreement of the parties and the Rules (in that order) shall at all times prevail over an inconsistent provision in the *International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration*.

¹⁵⁸ Born, above note 69, 1794.

¹⁵⁹ Preamble to the IBA Rules, para 1.

¹⁶⁰ Preamble to the IBA Rules, para 4.

¹⁶¹ IBA Rules, Article 4.

¹⁶² IBA Rules, Article 5.

This provision establishes a pecking order: it indicates that, whilst the agreement of the parties prevails over the ACICA Rules and the IBA Rules, the ACICA Rules prevail over the IBA Rules (in the absence of an agreement of the parties). This is essentially a conflict of laws model for rules of evidence. The ranking of the agreement of the parties reflects the primacy of party autonomy in international arbitration.

ARTICLE 28 - Interim Measures of Protection

28.1 Unless the parties agree otherwise in writing, the Arbitral Tribunal may, on the request of any party, order interim measures of protection. 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. The Arbitral Tribunal shall endeavour to ensure that the measures are enforceable.

The procedural guarantees that are central to international arbitration can be hazardous to the position of the claimant. Whilst the claimant waits for its case to be heard, there is often a risk that the respondent will use its time to take steps to avoid the effect of an award made against it. This can be done by moving target assets to other jurisdictions or entities, or devaluing the property the subject of the claim. In the worst case, evidence might be destroyed, and intentional damage might be done to the claimant's business while the clock ticks. For some time now, national laws have recognised that the delicate balance of procedural and substantive rights requires that users of international arbitration have means of preventing these abusive manoeuvres. The notion that arbitrators have the authority to order interim measures of protection has developed as a result. 'Interim measures' are orders directed at the preservation of a party's rights in the period in which the claim is on foot, but undecided. They are intended to preserve a factual or legal situation in order to safeguard rights, the recognition of which is sought from the tribunal that has jurisdiction over the substance of the case;¹⁶³ to prevent a *Pyrrhic* victory, in which the claimant succeeds but cannot achieve satisfaction. In the lexicon of international arbitration, interim measures are also known as 'provisional measures' and 'conservatory measures', and, depending upon the stage at which they are sought or made, they may also be referred to as 'preliminary' or 'interlocutory' measures. The linguistic preference in international arbitration for the expression 'interim measures' (rather than 'provisional measures', or 'conservatory measures') is traceable to the 1976 UNCITRAL Arbitration Rules, and the Model Law that followed them.

Whilst interim measures have a long history in public adjudication,¹⁶⁴ it is only relatively recently that they have become available to parties engaged in international commercial arbitration. The main reason for the historical absence of interim measures in international commercial arbitration is that most of the national laws that gave arbitrators their adjudicatory authority did not confer the power to order interim measures, or the related coercive powers (such as the power to hold a party in contempt) that are necessary to enforce them. The New York Convention was (and remains) silent on interim measures, as were the Geneva Protocol and Convention that preceded it. Indeed, some highly developed national laws expressly barred arbitrators from ordering interim measures of protection. Up until the passage of the Private International Law in 1987, Swiss law prohibited arbitrators from

¹⁶³ *Van Ulden Maritime BV v Kommanditgesellschaft in Firma Deco Line*, C-391/95 [1998] ECR I-7091 at 7133 (ECJ).

¹⁶⁴ Buckland, W. W., McNair, A. D., Lawson, F. H. (ed.), *Roman Law and Common Law*, Cambridge 1965, 420-3, cited in Yesilirmak, A., *Provisional Measures in International Commercial Arbitration*, Kluwer 2005, 224. The laws of Rome and Norman England allowed parties to civil claims to seek orders protecting property on a provisional basis.

issuing interim measures.¹⁶⁵ Similar restrictions were in force in Germany until the Model Law was adopted in 1998,¹⁶⁶ and also in Austria¹⁶⁷ (until 2005), Greece¹⁶⁸ (until 1999) and Spain¹⁶⁹ (until 2003). The arbitration laws of Argentina,¹⁷⁰ Italy,¹⁷¹ China¹⁷² and Quebec¹⁷³ still bar arbitrators from granting interim measures. Today, these laws are the exception, and although the scope and limits of the power vary, most developed arbitration laws now contain provisions which authorise the arbitrator to grant interim measures of protection.

Certain international laws also approach the issue of interim measures: the Washington Convention allows ICSID tribunals to ‘recommend’ that interim measures of protection be adhered to by a party¹⁷⁴ (a recommendation which is increasingly treated as binding),¹⁷⁵ and the European Convention on International Commercial Arbitration (1961) provides that a party who requests interim measures from a state court does not waive their right to arbitration.¹⁷⁶ Taken together, these laws display a broader trend towards the acceptance of interim measures that is an aspect of the increasing procedural sophistication and maturity of international arbitration. The most recent chapter in this story is the 2006 Revision of the UNCITRAL Model Law, which, generally speaking, forms the basis of the ACICA Rules régime for interim measures of protection. Some of the more controversial of the 2006 revisions to the Model Law - such as the inclusion of a power to grant *ex parte* preliminary orders - have been left out of the ACICA interim measures régime. The Swiss Rules also feature in Article 28, although not as prominently as in other parts of the ACICA Arbitration Rules. Common Law jurisprudence is also represented in places, such as the security for costs power at Article 28.2(e).

By way of further preface, it is also important to note that the ACICA regime for interim measures of protection presumes the formation of the arbitral tribunal. None of the operative provisions of Article 28 refer to ACICA *the institution*, the result being that ACICA itself is not empowered to grant interim measures, and it is only once the tribunal has been formed that the parties have the option of interim measures open to them under the ACICA Rules. This is the approach taken by all institutional rules. As it will usually take some weeks or months to form an international arbitral tribunal (longer if there are challenges), it is often the case that the need for interim measures of protection arises prior to the formation of the tribunal, and often before the notice of arbitration is sent. In such a situation, the application for preliminary orders must be made to the competent court, which will normally be the court that has jurisdiction over the relevant assets or evidence. As this will not always be the same state as the seat of the tribunal, such an application may take the form of an application for preliminary measures in aid of foreign arbitral proceedings. This is an interesting area, and

¹⁶⁵ Swiss Cantonal Concordat 1969, Article 26(1), which provided that, “The public judicial authorities alone have jurisdiction to make provisional orders”.

¹⁶⁶ German Code of Civil Procedure, Article 1036.

¹⁶⁷ Austrian Code of Civil Procedure, Article 593.

¹⁶⁸ Greek Code of Civil Procedure, Article 685.

¹⁶⁹ Spanish Arbitration Act, Article 23.

¹⁷⁰ Argentine National Code of Civil and Commercial Procedure, Article 753.

¹⁷¹ Italian Code of Civil Procedure, Article 818.

¹⁷² Chinese Arbitration Law, Article 68.

¹⁷³ Quebec Code of Civil Procedure, Article 940(4).

¹⁷⁴ Washington Convention, Article 47.

¹⁷⁵ *Occidental Petroleum Corp v Republic of Ecuador* (Decision on Provisional Measures) ICSID Case No. ARB/06/11 (17 August 2007); see also *Tokios Tokeles v Ukraine* (Procedural Order No.1), ICSID Case No. ARB/02/18 (1 July 2003); *Maffezini v Kingdom of Spain* (Procedural Order No. 2), ICSID Case No. ARB/97/7 (28 October 1999).

¹⁷⁶ European Convention, Article VI(4).

one which is outside the scope of this Commentary. It suffices to say here that there is good Common law authority for the proposition that the court has the inherent power to grant preliminary measures of protection in aid of foreign arbitral proceedings.¹⁷⁷ Following the decision of the Hong Kong Court of Appeal in *The Lady Muriel*, provided that the applicant can satisfy the court that the circumstances of the case necessitate that relief be given in order to prevent serious and irreparable damage to the position of the applicant in the arbitration, the court should grant the preliminary measure of protection without the approval of the arbitral tribunal.¹⁷⁸

Most modern institutional rules provide that the arbitral tribunal may grant interim measures. This is true of the Swiss Rules,¹⁷⁹ the SIAC Rules¹⁸⁰ and the ICC Rules.¹⁸¹ Article 17 Model Law also provides that, “Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures”.¹⁸² Under the Model Law, the tribunal may order a party to undertake interim measures of protection regarding the subject matter of the dispute.¹⁸³ A failure by a party to undertake those interim measures may be taken into account in awarding damages under the final award.¹⁸⁴ The tribunal may also require the provision of security in relation to these interim measures.¹⁸⁵ Article 28.1 ACICA Rules is generally compatible with Article 17 Model Law (2006 Revision), most significantly because it too allows the parties to deprive the tribunal of the power to order interim measures. Article 26 UNCITRAL Arbitration Rules refers to “interim measures of protection”, and it is from this provision that the ACICA Rules derive their language. The expression ‘interim measures’ is not defined in the UNCITRAL Arbitration Rules, and one result of this silence is that tribunals convened under these rules have broad discretion to decide what interim orders come within their power. It has been held, for example, that the ‘interim measures of protection’ envisaged by the Model Law included the power to issue subpoenas.¹⁸⁶ Whilst the ACICA Rules do not suffer from a lack of definition in this area, the broad understanding of ‘interim measures’ that prevails in UNCITRAL jurisprudence (and Model Law states) is still likely to affect ACICA tribunals.

Significantly, as has been noted above, unlike Article 17B Model Law (2006 Revision),¹⁸⁷ Article 28 ACICA Rules does not provide for *ex parte* interim measures. Both sides must be heard where interim measures are requested in ACICA Rules arbitration, and if ‘surprise’ interim orders (such as freezing or civil search orders) are required, then the *ex parte* application must be made to the competent court and not the arbitral tribunal. This is the position under most institutional arbitration systems. For example, Article 39(4) ICSID Rules provides that all sides must be heard on applications for interim measures. ICC tribunals have taken a similar approach,¹⁸⁸ and tribunals applying the UNCITRAL Arbitration Rules

¹⁷⁷ *The Lady Muriel* [1995] HKCA 615.

¹⁷⁸ *The Lady Muriel* [1995] HKCA 615 per Godfrey JA at 11.

¹⁷⁹ Swiss Rules, Article 26.

¹⁸⁰ SIAC Rules, Section 25.

¹⁸¹ ICC Rules, Article 23.

¹⁸² Model Law, Article 17.

¹⁸³ Model Law, Article 17,

¹⁸⁴ (1985) 16 *Yearbook of the United Nations Commission on International Trade Law* 124.

¹⁸⁵ Model Law, Article 17,

¹⁸⁶ *Vibroflotation AG v Express Builders Co Ltd* (unreported, High Court of Hong Kong, 15 August 1994, per Kaplan J)

¹⁸⁷ Article 17B of the Model Law (2006 Revision) provides that, “Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.”

¹⁸⁸ ICC Final Award 8893 of 1997.

