ACICA'S NEW INTERNATIONAL ARBITRATION RULES

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INTRODUCTION

In June 2005, the Australian Centre for International Commercial Arbitration (ACICA) released Australia's first set of arbitration rules designed specifically for international arbitration ('ACICA Rules').[1]

They were drafted by a committee whose members included arbitration practitioners, university professors and Australia's foremost international arbitrators. In addition, the ACICA Rules were endorsed by representatives of seven of Australia's top commercial law firms, ensuring that they will be recommended for incorporation into future arbitration agreements.

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 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.[2]

The new ACICA Rules are modern, commercial, and provide an appropriate level of administrative support. They are, accordingly, an exciting development for the international arbitration industry and its users in Australia and Asia, and are a reflection of the rapidly growing interest in and use of international arbitration in the region.

This article does not seek to describe each provision of the ACICA Rules, but rather focuses on interesting and unusual features that the rules exhibit in contrast with other comparable institutional arbitration rules.[3] Where appropriate, this article refers to features of Australian arbitration law which are relevant to provisions of the ACICA Rules.

OVERVIEW OF THE RULES

The ACICA Rules were 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')[4] and, as a result, their structure is well known and predictable. There are, however, innovative provisions or adaptations which will be discussed further below. As a few examples:

• on questions of evidence the arbitral tribunal must have regard to, but is not bound to apply,[5] the IBA Rules on the Taking of Evidence in International Commercial Arbitration ('IBA Rules');[6]

• detailed provisions on the granting of interim measures of protection are included based on UNCITRAL's proposed modifications to the UNCITRAL Model Law on International Commercial Arbitration ('Model Law');[7]

• innovative, flexible provisions concerning the remuneration of arbitrators are included;[8] and

• in general, party autonomy is expressed more strongly than in many other institutional rules.

ACICA's role in supervising arbitration proceedings is moderate. ACICA arbitration is not 'highly supervised' as is, for example, ICC arbitration. But, ACICA does provide the basic services which parties expect and need. The ACICA Rules offer a balance between the provision of necessary services and the maintenance of full flexibility. Broadly, ACICA's role includes:

• extending periods of time;

• the appointment of arbitrators upon default of a party nomination or upon default of a joint party or joint co–arbitrator nomination;

• deciding challenges to arbitrators in the event of a dispute;

• 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 commendable in many respects. They are clearly drafted, straightforward, simple, and flexible. They are also well–adapted to arbitration in Asia and, particularly, Australia, with several provisions having been included or adapted with regional and international court decisions in mind.

NOTABLE INCLUSIONS, EXCLUSIONS AND ADAPTATIONS

A. Model Clause and Application of ACICA Rules

Over a series of cases, Australian court jurisprudence indicates that the words 'arising out of, relating to or in connection with this contract'[9] 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.[10]

Had ACICA used any narrower formulation, Australian courts may have interpreted the clause as not covering quasi–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 quasi–contractual claims is gradually becoming more liberal,[11] but the adoption of the wording recommended by ACICA will maximize parties' chances of ensuring that all future disputes related to the contractual relationship will fall within the scope of the arbitration agreement.

The scope of application of the ACICA Rules is expressly stated to be 'subject to such modification as the parties may agree in writing.'[12] A reinforcement of party autonomy also appears in many other provisions of the ACICA Rules. 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. 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.[13]

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 (and Singapore). Article 2(3) provides: 'By selecting [the ACICA Rules] the parties do not intend to exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration.'[14]

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)[15] governs international arbitrations and one of seven Commercial Arbitration Acts (CAAs), depending on which state or territory the seat of arbitration is in, govern domestic arbitrations.[16] 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, an implicit exclusion of the Model Law would not occur where parties had chosen 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. However, in Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl–Ing BurkhardT GmbH ('Eisenwerk'),[17] one court in Australia's sunny northern state of Queensland found that by agreeing on the ICC Rules to govern their arbitration, the parties had implicitly excluded the operation of the Model Law in relation to that arbitration. While the matter has yet to come before Australian courts again, it is expected that Eisenwerk will be corrected next time it does. In the meantime, parties who choose the ACICA Rules are guaranteed not to fall foul of such a decision.[18]

B. Commencing Arbitration and 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 … the Statement of Claim referred to in Article 21.'[19] 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 Defense referred to in Article 22.'[20]

The option to include the statement of claim (or defense) with the notice of arbitration (or response/answer) appears in the Swiss Rules, but in few other major sets of arbitration rules.[21] 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 defense 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. 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 very rare that both a statement of claim and statement of defense (or their equivalents) are submitted within six months of the commencement of the arbitration.

