MAINTAINING THE ATTRACTIVENESS OF ARBITRATION IN A CHANGING WORLD: THE ACICA ARBITRATION RULES AND THE SIAC ARBITRATION RULES

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Cover Page Footnote
Gabriël A Moens is Emeritus Professor of Law, the University of Queensland; Professor of Law, Curtin University. Professor Moens is a Fellow and Deputy Secretary General of the Australian Centre for International Commercial Arbitration (ACICA). He is also a Chartered Arbitrator (CArb). Camilla Andersen is Professor of International Commercial Law, the University of Western Australia and Fellow at the Institute of International Commercial Law, Pace University, New York. Tracy Albin is Solicitor at GTC Lawyers, Western Australia.
MAINTAINING THE ATTRACTIVENESS OF ARBITRATION IN A CHANGING WORLD:
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Abstract


This article reviews the revised arbitration rules adopted by the Australian Centre for International Commercial Arbitration and the Singapore International Arbitration Centre. The rules of these prominent arbitration institutions are described, analysed and compared with each other. The authors concentrate on the most important revisions, including those relating to emergency arbitrators, interim measures of protection, and consolidation and joinder, among others. They argue that both sets of rules were revised to enhance procedural efficiency and to ensure international best practice in a world where arbitration is under fire for being too “judicialized”. The authors also consider why there appears to be a ‘race’ to revise institutional arbitration rules.

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I INTRODUCTION

Institutional arbitration rules developed by various dispute resolution organisations are used for the peaceful, orderly and efficient resolution of international commercial disputes. These bodies conduct regular reviews of their rules of arbitration in order to keep them up-to-date and ensure they reflect the most expedient method of conducting proceedings. To that end, the most prominent arbitration institutions have revised their arbitration rules during the last couple of years. For example, the current arbitration rules of the International Chamber of Commerce (‘ICC’) and the Centre for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (‘CAM-CCBC’) have only been in force since 1 January 2012. Furthermore, the London Court of International Arbitration’s (‘LCIA’) rules of arbitration, as amended, became effective on 1 October 2014 and the China International Economic and Trade Arbitration Commission’s (‘CIETAC’) new arbitration rules entered into force on 1 January 2015.

The revisions aim at strengthening the neutral framework for the resolution of cross-border disputes, making the rules more user-friendly, and ensuring that they meet the challenges of a changing world; reflecting best international practice and increasing procedural efficiency. These revisions deal with the appointment of emergency arbitrators, interim measures of protection, joinder, consolidation, confidentiality, tribunal-appointed experts, and expedited arbitration rules, among other things.

In 2015, the Australian Centre for International Commercial Arbitration (‘ACICA’) revised their rules, which entered into force on 1 January 2016. These revisions superseded the version introduced in 2011. The ACICA rules provide a good example of the kind of revisions that have either been implemented, or are being considered or proposed, by the most prominent arbitration institutions. There are many notable revisions, only some of which will be discussed in this article.

The revisions will be compared with the amended arbitration rules of the Singapore International Arbitration Centre (‘SIAC’), the 6th Edition of which came into effect on 1 August 2016. This comparison will mainly, but not exclusively, concentrate on the appointment of an emergency arbitrator, interim measures of protection, and consolidation and joinder, which arguably are
among the most important revisions of the ACICA rules. The paper will expand on the factors that informed the revision process.

It is important to note that these changes are happening at a time when commercial arbitration, as a whole, has come under increasingly heavy fire for becoming what some deem as “judicialized”, leaning too heavily on lengthy, costly and litigation-like procedures. This issue was first raised almost 15 years ago, in a 2003 industry survey, where Gerald Philips highlighted how judicialization was beginning to “infect” arbitration. \(^{(1)}\) In his 2010 article, Thomas Stipanowich reinforced the severity of the situation by urging arbitration to meet its promise by stepping away from lawyer-made “monolithic” procedures and remembering that it is based on choice. \(^{(2)}\)

Furthermore, in 2011, in the introduction to an essay on the judicialization of arbitration, Thomas Carbonneau wrote a scathing criticism of arbitral regulation. He stated that attempts to regulate arbitration through theories and research “circumscribed by the inexorable development of the institution itself” \(^{(3)}\) can be likened to ‘an out of control speeding freight train’. \(^{(4)}\) Further evidence of the impact of judicialization is seen in the 2013 Queen Mary University of London Arbitration Survey \(^{(5)}\) which focused on “Corporate Choices in International Arbitration: Industry Perspectives”. This survey confirmed that these fears of judicialization stem from industry users themselves; respondents from various aspects of industry pointed to the ‘judicialization of arbitration’ as the single greatest concern for the future of commercial arbitration, and one of its most challenging obstacles.

These observations may sound somewhat alarmist – and it is tempting to wonder if judicialization can truly be as damaging to commercial arbitration as alleged and if it is deserving of Carbonneau’s label of ‘manifest error’.

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(4) Ibid.
(5) PwC and the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, International Arbitration Survey 2013: Corporate choices in International Arbitration: Industry Perspectives (2013) available at http://www.arbitration.qmul.ac.uk/research/2013/index.html. Subsequent Queen Mary surveys have revisited the idea in different contexts, but this is the survey which deals in depth with the fear of judicialization.
However, when regulatory construction begins to unnecessarily burden and complicate the arbitration mechanism itself, it detracts from the flexible ability to focus on the outcome and undermines the freedom of form that made commercial arbitration a popular dispute resolution mechanism in its early years. So it is perhaps no wonder that the recent regulatory changes we have been observing in arbitration institutions have focused on user-friendliness and expedited procedures.

Some background information on ACICA and SIAC is provided in the next section.

II THE AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION AND THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE: SOME BACKGROUND INFORMATION

1 The Australian Centre for International Commercial Arbitration

ACICA was established in 1985 as a not-for-profit public company. The objects of ACICA are: (1) to support and facilitate international arbitration; and (2) to promote Sydney specifically, and Australia generally, as a venue for the conduct of international commercial arbitrations. Its headquarters are at the Australian International Disputes Centre in Sydney. ACICA also has registries in Victoria (Melbourne), and Western Australia (Perth) where it is represented by the Asia-Pacific Institute of Dispute Management (‘APIDM’). ACICA maintains a panel of international arbitrators and a list of experienced arbitration practitioners. ACICA provides information on international arbitration and is involved in education through the provision of seminars and conferences.

ACICA is the statutory appointing authority under the Water Management Act 1999 (Tas), the Water Industry Act 1994 (Vic) and the Construction Industry Long Service Leave Act 1997 (Vic). ACICA has cooperation

(1) Commenting on the establishment of ACICA, Simon Greenberg states that, ‘Although ACICA was formed in the mid-1980s as Australia’s international arbitration institution, ACICA’s former role in administering arbitrations was mainly limited to the appointment of arbitrators and the holding of cost deposits for ad hoc arbitrations under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules’. Simon Greenberg, ‘ACICA’s New International Arbitration Rules’ (2006) 23(2) Journal of International Arbitration 189, 189. The official website of ACICA is located at www.acica.org.au. ACICA is also a founding Member of the Asia Pacific Regional Arbitration Group (‘APRAG’), the website of which is located at www.aprag.org.
agreements with over 50 arbitral institutions, including the Permanent Court of Arbitration, the International Centre for the Settlement of Investment Disputes (‘ICSID’), the Stockholm Chamber of Commerce (‘SCC’) and the American Arbitration Association (‘AAA’). The current President of ACICA is Mr Alex Baykitch who is a partner of King & Wood Mallesons in Sydney.

