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Defining 'best practices of international arbitration': Perspectives from Australia: Part 1

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Best practices of international arbitration for Asia

Defining 'best practices of international arbitration': Perspectives from Australia

Part 1

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ADR Diary

Dr Clyde Croft SC

Globalisation has made international commercial arbitration more popular as a means of dispute resolution. In the Asia-Pacific region and since the early 1990s the number of arbitration requests received by the region's largest arbitral institutions has trebled.

This article looks at best practice for international arbitration and in particular how it works in Australia. Part 1 discusses the legal regime in Australia (including a current review) in the international context. It outlines four categories of interim measures of protection. Part 2 focuses on 'Ex parte applications for interim protection measures' before reaching its conclusion about international arbitration in Australia.

Growth in international arbitration

The globalisation of the world economy and the expansion of international trade and commerce has made international commercial arbitration more popular as a means of dispute resolution. In part this follows from the lack of alternatives but more so from the success of the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards (New York Convention), the network of Convention countries having grown to 144 during the 51 years since its birth.[1] In terms of alternatives, transnational court litigation is not possible to anything like the same extent under the Hague Convention[2] and there is a reluctance of one party to submit to the jurisdiction of national courts of the other; and transnational mediation and conciliation have yet to develop to a significant extent. In addition to these factors increases in the number and standing of international arbitrations are attributable to the development of efficient and expeditious arbitral procedures.

The growth in international arbitration is particularly evident in the Asia-Pacific region and since the early 1990s the number of arbitration requests received by the region's largest arbitral institutions has trebled.[3] Over time best arbitration practices have tended to be incorporated into the international arbitral landscape, replacing time-consuming and expensive practices.

Legal framework of international arbitration in Australia

International arbitration in Australia is predominantly governed by the *International Arbitration Act 1974* (Cth) (the IAA). The IAA has the effect of applying the New York Convention and ICSID Convention[4] in Australia and also adopting and applying the UNCITRAL Model Law on International Commercial

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Arbitration (the Model Law).[5] Australia's adoption of the Model Law demonstrated the support of the country for a fair and progressive arbitration law which was well-accepted internationally, having been developed by UNCITRAL through a process of international consensus.

The IAA has provided the essential framework for recognition and enforcement of foreign arbitral awards together with a comprehensive arbitration law for international arbitrations. This is not to overlook the ICSID Convention's application, but that is not the present focus.

Review of the legal framework of international arbitration in Australia

On 21 November 2008 the Australian Attorney-General, Hon Robert McClelland MP, announced government's intention to review the IAA. The review aims to achieve a comprehensive and clear framework that best supports effective and efficient international arbitration in Australia by adopting international best practice in arbitral law. It has three objectives: first, to ensure the IAA provides a comprehensive and clear framework governing international arbitration in Australia; secondly, to improve the effectiveness and efficiency of the arbitral process while respecting its fundamental consensual basis; thirdly, to consider whether to adopt overseas 'best-practice' developments in national arbitral law.

The public aspect of the review commenced with a discussion paper released by the Attorney-General.[6] The issues addressed by the paper include the meaning of the 'writing requirement' for arbitration agreements; the grounds on which courts may refuse to enforce foreign awards; clarification that parties' adoption of a set of arbitral rules does not constitute an 'opting out' of the Model Law; and the extent to which courts, or arbitral institutions such as ACICA, might perform functions under or by reference to Art 6 of the Model Law.

Independently of the review process there has been discussion arising out of the apparently stalled process of reviewing State and Territory Uniform Commercial Arbitration Acts[7] based on 1979 English arbitration legislation.[8] A degree of frustration has developed as a result of the glacial progress of this review by the Standing Committee of Attorneys-General — so much so that the NSW Attorney-General announced that the NSW Government is giving consideration to legislation applying the Model Law to domestic commercial arbitration in that State in place of the now outdated commercial arbitration legislation. Support has been expressed for this proposal by other States, except for Victoria.