(including Iran-United States Claims Tribunal panels)¹⁸⁹ often arrive at the same conclusion based on the right to be heard under Article 15(1) UNCITRAL Arbitration Rules. There is, however, a growing body of opinion in favour of *ex parte* applications for interim measures of protection in international arbitration, especially in the case of *Mareva*¹⁹⁰ and *Anton Piller*¹⁹¹ orders, which require surprise to be effective. In such a situation, allowing the respondent to be heard would thwart the purpose of the measure, and risk irreparable harm to the applicant.¹⁹² These practical concerns are reflected in Article 17B Model Law (2006 Revision)¹⁹³, but they have not informed the ACICA Rules. Instead, the ACICA Rules take the conventional approach, and allow only *inter partes* applications for interim measures. If the application succeeds, then the measures may be granted in the form of an ‘award’ or in any other form (for example, a ‘procedural order’) provided, however, that reasons for the measures are given. In this regard, Article 28.1 ACICA Rules differs from the Model Law (2006 Revision), Article 17C(5) of which stipulates that, “A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court.” In contrast, Article 28.1 ACICA Rules charges the tribunal with the task of ensuring that the measures are ‘enforceable’, meaning enforceable by state courts applying national arbitration laws. The closing words of Article 28.1 ACICA Rules (“endeavour to ensure that the measures are enforceable”) confirm the usual situation that state court assistance will be required if it becomes necessary to enforce interim measures granted by the tribunal.

Nearly all national arbitration laws acknowledge the limits of the arbitrator’s authority as not including the ‘direct coercive power’ to compel compliance with an interim measure of protection.¹⁹⁴ An arbitrator cannot, for example, find a party to be in contempt of a *Mareva* order. Accordingly, when an interim measure is ordered by the tribunal, enforcement is a matter for state courts alone. If enforcement assistance is sought, then those considerations which bear upon applications for interim measures in public adjudication will apply equally to the request for interim measures in aid of ACICA Rules arbitration. In a Common Law seat such as Australia, this will mean that local court rules and case law will be applicable. In Civil Law states, the local code of civil procedure will usually govern the application. Matters become significantly more complicated when the request for enforcement of the interim measures is made in a state other than the seat. This is because, due to the fact that interim measures are generally seen as lacking the substantive finality of an ‘arbitral award’, most state courts take the view that the special enforcement system of the New York Convention is

¹⁸⁹ *Component Builders Inc v Islamic Republic of Iran*, IUSCTR Case No. 395 (Order 10 January 1985), reprinted in Iran-US CT Reps 3, 4.

¹⁹⁰ Also known as ‘civil freezing orders’ or ‘asset preservation orders’, the term ‘*Mareva* Injunction’ originates from the decision of the English Court of Appeal in *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd’s Rep 509.

¹⁹¹ Also known as ‘civil search orders’, *Anton Piller* orders are named after the English Court of Appeal case *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

¹⁹² Berger, K. P., ‘Party Autonomy in International Economic Arbitration: A Reappraisal’ (1993) 4 *American Review of International Law* 1, 337.

¹⁹³ Article 17B Model Law (2006 Revision) allows parties to apply for 20 day ‘preliminary orders’ without giving notice to the party against whom they will be made. However, it is well settled that fairness and the interests of justice must guide the tribunal at all times, and if any *ex parte* applications for interim measures are made under this provision, the tribunal must ensure that the Article 18 Model Law principle of equal treatment is not offended, and the absent Respondent is able to present its case against the orders made at a later date. The 2006 Model Law’s specific regime for preliminary orders addresses these natural justice requirements directly by limiting the period of the preliminary order to twenty days, granting the respondent an ‘as soon as practicable’ right to be heard, and expressly stating that preliminary orders are not subject to enforcement in a court.

¹⁹⁴ Born, above note 68, 1966.

not available to aid their enforcement.¹⁹⁵ This is the position in Australia.¹⁹⁶ This view is, however, slowly changing, and at the risk of crystal ball gazing, there is good reason to expect that interim measures will become enforceable under the New York Convention in the coming decades. Indeed, as Gary Born notes, “there is no sound policy reason for withholding judicial enforcement mechanisms for tribunal-ordered provisional measures”.¹⁹⁷

28.2 An interim measure of protection is any temporary measure by which the Arbitral Tribunal orders a party to:

- (a) maintain or restore the status quo pending determination of the dispute;**
- (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;**
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied;**
- (d) preserve evidence that may be relevant and material to the resolution of the dispute; or**
- (e) provide security for legal or other costs of any party.**

This Article of the ACICA Rules defines the expression ‘interim measures’ by reference to content. Article 25 LCIA Rules also provides a limited definition of ‘interim measures’, focusing on security for costs and more substantive payments into escrow,¹⁹⁸ as well as orders for the preservation, storage or sale of property.¹⁹⁹ The interim measures contemplated by Article 28.2 ACICA Rules include the law’s ‘two nuclear weapons’,²⁰⁰ *Mareva*²⁰¹ and *Anton Piller* Orders.²⁰² *Mareva* Orders are certainly within the language of Article 28.2(c), in that the purpose of a civil freezing order is to prevent frustration of a monetary judgment (rather than provide security for the judgement that the Claimant hopes to obtain).²⁰³ In Anglo-Common Law freezing order jurisprudence, a class of ‘ancillary measures’ is recognised as including the following orders:

¹⁹⁵ The principal exception is the United States, where some courts have shown themselves willing to enforce foreign interim measures on the basis that interim measures attract *res judicata*. See for example *Sperry International Trade v Government of Israel*, 532 F. Supp. 901 (SDNY 1982); see also *Southern Seas Navigation Limited (Monrovia) v Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692 (1985).

¹⁹⁶ *Resort Condominiums International Inc v Howell & Anor* (1993) 118 ALR 655, where Lee J held (at 664) that an interim award restraining the respondent from exchanging certain confidential information with third parties was held not enforceable as an ‘award’ under the New York Convention because it was ‘clearly of an interlocutory or procedural nature’.

¹⁹⁷ Born, above note 68, 2023.

¹⁹⁸ LCIA Rules, Article 25.1(a).

¹⁹⁹ LCIA Rules, Article 25.1(b).

²⁰⁰ *Bank Mellat v Nikpour* (1985) FSR 87 (CA) per Donaldson LJ at 92.

²⁰¹ Also known as ‘civil freezing orders’ or ‘asset preservation orders’, the term ‘*Mareva* Injunction’ originates from the decision of the English Court of Appeal in *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd's Rep 509.

²⁰² Also known as ‘civil search orders’, *Anton Piller* orders are named after the English Court of Appeal case *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

²⁰³ *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 619.

1. Disclosure of Assets Order – an order obliging the Respondent to disclose the nature, value and location of its assets;²⁰⁴
2. Cross Examination Order – an order requiring the Respondent to attend for cross-examination in relation to its disclosure of assets statement;²⁰⁵
3. Order for Delivery Up – an order requiring the Respondent to hand over to a named third party (such as the Applicant’s lawyers) designated assets which are not at issue in the merits of the dispute;²⁰⁶
4. Bank Direction Order – an order requiring the Respondent to sign a document directing their bank to disclose information to the Applicant;²⁰⁷
5. Order to Pay into Account – an order requiring the Respondent to restore money removed from its accounts by paying a specified sum into escrow;²⁰⁸
6. Norwich Order – a type of disclosure of information order that is issued to an innocent third party, such as the Respondent’s bank.²⁰⁹

The wording of Article 28.2(c) ACICA Rules, coupled with the fact that Common Law jurisprudence acknowledges that ancillary orders are necessary “to ensure that the exercise of *Mareva* jurisdiction is effective”,²¹⁰ suggests that an ACICA Rules tribunal could grant all of these interim measures of protection. Article 28.2(d) ACICA Rules is a clear reference to *Anton Piller* orders, the purpose of which is to preserve material evidence which is in danger of being destroyed. This type of interim measure is especially important in intellectual property disputes. The third main category of measures contemplated by Article 28.2 ACICA Rules is orders for security for costs (sub-article (e)).

Unlike Article 17(2)(b) Model Law, the orders envisaged by Article 28.2(b) ACICA Rules are not limited to measures directed at the prevention of imminent harm “to the arbitral process itself”. Article 17(2)(b) Model Law has never been tested, and the precise effect of this provision is difficult to predict: it certainly means that a broader range of orders directed at maintaining the status quo are available to an ACICA Rules tribunal than would be the case under the Model Law (2006 Revision). Orders directed at the protection of the parties and their assets (including goodwill and business reputation) are able to be made as ‘interim measures’. An ACICA Rules tribunal would, for example, be able to make an order that a manufacturer keep supplying a distributor for the duration of their arbitration so that the distributor does not suffer irreparable harm to their reputation as a result of their having to break contracts with third parties. In such a case, the damage suffered by the distributor would be irreparable but unrelated “to the arbitral process itself”; under the ACICA Rules this does not prevent the distributor from seeking interim relief from the tribunal.

28.3 Before the Arbitral Tribunal orders any interim measure, the party requesting it shall satisfy the Arbitral Tribunal that:

²⁰⁴ See, for example, *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155.

²⁰⁵ *Den Norsk Bank ASA v Antonatos* [1999] QB 271 (CA).

²⁰⁶ *CBS United Kingdom Ltd v Lambert* [1983] 1 Ch 37 (CA).

²⁰⁷ *Bank of Crete SA v Koskotas* [1991] 2 Lloyd's Rep 587.

²⁰⁸ *Themehelp Ltd v West* [1996] QB 85 (CA).

²⁰⁹ *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133.

²¹⁰ *Bekhor & Co v Bilton* [1981] QB 923 (CA) per Ackner LJ (at 940).

- (a) irreparable harm is likely to result if the measure is not ordered;**
- (b) such harm substantially outweighs the harm that is likely to result to the party affected by the measure if the measure is granted; and**
- (c) 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.**

This Article, which is similar to Article 17A(1) Model Law (2006 Revision), provides a three-stage test which Applicant *must* pass in order for the relevant interim measures to be granted. The elements of a successful application for interim measures are compound (they are ‘*and*’-type elements), meaning that if the Applicant fails under one element, the tribunal will refuse to grant the interim measure. In terms of form, Article 28.3 ACICA Rules splits the first sub-article of Article 17A(1) Model Law (2006 Revision) into two. The principal *substantive* difference between the ACICA Rules and the Model Law (2006 Revision) is that, unlike the Model Law, the ACICA Rules do not give the tribunal the discretionary power to waive any of the Article 28.3 elements where the application is for an order to preserve evidence.²¹¹ This means that, in principle, it would be harder to get an *Anton Piller* order from an ACICA Rules tribunal than from a tribunal bound only by the 2006 text of the Model Law.