ACICA’s membership includes world leading practitioners and academics, as well as experts in the field of international and domestic dispute resolution. ACICA also played a leading role in the Australian Government’s review of the International Arbitration Act 1974 (Cth). On 2 March 2011, the Australian Government confirmed ACICA as the sole default arbitrator appointing authority to perform the appointment functions under the new Act.

Article 3.1 of the ACICA rules confirms that, ‘the overriding objective of these rules is to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved’.\(^{(1)}\) This objective is based on, or inspired by, the uniform Commercial Arbitration Act 2010 (Cth) which also describes the facilitation of ‘the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense’\(^{(2)}\) as the paramount objective of the Act. In Western Australia, this objective was confirmed by the Hon Christian Porter who stated in his First Reading Speech that:

The purpose of the law … is found in clause 1C in part 1A of the bill - the paramount object provision - to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.\(^{(3)}\)

These objects are reinforced in art 21.2 which exhorts the arbitral tribunal to adopt:

Suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues and the amount in dispute, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case.\(^{(4)}\)

\(^{(1)}\) Australian Centre for International Commercial Arbitration, above n 1, art 3.1.
\(^{(2)}\) Commercial Arbitration Act 2012 (Cth) s 1C.
\(^{(3)}\) Extract from Hansard, Wednesday, 15 June 2011, 4254c-4257a.
\(^{(4)}\) Australian Centre for International Commercial Arbitration, above n 1, art 21.2.
Further to the above, art 7.1 of the ACICA rules now stipulates that:

Prior to the constitution of the Arbitral Tribunal, a party may apply to ACICA in writing for the arbitral proceedings to be conducted in accordance with the ACICA Expedited Rules where:

(a) the amount in dispute determined in accordance with Article 2.2 of Appendix A of these Rules is less than $5,000,000;

(b) the parties so agree; or

(c) it is a case of exceptional urgency.

These rules aim to both facilitate the speedy resolution of a dispute and reduce the cost of arbitration.

2 Singapore International Arbitration Centre

The Singapore International Arbitration Centre (‘the Centre’), which is a prominent member of the APRAG, began operations in 1991 as an independent, not-for-profit organisation and aims to provide quality, efficient and neutral arbitration services to the global business community. The SIAC Court of Arbitration includes 18 eminent arbitration practitioners from various locations including Australia, Belgium, China, France, Japan, Korea, Singapore, the UK and the US. The Court is involved in the appointment of arbitrators as well as overall supervision of case administration at the Centre.

The Centre has a number of experienced international members including over 400 expert arbitrators from 40 jurisdictions. Appointments are made based on specialist knowledge of an arbitrator’s expertise, experience and track record. SIAC supervises and monitors the progress of a case and conducts scrutiny of the arbitral award. SIAC rules are efficient, cost-effective and flexible, incorporating features from civil and common law legal systems. SIAC arbitration awards have been enforced in many countries including Australia, China, Hong Kong, India, Indonesia, the UK, the US and Vietnam. SIAC’s mission is to be acknowledged as a truly international arbitration institution dedicated to providing world-class quality and efficient service, promoting arbitration as a preferred mode of dispute resolution, while achieving the highest satisfaction for their employees and stakeholders.

As of 1 June 2016, SIAC held around 600 active cases. Between 1 July 2010 and 1 June 2016, SIAC received a total of 263 applications of which 161 were accepted. 50 of these applications were for the appointment of emergency
arbitrators, all of which were accepted. Mr Lucien Wong is the Chairman of the Board of Directors of SIAC and is a senior partner of Allen & Gledhill LLP.

III EMERGENCY ARBITRATORS

Emergency arbitration has become increasingly popular in commercial arbitration sectors, and for good reason. Historically, arbitration has been criticized for being unable to offer speedy temporary relief in cases where swift action was needed. However, with the emergence of emergency arbitration offering interlocutory relief, this shortcoming has been addressed. Now, if parties cannot wait for the constitution of a tribunal or the outcome of a decision, they may apply for emergency arbitration which is now available from most arbitral centres worldwide. ACICA and SIAC are no exceptions.

1 Australian Centre for International Commercial Arbitration

The appointment of an emergency arbitrator is covered by sch 1 of the ACICA arbitration rules. The appointment of emergency arbitrators is inextricably linked to a party’s request for interim measures of protection; but only when a request has been made (and prior to the constitution of the arbitral tribunal) can the emergency arbitrator be appropriately appointed.

Art 1 provides for the application by the parties for interim measures of protection – this process will be discussed later in this paper. Only once an application has been made and payment of the emergency arbitrator’s fee is received will ACICA appoint an emergency arbitrator. According to r 2.1, ACICA must use its best endeavours to appoint an emergency arbitrator within one business day of the receipt of the application.

Once appointed, ACICA must notify the parties in writing of the appointment so as to give them the opportunity to challenge the appointed arbitrator. This challenge must be lodged within one business day of the appointment. Similarly, the emergency arbitrator must notify ACICA immediately in writing of any circumstances that may impinge on their ability

(1) Australian Centre for International Commercial Arbitration, above n 1, sch 1.
(2) Ibid r 2.2.
(3) Ibid r 2.1.
(4) Ibid r 2.1.
(5) Ibid r 2.1.
(6) Ibid.
to decide the matter impartially and independently.\(^{(1)}\) Further, unless otherwise agreed by the parties, the emergency arbitrator must not act as an arbitrator in the main proceedings.\(^{(2)}\) Once the matter is referred to the emergency arbitrator according to r 2.4, the arbitrator will have a maximum of five business days to make a decision unless ACICA grants an extension upon request by the arbitrator.\(^{(3)}\)

The emergency arbitrator has the power to order any interim measure it deems necessary and according to any terms it deems appropriate.\(^{(4)}\) They will also have the power to modify or vacate interim measures at any time before the arbitral tribunal is constituted.\(^{(5)}\) The interim award must be in writing, state the date it was made, outline the reasons for the decision, be signed by the emergency arbitrator and a copy must be given to each of the parties and ACICA.\(^{(6)}\) The emergency arbitrator may also require the parties to provide additional security for the interim measure at any time.\(^{(7)}\) The emergency arbitrator ceases to have any power to make decisions or alter interim awards after the arbitral tribunal is appointed.\(^{(8)}\) With regard to costs, the arbitrator may initially apportion them between the parties subject to the final order of the arbitral tribunal as to costs.\(^{(9)}\)

In accordance with the ACICA arbitration rules, a party in need of emergency interim measures of protection may make an application even prior to the constitution of the arbitral tribunal (sch 1, r 1.1). However, the authority of the emergency arbitrator to order provisional or interim measures of protection is controversial because the use of this authority might result in a dispute as to whether such application effectively ousts the jurisdiction of the courts. In addition, this authority may also be incompatible with art 17(1) of the Model Law on International Commercial Arbitration (‘Model Law’) because this article only provides for emergency interim measures taken by the arbitral tribunal, once it has been constituted.

