



The University of Sydney

Sydney Law School

Legal Studies Research Paper
No. 09/101

September 2009

The 2005 Rules of the Australian Centre for International Commercial Arbitration – Revisited

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The 2005 Rules of the Australian Centre for International Commercial Arbitration - Revisited[#]

Simon Greenberg, Luke Nottage & Romesh Weeramantry*

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I. INTRODUCTION

A decade ago, leading arbitration institutions and practitioners responded to growing concerns about burgeoning costs and delays in international commercial arbitration (ICA) partly through some considerable changes to Arbitration Rules.¹ Nowadays, however, disquiet has re-emerged especially about

[#] This paper updates and expands: Simon Greenberg, *ACICA's New International Arbitration Rules*, 23(2) JOURNAL OF INTERNATIONAL ARBITRATION 189 (2006). Thanks are due to Ruth Stackpool for assistance in the preparation of that article. We are grateful to Dr Michael Moser (editor of the JOURNAL OF INTERNATIONAL ARBITRATION) and Kluwer (its publisher) for permission to make this present paper more widely available. We also thank ACICA Rules Sub-Committee members (listed at footnotes 8 and 9 below) for many fruitful and collegial discussions over the years, and Wan Sang Lung for editorial and research assistance.

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¹ Luke Nottage, *The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration*, SYDNEY LAW SCHOOL RESEARCH PAPER No. 06/51; CDAMS Discussion Paper No. 03/1E (2006); available at SSRN: <<http://ssrn.com/abstract=838028>>.

costs. Some point to parallels with civil procedure reforms in various national court systems since the 1990s. Those may have accelerated processes, but front-loading costs does not necessarily reduce them significantly.²

Arbitration institutions are again responding to similar concerns about ICA. Some have published new Expedited Arbitration Rules, Mediation Rules, or encouraged renewed debate about more controversial measures to minimise costs such as Arb-Med (arbitrators encouraging settlement). Some institutions (like the ICC) have also instituted new rounds of reforms to their generic Arbitration Rules.³ Sometimes, Rule changes have followed amendments to arbitration legislation in the relevant jurisdiction (as in Japan⁴). The Australian Centre for International Commercial Arbitration (“**ACICA**”) also unveiled Arbitration Rules in 2005, and then Expedited Arbitration Rules in 2008. All these recent developments are occurring as UNCITRAL proceeds with revisions to its 1976 Arbitration Rules, designed initially for ad hoc arbitrations but influential also among many arbitration institutions.⁵

It is therefore useful for the broader development of ICA to make more widely accessible this updated overview of the 2005 ACICA Arbitration Rules. It is particularly timely because they will be used by hundreds of mock arbitrators and advocates in the 17th Vis Moot, to be held in Vienna and Hong Kong around March 2010.⁶ This event has become one of the most important in the ICA world, training not only a new generation of arbitration experts but also exposing more established experts to new developments and ideas. Both aspects are essential to the vitality of ICA and its perennial quest for an optimal balance between efficiency and procedural justice.

In June 2005 ACICA released Australia’s first set of arbitration rules designed specifically for international arbitration (“**ACICA Rules**”).⁷ They were drafted by a sub-committee whose members included arbitration practitioners, university professors and Australia’s foremost international arbitrators.⁸ In addition, the ACICA Rules were endorsed by representatives of seven of Australia’s top commercial law firms.

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. The 2005 ACICA Rules are modern, commercial and provide an appropriate level of administrative support.

² Luke Nottage and Richard Garnett, *The Top Twenty Things to Change in or around Australia's International Arbitration Act*, SYDNEY LAW SCHOOL RESEARCH PAPER No. 09/19; U OF MELBOURNE LEGAL STUDIES RESEARCH PAPER No. 405 (2009); available at SSRN: <<http://ssrn.com/abstract=1378722>> (forthcoming in *ASIAN INTERNATIONAL ARBITRATION JOURNAL*, 2010).

³ See <<http://www.iccwbo.org/policy/arbitration/id28796/index.html>>.

⁴ Gerald McAlinn and Luke Nottage, *Changing the (JCAA) Rules: Improving International Commercial Arbitration in Japan*, 18 *JOURNAL OF JAPANESE LAW* 23 (2004); available at SSRN: <<http://ssrn.com/abstract=837085>>.

⁵ James Crawford, *Current Issues in International Commercial Arbitration*, SYDNEY CENTRE FOR INTERNATIONAL LAW WORKING PAPER No. 23 (2009) <http://www.law.usyd.edu.au/scil/pdf/2009/SCILWP23_Crawford.pdf>.

⁶ See <<http://www.cisg.law.pace.edu/vis.html>> and already Luke Nottage, *Educating Transnational Commercial Lawyers for the 21st Century: Towards the Vis Arbitration Moot in 2000*, 66/1 & 66/3 *HOSEI KENKYU* F1-30 (Part One: May 1999) & F1-32 (Part Two, December 1999).

⁷ The ACICA Rules can be viewed on ACICA’s website at <<http://www.acica.org.au>>.

⁸ Sub-committee members included Stephen Burke, Dr Clyde Croft SC, Professor Richard Garnett, Bjorn Gehle, Simon Greenberg, Christopher Kee, Dr Luke Nottage, and Romesh Weeramantry. During the discussions and initial drafting, as well as the final deliberations including all ACICA Board members, the sub-committee worked particularly closely also with Professor Michael Pryles (then ACICA Chair, now Chairman of the Singapore International Arbitration Centre).

They also provided the basis and impetus for ACICA's Expedited Arbitration Rules ("**Expedited Rules**") released in 2008.⁹ The 2005 Rules therefore represented an important milestone for the international arbitration industry and its users particularly in Australasia, reflecting the rapidly growing interest in and use of international arbitration in the region.¹⁰

This paper does not seek to describe each provision of the ACICA Rules.¹¹ Instead, it focuses on interesting and/or unusual features they exhibit in contrast to other comparable institutional arbitration rules.¹² Where appropriate, the paper refers to features of Australian arbitration law that are relevant to provisions of the ACICA Rules. However, Australia's international arbitration legislation is currently under review.¹³ The ACICA Rules can also be used where the seat is outside Australia or where the applicable arbitration law is not necessarily Australian.

II. OVERVIEW OF THE RULES

The ACICA Rules are not drafted from scratch, and ACICA clearly did not intend to 're-invent the wheel'. The ACICA Rules often follow the Swiss Rules of International Arbitration ("**Swiss Rules**") and accordingly their structure is well known and predictable. There are, however, innovative provisions or adaptations which will be discussed further below. As a few examples:

⁹ The Expedited Rules were drafted by a sub-committee with overlapping membership: Dr Clyde Croft SC, Jonathan Deboos (ACICA Deputy Secretary-General), Professor Richard Garnett, Bjorn Gehle, and Associate Professor Luke Nottage. Those Rules are also available online at <<http://www.acica.org.au>>, and a guidance note written by those members is in preparation. They help in further highlighting some aspects of the 2005 Rules, as indicated later in this paper.