The criteria for granting interim measures under Article 28.2 ACICA Rules draw on the elements laid down by Lord Diplock in *American Cyanamid v Ethicon*.²¹² In *American Cyanamid*, the court required that the Applicant first pass an accessibility threshold by demonstrating that there is a serious question to be tried (but not necessarily a *prima facie* case). Once this threshold was passed, the House of Lords applied the following criteria:

1. Irreparable Harm: there must be a risk that the Applicant will suffer irreparable harm if an injunction is not ordered. The application will be refused if the harm can be adequately compensated at trial. The court must then evaluate the potential risk that the Respondent will suffer irreparable harm if an injunction is granted and the Respondent is successful on the merits. The application will be refused if the risk of irreparable harm to the Respondent is too high.
2. Balance of Convenience – the injunction will *not* be granted unless the relative hardship that will be suffered by the Applicant outweighs the relative hardship that will be suffered by the Respondent if the injunction *is granted*. If the balance of convenience is not able to be determined, then the court must decide the application based on which party is most likely to succeed on the merits.

Article 28.3(a) ACICA Rules captures the first arm of the ratio in *American Cyanamid*. Article 28.3(b) draws on Lord Diplock’s ‘balance of convenience’ test, and Article 28.3(c) is an approximation of His Lordship’s accessibility threshold. The party applying for an injunction

²¹¹ Article 17A(2) Model Law (2006 Revision) provides that the requirements for the grant of an interim measure of protection – being irreparable harm/balance of convenience and “reasonable possibility of success on the merits” – shall apply to applications for orders preserving evidence “only to the extent the arbitral tribunal considers appropriate”.

²¹² [1976] 2 WLR 316.

must have a ‘good arguable case’ against the Respondent.²¹³ Given that the ACICA Rules posit close approximations of the *American Cyanamid* elements, and considering the wide acceptance that these criteria have gained in Common Law jurisprudence over the last thirty years, ACICA Rules tribunals can be expected to treat Lord Diplock’s judgment, and those decisions following it, as persuasive authorities.

28.4 The Arbitral Tribunal may require a party to provide appropriate security as a condition to granting an interim measure.

This Article of the ACICA Rules is not concerned with securing the substantive claim, but rather with ensuring that the respondent does not suffer irreparable harm as a result of the interim measures. It contemplates tribunal-ordered undertakings as to costs and damages, given by the party seeking interim relief in favour of the respondent at the direction of the arbitrators. A similar provision is contained in Article 26(2) Swiss Rules.²¹⁴ The expression ‘appropriate security’ is plainly broad, and it is clear from the wording of ACICA Article 28.7 (“any costs or damages caused by the [interim] measure”) that the sums covered by Article 28.4 include both legal costs and more substantive damages.

Legal costs are the amounts that would be awarded to the party affected by the interim measures if the claimant’s case against them failed. Damages are those losses that the respondent has suffered as a result of the interim measures obtained against them. With respect to the first category, the power to grant security for legal costs has long been a feature of arbitration in Anglo-Common Law jurisdictions, and orders of this kind are a part of everyday life in litigation and arbitration in Common Law jurisdictions. Although orders for security for costs are generally uncommon in arbitrations conducted in Civil Law jurisdictions, they are not unheard of: for example, ICC tribunals have found an inherent power to order security for costs,²¹⁵ and Swiss Rules tribunals have reached similar conclusions.²¹⁶ However, these are relatively rare instances, and Civil Law-trained arbitrators are usually averse to making orders for security for costs, often concluding that requiring security from a party interferes with that party’s right to be heard.²¹⁷

With regard to the second category of sums covered by Article 28.4 ACICA Rules, the power to require security for damages also has its origins in Anglo-Common Law jurisprudence. In Common Law countries, and “save in special cases”,²¹⁸ applicants for prohibitive injunctions (including *Mareva* Orders) must provide undertakings that they will compensate the respondent for losses suffered as a result of the interim measure if their action on the merits fails.²¹⁹ This Common Law rule has now been codified in many states, including England²²⁰ and Australia,²²¹ where the modern approach is to treat such an undertaking as an element of

²¹³ *Barclay-Johnson v Yuill* [1980] 1 WLR 1259 at 1265. Australian jurisprudence varies on this point, with some states applying a ‘serious question to be tried’ rule, and others using a ‘reasonably arguable case’ formulation.

²¹⁴ Swiss Rules Article 26(2) provides that, “The arbitral tribunal shall be entitled to order the provision of appropriate security”.

²¹⁵ See for example Interim Award in ICC Case No. 8223; Interim Award in ICC Case No. 8670.

²¹⁶ Order No. 6, Zürich Chamber of Commerce, 12 November 1991, 13 ASA Bull 84; see also Award of 21 December 1998, 17 ASA Bull 59.

²¹⁷ Born, above note 68, 2005.

²¹⁸ *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545 (CA) per Neill LJ at 1551

²¹⁹ *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1980-81) 146 CLR 249

²²⁰ *English Civil Procedure Rules* 1998, Part 25.5.1(1)

²²¹ See for example *New South Wales Supreme Court Rules*, Part 28, Rule 7(2), which provides that the “usual undertaking as to damages, if given with any interlocutory order or undertaking, is an undertaking to the Court

the application for interim relief. However, just because the undertaking has been given does not mean it will be called upon. Where the successful applicant for a prohibitive injunction has been guilty of conduct that would render it inequitable to enforce the undertaking as to damages, the court has the discretion to refuse to enforce the undertaking. Given that court assistance is usually required for the enforcement of interim measures ordered by arbitrators, it is likely that these Common Law rules would guide an ACICA Rules tribunal in determining what security is ‘appropriate’, and whether any undertakings as to damages made by the applicant should be enforced.

28.5 The requesting party shall promptly disclose in writing to the Arbitral Tribunal any material change in the circumstances on the basis of which that party made the request for, or the Arbitral Tribunal granted, the interim measure.

This Article is, in substance, similar to Article 17F(1) Model Law (2006 Revision). However, Article 28.5 ACICA Rules imposes the obligation to disclose on the party requesting the interim measure, whereas under Article 17F(1) Model Law (2006) the arbitral tribunal may require *any party* to promptly disclose material changes to the circumstances which led to the granting of the interim measure. Additionally, the obligation under Article 28.5 ACICA Rules is framed in strong terms (‘*shall*’), whereas the arbitral tribunal has a discretion under Article 17F(1) Model Law (2006) to seek relevant information from any party. The rule has its origins in Common Law freezing order jurisprudence, which requires that applicants for *ex parte* interim relief must make full and frank disclosure of all material facts adverse to their case. However, because the ACICA Rules do not permit *ex parte* applications for interim measures of protection, Article 28.5 is drafted in the past-tense (‘made’) and speaks only to disclosure of ‘material’ changes in circumstances after the interim measure was granted.

The word ‘material’ clearly incorporates the *de minimis non curat lex* maxim into Article 28.5 ACICA Rules. The effect of *de minimis* is that the interim measure will not be affected by mere trifling changes in the circumstances of the applicant. It has been said that ‘material facts have a broad compass in that they include anything relevant to the question of whether or not the relief sought should be granted’. Accordingly, what is and is not material will depend upon the facts of the dispute. However, a good example of a material change that must be disclosed is where the financial circumstances of the claimant have deteriorated such that they may no longer be able to make good on their undertaking as to damages.²²² If, in ACICA Rules arbitration, the tribunal has required that the applicant for interim relief provide an undertaking as to damages under Article 28.4 ACICA Rules, then the applicant must ensure that the tribunal is advised of any changes to the profitability of the applicant’s business and its ability to meet its obligations. Failure to advise the tribunal will *prima facie* entitle the respondent (or the tribunal, acting under Article 28.6 ACICA Rules) to apply for discharge of the interim measures.²²³

28.6 The Arbitral Tribunal may modify, suspend or terminate any of its own interim measures at any time upon the request of any party. In exceptional circumstances the Arbitral Tribunal may, on its own initiative, modify, suspend or terminate any of its own interim measures upon prior notice to the parties.

to submit to such order (if any) as the court may consider to be just for the payment of compensation, to be assessed by the Court or as it may direct, to any person, whether or not a party, affected by the operation of the interlocutory order or undertaking or of any interlocutory continuation, with or without variation, of the order or undertaking”.

²²² *Manor Electronics Ltd v Dickson* [1988] RPC 618.

²²³ *Manor Electronics Ltd v Dickson* [1988] RPC 618.

Article 28.6 ACICA Rules is similar to Article 17D Model Law (2006 Revision). The second arm of the ACICA provision is most significant – it allows for *sua sponte* modification, suspension or termination of any interim measure ordered by the tribunal, on the proviso that the parties are given notice. Article 28.6 ACICA Rules does not empower the tribunal to issue interim measures *sua sponte*, but only to vary or terminate them in ‘exceptional circumstances’. The Article 28.6 ACICA Rules *sua sponte* power is, therefore, framed as an exceptional prerogative, and it will rarely be enlivened. The ACICA Rules do not define the expression ‘exceptional circumstances’, but it can be surmised that the circumstances contemplated by this provision include both the circumstances of the case and the circumstances of the parties. Following the reasoning of Scott J in *Manor Electronics*, non-disclosure of a material change in the applicant’s circumstances (in breach of Article 28.5 ACICA Rules) would qualify as an ‘exceptional circumstance’ activating the tribunal’s *sua sponte* power to lift the interim measure. However, even in such a situation, the tribunal would only act on its own initiative if no motion was made by the respondent.

28.7 If the Arbitral Tribunal later determines that the measure should not have been granted, it may decide that the requesting party is liable to the party against whom the measure was directed for any costs or damages caused by the measure.

This Article differs in wording from Article 17G Model Law (2006 Revision). Indeed, Article 28.7 ACICA Rules stipulates that the tribunal “*may* decide that the requesting party is liable to the party against whom the measure was directed for any costs or damages caused by the measure” (emphasis added). In contrast, Article 17G Model Law (2006) provides that, “The party requesting an interim measure or applying for a preliminary order *shall* be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measures or the order should not have been granted.” In effect, the two provisions are the same, as both leave it to the tribunal to determine whether, in hindsight, the interim measure should have been granted.

As has been noted, the mere fact that an undertaking as to costs or damages has been given does not mean the applicant must pay under it. Consistent with the equitable origins of interim measures, Anglo jurisprudence stresses that the enforcement of the undertaking is a matter for the court, and this discretion would appear to be enjoyed equally by arbitrators. If the undertaking is enforced, then the usual practice is to assess damages flowing from the interim measure in the same way damages would be assessed if the undertaking were a contract in which the applicant agreed not to prevent the respondent from doing what the interim measure prevented them from doing.²²⁴ It is clear from the wording of Article 28.7 ACICA Rules (‘*caused*’) that, in order to be entitled to damages, the party affected by the injunction must establish a chain of causation between the interim measure and the loss they say they have suffered. Much like tort, the prevailing method for establishing causation in Common Law contractual contexts is the ‘But For’ Test.²²⁵ This test is applied by the court as a question: but for the interim measure, would the respondent have suffered the loss they did? If the answer is ‘no’, then causation will normally be made out, and damages will be available. At Common Law, however, mitigation and remoteness must also be satisfied by parties claiming damages for breach of contract. Article 28.7 ACICA Rules does not expressly refer to these additional elements, directly addressing causation only, but it is likely

²²⁴ *F Hoffmann-La Roche & Co AG v Secretary of State for Trade & Industry* [1975] AC 295 per Lord Diplock at 361.