\(^{(1)}\) Ibid.
\(^{(2)}\) Ibid r 2.3.
\(^{(3)}\) Ibid r 2.4.
\(^{(4)}\) Ibid r 3.3.
\(^{(5)}\) Ibid r 3.4.
\(^{(6)}\) Ibid r 3.2, r 3.7.
\(^{(7)}\) Ibid r 3.6.
\(^{(8)}\) Ibid r 5.1.
\(^{(9)}\) Ibid r 6.3.
Thus, for an international commercial arbitration seated in Australia, this emergency power is problematic because the Model Law would supply the applicable Australian arbitration law in Australia. Moreover, the Model Law cannot be excluded in favour of the uniform Commercial Arbitration Act 2010 (Cth) because under s 21 of the International Arbitration Act 1974 (Cth), ‘if the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration’. These potential problems are somewhat alleviated by art 7.1 of sch 1 of the ACICA rules which stipulates that, ‘the power of the emergency arbitrator … shall not prejudice a party’s right to apply to any competent court or other judicial authority for emergency interim measures’. It will, of course, be the decision of the aggrieved party which path to pursue: court or arbitration, in seeking interim injunctions or other measures. Factors influencing this decision could include time, technical expertise, enforceability and costs, and should be made on a case by case basis. Moreover, there may be circumstances that will necessitate court applications rather than arbitration; certain types of interim relief, such as ex parte without communication or orders against third parties provide some examples.

The thorny issue of enforcement of emergency arbitration awards is outside the scope of this paper, and there is currently no basis for generating any international guidelines from domestic courts. While the Supreme Court of Queensland has decided that the interlocutory, rather than final, nature of an emergency arbitral award rendered it outside the scope of the New York Convention, the US Court of Appeals for the Seventh Circuit dismissed, in 2000, the attempts of the defendant to challenge enforceability of an interim measure and rejected the theoretical distinction between “orders” and “awards”. Suffice it to say that there is no international consensus. Nevertheless, emergency arbitration is an increasingly important part of arbitration as it represents a service which the parties wish to access.

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2. Ibid sch 1, r 7.1.
5. Publicis Communications v. True North Communications Inc. 206 F3rd 725 (7th Circ. 2000).
2 Singapore International Arbitration Centre

The issue of emergency arbitrators is covered by sch 1 of the 2016 SIAC arbitration rules. Pursuant to s 1 of this schedule, a party wishing to seek emergency interim relief may file an application for such relief with the Registrar either at the same time as, or following, a filing of a notice of arbitration. The applicant is required to send a copy of this application to all other parties and must include in their application:

1. The nature of the relief sought;
2. The reasons why the party is entitled to such relief; and
3. A statement certifying that all other parties have been provided with a copy of the application or, if not, certification that the party has taken all steps in good faith to provide a copy to all other parties.

Once an application is made in accordance with the rules, the President must appoint the emergency arbitrator within one day of receipt of the application and the relevant payments. The seat of arbitration can be determined by agreement by the parties, but in the absence of an agreement, the seat shall be Singapore. Similar disclosure rules, as found in the ACICA rules, are provided for in the SIAC rules. For instance, prior to appointment, a prospective emergency arbitrator must disclose to the Registrar any circumstances that may create doubt as to their ability to determine the matter impartially. Additionally, any challenge to their appointment by either of the parties must be made within two days of the parties’ being made aware of the prospective appointment and the reasons giving rise to their incompetence to hear the dispute must be outlined.

(1) Singapore International Arbitration Centre, Arbitration Rules of the Singapore Arbitration Centre (1 August 2016) SIAC
(2) Ibid sch 1, r 1.
(3) Ibid r 1.
(4) Ibid r 1(a)-(c).
(5) Ibid r 2, r 3.
(6) Ibid r 4.
(7) Ibid r 5.
(8) Ibid r 5.
The emergency arbitrator must not act as an arbitrator in any future proceedings between the parties, unless they agree otherwise.\(^1\) Upon appointment, and absent any challenge to their appointment, the emergency arbitrator shall, within two days, establish a schedule for consideration of the application for interim relief.\(^2\) This schedule is required by the rules to provide the parties with a reasonable opportunity to be heard, but may make provision for this to occur via telephone or video conference or written submissions, rather than requiring the parties’ physical appearance before the emergency arbitrator.\(^3\) The emergency arbitrator, in carrying out this schedule of events, is given all the powers of a regular tribunal, including the ability to make decisions as to their own jurisdiction.\(^4\) The rules also provide that a decision as to the application for interim measures must be made within 14 days of the arbitrator being appointed.\(^5\)

Once interim measures have been awarded, the emergency arbitrator’s power to act comes to an end.\(^6\) The tribunal, when the proceedings begin, is not bound by the reasons given by the emergency arbitrator and can reconsider, modify or vacate any interim award or measure including a ruling as to their own jurisdiction.\(^7\) The costs associated with the process can be apportioned by the emergency arbitrator, however this is subject to the tribunal’s final decision as to costs.\(^8\)

IV INTERIM MEASURES OF PROTECTION

1 Australian Centre for International Commercial Arbitration

A party requiring emergency interim measures of protection may make an application to ACICA pursuant to r 1.1 of sch 1 at any time before the arbitral tribunal is appointed.\(^9\) The application must be in writing, be made concurrently or after the filing of the notice for arbitration, be notified to all concerned parties before or at the same time as making the application, and

\(^{1}\) Ibid r 6.  
\(^{2}\) Ibid r 7.  
\(^{3}\) Ibid.  
\(^{4}\) Ibid.  
\(^{5}\) Ibid r 9.  
\(^{6}\) Ibid r 10.  
\(^{7}\) Ibid.  
\(^{8}\) Ibid r 13.  
\(^{9}\) Australian Centre for International Commercial Arbitration, above n 1, sch 1, r 1.1.
contain a certification that notice has been given or has been reasonably attempted to be given. The application must also detail the nature of the relief sought, the reasons why the relief is required on an emergency basis and the reasons why the applying party believes they are entitled to the relief. The party making the application must pay the emergency arbitrator fees at the time of application in order for it to be processed.

In order for an interim measure to be granted under the ACICA rules, the emergency arbitrator must be satisfied, pursuant to r 3.5 of sch 1, that:

1. Irreparable harm is likely to result if the interim measure is not granted;
2. That harm substantially outweighs the harm that is likely to result to the party that is being affected by the interim measure; and
3. There is a reasonable possibility that the applying party will succeed in arbitration on the merits.

Furthermore, an interim award is made binding on all parties by r 4.1. The parties also undertake to comply with the award in a speedy manner. However, an interim award will cease to be binding if: (1) the arbitral tribunal makes a final award, (2) the claim is withdrawn, (3) the emergency arbitrator or the arbitral tribunal makes a decision to revoke the award, or (4) an arbitral tribunal is not appointed within 90 days of the interim measure being awarded. Further, any interim measures so granted can be modified, reconsidered or vacated by the arbitral tribunal and the decision and the reasons of the emergency arbitrator are not binding on the tribunal’s decision.