Model Law in Australia

In applying the Model Law in Australia[9] a policy decision was made to allow party autonomy to the extent of permitting parties to an arbitration agreement to opt out by agreement in writing that their dispute is to be settled otherwise than in accordance with the Model Law.[10] Parties may exclude the Model Law expressly or by implication. If parties choose an arbitral seat in a country other than Australia the law applicable to the arbitration will not be Australian. In Australia the result of excluding the Model Law will be the application of one of the uniform Acts which are applicable to domestic commercial arbitration and are, in reality, less uniform than is desirable.[11]

Care needs to be taken in the manner parties agree procedural arrangements for arbitration where they do not intend to exclude the Model Law's application. For example it would not have been thought that an implicit exclusion of the Model Law would occur where parties had simply chosen a set of institutional rules to govern their arbitration, particularly as this is contemplated by Art 19(1) of the Model Law. Nevertheless in *Eisenwerk v Australian Granites Ltd*[12] a court found the parties had, by agreeing on the ICC Arbitration Rules, implicitly excluded application of the Model Law. The decision is generally regarded as being incorrectly decided and though the matter is yet to come before Australian courts again it is unlikely to be followed in the future.

The IAA provides a range of optional provisions which parties may agree to in addition to Model Law provisions in relation to settlement of their dispute.[13] The optional provisions apply the enforcement sections of Chapter VIII of the Model Law to interim measures of protection (IAA, s 23); provide for consolidation of arbitration proceedings (s 24); authorise the awarding of interest up to the making of the award (s 25); authorise the award of interest on debt under award (s 26); and provide for the basis and manner of the award of costs (s 27).

Australian Centre for International Commercial Arbitration

Since its 1985 formation in Melbourne the Australian Centre for International Commercial Arbitration (ACICA), now based in Sydney with offices in Melbourne and Perth, has played a prominent role in Australia's international arbitration landscape.

ACICA is a not-for-profit public company that supports and facilitates, and promotes Australia as a venue for, international commercial arbitration. Initially ACICA predominantly facilitated ad hoc arbitrations conducted under UNCITRAL Arbitration Rules.[14] In order to satisfy the need to facilitate and encourage efficient and cost-effective arbitral proceedings and more targeted rules in this respect, ACICA published its own comprehensive set of international arbitration rules in 2005 (the ACICA Arbitration Rules).[15]

In order specifically to promote expedition and cost-effectiveness ACICA then developed a separate set of expedited international commercial arbitration rules in 2008 (the ACICA Expedited Arbitration Rules). With a particular emphasis on efficiency, the ACICA Arbitration Rules and Expedited Rules are clear, concise and flexible, with an appropriate balance between supporting powers of arbitral tribunals to manage arbitration as they consider appropriate with party autonomy.

The Rules also promote cost-effectiveness, with a default three-member arbitral tribunal under the ACICA Arbitration Rules[16] and a default single member tribunal under the Expedited Rules.[17] In the same vein the Arbitration Rules provide for majority decision-making by a three-member tribunal or, failing a majority, the decision of Chairpersons prevail.[18] Clarity and efficiency are also enhanced under both sets of Rules by provisions enabling regard to be had to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration.[19]Additionally, the ACICA Expedited Rules provided for regard to be had to the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration with respect to challenges to the arbitrator.[20]

Both sets of ACICA Rules confer full power on arbitral tribunals to conduct proceedings in the manner considered appropriate.[21] In the case of the Expedited Rules the general power to manage the proceedings conferred on arbitrators is subject to the 'overriding objective' provided for in the Rules:

> **3. Overriding Objective**
>
> 3.1 The overriding objective of these Rules, which is to inform the processes, powers and rights here described, is to provide arbitration which is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues and facts involved.
>
> 3.2 By invoking these Rules the parties agree to accept the overriding objective and its application by the Arbitrator.