¹⁰ See Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia Pacific Perspective* (Cambridge University Press, forthcoming 2010), in particular Chapter 1.

¹¹ For that, see S R Luttrell and G A Moens, *Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration* (2009), available via <<http://www.acica.org.au>>. A shorter overview than this present paper is also in preparation: Douglas Jones and Bjorn Gehle, *Rules and Practices of the Australian Centre for International Commercial Arbitration*, in Hans Smit (ed) *World Arbitration Reporter* (forthcoming).

¹² Mainly the 2004 Swiss Rules of International Arbitration ("**Swiss Rules**"), the 1998 London Court of International Arbitration Rules ("**LCIA Rules**"), the 1998 Rules of Arbitration of the ICC International Court of Arbitration ("**ICC Rules**"), and the 1997 Singapore International Arbitration Centre Rules ("**1997 SIAC Rules**") as well as that Centre's 2007 Rules ("**2007 SIAC Rules**"). Because of the geographic proximity, the 2005 Hong Kong International Arbitration Centre Rules ("**HKIAC Rules**") are also occasionally compared, but they are quite different because they rely closely on the 1976 UNCITRAL Arbitration Rules ("**UNCITRAL Rules**"). However, the ACICA Rules also draw on the UNCITRAL Rules, which in turn have influenced many other institutional Rules over the decades, including the **Swiss Rules**. The UNCITRAL Rules are themselves now being revised: Judith Levine, *Current Trends in International Arbitral Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules*, 31 UNSWLJ 111 (2008). The Revised UNCITRAL Rules will probably influence the development of new Rules in many arbitral institutions, including ACICA itself. Conversely, existing Rules are also playing a role in determining the issues raised and solutions proposed for the revised UNCITRAL Rules: see eg Clyde Croft, Report from Forty-ninth Session of the UNCITRAL Working Group II (15 October 2008), <http://www.acica.org.au/downloads/APRAG%20Report%20-%20UNCITRAL%20Working%20Group%20II_49th%20Session%20Vienna%202008.pdf>. This analysis also extends Greenberg's original article by comparing the international arbitration rules of the International Centre for Dispute Resolution ("**ICDR Rules**"), the institution exclusively responsible for administering the American Arbitration Association's international arbitrations. These Rules are also based on the UNCITRAL Rules.

¹³ Nottage and Garnett, above n 2.

- on questions of evidence 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 (“**IBA Rules**”);¹⁴
- detailed provisions on the granting of interim measures of protection are included based on modifications that had been proposed, by 2005 for inclusion in the revised UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”);¹⁵
- innovative, flexible provisions concerning the remuneration of arbitrators are included;¹⁶ and
- in general, party autonomy is expressed very strongly.

ACICA’s role in supervising arbitration proceedings is moderate. ACICA arbitration is not ‘highly supervised’ as is ICC arbitration, for example, but ACICA does provide the basic services. Broadly, ACICA’s role includes:

- extending periods of time;
- appointing arbitrators upon default of a party nomination or upon default of a joint party or joint co-arbitrator nomination;
- deciding challenges to arbitrators if there is a dispute;¹⁷
- checking the basic requirements of the notice of arbitration;
- resolving any disagreement concerning the hourly fee rate of arbitrators; and
- holding advance deposits on arbitration costs.

Overall the ACICA Rules are clearly drafted, straightforward, simple and flexible. They are also well-adapted to arbitration in Australasia, with several provisions having been included or adapted with regional court decisions in mind.

III. NOTABLE INCLUSIONS, EXCLUSIONS AND ADAPTATIONS

A. Model Clause and Application of ACICA Rules

By 2005 Australian case law had already suggested that the words “arising out of, relating to or in connection with this contract” are the widest possible way to define the scope of an arbitration agreement. ACICA’s suggested wording for its model arbitration clause reflects this, stating that:

“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...”

¹⁴ Article 27.2 of the ACICA Rules.

¹⁵ Article 28 of the ACICA Rules. UNCITRAL went on to finalise revisions to the Model Law in 2006, particularly in relation to interim measures. Countries such as New Zealand have already enacted those provisions into their arbitration legislation, in full or in part, and in November 2008 the Australian Attorney-General’s Department (“**AGD**”) initiated a review to consider doing this too. See Nottage and Garnett, above n 2 (especially Part III.F on interim measures, with further references).

¹⁶ Articles 39 to 42 of the ACICA Rules.

¹⁷ The AGD’s Discussion Paper also sought views on whether new Australian legislation should allow an arbitral institution (such as ACICA) to assume Australian courts’ current functions in default appointments and/or considering challenges of arbitrators (at least initially), even in the absence of parties having accorded such powers to that institution by adopting its Rules. For one view, see Nottage and Garnett, above n 2, Part IV.B. For a summary of others’ Submissions on this point (and other issues raised by the AGD or more generally in the Review), see <http://www.law.usyd.edu.au/scil/pdf/2009/ArbitrationTableSummary_Nottage.pdf>. See also the end of Part III of the present paper.

Had ACICA used any narrower formulation Australian courts may have interpreted the clause as not covering non-contractual claims, such as pre-contractual misrepresentation and statutory torts relating to the contract. The Australian courts' approach to construing arbitration clauses in relation to non-contractual claims had been gradually becoming more liberal.¹⁸ However, the adoption of the wording recommended by ACICA was aimed at maximising the parties' chances of ensuring that all future disputes related to the contractual relationship would fall within the scope of the arbitration agreement. Fortunately, the Full Federal Court in Australia and then the House of Lords have subsequently indicated a willingness to interpret arbitration clauses more broadly.¹⁹ Nonetheless, it is safest to draft them expansively, along the lines of the ACICA Rules' Model Clause.

The scope of application of the ACICA Rules is expressly stated to be "subject to such modification as the parties may agree in writing".²⁰ A reinforcement of party autonomy also appears in many other provisions of the ACICA Rules.²¹ While international arbitral institutions almost invariably apply their rules subject to modifications agreed by the parties, this is not always expressly stated in the rules.²² The ACICA Rules go even further. Where other institutional rules sometimes state simply "unless the parties have agreed otherwise ...", several of the ACICA Rules provide the parties with an additional opportunity to agree on the particular procedural point prior to the institution taking a decision.²³

Article 2.3 of the ACICA Rules may seem curious to those familiar with the Model Law but unfamiliar with the arbitration regime and jurisprudence in Australia (or, for example, Singapore). Article 2.3 provides:

¹⁸ See eg Jim Morrisson, *Defining the Scope of Arbitrable Disputes in Australia: Towards a 'Liberal' Approach?*, 22(6) JOURNAL OF INTERNATIONAL ARBITRATION 569 (2005). Compare the more restrictive attitude in some case law up to 1999 detailed in Richard Garnett, *The Current Status of International Arbitration Agreements in Australia*, 15 JOURNAL OF CONTRACT LAW 29 (1999). However, some Australian judges still adopt an arguably narrow approach when construing arbitration clauses. See eg *Electra Air Conditioning BV v Seeley International Pty Ltd* [2008] FCAFC, upholding the first-instance decision by Mansfield J.