According to r 33 of the ACICA rules, the arbitral tribunal may also grant interim measures of protection on the written request of a party provided they give reasons for their award or order so rendered. Rule 33.2 notes that an interim measure is an order for a party to: (1) maintain or restore the status quo pending the final decision of the tribunal, (2) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm, (3)

(1) Ibid r 1.2.
(2) Ibid r 2.3.
(3) Ibid r 1.4.
(4) Ibid r 3.5.
(5) Ibid r 4.1.
(6) Ibid r 4.2.
(7) Ibid r 4.3.
(8) Ibid r 5.2, r 5.3.
(9) Ibid r 33.1.
provide a means for preserving assets out of which a subsequent award could be satisfied, (4) preserve evidence that may be relevant and material to the resolution of the dispute, or (5) provide security for legal or other costs of any party.\(^1\) The applying party must satisfy the tribunal of the same requirements as those to be satisfied when applying for interim protection by an emergency arbitrator.\(^2\)

2 Singapore International Arbitration Centre

Interim relief is governed by both art 30 and sch 1 of the SIAC rules. Article 30 provides that the tribunal may issue an order or award granting an injunction or any other interim relief upon the request of a party.\(^3\) That party may be required by the tribunal to pay security for the interim relief.\(^4\) The other substantial rules relating to interim relief are contained in sch 1. Similar to the ACICA rules, any application for emergency interim relief must be accompanied by payment of the administration fee and the requisite deposits for the emergency arbitrator’s fees and expenses.\(^5\) This amount may be increased by the Registrar and if the additional deposits are not paid, the application is considered as withdrawn.\(^6\)

The types of interim measures the emergency arbitrator may award are very broad. Pursuant to s 8 of sch 1, they can award any interim relief they deem necessary, including preliminary orders before the parties submit their evidence.\(^7\) The emergency arbitrator, similar to the ACICA rules, must provide written reasons for their decision and can modify or vacate the order for a good cause.\(^8\) The interim order must be made within 14 days from the date of appointment unless exceptional circumstances warrants the Registrar providing more time.\(^9\) In contrast to the ACICA rules, the emergency arbitrator’s interim award does not become effective unless and until it is approved by the Registrar as to its form.\(^10\) Another point of distinction is the absence of any standards of proof in the SIAC rules. Whereas the ACICA rules prescribe the circumstances

\(^1\) Ibid r 33.2
\(^2\) Ibid r 3.5.
\(^3\) Singapore International Arbitration Centre, above n 32, art 30(1).
\(^4\) Ibid.
\(^5\) Ibid, sch 1, r 2.
\(^6\) Ibid.
\(^7\) Ibid r 8.
\(^8\) Ibid.
\(^9\) Ibid r 9.
\(^10\) Ibid.
that must be proved for interim measures to be awarded, there are no such requirements under the SIAC rules.

Furthermore, if the arbitral tribunal is not constituted within 90 days of the interim measure being awarded, it will cease to have effect.\(^1\) This is also the case where the dispute to be heard by the tribunal is withdrawn.\(^2\) Just like the ACICA rules, the emergency arbitrator may require that the parties provide security before any interim measures are taken.\(^3\) The interim measures are binding as from the date they are made and each party undertakes, pursuant to the rules, to carry out the interim order immediately and without delay.\(^4\) Interestingly, the parties also agree under the rules to waive their right to any form of appeal, review of recourse to any State court or other judicial authority with respect to such interim awards insofar as any waiver may be validly made.\(^5\)

V THE EMERGENCY ARBITRATION AND INTERIM MEASURES OF PROTECTION: COMPARING AND EVALUATING THE ACICA RULES AND SIAC RULES

The provisions relating to emergency arbitrators and interim measures in the ACICA rules and the SIAC rules are largely similar. For instance, both rules provide that an emergency arbitrator will not be appointed until such time as the parties have lodged an application for interim measures in compliance with the relevant rules.\(^6\) Additionally, both rules state that the governing body must appoint an emergency arbitrator within one business day of receipt of a complying application.\(^7\) The arbitrators under both rules must notify the relevant parties of any circumstances that may interfere with their ability to independently decide the matter and each set of rules allow the parties to challenge the appointment on the same grounds.\(^8\) However, the ACICA rules only allow parties one business day to make this challenge while the SIAC rules allow two days.\(^9\)

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\(^1\) Ibid r 10.
\(^2\) Ibid.
\(^3\) Ibid r 11.
\(^4\) Ibid r 12.
\(^5\) Ibid.
\(^6\) Australian Centre for International Commercial Arbitration, above n 1, r 2.2; Singapore International Arbitration Centre, above n 32, r 2, r 3.
\(^7\) Ibid r 3.
\(^8\) Ibid r 5.
\(^9\) Ibid.
The arbitrators may both require the parties to provide additional security for the award of interim measures and both rules give the arbitrators the ability to modify the interim award or order at any time before the constitution of the arbitral tribunal.\(^1\) Also, both set of rules allow the emergency arbitrators to apportion costs for the interim measures between the parties, subject to the final decision as to costs by the arbitral tribunal.\(^2\)

Furthermore, both rules require the applicant to apply in writing and with notice to all relevant parties.\(^3\) The parties must also outline the reasons for seeking the emergency interim measures.\(^4\) Another similarity exists with the scope of the emergency arbitrator’s power under both rules; they both give emergency arbitrators a very broad power to make an order or award granting any interim measure they deem necessary and on the terms they deem appropriate.\(^5\) With regard to the interim award, both rules provide that the parties undertake to comply with the award immediately and in a speedy manner.\(^6\) The interim award will cease to be binding under both rules upon a decision to that effect by the arbitral tribunal or the withdrawal of the case.\(^7\)

The requirements that must be satisfied by the applicant before the emergency arbitrator will grant interim protection compound under both rules; they must all be satisfied before the emergency arbitrator (or the arbitration tribunal) will grant an interim measure.\(^8\) The differences between the requirements for interim protection are described below.

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\(^1\) Australian Centre for International Commercial Arbitration, above n 1, r 3.6, r 3.4; Singapore International Arbitration Centre, above n 32, r 11, r 8.
\(^2\) Australian Centre for International Commercial Arbitration, above n 1, r 6.3; Singapore International Arbitration Centre, above n 32, r 13.
\(^3\) Australian Centre for International Commercial Arbitration, above n 1, r 1.2; Singapore International Arbitration Centre, above n 32, r 1.
\(^4\) Ibid.
\(^5\) Australian Centre for International Commercial Arbitration, above n 1, r 3.3; Singapore International Arbitration Centre, above n 32, r 8.
\(^6\) Australian Centre for International Commercial Arbitration, above n 1, r 1.2; Singapore International Arbitration Centre, above n 32, r 12.
\(^7\) Ibid.


1 Requirements for Interim Order to be Made

The first point of difference is that the ACICA rules proscribe circumstances which must be satisfied by the applicant party for an interim award to be made whereas the SIAC rules do not. Rule 3.5 of the ACICA rules states that the requesting party shall satisfy the emergency arbitrator that:

a. irreparable harm is likely to result if the emergency interim measure is not ordered;

b. such harm substantially outweighs the harm that is likely to result to the party affected by the emergency interim measure if the emergency interim measure is granted; and

c. there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the liberty of decision of the arbitral tribunal in making any subsequent determination.\(^{(1)}\)

The SIAC rules do not require the requesting party to prove any of these things. Rather, the parties are given an opportunity to be heard under r 7 and it is during this process that they present their evidence, without any stringent information being required to be proved. The emergency arbitrator will make their decision based on the evidence provided during these hearings.