The ACICA Rules include a typical provision concerning representation. 'The parties may be represented or assisted by persons of their choice.'[22] This open ticket to representation is mainly designed to bypass the misconception that a party's representative should be a lawyer qualified in the place where the arbitration has its seat 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.[23]

It is submitted that some limitation of 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 and Chairperson's Powers

The ACICA Rules concerning the constitution of the arbitral tribunal reaffirm party autonomy in the broadest possible manner, 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 above, 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.

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.[24]

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 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.[25]

Some institutional arbitration rules and the Model Law do not deal expressly with this situation. For example, the ICC Rules and the LCIA Rules are silent on this matter, although they both 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 and the Swiss Rules provide nearly equivalent provisions.[26]

Article 17(3) of the ACICA Rules states:

Questions of procedure may be decided by the chairperson alone, or if the arbitral tribunal so authorizes, 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 authorizes the chairperson to decide 'questions of procedure' even without the prior consent of the other arbitrators, whereas other rules require either prior authorization from, or prior consultation with, the co–arbitrators.[27] Article 17(3) of the ACICA Rules reflects the reality of the decision–making in most cases anyway—where minor decisions of procedure such as extending time limits are taken by the chairperson alone—but dispensing with the need to seek prior authorization 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 authorize 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 authorized to decide a question of discovery of documents in relation to a particular point.

D. Confidentiality, Seat, Jurisdiction and Evidence

In light of the now infamous Australian decision in Esso Australia Resources Ltd v Plowman ('Esso')[28] it is not surprising that the confidentiality provision (Article 18) in the ACICA Rules is more detailed than its counterpart in any set of arbitration rules of which this author is aware.[29] 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 the witness maintains the same degree of confidentiality as that required of the party calling the witness.

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. It is submitted that 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.[30] This 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 provides the arbitral tribunal with the discretion to decide where the proceedings and meetings physically take place.

Article 19(4) of the ACICA Rules is surprising. It 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 and Article 16(4) of the Swiss Rules which state that 'the award shall be deemed 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

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the award was made' in Article 5 of the New York Convention.[31]

Article 24 of the ACICA Rules reflects international standards in relation to decisions on jurisdiction, competence–competence and separability, and is 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 defense 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.' Article 21(5) caused considerable controversy during pleadings for the Twelfth 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.[32]

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.[33]

This author is aware of no other arbitration rules which incorporate the IBA Rules. Parties using the ACICA Rules are given a familiar starting point to structure questions such as production of documents, witnesses, experts, on–site inspections, hearings, and the assessment and admissibility of evidence. ACICA's approach is commendable because it provides this background structure without binding the tribunal to the IBA Rules, which would risk inflexibility.

E. Interim Measures

Article 28 of the ACICA Rules on interim measures of protection is also commendable. In contrast to other rules which merely empower the arbitral tribunal to order interim measures[34] or provide a limited definition,[35] 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 proposed revision to Article 17 of the Model Law.[36]

There are however several modifications, including:

• the arbitral tribunal must give reasons if it grants an interim measure in the form of an order rather than an award;[37]

• the provision of security for legal or other costs is specifically included within the definition of interim measures of protection;[38]

• 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 draft provides that 'the requesting party shall be liable for any costs and damages' caused by the measure;[39]

• the ACICA Rules do not include the controversial Article 17(7) of the UNCITRAL draft text, which provides for ex parte interim measures; and

• the requirement that 'the arbitral tribunal shall endeavour to ensure that the measures are enforceable.'[40]

F. 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 provisions[41] is similar to that in the Swiss Rules.[42] 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.[43] ACICA's fees are determined on the basis of the amount in dispute.[44] As an additional service, ACICA offers to hold costs deposits on trust, with monies distributed upon request of the arbitral tribunal.[45]

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'.[46] An agreement is generally the preferred option in arbitration and these provisions fully facilitate this, with ACICA playing an appropriate role if such negotiations become uncomfortable. Remuneration on an hourly rate ensures that the tribunal is properly remunerated where the workload is substantial

relative to the amount in dispute and vice versa.