¹⁹ See *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; and Joachim Delaney and Katharina Lewis, *The Presumptive Approach to the Construction of Arbitration Agreements and the Principle of Separability - English Law Post Fiona Trust and Australian Law Contrasted*, 31(1) UNSWLJ 341 (2008).

²⁰ Article 2.1 of the ACICA Rules.

²¹ See eg Articles 3.3, 11.2, 18.1, 27.3, 28.1, 35.1 & 40.2 of the ACICA Rules.

²² However, depending partly on the wording of arbitral institutional rules, parties' rights to agree on changes may be limited after the arbitrator is appointed. See Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure* 24(3) JOURNAL OF INTERNATIONAL ARBITRATION 327 (2007).

²³ For example, Article 8 of the ACICA Rules states: "If the parties have not previously agreed on the number of arbitrators (that is, one or three), and if within 15 days after 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" (emphasis added). Rule 6 of the SIAC Rules, Article 6 of the Swiss Rules, Article 5.4 of the LCIA Rules, Article 8(2) of the ICC Rules, Article 6 of the HKIAC Rules and Article 5 of the ICDR Rules do not expressly provide this additional opportunity to agree before the fall back mechanism applies. While some institutions will as a matter of practice provide the parties with a further opportunity to agree (as the ICC Secretariat generally does in applying Article 8(2) of the ICC Rules) the ACICA Rules guarantee that the parties are provided with this further opportunity. Another example is Article 19.1 of the ACICA Rules: "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..." (emphasis added). This differs from most other rules which provide for institutional choice simply "if the parties have not agreed" (eg Article 14 of the ICC Rules, Rule 18.1 of the SIAC Rules, Article 16 of the Swiss Rules, Article 16.1 of the LCIA Rules, Article 15 of the HKIAC Rules and Article 13 of the ICDR Rules). Once again, while some institutions will offer a further opportunity to agree, and would almost certainly do so if one of the parties requested such an opportunity, the ACICA Rules spell it out.

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

It might seem obvious that choosing a set of institutional arbitration rules where the seat of the arbitration is in a Model Law jurisdiction does not mean that the parties intend to exclude the application of the Model Law itself. However, in Australia, which has two arbitration regimes, this is not necessarily the case. In Australia, the International Arbitration Act 1974 (“**IAA**”) governs international arbitrations and one of seven Commercial Arbitration Acts (“**CAA**”), depending on which state or territory the seat of arbitration is in, governs domestic arbitrations.²⁴ Section 16 of the IAA provides that international arbitrations are governed by the Model Law unless the parties have agreed in writing to exclude the Model Law, as is permitted under Section 21 of the IAA. Parties can exclude the Model Law expressly, for example by agreeing that the Model Law does not apply in relation to the settlement of that dispute (in which case the relevant CAA would apply), or implicitly by agreeing that a different arbitral procedural law applies to the settlement of that dispute.

Logically, this implicit exclusion of the Model Law would not occur where parties choose a set of institutional arbitration rules to govern their arbitration because Article 19(1) of the Model Law expressly allows the parties to do so (subject to the provisions of that Law). However, in the *Eisenwerk* case,²⁵ it was held that by agreeing on the ICC Rules to govern their arbitration the parties had implicitly excluded the operation of the Model Law in its entirety in relation to that arbitration. This judgment attracted considerable adverse commentary, and it was hoped that the approach in *Eisenwerk* would not be followed by other courts.²⁶ However, this cannot be taken for granted as there still appears to be some confusion in legal practice about the difference between (UNCITRAL) Rules as opposed to the Model Law.²⁷ Somewhat belatedly, compared for example to Singapore, the issue highlighted by *Eisenwerk* has been put on the legislative agenda in the Review of the IAA announced by Australia’s Attorney-General’s Department in November 2008.²⁸ In the meantime, the ACICA Rules are specifically worded to ensure that parties who choose them are not affected by the negative consequences of the *Eisenwerk* decision.

²⁴ Outlines of Australia’s arbitration law include: Simon Greenberg & Christopher Kee, *Can You Seek Security for Costs in International Arbitration in Australia?*, 26 AUSTRALIAN BAR REVIEW 89 (2005); Michael Pryles and Richard Garnett, *Australia*, in Michael Pryles (ed) *Dispute Resolution in Asia* (3rd ed 2006, Kluwer, The Hague); Bjorn Gehle and Douglas Jones, *Australia*, THE ASIA PACIFIC ARBITRATION REVIEW 2009 at <<http://www.globalarbitrationreview.com/reviews/12/sections/48/chapters/489/australia/>>; Richard Garnett, *International Commercial Arbitration in Australia: Legal Framework and Problems*, 19(4) AUSTRALASIAN DISPUTE RESOLUTION JOURNAL 249 (2008); Richard Garnett and Michael Pryles, *Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand*, 25(6) JOURNAL OF INTERNATIONAL ARBITRATION 899 (2008); Douglas Jones and Bjorn Gehle, *Australia*, in J William Rowley (ed) *Arbitration World: Jurisdictional Comparisons*” (3rd ed 2009, European Lawyer, London); Simon Greenberg, *Latest Developments in International Arbitration Down Under*, 7 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 287 (2003).

²⁵ *Australian Granites Limited v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Queensland Reports 461.

²⁶ See eg Stephen Barrett-White and Christopher Kee, *Enforcement of Arbitral Awards Where the Seat of Arbitration is Australia - How the Eisenwerk Decision Might Still Be a Sleeping Assassin*, 24 JOURNAL OF INTERNATIONAL ARBITRATION 515 (2007).

²⁷ See *Bitannia Pty Limited v Rossfield Nominees (ACT) Pty Limited* [2008] NSWSC 939 at [14]. The parties agreed that the arbitration agreement’s reference to the UNCITRAL Rules was a reference to the Model Law.