2 Time Limits for Making Decisions

Under the ACICA rules, the emergency arbitrator has five business days from the day of appointment to hand down a decision.\(^{(2)}\) This is contrasted to the SIAC rules under which the emergency arbitrator must, within two business days of appointment, develop a schedule for dealing with the application which gives the parties a reasonable opportunity to be heard.\(^{(3)}\) This means that the parties are granted more time to have their application heard and the emergency arbitrators are given a greater length of time to review the evidence. It also means that the parties are at risk for a longer amount of time while the decision is being made. This gives the other party the potential opportunity to take action to avoid the effects of an award.\(^{(4)}\) In any event, the emergency arbitrator under

\(^{(1)}\) Australian Centre for International Commercial Arbitration, above n 1, r 3.5.
\(^{(2)}\) Australian Centre for International Commercial Arbitration, above n 1, r 3.1.
\(^{(3)}\) Singapore International Arbitration Centre, above n 32, r 7.
\(^{(4)}\) See generally S R Luttrell and G A Moens, above n 81.
the SIAC rules must make a decision as to the application for interim measures within 14 days from their appointment.\(^{(1)}\)

3 The Process of Dealing with Applications

As noted above, the emergency arbitrators under the SIAC rules are given a greater length of time to hear and decide an application for interim measures of protection.\(^{(2)}\) This situation is not provided for under the ACICA rules and instead, the emergency arbitrators under those rules must decide the application on its merits and the information provided in the application.\(^{(3)}\) Whilst the process under the SIAC rules puts the applying party at risk for a longer period of time while waiting for an order to be made, it also allows for a fairer and more transparent and reliable process as the parties are both given a chance to openly make their own arguments and hear the other side’s contentions. This, on the face of it, appears to establish an equal playing field between the two sides and also enhances the confidence in the arbitrator’s decision and the process altogether.

All in all, it seems as though the ACICA rules and the SIAC rules afford relatively similar procedural advantages; both provide for a speedy appointment of emergency arbitrators, both implement the same method for applying for interim measures and both afford the same right to challenge an appointment within the same time limits. This means that parties having their disputes heard in accordance with either of these Rules have predominantly similar expectations with regard to procedure. However, the differences are important. As noted above, the time with which emergency arbitrators are given to make a decision on an application for interim measures under the SIAC rules is markedly longer than that under the ACICA rules. This leaves the applicant in a hazardous position where the other party can take measures to avoid the effect of an award.

Furthermore, the parties under the SIAC rules are given an express right to be heard. This is not expressly provided for in the ACICA rules. However, the absence of a provision for *ex parte* applications implies an opportunity for the parties to make their case – albeit in the relatively short time frame of five business days that the arbitrator has to make a decision. The lack of express

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\(^{(1)}\) Singapore International Arbitration Centre, above n 32, r 9.

\(^{(2)}\) Singapore International Arbitration Centre, above n 32, r 7, r 9.

\(^{(3)}\) Australian Centre for International Commercial Arbitration, above n 1, r 1.3, r 3.5.
provision for an opportunity to be heard may be a procedural disadvantage that parties should consider when deciding which rules will apply to their disputes.

On the balance of information, the rules do not seem too dissimilar. However, the differences as pointed out in this paper highlight some key considerations to be had when determining which rules to make applicable to a contract. Depending on which party is the claimant and which is the respondent, these differences may act in their favour or to their detriment in certain situations. In any event, both rules provide an efficient means for dealing with emergency interim measures of protection and represent the best methods for these processes at the current time.

VI CONSOLIDATION AND JOINDER

1 The Australian Centre for International Commercial Arbitration

In accordance with art 14.1, ACICA may consolidate two or more arbitrations if the parties have agreed to the consolidation and all the claims in the arbitration are made under the same arbitration agreement. Consolidation may also be ordered even if the claims are not made under the same arbitration agreements, but the claims present ‘a common question of law or fact’ and ‘the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and ACICA finds the arbitration agreements to be compatible’.\(^\text{(1)}\) Arbitrations are consolidated into the arbitration that commenced first, unless otherwise agreed by the parties: art 14.3. Importantly, pursuant to art 14.5:

The parties waive any objection, on the basis of ACICA’s decision to consolidate, to the validity and/or enforcement of any award made by the Arbitral Tribunal in the consolidated proceedings, in so far as such waiver can validly be made.\(^\text{(2)}\)

Article 15.1 deals with joinder; the arbitral tribunal has the power to allow an additional party to be joined to the arbitration provided that the additional party is bound by the same arbitration agreement between the existing parties to the arbitration and a request for joinder is made by a party or third party. A party wishing to join an additional party to the arbitration shall submit a Request for

\(^{\text{(1)}}\) Australian Centre for International Commercial Arbitration, above n 1, art 14.1(c).

\(^{\text{(2)}}\) Ibid art 14.5.
Joinder to ACICA (art 15.3) which must include the particulars listed in art 15.4. The answer to the request for joinder should be submitted by the additional party in accordance with art 15.5. A request for joinder may also be filed by a third party.\(^1\)

ACICA adopted a protocol for decisions on applications for consolidation and joinder and challenges to arbitrators under the ACICA rules 2016. This protocol has been developed ‘to provide a transparent process for the consideration and determination of applications’.\(^2\) To that purpose, a Council was established by ACICA in April 2016. Article 2 of the protocol stipulates that, ‘processes undertaken in accordance with this Protocol and all matters relating thereto are confidential to ACICA’ (art 2.1) and that ‘council members are subject to the same level of confidentiality as the parties, the arbitral tribunal and ACICA under the rules and expedited rules’.\(^3\)

2 The Singapore International Arbitration Centre

The SIAC rules deal with joinder and consolidation in art 7 and 8 respectively. In accordance with art 7.1, joinder of an additional party is possible provided that (a) the additional party to be joined is *prima facie* bound by the arbitration agreement, or (b) all parties, including the additional party to be joined, have consented to the joinder of the additional party. Under art 8, consolidation is possible where (a) all parties have agreed to the consolidation, (b) all the claims in the arbitration are made under the same arbitration agreement, or (c) the arbitration agreements are compatible, for example, the disputes arise out of the same legal relationships or out of the same transaction or series of transactions. Like ACICA, the disputes are consolidated into the arbitration that is deemed by the Registrar to have commenced first.

VII INTERNATIONALISATION

It is also notable that the 2016 ACICA rules and SIAC rules purport to implement international best practice. For example, with regard to the ACICA rules, although the parties may be represented or assisted by persons of their choice (art 8.1), each party is exhorted to use ‘its best endeavours to ensure that its legal representatives comply with the International Bar Association

\(^1\) Ibid art 15.6.
\(^2\) Available at: https://acica.org.au/acica-protocol/.
\(^3\) Australian Centre for International Commercial Arbitration, above n 1, art 2.2.
Guidelines on Party Representation in International Arbitration in the version current at the commencement of the arbitration’. (1) However, art 8.2 only refers to legal representatives, whereas art 8.1 does not limit assistance and representation to legally-qualified professionals. Hence, it might be questioned whether the rules impose an obligation on parties to ensure the applicability of the IBA Guidelines to representatives who are not legally qualified. IBA guidelines primarily address themselves to legal representatives; the IBA Arbitration Committee who drafted the rules were ‘established as a Committee of the International Bar Association’s Legal Practice Division’, and so their focus on legal practice is unsurprising. However, it would seem unduly limiting to set out the best practice enshrined in the rules and not extend it to all who practice in arbitration, regardless of legal qualification.