²²⁵ *Chappel v Hart* (1998) 195 CLR 232; see also *Kenny & God Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413.

that they would still need to be satisfied, particularly if the tribunal were seated in Australia. Regarding remoteness, according to the rule in *Hadley v Baxendale*,²²⁶ remoteness requires that the defendant knew, or ought reasonably to have known, that the plaintiff was likely to suffer the “kind or type of loss” they did.²²⁷ The onus is on the party claiming damages to establish that their losses are not remote. Turning to mitigation, the onus reverses: it is for the defendant to show that the party claiming damages failed to mitigate its losses.²²⁸ The defendant must show that the claimant could have avoided the losses, and that they failed to do so.

28.8 The power of the Arbitral Tribunal under this Article 28 shall not prejudice a party’s right to apply to any competent court or other judicial authority for interim measures. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated, in writing, by the applicant to the Arbitral Tribunal, all other parties and ACICA.

Article 28.8 ACICA Rules is compatible with Article 17J Model Law (2006 Revision), according to which “A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts”. This Article gives the parties the option of applying to the Tribunal or “any competent court or other judicial authority” for interim measures of protection. It is, in effect, a non-exclusive jurisdiction clause for interim measures. Provisions such as this, which vest limited concurrent jurisdiction in the arbitral tribunal and the courts, can be found in all states that have taken up to 2006 text of the Model Law. The United States *Federal Arbitration Act* (1925) and the Swiss *Private International Law* (1987) contain equivalent provisions. The rationale for ‘concurrent’ or ‘non-exclusive’ interim measures jurisdiction is that interim measures are often sought on an urgent basis, and often in jurisdictions other than the seat (where assets are located, for example). The problem of enforcement also justifies concurrent jurisdiction in the area of interim measures.

Under Article 28.8 ACICA Rules, so long as the applicant has not already applied to the tribunal for the interim measure (and lost), then the applicant may elect to go to court to obtain the interim measure. The likely exception to the Article 28.8 rule of concurrent jurisdiction is security for costs: state courts are generally unwilling to make orders for security for costs of arbitration.²²⁹ The basis for this resistance is the principle of non-intervention in arbitration²³⁰. In England, the *Arbitration Act* 1996 expressly banned courts from hearing applications for security for costs of arbitration,²³¹ and the position is similar in other Common Law countries.²³² Therefore, despite the fact that Article 28.2 ACICA Rules defines ‘interim measures’ as including applications for security for costs (sub-article (e)), the Common Law rule against granting security for costs of arbitral proceedings effectively deprives the parties of their Article 28.8 ACICA Rules right to elect to take their application for security for costs to the supervising court. Parties to ACICA Rules arbitrations that seek interim orders for security for costs must therefore make their application to the arbitrators.

²²⁶ (1854) 9 Exch 341.

²²⁷ *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 356.

²²⁸ *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130.

²²⁹ *Coppee-Lavalin SA/NY v Ken-REN Chemical and Fertilizers Ltd* [1994] 2 All ER 449 (HL).

²³⁰ Born, above note 68, 2006.

²³¹ *English Arbitration Act* 1996, s.38(3).

²³² See for example *Frontier International Shipping Corp v The Owners and All Others Interested in the Ship “Tavros”* [2000] FC 427, 445 (Canadian Federal Court).

Generally speaking, however, the parties may elect to take their applications for interim measures to the arbitrator or the court. This right to elect is, of course, subject to *res judicata*: if the applicant has previously applied for the same interim measure and been refused, then an issue estoppel will lie against any further attempts to obtain the previously refused measure from the competent court. In order for the issue estoppel to arise, the application must be between the *same parties* on the *same issue* of law – a wholly new, different cause of action will not be barred. This means that, if a party applies to the tribunal for a *Mareva* order and is refused, they may still apply to the competent court for an *Anton Piller* order. It also means that a party who gets an interim measure of protection from the tribunal may still apply to the court for enforcement of that interim measure, because the two actions are different. Indeed, the right to apply for court enforcement of interim measures of protection is guaranteed by the concurrent jurisdiction clause at Article 28.8 ACICA Rules, so long as its internal notice requirements are complied with.

ARTICLE 29 - Default

29.1 If, within the period of time fixed by the Arbitral Tribunal, the Claimant has failed to communicate its Statement of Claim without showing sufficient cause for such failure, the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the Arbitral Tribunal, the Respondent has failed to communicate its Statement of Defence without showing sufficient cause for such failure, the Arbitral Tribunal shall order that the proceedings continue.

This Article is identical to Article 28(1) Swiss Rules and Article 28(1) UNCITRAL Arbitration Rules. Under this rule, if the Claimant fails to prosecute its claim, then consistent with the burden of action, the tribunal shall make orders ending the arbitration. The more common scenario in international arbitration is where the Respondent fails to answer. Rules for default proceedings are ‘vitaly important’,²³³ and default awards are common in international arbitration, especially in proceedings involving state entities. Like most international arbitration law²³⁴ and rules,²³⁵ Article 29.1 ACICA Rules ensures that the proceedings cannot be derailed by ‘Ostrich tactics’: if no Statement of Defence is filed, and no good cause is shown, the tribunal may issue orders that the arbitration go ahead.

When default proceedings are conducted, the tribunal is still bound by the rules of natural justice. This means that the absent Respondent must be notified at each stage of the proceedings, just as they would be if they were participating. The arbitral tribunal is not a court and, and unlike a court the arbitral tribunal has no power to “issue a default judgment predicated simply on one party’s non-participation”.²³⁶ Any award made against the absent Respondent must be fully reasoned, with the result that notwithstanding the *ex parte* nature of the proceedings the Claimant must still make submissions, lead evidence, and where directed call witnesses to prove its case.

²³³ Born, above note 68, 1867.

²³⁴ Similar prerogatives can be found at Model Law, Article 35; *English Arbitration Act* 1996, s.41(4); *Dutch Code of Civil Procedure*, Article 1040; Washington Convention, Article 45(2).

²³⁵ See for example ICC Rules, Articles 6(3) and 21(2); LCIA Rules, Article 15(8); AAA Commercial Rules, R 29.

²³⁶ Born, above note 68, 1867.

29.2 If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the Arbitral Tribunal may proceed with the arbitration.

This Article is a verbatim adoption of Article 28(2) Swiss Rules and Article 28(2) UNCITRAL Arbitration Rules. It is a default proceedings rule specific to attendance at the hearing. The same rules of proof and procedural fairness outlined above in respect of Article 29.1 ACICA Rules apply to hearings conducted in the absence of a party under Article 29.2 ACICA Rules. As a general rule, if the party has previously participated in the proceedings, but fails to attend the hearing of the matter, then good faith and procedural fairness dictate that orders to proceed in their absence should not be lightly made. If the party has *never* participated in the arbitration, then the tribunal may more readily exercise its discretion to proceed *ex parte* under Article 29.2 ACICA Rules.

29.3 If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Arbitral Tribunal may make the award on the evidence before it.

Again, this Article adopts the language of Article 28(3) Swiss Rules and Article 28(3) UNCITRAL Arbitration Rules, and the same considerations that bear on the exercise of general default powers apply to orders made under this rule of evidence. Significantly, the power to proceed to an award is framed in discretionary terms (*'may'*).

ARTICLE 30 - Closure of Hearings

30.1 The Arbitral Tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

This Article is identical to Article 29(1) UNCITRAL Arbitration Rules. It also closely resembles Article 29(1) Swiss Rules. However, Article 29(1) Swiss Rules uses the term 'proceedings' instead of 'hearings', perhaps in recognition that oral hearings are not held in all arbitrations. It is important to note that the tribunal is under no obligation to inquire as to whether the parties have completed the presentation of their cases – it is a matter for the arbitrators. In practice, however, either out of habit or custom, such an inquiry is usually made unless a clear indication is given by counsel. It is important to note that the arbitrators do not become *functus officio* ('office performed') simply by declaring the hearings closed. Indeed, the authority of the arbitrators only ends when the award has been rendered and becomes final.

30.2 The Arbitral Tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

Article 30.2 ACICA Rules is a verbatim adoption of Article 29(2) UNCITRAL Arbitration Rules. As with Article 30.1 ACICA Rules, Article 30.2 closely resembles Article 29(2) Swiss Rules but, again, Article 29(2) Swiss Rules uses 'proceedings' instead of 'hearings'. The power to reopen the hearings is conditional upon the tribunal being satisfied that there are 'exceptional circumstances' to justify the order.

ARTICLE 31 - Waiver of Rules

A party that knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.

This Article is nearly identical to both Article 30 Swiss Rules and Article 30 UNCITRAL Arbitration Rules (with the only substitution of ‘his’ in the UNCITRAL Arbitration Rules for ‘its’ under the gender-neutral ACICA Rules). Waiver is often raised in the context of challenges to arbitrators, where the allegation usually relates to non-disclosure of a circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. If, during the proceedings, a party becomes aware of such circumstances – say for example, that the arbitrator had acted as counsel for the other side in a previous matter – and does not raise them promptly, then they will be deemed to have waived their right to challenge the enforcement of the award on the basis of apparent bias.²³⁷ The courts of Model Law and non-Model Law states have demonstrated broad support for this approach.²³⁸

SECTION IV: THE AWARD

ARTICLE 32 - Decisions

When there are three arbitrators, any award or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators. Failing a majority decision on any issue, the opinion of the Chairperson shall prevail.

This provision closely reflects Article 31(1) Swiss Rules. It is also similar to Article 31(1) UNCITRAL Arbitration Rules. However, the UNCITRAL Arbitration Rules do not provide for circumstances in which there is no majority decision. The ICC Rules²³⁹ and the LCIA Rules²⁴⁰ contain similar provisions to Article 32 ACICA Rules, providing for majority awards and conferring on the Chairman of the tribunal the exceptional power to make a decision alone. The Chairperson's power to decide alone in the absence of a majority reflects the customary primacy of the presiding member, and the fundamentally different role they perform on the tribunal from that of their fellow members. The arbitration laws of England²⁴¹ and Switzerland²⁴² expressly provide that, in the event of deadlock, the vote of the Chairperson shall prevail.

ARTICLE 33 - Form and Effect of the Award

33.1 In addition to making a final award, the Arbitral Tribunal shall be entitled to make interim, interlocutory, or partial awards.

²³⁷ *The Island Territory of Curacao v Solitron Devices Inc*, 356 F. Supp 1 (U.S.D.C., S.D.N.Y. 1973).

²³⁸ See, for example, *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm); *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14 (QB); *Ghiradosi v Minister of Highways (BC)* (1996) 56 DLR (2d) 469; *AAOT Foreign Economic Association (VO) Technostroyexport v International Development and Trade Service, Inc.*, 139 F 3d 980 (2d Cir. 1999); Judgment of Swiss Federal Tribunal of 4 August 2006 (DFT 4P.105/2006); Judgement of Paris Court of Appeal of 2 June 1989.