²⁸ See Nottage and Garnett, above n 2, Part IV.A. Other public Submissions on this issue unanimously recommend overturning the approach in *Eisenwerk*: see <http://www.law.usyd.edu.au/scil/pdf/2009/ArbitrationTableSummary_Nottage.pdf>. A decision equivalent to *Eisenwerk* was handed down by the Singapore High Court in *John Holland Pty Ltd v Toyo Engineering Corporation*, [2001] 2 SLR 262, but its Parliament corrected it by amending the Singapore International Arbitration Act;

B. Commencing Arbitration & Representation

Apart from the usual requirements concerning the notice of arbitration, Article 4.4 of the ACICA Rules states: “the Notice of Arbitration may also include: ... (c) the Statement of Claim referred to in Article 21”. This is complemented by Article 5.3(c) which permits the respondent to include with its Answer to the Notice of Arbitration its “Statement of Defence referred to in Article 22”.²⁹

The option to include the statement of claim (or defence) with the notice of arbitration (or response/answer) appears in the Swiss Rules but in few other major sets of arbitration rules.³⁰ If parties decide to use these optional provisions, and even assuming that the respondent is granted (as is typical) an extension of the time for filing its Answer to the Notice of Arbitration, the Statement of Claim and Statement of Defence are likely to form part of the arbitration file within about two months after commencement of the arbitration. This has the potential to save time and to clarify the main issues in dispute at an early stage.³¹ In ICC arbitration, for example, parties typically do not start work on their first memorials until the arbitral tribunal is fully constituted and the terms of reference and provisional procedural timetable are settled, meaning it would be rare that both a statement of claim and statement of defence (or their equivalents) are submitted within six months of the commencement of the arbitration. However, this delay is up for review by the Task Force currently revising the ICC Rules.

The ACICA Rules include a typical provision concerning representation: “The parties may be represented or assisted by persons of their choice”.³² This open ticket to representation is mainly designed to bypass the misconception that a party’s representative should be a lawyer qualified in the seat of arbitration or in the jurisdiction of the applicable substantive law. Most modern arbitration laws of course provide that lawyers are not required to be qualified in the jurisdiction in order to represent clients in arbitration proceedings.³³

another decision led to a further amendment (see Sections 15 and 15A of that Act). See also Michael Pryles, *Excluding the Model Law*, [2001] INTL. ARB. LAW REV. 175.

²⁹ Curiously, Articles 21.3 (in relation to the Statement of Claim) and 22.2 (in relation to the Statement of Defence) of the ACICA Rules state that the party submitting the statement of claim/defence “may” annex to that statement “all documents it deems relevant or add a reference to the documents or other evidence it will submit”. This option to “add a reference” to documents that will be submitted later is innovative. Rule 18.6 of the SIAC Rules and 15.6 of the LCIA 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 18(3) of the Swiss Rules provides that “as a rule” the claimant shall annex its documentary evidence to its statement of claim. Likewise, the annexure of documents is the only option provided under Article 17.3 of the HKIAC Rules. The ICDR Rules make no reference to the annexure of documents: see Articles 2 and 3. It will be interesting to see how the ACICA Rules’ option to provide a mere reference to documentary evidence is interpreted and used to further the interests of efficient and fair proceedings.

³⁰ See Article 4(c) (notice of arbitration) and Article 8(c) (answer) of the Swiss Rules. The HKIAC Rules also allow this option: Article 4.6 (notice of arbitration) and Article 5.3 (answer). Article 2(3) of the ICDR Rules states that the “notice of arbitration shall contain a statement of claim” but the elaboration of what such a notice and statement must include does not require the submission of documents on which the claimant relies. Rule 3.2 of the SIAC Rules provides an option for the claimant to submit its statement of case with the notice of arbitration, but does not provide for the respondent to submit its statement of defence with the response. In the latest draft of the revised UNCITRAL Rules (A/CN.9/WG.II/WP.154/Add.1, Working Group II, 51st session, via http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html), Articles 21 and 22 provide for both.

³¹ Crawford, above n 5, para 32.

³² Article 6 of the ACICA Rules.

³³ See for example Section 29(2) of the International Arbitration Act 1974 (Australia). See also the changes allowing foreign lawyers to represent clients in arbitration in Singapore even when Singaporean law applies:

Certain limitations on this open ticket to representation may become necessary at some stage. Regulation of the legal profession by various bar associations around the world means that, if necessary, the right of a person to provide representation in legal proceedings can be suspended or cancelled. This occurs for example in cases of misconduct. There is currently no restriction on a lawyer who is guilty of misconduct on an international standard representing a client in arbitration proceedings so long as that lawyer is permitted to do so under the law of the jurisdiction applying to his or her practice. It is submitted that this is an issue for the international arbitration community and perhaps the drafters of arbitration rules and guidelines to consider for the future. It may be appropriate to empower international arbitral tribunals to refuse a party's chosen representative in certain circumstances.

C. Constitution of the Arbitral Tribunal & Chairperson's Powers

The ACICA Rules concerning the constitution of the arbitral tribunal broadly reaffirm party autonomy, expressly providing the parties with a further opportunity to agree on any aspect of the tribunal's constitution on which they have not previously agreed. As noted earlier, while other institutions may accord parties a further opportunity to agree should a party request it, the ACICA Rules expressly encourage agreement before the fall back mechanism kicks in.³⁴

Article 9.3 of the ACICA Rules provides that where ACICA is to appoint the sole arbitrator because the parties cannot agree:

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.

Curiously, an equivalent provision to Article 9.3 is not provided in relation to Article 10.3, which deals with the appointment by ACICA of a chairperson where the co-arbitrators cannot agree. However, it is assumed that the same principle will be applied for ACICA's appointments under Article 10.3.

Article 16 of the ACICA Rules deals with the situation where an arbitrator has been replaced for whatever reason. It states, similarly to Article 12(4) of the ICC Rules, that:

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.

Some institutional arbitration rules and the Model Law do not deal expressly with this situation. For example, the LCIA Rules are silent on this matter, although they provide for the two remaining arbitrators to continue as a truncated tribunal where the third has been removed. The ACICA Rules do not provide for truncated tribunals. The SIAC Rules, Swiss Rules, HKIAC Rules and ICDR Rules provide equivalent but slightly different provisions.³⁵

Michael Polkinghorne, *More Changes in Singapore: Appearance Rights of Foreign Counsel* 22(1) JOURNAL OF INTERNATIONAL ARBITRATION 75 (2005).

³⁴ Above n 23.

³⁵ Article 14 of the Swiss Rules (very similar to Article 13 of the HKIAC Rules) states: "If an arbitrator is replaced, the proceedings shall as a rule resume at the stage where the arbitrator who was replaced ceased to perform his functions, unless the arbitral tribunal decides otherwise". Rule 16 of the 1997 SIAC Rules (identical to Rule 14 of the 2007 SIAC Rules, and very similar to Article 11(2) of the ICDR Rules) states: "If under Rules 13-15 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated unless otherwise agreed to by the parties. If any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the

Article 17.3 of the ACICA Rules states:

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.

This article goes further in empowering the chairperson than other institutional rules because it authorises the chairperson to decide “*questions of procedure*” even without the prior consent of the other arbitrators whereas other rules require either prior authorisation from, or prior consultation with, the co-arbitrators.³⁶ Article 17.3 of the ACICA Rules reflects the reality of the decision-making in many cases anyway, where minor decisions of procedure such as extending time limits are taken by the chairperson alone. However, dispensing with the need to seek prior authorisation from the co-arbitrators may be viewed by some as going too far. Conversely, the possibility in Article 17.3 for the arbitral tribunal to authorise a co-arbitrator to take procedural decisions alone is a welcome innovation, and also reflects reality. Such a provision will be useful where, for example, the chairperson is too busy to deal with an urgent procedural matter and wishes to delegate that decision to one of the co-arbitrators, or when one of the co-arbitrators can be authorised to decide a question of discovery of documents in relation to a particular point.