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 and is especially sensitive in Australia since the New South Wales Supreme Court 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.[47]

G. Other Provisions and Omissions

It should be noted, finally, that a few 'optional extras' that can be found in some arbitration rules are not found in the ACICA Rules, such as provisions on:

• the consolidation of proceedings and joinder of new parties;

• expedited proceedings;

• 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);

• 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; and

• tribunal administrative secretaries.

The ACICA Rules contain every provision necessary for an efficient arbitration and are tailored to international commercial arbitration and it should be recalled that this article has not attempted to set out the entire ACICA Rules. Only provisions of interest or innovation have been commented on. The complete ACICA Rules are available on ACICA's website.[48]

CONCLUSION

The ACICA Rules are to be welcomed in Australia, where the arbitration and business communities have been waiting for such a development over the last several years. The end product is appropriate for an institution such as ACICA and is very well adapted for arbitration in Australia and Asia. The various innovative provisions are a credit to the drafting committee. The handful of provisions which, in the opinion of this author, are not ideal are likely to be interpreted in a practical and arbitration–friendly manner, and may well be amended in future if and when ACICA revisits the ACICA Rules.

REFERENCES

1. Australian Centre for International Commercial Arbitration, Arbitration Rules, June 2005, available at www.acica.org.au [hereinafter 'ACICA Rules']

2. UNCITRAL Arbitration Rules, GA Res 31/98, UN GAOR, 31st Sess., Supp. No. 17, ch. V, sec. C, UN Doc A/31/17 (1976)

3. Mainly the Swiss Rules of International Arbitration, January 1 2004 [hereinafter 'Swiss Rules']; Arbitration Rules of the London Court of International Arbitration Rules, January 1 1998 [hereinafter 'LCIA Rules'], International Chamber of Commerce Rules of Arbitration, January 1 1998, [hereinafter 'ICC Rules']; Singapore International Arbitration Centre Rules, October 22 1997 [hereinafter 'SIAC Rules']. Because of the geographic proximity, the Hong Kong International Arbitration Centre Rules, March 7 2005 [hereinafter 'HKIAC Rules'] are also occasionally compared, but they are quite different because they rely on the UNCITRAL Arbitration Rules

4. Swiss Rules id

5. ACICA Rules, supra note 1, art. 27(2)

6. UN Doc. A/40/17, Annex I, adopted by the United Nations Commission on International Trade Law on June 21 1985, reprinted in 24 I.LM 1302 (1985) [hereinafter 'UNCITRAL Model Law']

7. ACICA Rules, supra note 1, art. 28

8. Id arts. 39–42

9. See, e.g. Hi–Fert Pty Ltd v Kiukiang Maritime Carriers Inc (1999) 159 A.L.R. 142 and earlier dicta in cases such as Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways (1996) 39 NSWLR 160 and IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466

10. ACICA Rules, supra note 1, Model Arbitration Clause

11. For a recent discussion of the cases, see James Morrison 'Drawing a Line in the Sand: Defining the Scope of Arbitrable Disputes in Australia' 22 J Int'l Arb 395 (No. 5, 2005). For a detailed account of the cases up to 1999, see Richard Garnett 'The Current Status of International Arbitration Agreements in Australia' 15 J Contract L 29 (1999)

12. ACICA Rules, supra note 1, art. 2(1).13. See, e.g., ACICA Rules, supra note 1, art. 8: 'If the parties have not previously agreed on the number of arbitrators (i.e., 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, art 6 of the Swiss Rules, art 5(4) of the LCIA Rules, and art 8(2) of the ICC Rules do not 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 art. 8(2) of the ICC Rules) the ACICA Rules guarantee that the parties are provided with this further opportunity. Another example is ACICA Rules, art 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' (emphasis added). This differs from most other rules which provide for institutional choice simply 'if the parties have not agreed' (e.g. ICC Rules, supra note 3, art 14; SIAC Rules, supra note 3, r 19(1); Swiss Rules, supra note 3, art 16; LCIA Rules, supra note 3, art 16(1)). 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 guarantee it. Many other examples of strong respect for party autonomy are found in the ACICA Rules. See, e.g. ACICA Rules, supra note 1, arts 3(3), 10(3), 27(3) and 40(2)