²³⁹ ICC Rules, Article 25(1).

²⁴⁰ LCIA Rules, Article 26(3).

²⁴¹ *English Arbitration Act* 1996, s.20(4).

²⁴² SPIL, Article 189(2).

This Article is a verbatim adoption of Article 32(1) UNCITRAL Arbitration Rules. It is also the same as the first part of Article 32(1) Swiss Rules. However, Article 32(1) Swiss Rules also provides that, “if appropriate, the arbitral tribunal may also award costs in awards that are not final.” Article 33 ACICA Rules expressly provides for three types of awards: interim, interlocutory and partial awards. An interim award deals with an issue in dispute on a ‘temporary’ basis, and therefore, it could be overturned in the ‘final’ award. It is a question of law as to whether an award is an ‘interim’ or ‘final’ award.²⁴³ An interlocutory award relates to issues which are incidental to the principal purpose of the proceedings. A partial award deals with one or more (but not all) of the issues presented to the arbitral tribunal for resolution.

33.2 The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

Article 33.2 ACICA Rules is identical to Article 32(2) UNCITRAL Arbitration Rules and Article 32(2) Swiss Rules. It is consistent with Article 31.1 Model Law: the award must be made in written form. It must be supported by written reasons, unless the parties have agreed otherwise.²⁴⁴ The issue of a final award ends the arbitral proceedings,²⁴⁵ and by issuing a final award the arbitrators become *functus officio*. According to the *functus officio* doctrine, the adjudicatory authority of the arbitrator ends when the award they hand down becomes final and the matters of law and fact the subject of it become *res judicata*. Most national laws and institutional rules (including the ACICA Rules) include exceptional provisions for the correction, interpretation and supplementation of the award, but other than in these limited circumstances, the issuance of a final award brings an end to the mandate of the arbitrator.

The tribunal may also terminate the proceedings without issuing a final award if the Claimant withdraws its claim, if the parties so agree, or if the tribunal considers that continuing the arbitration is “unnecessary or impossible”.²⁴⁶ These powers are conferred expressly by Article 35 ACICA Rules.

33.3 The Arbitral Tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

This Article is the same as Article 32(3) UNCITRAL Arbitration Rules and Article 32(3) Swiss Rules, and a similarly derogable duty to give reasons exists under Article 31(2) Model Law – these systems create a default ‘reasons-rule’, under which the tribunal will be obliged to give reasons unless the parties agree otherwise. In contrast, reasoned awards are required under the arbitration rules of the ICC,²⁴⁷ CIETAC²⁴⁸ and ICSID.²⁴⁹ Indeed, the reasons requirement is a point of interest for the comparative arbitration lawyer: where the Common Law has traditionally allowed for the enforcement of unreasoned awards, the Civil Law has not. Modern practice reflects the European approach: today, the duty to give reasons is imposed by the arbitration laws of most developed seats, and is widely regarded as a

²⁴³ *Wanari Pty Ltd v Mercy & Sons Pty Ltd*, unreported decision of Supreme Court of New South Wales, 27 February 1991, Brownie J.

²⁴⁴ Model Law, Article 31(2).

²⁴⁵ Model Law, Article 32(1).

²⁴⁶ Model Law, Article 32(2)(c).

²⁴⁷ ICC Rules, Article 25(2).

²⁴⁸ CIETAC Rules, Article 43(2).

²⁴⁹ ICSID Rules, Rule 47.

‘universal principle’ or custom of international arbitration.²⁵⁰ In nearly all Common Law jurisdictions (the United States being the principal exception), the old rule has been superseded, and the tribunal is now obliged to give reasons unless the parties have agreed otherwise.²⁵¹

The duty to give reasons requires that the arbitrators set out what, on their view of the evidence, did or did not transpire between the disputants, and why, in light of what transpired, they have reached the conclusion they have. The award must clearly and succinctly state what that conclusion is.²⁵² Best practice is to separately identify the relief ordered, usually in point form at the end of the award, so that interested parties can readily determine the effect of the decision. Point-form summaries of the orders made also reduce the need for interpretations of the award, and assist national courts at the enforcement stage.

33.4 An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. If any arbitrator refuses or fails to sign the award, the signatures of the majority or (failing a majority) of the Chairperson shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or Chairperson.

This Article is similar to Article 32(4) UNCITRAL Arbitration Rules and Article 32(4) Swiss Rules. However, unlike the UNCITRAL Arbitration Rules and the Swiss Rules, Article 33(4) ACICA Rules provides that in the event that any arbitrator refuses or fails to sign the award, the signatures of the majority, or failing a majority, the signature of the Chairperson, shall be sufficient. The German enactment of the Model Law takes a similar approach.²⁵³ Article 32(4) UNCITRAL Arbitration Rules and Article 32(4) Swiss Rules also provide that if an arbitrator refuses to sign, the award shall state the reason for the absence of their signature. Courts in some Common Law states have imposed this requirement.²⁵⁴ In practice, however, it is rare for an arbitrator to refuse to sign the award. Most of the reported instances of arbitrators refusing to sign awards come from notoriously heated proceedings of the Iran-United States Claims Tribunal.²⁵⁵

33.5 The Arbitral Tribunal shall communicate copies of the award signed by the arbitrators to the parties and ACICA.

Article 33.5 ACICA Rules reflects Article 32(6) UNCITRAL Arbitration Rules. Article 33.5 ACICA Rules also imposes the additional requirement that the arbitrators shall communicate copies of the award to ACICA. This part of Article 33.5 ACICA Rules is similar to Article 32(6) Swiss Rules which requires the arbitrators to communicate the award to the Chambers of Commerce and Industry. Article 32(6) Swiss Rules however provides that “originals of the award” shall be provided rather than copies.

33.6 Before communicating the award to the parties, the Arbitral Tribunal shall inquire of ACICA whether there are any outstanding monies due to it. The award shall not be communicated to the parties until ACICA certifies that there are no monies due to it.

²⁵⁰ Born, above note 68, 2450.

²⁵¹ This is the rule under s.16(1) IAA. See also *English Arbitration Act 1996*, s52(4); *New Zealand Arbitration Act*, s.31(2); *British Columbia International Commercial Arbitration Act*, s.31(3).

²⁵² *Bremer Handelsgesellschaft v Wetzucker* [1981] 2 Lloyd's Reps 130 at 123 (CA).

²⁵³ *German Code of Civil Procedure*, Article 1052(2); see also *Austrian Code of Civil Procedure*, Article 604.

²⁵⁴ See, for example, *D Frampton & Co. v Thibeault* [1998] FCJ No.305 (Federal Court of Canada).

²⁵⁵ Born, above note 68, 2448.

This provision is without equivalent in the UNCITRAL Arbitration Rules, the Swiss Rules or the ICC Rules. It is clear from this provision that ACICA has a lien on the award for unpaid fees.

33.7 If the arbitration law of the place where the award is made requires that the award be filed or registered by the Arbitral Tribunal, the Tribunal shall comply with this requirement within the period of time required by law.

This Article closely reflects Article 32(7) UNCITRAL Arbitration Rules. This provision, however, is not relevant in Model Law states such as Australia which, in general, do not require that foreign arbitral awards must be registered in the state in which they were rendered. Indeed, the abolition of the ‘double *exequatur*’ requirement was one of the main aims of the New York Convention.²⁵⁶ Nevertheless, where the award-debtor is from (or has target assets in) a non-Model Law state, the award-creditor should seek specialist advice from lawyers on whether the courts of that state observe a registration or double *exequatur* requirement for foreign arbitral awards.

ARTICLE 34 - Applicable Law, Amiable Compositeur

34.1 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.

Under this provision, the arbitral tribunal must decide the substance of the dispute in accordance with the law chosen by the parties, and if no choice of substantive law has been made, then the tribunal must apply the ‘rules of law’ that it considers to be appropriate in the circumstances of the dispute. Article 34.1 ACICA Rules is similar to Article 22(1) SCC Rules. It is also close in form to Article 33 UNCITRAL Arbitration Rules, except that the UNCITRAL Arbitration Rules stipulate that, failing a designation of the applicable law by the parties, the question of applicable substantive law is to be determined by conflict of laws rules. Article 28(2) Model Law takes a similar approach.²⁵⁷

The reference to ‘law’ in the first arm of Article 34.1 ACICA Rules is a reference to *national* law. The substantive *national* law applicable to the contract may include uniform instruments and conventions adopted or acceded to by the state of choice. These may include the United Nations Convention on Contracts for the International Sale of Goods (CISG); transport law conventions such as the Hague Rules,²⁵⁸ the Hague-Visby Rules,²⁵⁹ the Hamburg Rules,²⁶⁰ the Chicago Convention²⁶¹ and the Warsaw Convention;²⁶² and applicable bilateral and multilateral investment treaties (such as the Energy Charter Treaty). There is a growing body of authority for the proposition that, when applying a uniform international commercial law, foreign decisions should be considered and, where appropriate, treated as persuasive. For

²⁵⁶ *Karaha Bodas Company Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366-7 (5th Cir. 2003).

²⁵⁷ Model Law, Article 28(2).

²⁵⁸ *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* 1924, done at The Hague on 25 August 1924.

²⁵⁹ *Brussels Protocol Amending the Hague Rules Relating to Bills of Lading* (1968).

²⁶⁰ *Convention on the Carriage of Goods by Sea* (1978).

²⁶¹ *Chicago Convention on International Civil Aviation*, done at Chicago on 7 December 1944.

²⁶² *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, done at Warsaw on 12 October 1929.

example, in *The 'Comandate'*²⁶³ Rares J. of the Federal Court of Australia commented (in *obiter*) that, in cross-border commercial disputes, Australian judges should consider relevant foreign decisions to facilitate the development of a *jurisprudence constante*. Similarly, courts in the United States,²⁶⁴ Germany,²⁶⁵ Italy,²⁶⁶ Serbia,²⁶⁷ Poland,²⁶⁸ Spain,²⁶⁹ and Switzerland²⁷⁰ have treated foreign decisions applying the CISG as persuasive.²⁷¹ There is good reason to expect that this trend will continue.

In the second arm of Article 34.1 ACICA Rules, the expression 'rules of law' is often read as a reference to customary international commercial law (*lex mercatoria*),²⁷² as developed by international tribunals and restated in the UNIDROIT Principles of International Commercial Contracts. Other sources of *lex mercatoria* include the Principles of European Contract Law 1998 (PECL), the Principles of the Existing EC Contract Law (the 'Acquis Principles'), the ICC INCOTERMS 2000 and the ICC Uniform Customs and Practice for Documentary Credits 2007 (UCP 600). In practice, international arbitral tribunals dealing with strictly private commercial disputes rarely apply *lex mercatoria* to the merits. Without entering into the debate over the legitimacy of *lex mercatoria*, it is worth noting that Common Law and Civil Law practitioners alike have shown themselves to be hostile to the notion of 'international customary commercial law', and the position of the *lex mercatoria* is still unclear in many states.