The Expedited Rules are intended primarily to cater for smaller disputes but there is nothing to prevent parties applying them to disputes of any quantum or nature if they wish, with or without some agreed modifications to suit particular disputes.

Party autonomy is an important feature of both sets of ACICA Rules but balanced, as indicated, by the need to ensure that tribunals are able to manage proceedings without feeling constrained to yield to a party's demands for inefficient and unnecessary procedures or cost-generating delaying tactics. This is evident in many provisions of both sets of rules, and also in the more general provisions of Art 2.2 of each which provides for their application 'subject to such modification as the parties may agree in writing'.[22]

There is also a variety of other provisions in both sets which provide expressly for modification of their application as a result of parties' agreement.[23] Art 17.2 of the Arbitration Rules is also an example of a provision which allows a party to trigger a process, or otherwise be involved in the arbitral process.[24] This article allows either party to request the Arbitral Tribunal to hold hearings for presentation of evidence by witnesses, including expert witnesses, or for oral argument.[25]

Reference should also be made to provisions in the ACICA Rules which enable parties to agree to a tribunal deciding as *amiable compositeur* or *ex aequo et bono*. [26]Additionally, both sets of rules encourage resolution of arbitral procedural matters by agreement of the parties before applying default positions or fall-back mechanisms.[27]

Arbitration confidentiality has become a significant issue in recent

Since its 1985 formation in Melbourne the Australian Centre for International Commercial Arbitration ... has played a prominent role in Australia's international arbitration landscape.

years, particularly following the High Court decision in *Esso Australia Resources Ltd v Plowman*[28] in which it was held that arbitrations were private but not confidential proceedings. This position has not been greeted with enthusiasm as one of the advantages routinely cited for arbitration over litigation has been its confidentiality.

New Zealand, unlike Australia, legislated for confidentiality in arbitration proceedings in its Arbitration Act 1996,[29] and significantly strengthened the provisions in 2007.[30] The ACICA Rules have been responsive to the general view that arbitrations should be confidential unless the parties have agreed otherwise.[31] Article 18 of the ACICA Rules contains detailed provisions designed to overcome practical difficulties with respect to maintaining confidentiality as highlighted in the *Esso* case:

18. Confidentiality

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

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

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

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

18.4. To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

Article 14 of the ACICA Expedited Arbitration Rules is in substantially the same terms.

The ACICA Rules also contain provisions with respect to remuneration of arbitrators.[32] Article 40 provides for remuneration on the basis of an hourly rate as agreed with the parties.[33] In default of agreement the rate will be determined by ACICA considering: '(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.' [34] Article 41 of the Arbitration Rules and Art 34 of the Expedited Arbitration Rules provide for,[35] or proceed on the basis of, a broad costs discretion in the arbitral tribunal[36] on the basis that costs would generally follow the event.[37]

As to the seat of arbitration, Art 19.1 of the Arbitration Rules and Art 15.1 of the Expedited Rules provide that if parties have not previously agreed on a seat and cannot do so within 15 days after commencement of arbitration, the seat shall be Sydney. An arbitral tribunal has discretion to decide where the proceedings, hearing of witnesses and meetings take place.[38] An overview of various aspects of the operations of the ACICA is contained in the Appendix.

Arbitration agreements and the 'writing' requirement

The Attorney-General's Review of the IAA also addressed the 'writing' requirement in Part II of the Act. The Discussion Paper addressed two questions:

> Should the meaning of the writing requirement for an arbitration agreement, in Part II of the International Arbitration Act (subsection 3(1)), be amended?'

and if so:

> Should elements of the amended writing requirement in art 7 of the UNCITRAL Model Law … be used in the amended definition?'