14. Id art. 2(3)

15. International Arbitration Act, 1974 (Austl.)

16. An explanation of Australia's arbitration law can be found in Simon Greenberg & Christopher Kee 'Can You Seek Security for Costs in International Arbitration in Australia?' 26 Aust'l Bar Rev. 89 (2005). More information on arbitration law and practice in Australia is in the Australian chapter of Arbitration World: Jurisdictional Comparison, European Lawyer 117 (2004)

17. Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl–Ing BurkhardT GmbH [2001] 1 QR 461

18. A decision equivalent to Eisenwerk was handed down in Singapore before the Parliament corrected it by amending the Singapore International Arbitration Act (see s15 of that Act). See further discussion on this issue in Michael Pryles, 'Excluding the Model Law Int'l Arb Law Rev 175 (2001)

19. ACICA Rules, supra note 1, art 4(4)(c)

20. Curiously, art 21(3) (in relation to the statement of claim) and art 22(2) (in relation to the statement of defense) of the ACICA Rules state that the party submitting the statement of claim/defense '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 art 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. Art 18(3) of the Swiss Rules provides that 'as a rule' the claimant shall annex its documentary evidence to its statement of claim. 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.

21. See Swiss Rules, supra note 3, art 4(c) (notice of arbitration) and art 8(c) (answer). See also SIAC Rules, supra note 3, r 3(2), which 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 defense with the response.

22. ACICA Rules, supra note 1, art 6

23. See, e.g. International Arbitration Act 1974, s 29(2) (Austl.). The recent changes allowing foreign lawyers to represent clients in arbitration in Singapore even when Singapore law applies are discussed in Michael Polkinghorne 'More Changes in Singapore: Appearance Rights of Foreign Counsel' 22 J Int'l Arb 75 (No. 1 2005)

24. ACICA Rules, supra note 1, art 9(3)

25. Id art 16

26. Art 14 of the Swiss 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' and r 16 of the SIAC 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 tribunal.' This latter provision appears to have been inspired by art 18 of the UNCITRAL Arbitration Rules, which is very similar.

27. Art 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 SIAC Rules states: 'In the case of a three–member tribunal, the presiding arbitrator may, after

consulting the other arbitrators, make procedural rulings alone'. Art 31(2) of the Swiss Rules states: 'In the case of questions of procedure, when the arbitral tribunal so authorizes, 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.

28. Esso Australia Resources Ltd v Plowman (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 The Leading Arbitrators' Guide to International Arbitration (LW Newman & RD Hill, eds. 2004).

29. Art 18 of the ACICA Rules goes much further than r 34(6) of the SIAC Rules, art 43 of the Swiss Rules, and art 30 of the LCIA Rules. The ICC Rules do not contain a confidentiality rule, but one is often included in the terms of reference.

30. An equivalent approach in favour of Singapore is found in r 19(1) of the SIAC Rules and in favour of London at art 16(1) of the LCIA Rules, but those provisions allow for the tribunal or the LCIA Court respectively to fix a different seat of arbitration 'in view of all the circumstances.'

31. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10 1958, 330 UNTS 3

32. See www.cisg.law.pct.edu/vis.html.

33. ACICA Rules, supra note 1, art 27(2)

34. Swiss Rules, supra note 3, art 26; SIAC Rules, supra note 3, r 25; LCIA Rules, supra note 3, art 25; UNCITRAL Model Law, art 17; ICC Rules, supra note 3, art 23

35. LCIA Rules, supra note 3, art 25

36. See www.uncitral.org/uncitral/en/commission/working_groups/2arbitration.html. The most recent proposed wording for art 17 was prepared for the 43d Session held in Vienna on October 3–7, 2005.

37. ACICA Rules, supra note 1, art 28(1)

38. Id art 28(2)(e)

39. Id art 28(7) (emphasis added)

40. Id art 28(2)

41. Id arts 39–42

42. See Swiss Rules, supra note 3, rr 38–40

43. ACICA Rules, supra note 1, art 42

44. Id app A

45. Id art 42(5)

46. Id art 40(4). 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, e.g.HKIAC Rules, supra note 3, app A; SIAC Rules, supra note 3, r 31(4). Rule 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.

47. See ICT Pty Ltd v Sea Containers Ltd [2002] NSWSC 77, as analysed in Simon Greenberg, Latest Developments in International Arbitration Down Under, 3 Vindobona J. Int'l Com L & Arb 287 (2003)

48. www.acica.org.au

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