In arbitration subject to Australian law, there is no authority approving of the use of *lex mercatoria* as the law of the merits.²⁷³ However, the application of customary legal principles to the substance of the dispute is common in investor-state arbitration, where the decisions of arbitral tribunals interpreting bilateral investment treaties are a leading source of jurisprudence. The record shows that ICSID tribunals most often apply customary law to questions of state responsibility, denial of justice, nationality and the legality of expropriation. ICSID tribunals regularly cite and follow earlier ICSID decisions when they determine these merits issues, and the published awards of ICSID tribunals are the best source for the substantive law of foreign investment. Although the Washington Convention does not posit a doctrine of precedent, the practice of following earlier decisions is increasingly common in ICSID arbitration. The subject matter of ICSID arbitration is the chief reason for this practice: because the same issues arise over and over between investors and host states (such as the foreign investor's entitlement to fair and equitable treatment), each award's persuasive value as an expression of customary law is increased by a recurring

²⁶³ (*No 2*) (2006) 234 ALR 483; [2006] FCA 1112.

²⁶⁴ *Chicago Prime Packers Inc v Northam Food Trading Co* 320 F Supp 2d 702.

²⁶⁵ German Bundesgerichtshof, VIII ZR 121/98, 24 March 1999.

²⁶⁶ *Sport d'Hiver di Genevieve Culet v Ets. Louys et Fils*, District Court of Cuneo, Italy, 31 January 1996; see also *Rheinland Versicherungen v Atlarex*, District Court Vigevano, Italy, 12 July 2000.

²⁶⁷ *Mineral Water and Wooden Pallets Case*, Serbian Foreign Trade Court, 13 November 2007. See Andersen, C., *The Global Jurisconsultorium of the CISG Revisited* (2009) 13 VJ 1.

²⁶⁸ *Shoe Leather Case*, Supreme Court of Poland, 11 May 2007.

²⁶⁹ *Cherubino Valsangiacomo, S.A. v. American Juice Import Inc*, Audiencia Provincial de Valencia, 7 June 2003.

²⁷⁰ *Blood Infusion Devices Case*, Higher District Court of the Canton of Luzern, 8 Jan. 1997.

²⁷¹ Ferrari, F., 'Applying the CISG in a Truly Uniform Manner: Tribunale di Vegavano (Italy), 12 July 2000', [2001] *Uniform Law Review* 203.

²⁷² *Report of the Secretary General on the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN Doc A/CN.9/264, XVI Y.B. UNCITRAL 104, 132-3 (1985).

²⁷³ However, given the indirect recognition of *lex mercatoria* by the English Court of Appeal in *Deutsche Schachtbau v Rakoil* [1987] 2 All ER 769, it is likely that an Australian court would accept the validity of an award rendered on the basis of international commercial custom.

congruency of facts. Leading investor-state arbitrators have confirmed the trend towards precedent: according to Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, ICSID awards ‘naturally serve as precedents’;²⁷⁴ Albert Jan van den Berg has observed that “there is a tendency to create a true arbitral case law” in the field of investment disputes;²⁷⁵ in 2005 Pierre Duprey noted the similarity between investor-state awards and judicial case law.²⁷⁶

34.2 The Arbitral Tribunal shall decide as amiable compositeur or *ex aequo et bono* only if the parties have, in writing, expressly authorized the Arbitral Tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

This Article closely reflects Article 33(2) UNCITRAL Arbitration Rules. Article 34.2 ACICA Rules imposes the additional requirement that the authorisation must be in writing. The tribunal must decide in accordance with the terms of the specific contract, and must take into account relevant trade usages.²⁷⁷ Unless the parties have expressly provided that it may do so, the tribunal may not decide the dispute *ex aequo et bono* (‘on the basis of what is fair and right’) or as *amiable compositeur* (‘friendly arbiter’).²⁷⁸ However, such a procedure is permissible where the parties so agree.²⁷⁹ This Article has counterparts in comparable rules, for example, in Article 28(3) AAA Rules and Article 17(3) ICC Rules.

34.3 In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

This Article is a verbatim adoption of Article 33(3) Swiss Rules, Article 33(3) UNCITRAL Arbitration Rules, and Article 28(4) Model Law. The requirement that the tribunal decide in accordance with the terms of the contract ensures that, *in all cases* (even where the arbitrators are empowered *ex aequo et bono*) the contractual obligations of the parties are of paramount importance. The obligation that account be taken of applicable trade usages “underscores arbitration’s historic roots in, and objective of, providing resolutions of international business disputes in a manner that accords with commercial expectations and practices”.²⁸⁰ Although some ICC panels have held that the reference to ‘usages of trade’ impliedly authorises the arbitrators to resort to *lex mercatoria*,²⁸¹ the prevailing view is that this language merely entitles the tribunal to take into account the practices, expectations and economic context of the transaction.²⁸²

²⁷⁴ Gaillard, E., Savage, J., (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, Kluwer 1999, 384.

²⁷⁵ Van den Berg, A. J., Introductory note to Duprey, P, ‘Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration be Distinguished in this Regard from Arbitration Based on Investment Treaties?’, in Schlaepfer, A, Pinsolle, P, Degos (eds), *Towards a Uniform International Arbitration Law?*, Juris 2005, 249.

²⁷⁶ *Ibid*, 258.

²⁷⁷ Model Law, Article 28(4); see also ACICA Rules, Article 34.3.

²⁷⁸ Model Law, Article 28(3).

²⁷⁹ (1985) 16 *Yearbook of the United Nations Commission on International Trade Law* 133.

²⁸⁰ Born, above note 68, 2146.

²⁸¹ See for example Award in ICC Case No. 3493; Award in ICC Case No. 3896; Award in ICC Case No. 8502; and Interim Award in ICC Case No. 5314.

²⁸² Born, above note 68, 2147.

ARTICLE 35 - Settlement or Other Grounds for Termination

35.1 If, before the award is made, the parties agree on a settlement of the dispute, the Arbitral Tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the Tribunal, record the settlement in the form of an arbitral award on agreed terms. The Arbitral Tribunal is not obliged to give reasons for such an award.

This Article derives from Article 34(1) Swiss Rules, Article 34(1) UNCITRAL Arbitration Rules, and Article 30(1) Model Law. Article 35.1 provides the arbitral tribunal with an alternative: it shall either issue an order for the termination of the arbitral proceedings, or it shall render a consent award (referred to in Article 35.1 ACICA Rules as an “arbitral award on agreed terms”) if requested by the parties. The words “and accepted by the Tribunal” make it clear that the tribunal is not obliged to render a consent award, even if the parties request one. This is consistent with the approach taken by most developed national arbitration laws,²⁸³ which leave to the tribunal the question of whether a consent or ‘an award on agreed terms’ is appropriate. There may be good reasons for refusal: the tribunal may consider that the award would be unenforceable for reasons of public policy due to manifest illegality, corruption or fraud on the part of the disputants. Money laundering is an example.²⁸⁴ In practice, however, tribunals usually grant requests for consent awards. When a consent award is made under Article 35.1 ACICA Rules, it need not contain reasons.

35.2 If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in Article 35.1, the Arbitral Tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The Arbitral Tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

Article 35.2 is nearly identical to both Article 34(2) Swiss Rules and Article 34(2) UNCITRAL Arbitration Rules. It contemplates situations in which the proceedings terminate (before an award is rendered) for reasons other than resolution by consent. The most common circumstance involving the termination of international arbitral proceedings without an award is where the Claimant abandons its claim, or in the exceptional case that the claim is dismissed for want of prosecution. Although not all institutional rules expressly empower the tribunal to make orders terminating the proceedings without an award,²⁸⁵ the prevailing view is that such a power is implicit in the tribunal’s procedural authority.²⁸⁶

35.3 Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the Arbitral Tribunal to the parties and ACICA. Where an arbitral award on agreed terms is made, the provisions of Articles 33.2, and 33.4 to 33.7, shall apply.

²⁸³ See for example *English Arbitration Act 1996*, s.51(2); *Belgian Judicial Code*, Article 1715(1); *Japanese Arbitration Law*, Article 38(1); *PRC Arbitration Law*, Article 49.

²⁸⁴ *Islamic Republic of Iran v United States of America*, IUSCT Decision No. DEC 8-A1-FT (17 May 1982).

²⁸⁵ For example, the LCIA and ICC Rules are silent on pre-award termination in circumstances other than consent.

²⁸⁶ Craig, W., Park, W., Paulsson, J., *International Chamber of Commerce Arbitration*, 3rd ed., Oxford University Press, 2000, para 19.02.

This Article is substantially the same as both Article 34(3) Swiss Rules and Article 34(3) UNCITRAL Arbitration Rules, except that Article 35.3 ACICA Rules also requires that the consent award must be communicated to ACICA.

ARTICLE 36 - Interpretation of the Award

36.1 Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the Arbitral Tribunal give an interpretation of the award.

This Article is identical to Article 35(1) UNCITRAL Arbitration Rules. It also closely reflects Article 35(1) Swiss Rules. However, the Swiss Rules also allow the arbitral tribunal to set a time-limit in which the other party can comment on the request.²⁸⁷ The Model Law is different to Article 36.1 ACICA Rules, in that under Article 33(1)(b) Model Law the parties must first agree that an interpretation may be requested before the tribunal can issue any interpretation. The purpose of this provision of the Model Law is to prevent dilatory requests. However, Article 33(1) Model Law is derogable, and where the ACICA Rules are used in a Model Law seat, it is likely that a court would take it as excluded by incorporation of institutional rules.²⁸⁸ Even where the parties have not agreed on, or requested an interpretation, if there is ambiguity in the award such that it might not be enforceable, then given that the tribunal is under a general duty to render an enforceable award, the tribunal may conclude that it is not yet *functus officio* and issue an interpretation on its own initiative.²⁸⁹

It is important to note that an interpretation is *not* a correction (or a supplementation), and does not change the substance of the award: it merely elucidates its effect. In practice, it is quite rare for international arbitral tribunals to issue interpretations of their awards, and interpretations (sometimes called ‘clarifications’)²⁹⁰ are usually only sought where there is ambiguity in a material part of the final award. A rare example of an interpretation being issued can be found in the case of *Wintershall AG v Government of Qatar*.²⁹¹

36.2 The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of Articles 33.2 to 33.7, shall apply.

This Article adopts Article 35(2) Swiss Rules and Article 35(2) UNCITRAL Arbitration Rules. By imposing most of the form requirements of Article 33 on the interpretation, and deeming it ‘part of the award’, the ACICA Rules ensure that the award and any interpretations of it are enforceable.

ARTICLE 37 - Correction of the Award

37.1 Within 30 days after the receipt of the award, either party, with notice to the other party, may request the Arbitral Tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The

²⁸⁷ Swiss Rules, Article 35(1).