Article 32 also provides greater powers to the chairperson regarding awards themselves: “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 differs from Article 31(1) of the UNCITRAL Rules, which requires a majority and therefore forces the arbitrators to negotiate among themselves to achieve a decision.³⁷ Article 32 of the ACICA Rules, like its counterparts in the Swiss Rules, ICC Rules, SIAC Rules and HKIAC Rules, allows the chairperson to “go it alone” if s/he remains unconvinced by the reasoning of either of the other arbitrators.³⁸ This more expeditious approach is particularly suited to ICA, as opposed to investor-state arbitrations where broader public interests arguably call for greater procedural controls.³⁹

tribunal”. This latter provision appears to have been inspired by Article 18 of the UNCITRAL Arbitration Rules, which is very similar.

³⁶ Article 14.3 of the LCIA Rules states: “In the case of a three-member arbitral tribunal, the chairman may, with the prior consent of the other two arbitrators, make procedural rulings alone”. Rule 17.3 of the 1997 SIAC Rules (almost identical to Rule 15.3 of the 2007 SIAC Rules) states: “In the case of a three-member tribunal, the presiding arbitrator may, after consulting the other arbitrators, make procedural rulings alone”. Article 31(2) of the Swiss Rules (very similar to Article 26(2) of the ICDR Rules) states: “In the case of questions of procedure, when the arbitral tribunal so authorises, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal”. The ICC Rules do not address the question of the chairperson taking procedural decisions alone but this power is often agreed in the terms of reference. Article 29.2 of the HKIAC Rules provides: “With the prior authorisation of the arbitral tribunal, the presiding arbitrator may decide questions of procedure on his own.” It should be noted that a number of the provisions quoted above contain no provision for later revision of that decision by the arbitral tribunal as a whole.

³⁷ A similar provision is found in Article 26(1) of the ICDR Rules.

³⁸ See Article 31(1) of the Swiss Rules, Article 25(1) of the ICC Rules, Rule 27.4 of both the 1997 and 2007 SIAC Rules, and Article 29(1) of the HKIAC Rules.

³⁹ Luke Nottage and Kate Miles, *‘Back to the Future’ for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests*, 26(1) JOURNAL OF INTERNATIONAL ARBITRATION 25 (2009). This distinction explains why the UNCITRAL Rules, originally designed partly with investment disputes in mind and not just commercial arbitrations, had the “majority” rule. It also explains why a proposal instead to allow the chairperson the casting vote is proving controversial in the current review of the UNCITRAL Rules (cf generally Levine, above n 12).

D. Jurisdiction

Article 24 of the ACICA Rules reflects international standards in relation to decisions on jurisdiction and separability, and is substantially identical to Article 21(1)-(4) of the Swiss Rules. The ACICA Rules do not, however, include a provision similar to Article 21(5) of the Swiss Rules, which provides that the arbitral tribunal has “jurisdiction to hear a set-off defence even when the relationship out of which this defence 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”.⁴⁰

In particular, Article 24 of the ACICA Rules basically restates the power of the arbitral tribunal to rule on its own jurisdiction (*Kompetenz-Kompetenz*), found also in the UNCITRAL Arbitration Rules (Article 21) and Model Law (Article 16) as well as in most national laws world-wide nowadays. It also follows the UNCITRAL Rules regarding how and when this ruling should usually be carried out.

An arbitral tribunal's power to split an arbitration into separate phases arises from its general powers to manage the proceedings. In addition, the Model Law and most arbitration laws expressly reiterate this power in relation to jurisdictional decisions. Article 16(3) of the Model Law provides that “the arbitral tribunal may rule on a [jurisdictional objection] either as a preliminary question or in an award on the merits”. Article 186 of the Swiss Private International Law Act of 1987 is different in that it provides a presumption in favour of deciding jurisdiction as a preliminary matter: “The arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award”. However, arbitral tribunals sitting in Switzerland regularly decide to hear jurisdiction and the merits together.⁴¹

The ACICA Rules, unlike many rules in the Asia-Pacific region, follow the approach of the Swiss legislation. Article 24.4 reproduces UNCITRAL Rule Article 21(4) by providing: “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.”⁴²

E. Confidentiality, Seat & Evidence

In the light of the controversial Australian decision in *Esso Australia Resources Ltd v Plowman*,⁴³ it is not surprising that the confidentiality provision (Article 18) in the ACICA Rules is more detailed than its

⁴⁰ Article 21(5) caused considerable controversy during pleadings for the 12th Willem C Vis International Commercial Arbitration Moot, where the respondents sought to introduce a counterclaim or set-off arising out of a contract with totally different dispute resolution provisions: see <<http://www.cisg.law.pct.edu/vis.html>>.

⁴¹ See Greenberg et al, above n 10.

⁴² In investment arbitrations, the usual practice remains for the arbitral tribunal to make an award on jurisdiction before it proceeds to determine the merits. Article 41(3) of the ICSID Rules states that upon the raising of an objection to jurisdiction, the proceeding on the merits may be suspended. Comparing ICSID, ACICA, UNCITRAL and other Rules in the context of investment arbitrations, see also Nottage and Miles, above n 39.

⁴³ [1995] 183 CLR 10. In *Esso*, the High Court (Australia's highest court) confirmed that arbitral proceedings and hearings are private in the sense that they are not open to the public. However, the High Court took a different position with respect to documents and information concerning the arbitration. It held that documents voluntarily produced by a party during an arbitration are not automatically confidential. The parties may agree that such documents are to be kept confidential, but that agreement is not implied by the mere fact that parties have agreed to arbitrate. The High Court set down a different rule in relation to documents produced under compulsion, such as pursuant to a discovery order. Such documents are automatically confidential and may only be used outside the arbitration with the prior consent of the party to whom they belong. *Esso* is analysed in Michael Pryles *Confidentiality*, in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International*

counterpart in any set of arbitration rules of which the authors are aware.⁴⁴ Article 18.2 contains a detailed inclusive definition of what is confidential (including the existence of the arbitration) and sets out a clear and appropriate list of exceptions. Article 18.3 provides that a party planning to disclose a document pursuant to one of the exceptions must first notify the arbitral tribunal, ACICA and the other parties. This is complemented by Article 18.4, which obliges any party who calls a witness to ensure that s/he maintains the same degree of confidentiality as that required of the party calling the witness.⁴⁵

Concerning the seat of arbitration, Article 19.1 provides that if the parties cannot agree otherwise within fifteen days after the commencement of the arbitration, the seat is Sydney. This provision is somewhat restrictive in the sense that it does not provide the possibility for ACICA or alternatively the arbitral tribunal to fix a different seat where the circumstances so demand.⁴⁶ The rule might accordingly be abused by an Australian party to the arbitration who refuses to agree on a foreign seat. Parties are of course assumed to know the content of arbitration rules which they agree to govern their dispute but, apart from arbitration practitioners, someone reading the ACICA Rules could miss this provision. However, Article 19.2 of the ACICA Rules (very similar to Article 15.2 of the HKIAC Rules) provides the arbitral tribunal with the discretion to decide where the proceedings and meetings physically take place.