This new art 8 probably purports to address a situation where a party may seek a procedural advantage by changing their legal counsel once the arbitration has already started, presumably for the purpose of selecting counsel who are known to, or are friendly with, the members of the arbitral panel. In order to avoid any perception of real, potential or perceived conflict of interest, ACICA proposed in its Exposure Draft of September 2014 to incorporate an article (proposed art 6.3) which stipulated that:

The Arbitral Tribunal may withhold approval of any intended change or addition to a party’s legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict or other like impediment).

This proposed article has not been adopted, arguably because it violates the concept of party autonomy in arbitration. In addition, art 11.4 similarly states that:

ACICA, the Arbitral Tribunal and the parties may have regard to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration when assessing the impartiality and independence of arbitrators.

In contrast, the SIAC rules of Arbitration do not refer specifically to International Bar Association documents. However, a reading of the rules discloses that the drafters made an attempt at ensuring that the rules are compatible with best international practice. For example, art 19.2 states that, ‘the tribunal shall determine the relevance, materiality and admissibility of all

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(1) Ibid art 8.2.
evidence’. Although this article does not specifically refer to art 9.1 of the IBA rules on the Taking of Evidence in International Arbitration, it is inspired by this article which states that, ‘the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence’. The rules allow a change in, or addition to, the representation of parties. In accordance with art 23.2, ‘after the constitution of the tribunal, any change or addition by a party to its representatives shall be promptly communicated in writing to the parties, the tribunal and the registrar’. Although this is consistent with the principle of party autonomy, it may lead to a conflict of interest, thereby potentially increasing the likelihood of violating art 39.1 which imposes confidentiality obligations on the parties and arbitrators.

**VIII Disclosure**

There are a number of new provisions in the 2016 ACICA rules that deal with the disclosure and information about arbitrators. In particular, in accordance with art 16.3, ‘before appointment, a prospective arbitrator shall sign a statement of availability, impartiality and independence’ and shall disclose ‘any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence’. It also imposes an obligation on arbitrators, to disclose throughout the arbitral proceedings ‘without delay … in writing such circumstances to the parties unless he or she has already informed them of these circumstances’.

An interesting provision is art 16.4 because it imposes an obligation on parties or their representatives to refrain from having *ex parte* communication with arbitrators (or candidates for appointment as arbitrators), except to advise the candidate of the general nature of the dispute, to discuss the candidate’s qualifications, impartiality and independence in relation to the parties, or to discuss the suitability of candidates for the selection of Chairperson of the tribunal when the parties or party-nominated arbitrators are to designate that arbitrator.

Similarly, art 13.4 of the SIAC rules stipulates that:

A nominated arbitrator shall disclose to the parties and to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence as soon as reasonably practicable and in any event before his appointment.
In addition, art 13.5 also imposes on appointed arbitrators an obligation to disclose any circumstances that may affect their impartiality or independence ‘that may be discovered or arise during the arbitration’.

IX The Right to be Heard

Naturally, in arbitral proceedings all parties should be given an opportunity to be heard. Article 18 Model Law stipulates that, ‘the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case’. However, art 21.2 of the ACICA rules, whilst referring to equal treatment of the parties, only affords the parties ‘a reasonable opportunity to present their case’. This accords with s 18C International Arbitration Act 1974 (Cth) which indicates that, ‘for the purposes of article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party’s case if the party is given a reasonable opportunity to present the party’s case’.

Presumably, the fact that parties were given a reasonable (as opposed to a full) opportunity to present their case, would not affect the enforceability of the award under the New York Convention, especially on the assumption that anything that may not have been heard would not have been determinative. Indeed, although art V(d) of the New York Convention provides for non-enforcement of the award where the arbitral procedure ‘was not in accordance with the law of the country where the arbitration took place’, this would not be the case in Australia where a “reasonable” opportunity has statutory support.

The SIAC rules deal with the right to be heard in art 24. It confirms that the tribunal shall hold a hearing if requested by the parties. It is of interest to note that the tribunal is entitled to proceed ex parte ‘if any party fails to appear at a meeting or hearing without showing sufficient cause for such failure. In such case, the tribunal will proceed on the basis of submissions and evidence before it.

A most important and illuminating provision is art 21.3 ACICA rules which directs the arbitral tribunal to hold a preliminary hearing with the parties as soon as practicable after being appointed. The novel part of this article goes on to state that, ‘the arbitral tribunal shall raise for discussion with the parties the possibility of using other techniques to facilitate settlement of the dispute’. This provision is potentially problematic because the parties, having entered into an arbitration agreement or having submitted to arbitration, would already have
MAINTAINING THE ATTRACTIVENESS OF ARBITRATION IN A CHANGING WORLD

consented to arbitration. It would thus appear that art 21.3, in imposing an obligation on arbitrators to discuss alternative forms of dispute resolution, erodes the concept of party autonomy. Moreover, if an arbitrator were to overlook this requirement, in circumstances where the parties have made the 2016 ACICA rules applicable to their dispute, the losing party could potentially resist the enforcement of the award on the ground that the arbitral procedure ‘was not in accordance with the law of the country where the arbitration took place’ (art V(d) New York Convention).

It may well be that art 21.3 ACICA rules was inspired by SIAC which adopted the SIAC-SIMS Arb-Med-Arb Protocol (‘the AMA Protocol’) on 5 November 2014. This Protocol applies to all disputes submitted to the SIAC for resolution under the Arb-Med-Arb Clause (‘the AMA Clause’). Under this Protocol, the parties agree that any dispute settled in the course of the mediation at the Singapore International Mediation Centre, shall fall within the scope of their arbitration agreement. The arbitration is stayed during the mediation. The arbitration resumes if is not possible for the parties to settle the dispute by mediation during an 8-week period. If the dispute is settled by mediation, the parties may request the arbitral tribunal to render a consent award on the terms agreed by the parties (art 9).

The incorporation of Arb-Med-Arb clauses in arbitration agreements and the obligation imposed upon arbitrators, to discuss alternative forms of dispute resolution, indicates that mediation may well be promoted by the Alternative Dispute Resolution community as the preferred dispute resolution method.

X CONFIDENTIALITY

1 Australian Centre for International Commercial Arbitration

Article 22 ACICA rules is headed “Confidentiality”. However, art 22.1 talks about privacy, even though “confidentiality” and “privacy” are conceptually different from each other. Article 22.4 is an unusual provision which does not have a counterpart in any of the other arbitration rules:

To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the

(1) While ‘privacy’ means that no third party can attend arbitral conferences/hearings, ‘confidentiality’ refers to non-disclosure of specific information in public.
maintenance by the witness of the same degree of confidentiality as that required of the party.