²⁸⁸ Born, above note 69, 2537.

²⁸⁹ Ibid, 2538.

²⁹⁰ *PepsiCo, Inc v Islamic Republic of Iran*, Decision No. DEC 55-18-1 (19 December 1986).

²⁹¹ Final *Ad Hoc* Award 31 May 1988, cited in Born, above note 68, 2538 (FN 145).

Arbitral Tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

Article 37.1 ACICA Rules closely follows Article 36(1) UNCITRAL Arbitration Rules. It creates a ‘Slip Rule’ which enables the arbitral tribunal to correct any computational, clerical or typographical errors in the award. The Tribunal may act following receipt of a request from either party, or it may “within 30 days after the communication of the award make such corrections on its own initiative.” Article 37.1 ACICA Rules is also identical to Articles 36(1) and 36(2) Swiss Rules. Article 37.1 ACICA Rules reflects Article 33(1) Model Law, which authorises the arbitral tribunal to issue a correction or interpretation of its award.²⁹² It may also make an additional award regarding matters raised in the proceedings but not determined in the award.²⁹³

37.2 Such corrections shall be in writing, and the provisions of Articles 33.2 to 33.7 shall apply.

This Article is derived from Article 36.2 of the UNCITRAL Arbitration Rules. The writing requirement for corrections is also a feature of the Model Law,²⁹⁴ and most developed national arbitration laws.²⁹⁵ Again, by subjecting corrections to the form requirements of Article 33, and giving them the same status as an award proper, the ACICA Rules ensure that the award and its corrections are valid for the purposes of recognition and enforcement under national law.

ARTICLE 38 - Additional Award

38.1 Within 30 days after the receipt of the award, either party, with notice to the other party, may request the Arbitral Tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

This Article adopts Article 37(1) UNCITRAL Arbitration Rules. It also closely reflects Article 33(3) Model Law, and Article 37(1) Swiss Rules. The Swiss Rules, however, allow the tribunal to set a time-limit in which the other party may comment on such a request. And in contrast to the Model Law, Article 38 ACICA Rules does not provide that the power to issue an additional award is subject to contrary agreement of the parties. Most national arbitration laws provide for the annulment of arbitral awards where the arbitrators have failed to deal with an issue referred to them (so-called ‘*infra petita*’ awards). The principal function of an additional award power is to allow the tribunal to dispense with *infra petita* challenges before the enforcement process begins.²⁹⁶ For example, where the tribunal was required to determine costs, but omitted to do so, a party could invoke Article 38 ACICA Rules to request the tribunal to award costs in the form of an additional award.²⁹⁷

²⁹² Model Law, Article 33(1).

²⁹³ Model Law, Article 33(3).

²⁹⁴ Model Law, Article 33(5).

²⁹⁵ *English Arbitration Act 1996*, s.57(7); *German Code of Civil Procedure*, Article 1058; *Austrian Code of Civil Procedure*, Article 610; *Dutch Code of Civil Procedure*, Article 1060(5); *Swedish Arbitration Act*, s.32.

²⁹⁶ *General Distributors Ltd v Casata Ltd* [2006] 2 NZLR 721.

²⁹⁷ *General Distributors Ltd v Casata Ltd* [2006] 2 NZLR 721.

38.2 If the Arbitral Tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within 60 days after the receipt of the request.

This Article is identical to Article 37(2) UNCITRAL Arbitration Rules and Article 37(2) Swiss Rules. When a request for an additional/supplemental award is made, it will often be necessary to direct the parties to file submissions and, in some cases as Article 38.2 ACICA Rules suggests, hold a hearing on the application.²⁹⁸

38.3 When an additional award is made, the provisions of Articles 33.2 to 33.7, shall apply.

This provision is derived from Article 37(3) UNCITRAL Arbitration Rules.

ARTICLE 39 - Costs

The Arbitral Tribunal shall fix the costs of arbitration in its award. The term “costs of arbitration” includes only:

- (a) the fees of the Arbitral Tribunal, to be stated separately as to each arbitrator and to be fixed in accordance with Article 40;**
- (b) the travel (business class airfares) and other reasonable expenses incurred by the arbitrators;**
- (c) the costs of expert advice and of other assistance required by the Arbitral Tribunal;**
- (d) the travel (business class airfares) and other reasonable expenses of witnesses to the extent such expenses are approved by the Arbitral Tribunal;**
- (e) 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 Arbitral Tribunal determines that the amount of such costs is reasonable;**
- (f) ACICA's registration fee and administration fee; and**
- (g) fees for facilities and assistance provided by ACICA in accordance with Articles 7 and 42.5.**

Article 39 ACICA Rules defines the costs of the arbitration and also stipulates that the tribunal shall fix those costs in its award. Article 39 ACICA Rules closely reflects Article 38 Swiss Rules and Article 38 UNCITRAL Arbitration Rules. However Article 39 ACICA Rules requires that the expenses incurred by the arbitrators and witnesses must be ‘reasonable.’

²⁹⁸ Decision of München Oberlandesgericht, 20 December 2006 (34 Sch 17/06).

The Model Law itself makes no provision for costs, a matter which the Working Party left for determination according to domestic law.²⁹⁹ In arbitration subject to Australian law, the Model Law Plus ‘opt-in’ provisions of the IAA provide for the payment of interest and the award of costs. Unless there is a contrary agreement between the parties, where a tribunal orders the payment of money, it may order the payment of interest at a ‘reasonable rate’ from the date when the cause of action arose until the date of the award.³⁰⁰ The tribunal may also order the payment of interest upon unpaid moneys under the award beginning from the date of the award.³⁰¹ In the absence of a contrary agreement between the parties, the award of the costs of the arbitration is at the tribunal’s discretion.³⁰²

ARTICLE 40 - Fees of the Arbitral Tribunal

40.1 Unless otherwise agreed, the arbitrators shall be remunerated on the basis of an hourly rate.

40.2 The hourly rate shall be agreed between the parties and the arbitrators or, failing agreement, shall be determined by ACICA.

40.3 Unless otherwise agreed in writing, the hourly rate will be exclusive of GST, value added tax or any other like tax which may apply.

40.4 Where ACICA is requested to determine the hourly rate, it shall take into account, inter alia:

(a) the nature of the dispute and the amount in dispute, insofar as it is aware of them; and

(b) the standing and experience of the arbitrator.

Articles 40.1-40.4 ACICA Rules are similar to Articles 38-40 Swiss Rules, except that Article 40.1 ACICA Rules is drafted on an ‘opt-out’ basis. In essence, unless otherwise agreed, the arbitrators will be paid an hourly rate. The ACICA Rules are unique in this regard because in other institutional arbitration rules, arbitrators are paid a lump sum or on the basis of a sliding scale.³⁰³

The acronym ‘GST’ in Article 40.3 ACICA Rules refers to the Australian Goods and Services Tax, payable under and defined further in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

ARTICLE 41 - Apportionment of Costs

41.1 Except as provided in Article 41.2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the Arbitral Tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

²⁹⁹ *General Distributors Ltd v Casata Ltd* [2006] 2 NZLR 721, [40], [124]; [2006] NZSC 8.

³⁰⁰ IAA, s.25.

³⁰¹ IAA, s.26.

³⁰² IAA, s.27(1).

³⁰³ See, for example, Appendix C, Swiss Rules and Appendix III, ICC Rules (Article 4).

This Article is identical to Article 40(1) Swiss Rules and Article 40(1) UNCITRAL Arbitration Rules. The LCIA Rules contain a similar apportionment power³⁰⁴ as do the ICC Rules.³⁰⁵ Article 41.1 ACICA Rules follows the familiar Common Law rule that costs follow the event: the unsuccessful party is (in principle) expected to bear the costs of the arbitration. Costs powers can be found under the rules of most arbitration institutions. Under the ACICA Rules the tribunal does have the authority to apportion costs between the parties, provided apportionment is ‘reasonable’, taking special circumstances into account. As is clear from Article 39(e), and the specific coverage of Article 41.2 ACICA Rules, the expression ‘costs of the arbitration’ includes legal fees.

The most common situation in which costs will be apportioned between the parties is where there have been counterclaims, and the Claimant has succeeded on some claims, and the Respondent has succeeded on others. Other factors which bear on the award and whether the apportionment of costs is ‘reasonable’ include the manner in which the successful party conducted its case, the costs caused by reckless or abusive requests, whether there has been uncooperative or inefficient behaviour,³⁰⁶ and the extent to which dilatory tactics have been employed.³⁰⁷

41.2 With respect to the costs referred to in Article 39(e), the Arbitral Tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

This provision is drawn from Article 40(2) UNCITRAL Arbitration Rules. Article 39(e) ACICA Rules is concerned with “the legal and other costs directly incurred by the successful party if such costs were claimed during the arbitral proceedings”. In general, the same considerations that bear on the exercise of the tribunal’s discretion to apportion costs under Article 41.1 are relevant to the apportionment of legal and other costs under this Article. The general freedom of the tribunal to award legal costs (*‘shall be free’*) is consistent with international custom and practice: with or without express authority, international arbitral tribunals commonly award legal costs to the ‘prevailing party’ in a ‘reasonable’ or ‘appropriate’ amount.³⁰⁸

41.3 When the Arbitral Tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in Article 39 in that order or award.

This is an adoption of Article 40.3 UNCITRAL Arbitration Rules. Article 41.3 ACICA Rules imposes an obligation on the arbitral tribunal to fix the costs of arbitration when it issues an order for termination of the proceedings or renders a consent award. This means that the issuance of a costs order is a precondition to the tribunal becoming *functus officio* under Article 33.3 ACICA Rules.

³⁰⁴ LCIA Rules, Article 28(2).

³⁰⁵ ICC Rules, Article 31(3).

³⁰⁶ Final Award in ICC Case No. 6515 and 6516.

³⁰⁷ Final Award in ICC Case No. 11670.

³⁰⁸ See for example *Himpurna California Energy Ltd v PT (Persero) PLN*, Final *Ad Hoc* Award of 4 May 1999; *Econet Wireless Ltd v First Bank of Nigeria*, *Ad Hoc* Award of 2 June 2005; Final Award in ICC Case No. 7006; *Beckman Instruments, Inc. v Overseas Private Investment Corp*, Award in AAA Case No. 16 199 00209, cited in Born, above note 68, 2498 (fn 429).

41.4 No additional fees may be charged by an Arbitral Tribunal for interpretation or correction or completion of its award under Articles 36 to 38.

This Article derives from Article 40(4) UNCITRAL Arbitration Rules. This rule is consistent with the implied term of the arbitration agreement that the tribunal shall render an enforceable award – if the award needs correction, interpretation or supplementation to be complete (and enforceable), no further fees can be charged by those who were obliged to render it in the first place.

ARTICLE 42 - Deposit of Costs

42.1 The Arbitral Tribunal, on its establishment, shall request each party to deposit an equal amount as an advance for the costs referred to in Article 39.1(a), (b), (c), (f) and (g).