Article 19.4 of the ACICA Rules states that “the award shall be made at the seat of the arbitration”. Read literally, this means that the arbitrators have to be physically present in the seat of arbitration when they sign the award. However, it is assumed that Article 19.4 will be read liberally, and interpreted in such a way that it applies like Article 25(3) of the ICC Rules, Article 15.4 of the HKIAC Rules and Article 16(4) of the Swiss Rules, which deem the award to be made at the seat of the arbitration. These latter provisions are more practical and remain in harmony with the reference to “the country where the award was made” in Article V of the New York Convention.

The ACICA Rules are truly innovative concerning evidence and hearings. Article 27.2 states:

The arbitral tribunal shall have regard to, but is not bound to apply, the International Bar Association Rules on the Taking of the Evidence in International Commercial Arbitration in the version current at the commencement of the arbitration.

Arbitration (Juris Publishing Inc, 2004) chapter 24 (pp 501-552). He comments there that *Esso* “is not an antipodean aberration”— some courts in the United States and Sweden have also ruled that no general implied obligation of confidentiality exists.

⁴⁴ Article 18 of the ACICA Rules goes much further than Rule 34.6 of the SIAC Rules, Article 43 of the Swiss Rules, Article 30 of the LCIA Rules, and Article 39.1 of the HKIAC Rules. The ICC Rules do not contain a confidentiality rule, but one is often included in the terms of reference.

⁴⁵ This would normally be done simply by the party having the witness sign a confidentiality agreement, already quite a common practice. Compare also Article 43(1) of the Arbitration Rules of the German Arbitration Institution (DIS), which provides: “Persons acting on behalf of any person involved in the arbitral proceedings shall be obligated to maintain confidentiality”. See also the detailed provisions in New Zealand’s Arbitration Act, as amended in 2007; and more generally Nottage and Garnett, above n 2, Part V.A (with further references on the evolving debates about confidentiality in international commercial arbitration).

⁴⁶ An equivalent approach in favour of Singapore is found in Rule 19.1 of the SIAC Rules and in favour of London at Article 16.1 of the LCIA Rules, but those provisions allow for the arbitral tribunal or the LCIA Court respectively to fix a different seat of arbitration in view of “all the circumstances”. Under Article 15.1 of the HKIAC Rules, Hong Kong is also presumed as the seat, unless the parties agree otherwise (but there is no proviso giving the arbitral tribunal the power to change the seat).

It appears that no other arbitration rules incorporate the IBA Rules even to this extent.⁴⁷ Parties using the ACICA Rules thereby are given a familiar starting point to deal with important and sometimes controversial questions such as production of documents, witnesses, experts, on-site inspections, hearings, and the assessment and admissibility of evidence.⁴⁸ ACICA's approach is commendable because it provides this background structure without binding the tribunal to the IBA Rules, which would risk inflexibility.⁴⁹

F. Interim Measures

The ACICA Rules on interim measures of protection (Article 28) are also innovative. In contrast to other rules which merely empower the arbitral tribunal to order interim measures⁵⁰ or provide a limited definition,⁵¹ the ACICA Rules define interim measures and then set out the test which the requesting party must satisfy in order to obtain them. Both the definition and the test follow closely the UNCITRAL Arbitration Working Group's then proposed revision to Article 17 of the Model Law.⁵²

There were several modifications, however. For example:

- the arbitral tribunal must give reasons if it grants an interim measure in the form of an order rather than an award (Article 28.1);
- the provision of security for legal or other costs was specifically included within the definition of interim measures of protection (Article 28.2(e));
- Article 28.7 provides that where the tribunal later determines that the interim measure should not have been granted, the tribunal *may* decide that the requesting party is liable for any costs or damages caused by the measure whereas the UNCITRAL Model Law draft provided that "the requesting party *shall* be liable for any costs and damages" caused by the measure (emphasis added);
- Article 28.1 requires that "the arbitral tribunal shall endeavour to ensure that the measures are enforceable" - inspired by a more general requirement on arbitrators contained in the ICC Rules (Article 35); and
- the ACICA Rules did not include the then Article 17(7) of the UNCITRAL Model Law draft text, which provided for *ex parte* applications and was proving controversial among delegates and stakeholders.

⁴⁷ The position taken in the ACICA Rules is in harmony with the IBA Rules Preamble, which indicates that they are designed not to supplant but "to supplement the legal provisions and the international or ad hoc rules according to which the Parties are conducting their arbitration."

⁴⁸ See for example Michael Buehler & Carroll Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration: Novel or Tested Standards?*, 17(1) JOURNAL OF INTERNATIONAL ARBITRATION 3 (2000). Compare the often different approaches still in national court procedures: Peter Griffin, *Trends in the Conduct of International Arbitration: Discovery Procedures and Witness Hearings*, 17(2) JOURNAL OF INTERNATIONAL ARBITRATION 19 (2000).

⁴⁹ The ACICA Expedited Arbitration Rules go further, befitting a process aimed at the expeditious resolution of smaller-value or less complex disputes, Article 23.2 similarly directs the tribunal to consider using the IBA Rules. However, Article 13 envisages no oral hearings (except in exceptional circumstances, as determined by the tribunal) and no common law style discovery process.

⁵⁰ See Article 26 of the Swiss Rules, Rule 24 of the SIAC Rules, Article 25 of the LCIA Rules, Article 23 of the ICC Rules, Article 24 of the HKIAC Rules and Article 21 of the ICDR Rules.

⁵¹ Article 25 of the LCIA Rules.

⁵² The wording was based on that tabled at the 41st session held in Vienna on 13-17 September 2004 (Working Paper 131: <<http://daccessdds.un.org/doc/UNDOC/LTD/V04/566/07/PDF/V0456607.pdf?OpenElement>>, accessible via <http://www.uncitral.org/uncitral/en/commission/working_groups/2arbitration.html>.