Currently, s 3(1) of the IAA provides that 'agreement in writing has the same meaning as in the Convention', a reference to the New York Convention which provides that:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.[39]

Australia has traditionally favoured a broad approach to the Convention's writing requirement. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[40] the Full Federal Court held that the requirement may be satisfied by clear, mutual documentary exchange showing the terms of, and the parties' assent to, the arbitration agreement. However, it is still possible to interpret Art II (2) of the New York Convention narrowly to exclude arbitration

New Zealand, unlike Australia, legislated for confidentiality in arbitration proceedings in its Arbitration Act 1996 and significantly strengthened the provisions in 2007. The ACICA Rules have been responsive to the general view that arbitrations should be confidential unless the parties have agreed otherwise.

agreements concluded other than in one written document. In this context UNCITRAL Working Group II recommended that this Article 'be applied recognising that the circumstances described therein are not exhaustive'.[41] This recommendation is not binding and consequently Art II(2) may still be interpreted narrowly.

The original 1985 version of Art 7(2) of the Model Law which applies in Australia[42] is as follows:

> (2) The arbitration agreement shall be in writing.
>
> An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

The provisions of this version of Art 7 of the Model Law means that the working requirements with respect to an 'arbitration agreement' may not be satisfied in a number of circumstances. For example:

- Where a maritime salvage contract was concluded orally through radio with a reference to a pre-existing standard contract form containing an arbitration clause;
- Contracts concluded by performance or by conduct with reference to a standard form containing an arbitration clause;
- Contracts concluded orally but subsequently confirmed in writing or otherwise linked to a written document containing an arbitration clause, such as the general sale or purchase conditions established unilaterally by a party and communicated to the other.

In a bid to meet developments in international trade and commerce, and future developments in communication technologies, Art 7 of the Model Law was amended in 2006 to read:

> *Article 7 – Definition and form of arbitration agreement*
>
> (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) The arbitration agreement shall be in writing.
>
> (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
>
> (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
>
> (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
>
> (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

In order to avoid the possibility of narrow interpretations of the writing requirement ACICA has submitted that the IAA should be amended to apply Option 1 of the 2006 amendments to Art 7 of the Model Law, as revised in 2006.

Interim measures of protection

Interim measures of protection are often critical in ensuring that a party does not act in a way that negates the effect of an outcome adverse to it in arbitration proceedings. Generally, measures of this kind involve protection of the subject-matter of the dispute but in some instances broader protection may be required. It is not always clear under the applicable law or arbitration rules whether the power to grant interim measures does or does not extend beyond the protection of the subject-matter of the dispute.

Arbitration Law and Rules

The regime of most interest in this region is the UNCITRAL Model Law on International Commercial Arbitration adopted by the UN General Assembly in 1985. Of critical importance with respect to interim measures are Arts 17 and 9. The provisions of Art 17 were modified significantly as a result of the deliberations of UNCITRAL Working Group II, the modifications being adopted by the General Assembly in 2006. The Model Law operates in effect as a recommended text directed to developing 'uniformity of the law of arbitral procedures'.[43] Extensive modifications to Art 17 in 2006 are still subject to consideration by states and have not been generally adopted as yet.[44] Consequently attention is directed initially to pre-2006 provisions of the Model Law and the current UNCITRAL Arbitration Rules.[45] Further reference is made to the modifications to Art 17 of the Model Law and the work of the UNCITRAL Working Group II in relation to revision of Art 26 of the Arbitration Rules (dealing with interim measures of protection).