The incorporation of this rule may be partly in response to the statement made in *Esso Australian Resources Ltd and Ors v The Honourable Sidney J Plowman (Minister for Energy & Minerals) and Ors*\(^{(1)}\) by Mason CJ:

> It is common ground between the parties that no obligation of confidence attaches to witnesses who are therefore at liberty to disclose to third parties what they know of the proceedings.\(^{(2)}\)

Thus, parties intending to call witnesses to give oral or written evidence before ACICA tribunals should ensure that their witnesses sign a confidentiality agreement pursuant to art 22.4. The terms of the confidentiality agreement must state that the witness generally acknowledges that the arbitral proceedings in which they are called are private and confidential, and that the witness undertakes to be bound by the obligation of confidentiality. These agreements will impose an obligation of confidentiality on witnesses as if they were a party to the arbitration agreement. Alternatively, the confidentiality agreement could recite the facts of the proceedings, and then incorporate art 22 as the operative part of the deed (i.e. with art 22.2 as the no disclosure provision, and art 22.3 as the notice rule). The governing law of the confidentiality agreement should be Australian law, and the dispute resolution provision should incorporate the ACICA Model Arbitration Clause.

The extent of the duty of confidentiality generally in arbitration is outside the scope of this paper. Note, however, that there is no implied duty of confidentiality in arbitration. The Australian High Court in *Plowman* observed that private arbitration hearings do not clothe the disclosed information and documents with confidentiality since absolute confidentiality is absent in Australia. A wish for confidentiality in arbitration therefore must utilize a clause like the one facilitated in the rules outlined above.

**2 Singapore International Arbitration Centre**

The SIAC rules employ an automatic protection of confidentiality. Pursuant to r 39.1, unless otherwise agreed by the parties, all parties including arbitrators, emergency arbitrators, secretaries and any other member of the tribunal are

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\(^{(1)}\) (1995) 183 CLR 10.

required to treat any matters relating to the proceedings as confidential.\(^{(1)}\) “Any matters” for the purpose of r 39.1 includes:

1. the existence of the proceedings;
2. the pleadings;
3. any evidence or materials;
4. any other documents produced by the parties for the proceedings; and
5. any award rendered in the proceedings.\(^{(2)}\)

However, any information that is already in the public domain is not covered by the confidentiality provisions.

These confidentiality protections are furthered by r 39.4 which allows the tribunal to issue an award against a party for sanctions or costs if they breach the confidentiality provisions. Rule 39.2 contains some brief exceptions to the confidentiality rules such as disclosing information for the purpose of pursuing a legal right or claim or pursuant to an order of the tribunal.\(^{(3)}\)

**XI The Seat of Arbitration**

The seat of arbitration is chosen by the parties. However, if the parties have not previously agreed on the seat of the arbitration and if within 15 days after the commencement of the arbitration they cannot agree, the seat of the arbitration shall be Sydney, Australia according to art 23.1. The “seat” is an important concept because it attracts the applicability of the state’s arbitration statute. In this context, Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides state that, “the concept that an arbitration is governed by the law of the place in which it is held, which is the ‘seat’ (or ‘forum’ or ‘lex arbitri’) of the arbitration, is well established in both the theory and practice of international arbitration”.\(^{(4)}\) The “seat” is a legal concept because, where the parties have agreed upon the seat of arbitration, that seat does not change even though the tribunal conducts all of the hearings in another country.

Article 23.5 states that, “The law of the seat shall be the governing law of the arbitration agreement, unless the parties have expressly agreed otherwise and that agreement is not prohibited by an applicable law.” This article is slightly

\[^{(1)}\] Singapore International Arbitration Centre, above n 32, r 39.1.
\[^{(2)}\] Ibid r 39.3.
\[^{(3)}\] Ibid r 39.2.
confusing because, in dealing with the seat of arbitration, it could presumably refer to the applicability of the relevant state’s arbitration law. However, it is possible that art 23.5 could also be a reference to the substantive law of the country. This latter interpretation is possibly the correct one because, as the seat always attracts the applicability of the seat of arbitration, there would be no reason to include this rule if the arbitration agreement were not deemed to be subject to the substantive law of the country where the seat of arbitration is located.

The seat of arbitration is dealt with in art 21 of the SIAC rules. It merely confirms that the parties may agree on the seat of arbitration. If the parties fail to select the seat, the seat will be chosen by the arbitral tribunal. In the context of judicialization, the more flexible SIAC rule would seem to be the one presenting the most arbitrator choice and thus the least judicialized approach.\(^{(1)}\)

**XII EXPERTS APPOINTED BY THE TRIBUNAL**

There is a lengthy, new section on experts appointed by the tribunal. It is stated in art 32.1 of the ACICA rules that the tribunal may appoint experts (after consulting the parties) and that it ‘may meet privately with any tribunal-appointed expert’. This may well be a violation of rules of natural justice. Although this would be appropriate in mediation, it may be fatal in arbitration. This problem is not vitiated by art 32.5 which enables parties to examine the expert witness in a hearing.

Similarly, under art 26 of the SIAC rules, the tribunal may appoint an expert to report on specific issues, after consulting the parties. The expert, after delivering their report to the tribunal, may be required to participate in a hearing, thereby providing the parties with an opportunity to examine the report.

**XIII JUDICIALIZATION, VALIDITY AND OTHER REASONS FOR REVISION**

All these revisions discussed in this paper cause us to ask the question as to why there appears to be a “race” to revise institutional arbitration rules? Theoretically, these revisions are necessary to ensure that arbitration rules respond to the requirements of a changing world. However, it is fair to suggest

that these revisions reveal the existence of a perceived underlying threat to the viability of arbitration as a preferred method of resolution of commercial disputes. Indeed, the viability of commercial arbitration is under threat for a number of reasons.

First, there is a well-founded fear (or reality) that arbitration is being overtaken by mediation as the most popular or preferred dispute resolution mechanism. Much of this is tied to the advancement of mediation as a more flexible and less judicialized method of ADR, while arbitration remains in the shadow of judicialization, as mentioned in the introduction.

Second, other specialised dispute resolution services, for example the Panel of Recognized International Market Experts in Finance (‘PRIME’), Docdex (ICC specialised dispute resolution services for letters of credit transactions), Adjudication (construction contracts), the Perth Centre for Energy and Resources Arbitration (‘PCERA’), the Asia-Pacific Institute of Dispute Management (‘APIDM’) just to name a few, replace many of the traditional functions of mainstream arbitration institutions and divert much needed funds away from these institutions. They are thus under the gun to offer more attractive services to the industry.

Third, as a counterweight to the fears of judicialization (and an explanation for its existence) lies the fear of the legitimacy of arbitration in some disputes. Since the days of the landmark case of Scherk v Alberto-Culver Co,\(^1\) there been periodic claims that arbitration is somehow illegitimate because it results in the ousting of the jurisdiction of the courts.