On this last point, the 2006 revision of the Model Law includes provisions on *ex parte* applications for “preliminary orders directing a party not to frustrate the purpose of the interim measure requested.”⁵³ However, it adds that: “A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award”.⁵⁴ Even this compromise is proving controversial when considered for adoption in national legislation.⁵⁵

G. Applicable Law

Article 28 of the Model Law provides that:

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. ...
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The reference to “rules of law” in paragraph (1) is widely interpreted as allowing parties to select expressly either the law of a national legal system (such as the Australian law of contract) or the *lex mercatoria* (such as the UNIDROIT Principles of International Commercial Contracts⁵⁶) to govern the substance of their dispute. But if the parties have not made such a designation, paragraph (2) only allows the arbitrators to apply “the law” of a national legal system, not the *lex mercatoria* (although that might still be used when interpreting the applicable national law).⁵⁷

By contrast, Article 34(1) of the ACICA Rules provides that: “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” (emphasis added). Thus, at first glance, it appears that the ACICA Rules restrict party choice to a national law but, absent such choice, arbitrators may select “rules of law” – including simply the *lex mercatoria*.

However, it is unclear whether this effect was intended or indeed whether this consequence necessarily follows. If the parties expressly choose the *lex mercatoria* to govern their dispute, arbitrators might construe this as an implied opting-out of the first sentence of Article 34(1) of the Rules, pursuant to Article 2.1 (provided the designation is “in writing”). If the *lex arbitri* is based on the Model Law, such as the IAA, Article 28(1) will then allow – indeed, require – the arbitrators to respect the parties’ selection of the *lex mercatoria*.

⁵³ Article 17B(1) of the 2006 revised Model Law, available via <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

⁵⁴ Article 17C(5).

⁵⁵ See Nottage and Garnett, above n 2, Part III.F (updated in this respect by Richard Garnett and Luke Nottage, *IAA Review: Towards More Informal, Global and Comprehensive Solutions*, 10/11 THE AUSTRALIAN ADR REPORTER (March-June 2009) via <<http://www.arbitrators.org.au>>, comparing New Zealand, Slovenia, Peru and Ireland). Singapore is soon to amend its International Arbitration Act but is unlikely to adopt the preliminary orders provisions in Article 17 of the 2006 Model Law. By contrast, Hong Kong is likely to adopt the 2006 revised Model Law preliminary orders regime: see Clauses 38 and 39 of the Hong Kong Draft Arbitration Bill (December 2007).

⁵⁶ See M J Bonell, Paul Finn, Donald Robertson and Luke Nottage, “The UNIDROIT Principles of International Commercial Contracts: What Do They Mean for Australia?”, SYDNEY CENTRE FOR INTERNATIONAL LAW WORKING PAPER No. 7 (2008) <<http://www.law.usyd.edu.au/scil/pdf/SCILWP7Finalised.pdf>>.

⁵⁷ See further Greenberg et al, above n 10.

If the parties have not expressly selected either the *lex mercatoria* or a national law, however, Article 34(1) of the Rules would extend Article 28(2) of the Model Law, which is permissible if – as seems likely – the latter provision is not mandatory. Accordingly, the arbitral tribunal could nonetheless apply the transnational *lex mercatoria* instead of being required to select a national law.

A separate issue concerns the applicable law governing the substantive validity of the arbitration agreement (separate from any underlying contract). A gap currently exists in the legislative framework of Article II(3) of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (“**NYC**”) and its Australian analogue in section 7 of the IAA. It should be filled by specifying that the applicable law for the arbitration agreement is that expressly chosen by the parties to govern this agreement, otherwise the law at the seat of the arbitration.⁵⁸ This approach is similarly spelled out in NYC Article V, when it comes to enforcing foreign awards: the test is whether the ‘agreement is not *valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*’ (emphasis added). This rule should be extended to any substantive validity questions, such as whether ‘third parties’ are bound by or can enforce the arbitration agreement.⁵⁹ However, the ACICA Rules do not provide a gap-filling default provision specifying the law governing the substantive validity of the arbitration agreement, so parties would need to clarify this point in their agreement, or leave it to the arbitral tribunal to determine.

Another sub-issue is highlighted by the wording of NYC Article V. As just quoted, it always requires a ‘law’ to govern the arbitration agreement. There is an argument for clearly allowing parties similarly to be able to expressly choose ‘rules of law’ (like the UNIDROIT Principles) to govern their arbitration agreement. Such results may be achievable by adding provisions to the ACICA Rules, but such provisions are rarely (if ever) found in arbitration rules. It is probably more certain and effective to add such provisions instead through legislative amendment (especially regarding the applicable law for determining whether third parties are bound to the arbitration).⁶⁰

H. Costs of Arbitration

ACICA plays a relatively moderate role concerning the costs of arbitration. With the exception of the calculation of arbitrators’ fees, the structure of the costs provisions⁶¹ is similar to that in the Swiss Rules.⁶² Article 39 of the ACICA Rules defines the phrase ‘costs of arbitration’ and provides that the arbitral tribunal shall fix those costs in its award. Article 41 sets out typical provisions for apportionment of costs: all costs except parties’ legal costs are in principle to be borne by the unsuccessful party but the tribunal is free to determine which party bears the legal costs taking into account the circumstances of the case. The arbitral tribunal decides on the amount of deposit to be taken at the outset of the arbitration and may call for further deposits as the proceedings progress; however the tribunal must consult ACICA before fixing the amount of any deposit.⁶³ ACICA’s fees are determined on the basis of the amount in

⁵⁸ *Comandate*, above n 19, implies it is Australian law, perhaps as the law of the forum. NYC Article II(3) simply states that a stay of proceedings need not be given where the arbitration “agreement is null and void, inoperative or incapable of being performed”.

⁵⁹ Klaus Peter Berger, ‘Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?’ in Albert van den Berg (ed), *International Arbitration 2006: Back to Basics?* (2007) 301 at 322. In recent two-party and multi-party cases, respectively *Comandate*, above n 19 and *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 255, the applicable law question was not clearly argued or decided.

⁶⁰ See further Nottage and Garnett, above n 2, Part II.B.

⁶¹ Articles 39-42 of the ACICA Rules.

⁶² Articles 38-40 of the Swiss Rules.

⁶³ Article 42 of the ACICA Rules.

dispute.⁶⁴ As an additional service, ACICA offers to hold costs deposits on trust, with monies distributed upon request of the arbitral tribunal.⁶⁵

The process for determining arbitrators' fees under the ACICA Rules is interesting. Article 40 provides that arbitrators are remunerated on the basis of an hourly rate which is to be agreed between the arbitrators and the parties. However, if they cannot agree on that hourly rate, ACICA determines it taking into account "(a) the nature of the dispute and the amount in dispute, in so far as it is aware of them; and (b) the standing and experience of the arbitrator."⁶⁶ These provisions fully facilitate the parties reaching an agreement, with ACICA playing an appropriate role if such negotiations become uncomfortable.

It is assumed, but not expressly stated in the ACICA Rules, that this hourly rate would be agreed or decided by ACICA at the outset of the arbitration to avoid any difficulties later. The negotiation of fee arrangements after commencement of the arbitration is obviously delicate.⁶⁷ A related issue concerns (re)negotiation of timeframes for progressing and concluding the arbitration.⁶⁸

I. Other Provisions & Omissions

For the sake of completeness, it should be noted that a few 'extras' that can be found in some arbitration rules are not found in the ACICA Rules. These include provisions on:

- appointment of a pre-arbitral referee;⁶⁹
- expedited proceedings;⁷⁰
- overarching principles (to guide the parties, arbitrators and institution in interpreting and applying the Rules);⁷¹

⁶⁴ Appendix A to the ACICA Rules.