The 1985 text of Arts 17 and 9 of the Model Law (which applies in Australia as the IAA has not been amended to incorporate the 2006 revisions) is as follows:

> Article 17 – *Power of arbitral tribunal to order interim measures*
>
> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.
>
> Article 9 – *Arbitration agreement and interim measures by court*

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Article 26 of the UNCITRAL Arbitration Rules as it presently stands is as follows:

Article 26 – *Interim measures of protection*

(1) At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

(2) Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

(3) A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

In considering the ambit of the interim measures of protection provisions of the UNCITRAL Rules it is instructive to consider and contrast some other rules provisions. Article 23 of the ICC Rules of Arbitration (in force from 1 January 1998) is cast as follows:

Article 23 – *Conservatory and Interim Measures*

(1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measures it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

(2) Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

Article 23(1) of the Rules of Arbitration makes it clear that the arbitral tribunal has power to 'order any interim or conservatory measures it deems appropriate'. The expression 'interim or conservatory measures' has not been defined, giving tribunals discretion to interpret the words as broadly or narrowly as they like. For example in *Vibroflotation AG v Express Builders Co Ltd*,[46] a subpoena was found not to be an interim measure of protection.

> Article 23(1) … leaves it up to the arbitrators to determine whether their decision should take the form of an order … or an Award, a matter that will often depend on the nature of the measure and the laws of the place of the arbitration…[47]

As Art 23(1) does not list the forms of interim or conservatory relief available, there is a wide discretion given to arbitral tribunals to grant relief they consider necessary. Consequently the variety of interim or conservatory measures available in ICC arbitration proceedings is potentially very broad. It extends far beyond the mere conservation or restraints on disposal of goods.[48] The Rules would allow arbitral tribunals to grant injunctive relief, preserve evidence, protect trade secrets, make orders for provisional payment and appoint experts to report on factual matters. Further, unlike Art 26 of the UNCITRAL Arbitration Rules, Art 23(1) of the ICC Rules does not require that the measures concern 'the subject matter of the dispute'.[49] Consequently, if there is sufficient connection with the arbitration the tribunal may have authority to grant interim relief not necessarily related to the 'subject matter of the dispute'.[50] There may, however, be problems associated with this wide conferral of power because, 'When asked to issue orders for interim relief, a tribunal must first determine whether the factors justifying the relief sought exist. Article 23(1) of the [ICC] Rules provides no real help; it merely confirms the power of the tribunal to give relief.'[51]

The ACICA Arbitration Rules contain extensive provisions with respect to interim measures, which address the issues to which reference has been made:

Article 28 – *Interim Measures of Protection*

28.1. Unless the parties agree otherwise in writing, the Arbitral Tribunal may, on the request of any party, order interim measures of protection. The Arbitral Tribunal may order such measures in the form of an award, or in any other form (such as an order) provided reasons are given, and on such terms as it deems appropriate. The Arbitral Tribunal shall endeavor to ensure that the measures are enforceable.

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

(a) maintain or restore the status quo pending determination of the dispute;

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied;

(d) preserve evidence that may be relevant an material to the resolution of the dispute; or

(e) provide security for legal or other costs of any party.

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

(a) irreparable harm is likely to result if the measure is not ordered;

(b) such harm substantially outweighs the harm that is likely to result to the party affected by the measure if the measure is granted; and

(c) there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination of this possibility shall not affect the liberty of decision of the Arbitral Tribunal in making any subsequent determination

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

28.5 The requesting party shall promptly disclose in writing to the Arbitral Tribunal

any material change in the circumstances on the basis of which that party made the request for, or the Arbitral Tribunal granted, the interim measure.

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

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

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

Article 24 of the ACICA Expedited Arbitration Rules is in substantially the same terms.

Contrasting the ACICA Arbitration Rules with respect to interim measures of protection with corresponding provisions of other rules, Greenberg comments:

> [i]n contrast to other rules which merely empower the arbitral tribunal to order interim measures or provide a limited definition, 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 Art 17 of the Model law.[52]

Greenberg also notes that the ACICA Rules, '… do not include the controversial Article 17(7) of the UNCITRAL draft text, which provides for ex parte interim measures.'[53] The ACICA Arbitration Rules and Expedited Rules make clear the nature of interim measures of protection[54] and the tests to be applied, which include a 'balance of convenience' rather than an 'irreparable harm' test.[55]