This issue was deemed to be settled in a 5 to 4 decision, at least in the United States, by Mr Justice Stewart’s decision in Scherk that:

\[\text{A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is … an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction [and that] A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.}\(^2\)

\(^{1}\) 417 U.S. 506 (1974).
\(^{2}\) Ibid 516–7.
Hence, the Supreme Court held that ‘the agreement of the parties … to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced’.\(^{(1)}\)

In Australia the constitutional validity of “arbitration” was challenged in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia and Anor.*\(^{(2)}\) In this case, the claimant had argued that, in violation of Chapter III of the Australian Constitution, according to which the judicial power is exercised by the judicial branch of government

The inability of the Federal Court [under Article 35 of the Model Law] … to refuse to enforce an arbitral award on the ground of error of law … impermissibly confers the judicial power of the Commonwealth on the arbitral tribunal that made the award, by giving the arbitral tribunal the last word on the law applied in deciding the dispute submitted to arbitration.\(^{(3)}\)

The High Court rejected the claimant’s argument by confirming that, ‘article 35 of the Model Law neither undermines the institutional integrity of the Federal Court nor confers judicial power on an arbitral tribunal’.\(^{(4)}\) Hayne, Crennan, Kiefel and Bell JJ observed that Commonwealth judicial power was an exercise of public authority. Where parties agreed to submit their disputes to a private arbitral tribunal, the tribunal exercised private arbitral power not public judicial power.\(^{(5)}\) The finality of an arbitrator’s determination of questions of law was not a delegation of judicial power to the arbitrator. A private arbitrator’s determination of a dispute was not an exercise of public power.\(^{(6)}\) The finality of the arbitrator’s determination of issues of law was the result of agreeing to submit the dispute to arbitration. The original rights and obligations of the parties were replaced by new obligations created by the award.\(^{(7)}\)

French CJ and Gageler J also drew a distinction between public judicial power and private arbitral power: Commonwealth judicial power was a coercive governmental power that was not exercised by mutual agreement between the parties.\(^{(8)}\) By contrast, private arbitral power arose from a voluntary agreement

\(^{(1)}\) Ibid 519–20.
\(^{(2)}\) (2013) 251 CLR 533.
\(^{(3)}\) Ibid 607 [34] (French CJ and Gageler J).
\(^{(5)}\) Ibid 616 [75] (Hayne J).
\(^{(6)}\) Ibid 622 [107] (Hayne J).
\(^{(7)}\) Ibid 622 [108] (Hayne J).
\(^{(8)}\) Ibid 606 [28] (French CJ and Gageler J).
between the parties.\(^1\) The making of an arbitral award was not an exercise of Commonwealth judicial power since the authority of an arbitral award derived from the agreement between the parties.\(^2\) Judicial enforcement of an arbitral award was an exercise of Commonwealth judicial power.\(^3\)

Against these arguments of validity stand the party autonomy theory of arbitration; the view that the arbitration clause is evidence of parties exercising their contractual freedom to relinquish rights to litigation and court hearings. In commercial contexts, this theory tends to prevail internationally, and thus speak in favour of more flexibility of arbitration to give parties what they wish. Blended Med/Arb, expedited processes, emergence of emergency arbitrations are all populist advancements of an industry needing to please its customers to ensure they keep preferring it. And they still do; the 2013 Queen Mary University of London survey indicated that within different industry sectors, 73–84\% of different groups prefer arbitration as a dispute resolution mechanism.\(^4\)

But these same surveyed industry groups also identified ‘judicialization’ as a real threat – so it is no wonder arbitration as a service industry has had to react. Previous work has analysed the fear of non-enforcement underlying much of judicialization,\(^5\) and the ball is very much in the courts’ court. The conclusion was that the process of judicialization – at the moment – seems to be ruled by fear; arbitrators fear non-enforcement, and courts fear non-transparent regulations. Hence, at the danger of oversimplifying a complex process: if courts embrace the idea that enforcement of commercial arbitral awards is not preconditioned on formalities and procedures and transparency of regulation, and if they embrace the promise of flexible commercial justice (as they ideally should), then arbitrators can let go of their fear of non-enforcement and everyone can focus on the outcome of the dispute.

However, this is a bit of a proverbial Mexican stand-off, and there are no signs that the judiciary at the enforcement stage are recognizing their responsibility in changing arbitration. So, caught between the fear of non-

\(^{1}\) Ibid 606 [29] (French CJ and Gageler J).
\(^{2}\) Ibid 606–07 [31] (French CJ and Gageler J).
\(^{3}\) Ibid 607 [32] (French CJ and Gageler J).
\(^{5}\) See generally Andersen and Zeller, above n 105.
enforcement and the fear of unattractiveness to its users, arbitral institutions are caught between a rock and a hard place. User friendly rules which allow expedited procedures, with transparent processes, seem to be the favoured compromise.

XIV Conclusion

The work undertaken by various arbitration organisations, including ACICA and SIAC, reveals that arbitration is still an important dispute resolution method. However, its relevance and viability are always under threat, and must remain dynamic to accommodate the industries it serves. With judicialization as the most imminent identifiable threat, and others always present as outlines above, it is no wonder that user-friendliness and expedited procedures are the flavour of the day.

However, regardless of what changes are currently made, and the current environment where judicialization is a threat, arbitration as a whole remains a dispute resolution service industry which will need to retain its dynamic approach to cater to the wants of its users in any commercial environment it may face – now or in the future. This is why revisions of arbitral rules are under constant scrutiny and revision. These new changes are welcome, for now, as outlined in this paper and are considered valuable improvements to the current international arbitral framework. Is it enough? Never. Therein lies the main trial facing major arbitral institutions; their rules remain dynamic and ever evolving; they must continue to rise to the challenge of adapting their rules to changing demands and business preferences.
الإبقاء على جاذبية التحكيم في عالم متغير:
قواعد التحكيم في كل من مركز أستراليا لقواعد التحكيم التجاري الدولي (اسيكا) ومركز التحكيم الدولي في سنغافورة (سياك)
إعداد:
غابرييل أي مونز(1) - كاميلا أندرسون(2) - تريس ألبين(3)

ملخص البحث باللغة العربية

النصوص التالية: المركز الأسترالي للتحكيم التجاري الدولي - مركز التحكيم الدولي في سنغافورة - التحكيم - المحكم في الحالات الطارئة - التدابير المؤقتة - القضاء على التحكيم - شعبية التحكيم

تستعرض هذه المقالة قواعد التحكيم المنقحة التي اعتمدها المركز الأسترالي للتحكيم التجاري الدولي ومركز سنغافورة للتحكيم الدولي. يتم وصف قواعد هذه المؤسسات التحكيمية البارزة وتحليلها ومقارنتها مع بعضها البعض. ويركز المؤلفون على أهم التنقيحات، بما في ذلك تلك المتعلقة بمحكمي الحالات الطارئة، والتدابير

(1) أستاذ فخري في القانون، جامعة كوين لاند؛ أستاذ القانون، جامعة كيرتين. البروفيسور مونز هو باحث ونائب الأمين العام للمركز الأسترالي للتحكيم التجاري الدولي (اسيكا) وهو أيضا محكم معتمد.
(2) أستاذ القانون التجاري الدولي، جامعة غرب أستراليا وزميل في معهد القانون التجاري الدولي، جامعة بابس، نيويورك.
(3) محامي في مكتب جي سي للمحاماة، غرب أستراليا.
المؤقتة للحياية، والتوطيد والضم، من بين أمور أخرى. ويجادلون بأن كلا المجموعتين من القواعد قد نجحت لتعزيز الكفاءة الإجرائية ولضمان أفضل الممارسات الدولية في عالم يخضع التحكيم فيه للنقد لكونه "قضائيا". كما يدرس المؤلفون لماذا يبدو أن هناك "سباق" لمراجعة قواعد التحكيم المؤسسي

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