⁶⁵ Article 42.5 of the ACICA Rules.

⁶⁶ Article 40.4 of the ACICA Rules. Other arbitration rules provide a mechanism for the institution to consult with the arbitrators concerning their fees but this is limited to consultation rather than determination in case of disagreement (see for example Article 3 of Appendix A to the HKIAC Rules and Article 31.4 of the SIAC Rules). Article 31.3 of the SIAC Rules provides for the SIAC Registrar to set an appropriate fee rate in certain circumstances and the Registrar taxes the costs of arbitration.

⁶⁷ It was especially sensitive in Australia around the time the 2005 Rules were drafted. The New South Wales Supreme Court had removed an entire ad hoc arbitral tribunal for misconduct because the tribunal attempted to renegotiate its fee arrangement with the parties during the arbitration. The tribunal went so far as refusing the parties' joint request to vacate the scheduled hearing dates until the parties agreed to hearing cancellation fees. See *ICT Pty Ltd v Sea Containers Ltd* [2002] NSWSC 77, analysed in Simon Greenberg, *Latest Developments in International Arbitration Down Under*, above n 24.

⁶⁸ See generally Pryles, above n 22, explaining how the issue depends on the express terms (including Arbitration Rules) as well as any implied terms relating to the arbitration agreement. Articles 3 and 22 of the ACICA Expedited Arbitration Rules significantly constrain the scope to extend time limits, compared to the generic ACICA Rules, and this should help limit hourly fees charged by the sole arbitrator.

⁶⁹ See eg the ICC Rules for a Pre-Arbitral Referee Procedure.

⁷⁰ See eg Article 38 of the HKIAC Rules, which contains a set of expedited procedures applicable "to all cases in which the amount in dispute representing the aggregate of the claim and the counterclaim (or any set-off defence) does not exceed USD 250,000". However, the parties may agree otherwise or the HKIAC Secretariat may decide otherwise "taking into account all the relevant circumstances".

⁷¹ See now Article 3 of the more elaborate and tailored ACICA Expedited Arbitration Rules (2008). This aims "to promote arbitration that is quick, cost-effective and fair, considering especially the amounts in dispute and complexity of the issues or facts involved".

- arb-med (arbitrators encouraging settlement during proceedings);⁷²
- the consolidation of proceedings and joinder of new parties;⁷³
- the extent to which reasons need to be detailed in awards;⁷⁴
- the scrutiny of arbitral awards (except Article 33.6, enabling ACICA to confirm that no monies are due to it for the purpose of the award);⁷⁵
- permitting or requiring the arbitral tribunal (or institution) to invest money held on deposit for the arbitration and account to the parties for any income earned;⁷⁶ and
- tribunal administrative secretaries.⁷⁷

Several of these additional matters can or should be elaborated instead through legislative reform. This is certainly true of some further issues that have been canvassed in the current review of Australia's IAA, such as whether and how arbitral institutions (especially ACICA) should replace the courts as default appointing authority for arbitrators or to hear challenges to arbitrators.⁷⁸

Meanwhile, the ACICA Rules contain provisions necessary for an efficient arbitration, and they remain tailored to meet contemporary expectations in international commercial arbitration, particularly in Australia. This paper has highlighted the most important, interesting or innovative aspects. All of the other provisions in the ACICA Rules are available on its website for anyone interested to read, together with a more exhaustive recent Commentary.⁷⁹

IV. CONCLUSION

The ACICA Rules were welcomed in Australia, where the industry and business generally had been waiting for such a development for several years. The end product is appropriate for an institution such as ACICA and is very well adapted for arbitration in Australasia more generally. The Rules also play a

⁷² See eg Article 40 of the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules.

⁷³ On these two topics, compare respectively Nottage and Garnett, above n 2, Parts IV.E and IV.G (with further references).

⁷⁴ Article 33.3 requires arbitrators to give reasons unless parties agree that none are needed, but does not elaborate any further. This question has become controversial in Australia in light of *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 255, although that (de facto international) arbitration was decided under the CAA rather than the IAA. See further Richard Garnett and Keith Steele, *In Search of an Appropriate Standard for Reasons in Arbitral Awards*, [2007] (10) INTERNATIONAL ARBITRATION LAW REVIEW 111; Peter Gillies and Niloufer Selvadurai, *Reasoned Awards: How Extensive Must the Reasoning Be?*, 74 ARBITRATION 125 (2008); and Nottage and Garnett, above n 2, Part IV.F.

⁷⁵ See eg Article 27 of the ICC Rules and Rule 27.1 of the SIAC Rules.

⁷⁶ See eg Section 6 of the HKIAC Schedule of Fees and Costs of Arbitration, which provides that any interest earned on deposits made by the parties "shall be included in the final computation of the costs of the arbitration in favour of the party or parties having made the deposit or deposits so invested". Compare Rule 26.8 of the SIAC Rules, which requires that "[a]ll advances and deposits shall be made to and held by the Centre. Any interest which may accrue on such deposit(s) shall be retained by the Centre".

⁷⁷ See eg Article 14.5 of the HKIAC Rules.

⁷⁸ Nottage and Garnett, above n 2, Part IV.B. ACICA Rules Article 14 allows for ACICA to hear challenges, and Article 43.2 states that its decisions 'shall be conclusive and binding upon the parties and the Arbitral Tribunal', with ACICA not having 'to give any reasons'. However, this is subject to mandatory provisions of the seat of the arbitration, with the current IAA regime for example allowing challenges also to be heard by the courts. See also Greenberg, above n 67.

⁷⁹ Above n 7; Luttrell & Moens, above n 11.

broader role as a reference point for the ongoing review of the UNCITRAL Arbitration Rules, current or future revisions of the rules of other arbitral institutions, and indeed in legislative reform initiatives in Australia and further afield. Several provisions of the ACICA Arbitration Rules are quite innovative, drawing on developments and debates world-wide.

It is impossible, of course, to draft all provisions in ways that avoid all potential for differences in views on how to interpret and apply them. But they have already been used to good effect in actual arbitrations. And those Articles on which views may reasonably differ are likely to be interpreted in a practical and arbitration-friendly manner, drawing on the general principles underlying these 2005 Rules and comparable provisions elsewhere.

ACICA's Rules Sub-Committee is also maintaining an active "watching brief" on the 2005 Rules, to ensure they work well in practice but also meet evolving expectations. This process draws on practical experiences and commentaries focusing on the 2005 Rules themselves, but also new directions and ideas identified when drafting ACICA's 2008 Expedited Arbitration Rules, as well as issues being raised in the deliberations and drafting of the revised UNCITRAL Rules.