The original general provisions of Art 17 of the Model Law do not indicate the type of interim measures that can be granted by courts or arbitral tribunals.[56] Donovan comments:[57]

> The Model Law provides very little guidance about the scope of authority of courts and tribunals to order interim measures. Article 9 does not provide an exhaustive or illustrative list of the types of interim measures that may be ordered by a court, not does it indicate whether this power should be subject to any limitations. It does … make clear that courts should have the power to order interim measures 'before or during arbitral proceedings'… Although Article 17 does not include a list of such measures, it does provide that arbitral tribunals only have the power to order interim measures that relate to the 'subject matter of the dispute' and at the request of one of the parties.

Against this background it is useful to consider different types of interim measures of protection that might be sought and the extent to which Model Law provisions or the provisions of various arbitration rules might empower their grant.

Variety and nature of interim measures of protection

The variety of possible interim measures of protection is illustrated by the provisions of s 7 of the United States Federal Arbitration Act:

> § 7. *Witnesses before arbitrators; fees; compelling attendance*
>
> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case … Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States District Court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Nevertheless, various authors, including Redfern and Hunter, have helpfully described the nature of interim measures of protection with reference to four categories:[58]

1. Measures relating to the preservation of evidence

As evidence is a fundamental ingredient in most arbitrations it is not surprising that under many laws and rules arbitral tribunals are empowered to make orders which have the effect of preserving evidence. Measures of this kind may include demands relating to

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the attendance of witnesses. However:

> [S]ince an arbitral tribunal does not in general possess the power to compel the attendance of witnesses, it may be necessary to resort to the courts, particularly if the witness whose presence is required is not in any employed or other relationship to the parties to the arbitration, and so cannot be persuaded by them to attend voluntarily.

The English Arbitration Act of 1996 expressly provides that court proceedings are available for a party to arbitral proceedings to secure attendance of witnesses and to produce documents or other material evidence.[59] It should be noted that para (c) of s 1 of this Act, which follows the Model Law approach,[60] provides that the (English) courts should not intervene except as provided by Part 1 of the Act.[61]

The US Federal Arbitration Act provides a wide power to arbitrators to subpoena witnesses, either to give evidence or to disclose relevant evidence in their possession.[62] If a person does not comply with an arbitrator's subpoena punishment may ensue for contempt as provided by law. The use of these powers is not common in international arbitration, if only because some or all witnesses may be outside the US and not subject to its jurisdiction.[63] Thus Redfern and Hunter comment:[64]

> In one unreported ICC case, a tribunal refused to exercise its power to issue a subpoena to produce documents against a foreign national only present in the jurisdiction for the arbitration hearing. The tribunal considered that the parties would not have contemplated the exercise of such power when electing New York as a seat for a dispute which had no connection with the US. Further, this power to issue subpoenas does not extend to "third parties", who are not parties to the arbitration agreement, and can only be issued where a party to the arbitration controls the person sought as a witness.

2. Measures aimed at preserving the status quo

Preservation of the status quo may be critical if arbitration proceedings are to yield effective outcomes, particularly where damages awards would not fully compensate. Redfern and Hunter provide some examples:[65]

> … a manufacturer may refuse to continue supplies under a distribution agreement, alleging breach of contract. If the distributor does not receive the supplies … he then may not be able to fulfill the contracts that he in turn has made. This may cause damage to his reputation … In such a case, the distributor would no doubt wish to argue that the status quo should be maintained, and that the manufacturer should continue to supply him, pending resolution of their dispute by arbitration.

Before making an award or order of this kind an arbitral tribunal must first determine if it has power to do so. Redfern and Hunter doubt whether the Model Law grants such a power as the provisions of Art 17 (in original 1985 form) appear restricted to empowering orders in relation to the 'subject matter of the dispute'.[66] As indicated previously any perceived limitation of this kind would seem to be compounded by Art 26 of the UNCITRAL Arbitration Rules as they presently stand.[67]

3. Security for costs

Arbitral tribunals may be satisfied there is need to secure a party's assets so that a cost order against it can be met. Whether an arbitral tribunal may grant an order of this nature depends on the provisions of the applicable law and any arbitration rules under which the arbitration is being conducted.

