

## International Arbitration Update

# Choosing the right set of arbitration rules

It is paramount that parties entering into a contract with an arbitration clause should carefully consider the set of arbitration rules which are to be adopted. Given the myriad of arbitration rules worldwide, such a question by no means has an easy answer.

In this article, we reflect on three sets of rules which are commonly seen in arbitration agreements involving an Australian counterparty and highlight some salient features which parties should consider when choosing between them. The rules which we will consider are: the 2011 Arbitration Rules of the Australian Centre for International Commercial Arbitration ("ACICA Rules"), the 2010 ACICA Expedited Arbitration Rules; the 2012 International Chamber of Commerce Arbitration Rules ("ICC Rules"); and the 2010 United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Rules").

### **Institutional or ad hoc arbitration?**

Parties to an arbitration may choose to designate an arbitral institution such as ACICA or the ICC to administer their arbitration usually in accordance with that institution's own set of arbitration rules (institutional arbitration). By choosing institutional arbitration the parties can avoid the time and expense of drafting their own arbitration rules. However the fees of the institution may be a consideration.

On the other hand parties may prefer to allow the appointed arbitrator(s) to administer bespoke rules for the arbitration without the involvement of any arbitral institution (ad hoc arbitration). The UNCITRAL Rules are widely used or adapted in ad hoc arbitrations (but can also be used in institutional arbitrations). The use of ad hoc procedural rules such as the UNCITRAL Rules are useful where the parties cannot agree on a set of rules or a designated institution.

### **Different approaches to case management**

The rules of arbitral institutions typically regulate the conduct of proceedings comprehensively from beginning to end. The ICC Rules generally provide for a greater degree of case management by the institution than under the ACICA Rules.

For example, a unique feature of the ICC Rules, which is not found in the ACICA Rules, is the scrutiny of draft awards by the ICC Court which deliberates whether or not to approve the award. The ICC Court does not interfere with the tribunal's decision but it may make modifications as to the form of the award and draw the tribunal's attention to points of substance for reconsideration. The purpose of review by the ICC Court is to enhance the correctness and enforceability of all arbitral awards.

### **Efficiency and expedition**

Institutional and ad hoc sets of arbitration rules reinforce to varying degrees the objective that arbitration should be cost-effective, efficient and adaptable to the urgency and complexity of commercial disputes.

The ICC Rules were amended in 2011 to impose an express duty on the parties and the arbitrators to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute." Similarly, the ACICA Expedited Arbitration Rules (but not the ACICA Rules) operate in light of the overriding objective of providing "arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved". The UNCITRAL Rules similarly provide that the arbitral tribunal is to conduct proceedings "so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute". The ICC Rules further go on to provide that a tribunal may take into account the extent to which

the parties have conducted the arbitration in an "expeditious and cost-effective manner" when making decisions as to costs. The ICC Court is also to take into account when fixing the arbitrators' fees the "diligence and efficiency" of the arbitrator and the timeliness of the submission of the draft award.

The ICC Rules require the tribunal to render a final award within six months from the signing of the Terms of Reference (an initial document drawn up to define the claims, the relief sought and the issues in dispute) by the arbitral tribunal or by the parties of the Terms of Reference. While there are no time limits for the making of an award under the ACICA Rules, parties wishing to have expeditious resolution of disputes may choose to apply the ACICA Expedited Arbitration Rules, which require delivery of an award within four months to five months of the appointment of the arbitrator.

## Confidentiality

The ACICA rules impose a duty of non-disclosure of all matters relating to "the arbitration (including the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain". In

contrast, the ICC Rules do not impose a duty of confidentiality on the parties. However, the arbitrator(s) are empowered to make orders concerning the confidentiality of the arbitration proceedings and to take measures to protect trade secrets and confidential information upon the request of any party". Likewise the UNCITRAL Rules do not impose a general duty of confidentiality save for providing that an award can only be made public with the consent of both parties.

Since parties who choose to arbitrate under the ICC Rules and the UNCITRAL rules cannot assume that there is a duty of confidentiality, they should consider including express confidentiality provisions in their arbitration agreement or agree that the optional confidentiality provisions in the *International Arbitration Act 1974* (Cth) should apply.

## Conclusion

This article has hopefully illustrated that the choice of applicable arbitration rules is not a straightforward one, and will depend on a number of considerations which will differ from contract to contract. What can be seen from the recent revisions to these rules is that there is a continual push to improve the efficiency of the procedures for the benefit of their users.

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