This provision is based on Article 41(1) UNCITRAL Arbitration Rules, with the only exception that Article 42.1 ACICA Rules is a ‘*shall*’ provision whereas Article 41.1 UNCITRAL Arbitration Rules uses the word ‘*may*’. Like the other sub-articles of Article 42 ACICA Rules, it is self-explanatory.

42.2 Where a Respondent submits a counterclaim, or it otherwise appears appropriate in the circumstances, the Arbitral Tribunal may in its discretion establish separate deposits.

This Article is identical to Article 41(2) Swiss Rules.

42.3 During the course of the arbitral proceedings the Arbitral Tribunal may from time to time request supplementary deposits from the parties.

This Article is based on Article 41(2) UNCITRAL Arbitration Rules.

42.4 The Arbitral Tribunal shall fix the amount of any deposit or supplementary deposits only after consultation and with the approval of ACICA.

This provision of the ACICA Rules is derived from Article 41(3) UNCITRAL Arbitration Rules

42.5 With the consent of ACICA, the Arbitral Tribunal may lodge the deposits in a trust account maintained by ACICA. ACICA shall disburse those funds on the instructions of the Arbitral Tribunal. ACICA may make a charge for its trust account services.

Article 42.5 ACICA Rules is an operational provision which reflects best practice in arbitration. It provides for any deposits paid by the parties to be lodged in a trust account (with the consent of ACICA).

42.6 If the required deposits are not paid in full within 30 days after the receipt of the request, the Arbitral Tribunal shall so inform the parties in order that one or another of

them may make the required payment. If such payment is not made, the Arbitral Tribunal may order the suspension or termination of the arbitral proceedings.

This provision is derived from Article 41(4) UNCITRAL Arbitration Rules.

42.7 After the award has been made, the Arbitral Tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

This Article is taken from Article 41(5) UNCITRAL Arbitration Rules.

SECTION V: GENERAL

ARTICLE 43 - Decisions Made by ACICA

43.1 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.

This Article is an operational provision which establishes that the ACICA Board of Directors (or any person to whom the Board has delegated decision making authority) is authorised to make decisions on behalf of ACICA. The most likely situation in which ACICA would delegate a decision to another person is where an arbitration clause nominates ACICA as the designating authority for the purposes of the appointment of arbitrators. In such a case, ACICA will designate an impartial and independent person to act as appointing authority. The role of designating authority is, for example, regularly performed by the Secretary General of the Permanent Court of Arbitration at The Hague under the UNCITRAL Arbitration Rules.

43.2 Decisions made by ACICA with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. ACICA shall not be required to give any reasons.

This rule is a merger of Articles 32(2) and 32(3) Swiss Rules. Although it has an administrative focus (being intended to cover decisions made by ACICA rather than the arbitral tribunal) the ACICA Rules finality provision applies to decisions made by ACICA on “all matters relating to the arbitration”. This suggests that the Article 43.2 ACICA Rules finality principle would apply to decisions made by ACICA regarding:

- the extension of time limits;³⁰⁹
- the number of arbitrators;³¹⁰
- the appointment of sole arbitrators;³¹¹
- default appointment of party-arbitrators;³¹²
- appointment of the Chairperson;³¹³

³⁰⁹ ACICA Rules, Article 3.4.

³¹⁰ ACICA Rules, Article 8.

³¹¹ ACICA Rules, Article 9.2.

³¹² ACICA Rules, Article 10.2.

- the appointment of the full tribunal in deadlocked multiparty disputes under the *Pertamina* clause;³¹⁴ and
- challenges to arbitrators.³¹⁵

The words ‘conclusive and binding’, when read in conjunction with Article 43.3 ACICA Rules, mean that the decisions of ACICA on these matters shall not be subject to appeal. The breadth of Article 43.2 may bring it into conflict with public policy. For example, in the well known challenge to arbitrator Yves Fortier QC in *AT&T v Saudi Cable*³¹⁶ the finality provision of the ICC Rules³¹⁷ was disregarded by the English Court of Appeal. It remains to be seen whether, in light of *Saudi Cable*, the ACICA Rules finality and waiver of appeal provisions would be enforceable. It is likely that a court in a Model Law state would enforce the finality and waiver provisions of the Rules in respect of ACICA decisions on purely administrative matters (such as fees and deposits), but not in the case of decisions that affect the fundamental rights and expectations of the parties. *Saudi Cable* suggests that bias challenges are an example of subject matter in respect of which a waiver of judicial review will not be effective.

43.3 To the extent permitted by the law of the seat of the arbitration, the parties shall be taken to have waived any right of appeal or review in respect of any such decisions made by ACICA to any State court or other judicial authority.

Article 43.3 ACICA Rules stipulates that parties to arbitration are deemed to have waived any right to appeal decisions made by ACICA to a judicial authority. Importantly, this provision is subject to any existing mandatory arbitration rules in the ‘seat’ of arbitration. In considering the enforceability of this Article, it is worth recalling the dicta of Lord Justice Scrutton in *Czarnikow v Roth Schmidt* that “there must be no Alsatia in England where the King's writ does not run”³¹⁸ – the courts of most Common Law states will not enforce agreements that purport to wholly oust them of jurisdiction. This is true of most Civil Law states also, the notable exceptions being Switzerland, Belgium, Tunisia and Turkey.

43.4 Neither ACICA nor its members, officers, servants or agents shall be liable for making any decision or taking any action or failing to make any decision or take any action under these Rules.

This provision is taken from Article 44(1) Swiss Rules. It is an exclusion of liability clause which benefits ACICA, its members, officers, servants or agents: these people will not be liable “for making any decision or taking any action or failing to make any decision or take any action” under the ACICA Rules. In theory, this provision provides for immunity from legal action for ACICA officers, servants or agents who make decisions or take action under the ACICA Rules. However, the validity of this provision may be problematic in view of the recent decision of the Paris Court of Appeal in *SNF v Cytec*.³¹⁹ The Paris Court of Appeal

³¹³ ACICA Rules, Article 10.3.

³¹⁴ ACICA Rules, Article 11.2.

³¹⁵ ACICA Rules, Article 14.4.

³¹⁶ *AT&T Corporation and Lucent Technologies Inc v Saudi Cable Company* [2000] All ER (Comm) 625

³¹⁷ ICC Rules, Article 2.13.

³¹⁸ [1922] 2 KB 478 at 488. Alsatia was a precinct in medieval London where arrest warrants could not be executed.

³¹⁹ Paris Court of Appeal, First Section C, 22 January 2009, 07-19492.

held that the exclusion of the liability clause contained in Article 34 ICC Rules (1998 version) was incompatible with an essential duty owed by the ICC and, therefore, was unenforceable.³²⁰ Although Australian law is quite different to French law, Article 43.4 ACICA Rules might potentially be challenged under the *Trade Practices Act*,³²¹ Common Law and equitable principles. It may be that, in light of the decision of the Paris Court of Appeal in *SNF v Cytec*, this provision is reconsidered when the ACICA Rules are next reviewed.

ARTICLE 44 - Liability of Arbitral Tribunal

The Arbitral Tribunal shall not be liable for any act or omission in connection with any arbitration conducted by reference to these Rules save where the act or omission is fraudulent.

Most institutional rules contain an immunity clause designed to protect the arbitrators from ‘reprisals by dissatisfied parties’;³²² the ACICA Rules are no exception. The ACICA immunity rule is derived from Article 34 ICC Rules, and has some parallels with Article 31(1) LCIA Rules.³²³ It grants the arbitrators, subject to fraud, immunity from civil suit that reflects English³²⁴ and Australian³²⁵ authority. This Common Law immunity is codified at s.28 IAA, and the ACICA arbitrator immunity provision draws on the language of this Model Law Plus provision of the Australian statute.³²⁶

APPENDIX A: ACICA's Fees

1 Registration Fee

1.1 The reference in these Rules to "dollars" or "\$" is to Australian currency.

1.2 When submitting the Notice of Arbitration the Claimant shall pay to ACICA a registration fee of \$2,500. The registration fee is not refundable.

2 Administration Fee

2.1 The parties shall pay to ACICA an administrative fee as specified in Schedule 1.

2.2 For the purposes of determining the amount in dispute:

(a) claims, counterclaims and set-off defences shall be added together;

³²⁰ Article 34 ICC Rules, which is similar to Article 43.4 ACICA Rules, stipulates that, “Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the National Committees shall be liable to any person for any act or omission in connection with the arbitration”.

³²¹ 1974 (Cth).

³²² *International Union, United Auto v Greyhound Lines, Inc.* 701 F 2.d 1181, 1186 (6th Cir. 1983).

³²³ The principal substantive difference is that the Article 31(1) LCIA Rules exclusion of liability creates an express exception for ‘deliberate wrongdoing’.

³²⁴ *Sutcliffe v Thackrah* [1974] 1 All ER 859 (HL); *Arenson v Casson Beckman Rutley & Co* [1975] 3 All ER 901 (HL).

³²⁵ *Mond v Berger* [2004] VSC 150; see also *Sinclair v Bayly*, unreported decision of the Supreme Court of Victoria, 19 October 1994 (Case No. 4909/1992).

³²⁶ Under the IAA, the arbitrators are immune from all suit, including negligence, subject to an exception for “fraud in respect of anything done or omitted to be done”.

(b) amounts claimed for interest shall not be taken into account, unless the interest claim exceeds the principal amount claimed, in which case the interest claims alone shall be considered in calculating the amount in dispute;

(c) claims expressed in currencies other than in Australian dollars shall be converted into Australian dollars at the rate of exchange applicable on the day when ACICA received the Notice of Arbitration; and

(d) if the amount in dispute is not specified in the Statement of Claim or counterclaim, the amount in dispute shall be determined by the Arbitral Tribunal taking into account all relevant circumstances.

Schedule 1

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 amount in dispute above \$500,000
\$1,000,001 to \$10,000,000	\$7,500 plus 0.25% of 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

The current ACICA scale Schedule 1 calculates the administrative fee payable by the parties to arbitration by reference to the amount in dispute. This is common in most international arbitration rules: see Appendix B Swiss Rules and Appendix III, Article 4 ICC Rules.

APPENDIX B: ACICA's Contact Details

1 Sydney Office

Level 6, 50 Park Street
Sydney NSW 2000
Telephone: +61 (0) 2 9286 3591
Facsimile: +61 (0) 2 9267 3125
Email: secretariat@acica.org.au

2 Melbourne Office

470 Bourke Street
Melbourne VIC 3000
Telephone: +61 (0) 3 9286 6384
Facsimile: +61 (0) 3 9286 6460
Email: secretariat@acica.org.au

3 Perth Office

Murdoch University
Western Australian Institute for Dispute Management
South Street, Murdoch WA 6150
Western Australia 6150
Telephone: +61 (0) 8 9360 7563
Facsimile: +61 (0) 8 9360 6053
Email: secretariat@acica.org.au

[mailto:](mailto:secretariat@acica.org.au)