It appears that Art 23 of the ICC Rules of Arbitration would permit such an order. In relation to these Rules Yves, Derains and Schwartz comment:

> Although not specifically mentioned, the drafters … considered the wording of Article 23(1) to be broad enough to embrace applications for security of costs … However … those drafting the 1998 Rules were reluctant to mention security for costs expressly because they did not wish to encourage the proliferation of such applications, which, apart from being rare, are generally disfavored in ICC arbitration …[68]

As indicated previously, possible limitations on the grant of power under Art 17 of the Model Law (in original form), particularly in association with Art 26 of the UNCITRAL Arbitration Rules,[69] raise some doubt as to the existence of any power to make an order for security for costs under this regime. The ACICA Arbitration Rules, on the other hand, specifically contemplate orders of this nature.[70]

4. Other forms of interim relief, including injunctions

Parties to an arbitration may wish to apply for injunctive relief for an almost infinite variety of reasons. Many examples of injunctive relief could be given but as they depend on the nature of the dispute or particular circumstances giving rise to the application it is not necessary to consider specific examples. As with all applications for interim protection measures the tribunal will need to consider, in context of the particular circumstance and nature of relief sought, whether there is a likelihood of irreparable harm if a measure is not granted, whether the harm is likely to outweigh any prejudice to the party against whom it is ordered and the likelihood, or otherwise, of the applicant succeeding on the merits in arbitration.[71]

A type of injunction that has arisen and is becoming more common in international arbitration is the 'anti-arbitration' or 'anti-suit' injunction. This relief may be sought from a court or tribunal where, for example, the validity of an arbitration agreement or jurisdiction of an arbitral tribunal is challenged on some basis. These applications often arise where a party no longer wants to resolve the dispute by arbitration, or is merely intent on delaying the dispute's resolution. Redfern and Hunter comment that such a '… problem has raised serious challenges to the modern arbitrator …'[72] ●

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This is part 1 of a two-part article. Part 2 will appear in the next issue of ADR Bulletin. This article is based on a paper presented at the APRAG Conference, Seoul, 2009.

Overview of various aspects of the operations of ACICA

1. Statistics

Number and monetary volume of international cases handled by each institution in the past three years. Five cases handled in past three years. Approximately $25,000,000 AUD.

Number and monetary volume of international cases where a Korean entity is named as applicant or respondent. Two international cases wherein a Korean entity is named as applicant or respondent. Approximately $770,000 AUD.

Number of staff and lawyers working for the institution? Three staff and one lawyer – and many lawyers (eminent arbitration practitioners) and others advising ACICA through its governing Board and Executive.

2. Pre-filing stage

Any magic words in order to make a binding arbitration clause? "'..in connection with this contract, including its existence, validity or termination'.

Model clause recommended by each institution: Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia *[or choose another city].* The language of the arbitration shall be English *[or choose another language].* The number of arbitrators shall be one *[or three, or delete this sentence and rely on Article 8 of the ACICA Arbitration Rules].*

System to preview certain requirements? For example, an arbitration clause could state parties are required to conduct a discussion to resolve disputes before they could file an arbitration application. Under this situation, what is the role of the institution in screening the requirement, i.e. whether the party filing arbitration has fulfilled the prerequisite of mandatory settlement discussion? None.

Overview of various aspects of the operations of ACICA (con't)

3. Post-filing stage

Do you have an arbitrators' roster? ACICA has panel of arbitrators experienced in international arbitration.

Is it mandatory to select arbitrators from the roster? Or is this roster for reference only? The roster (or panel) is for reference and it is not mandatory to select from the panel. Though if ACICA nominating it would be expected to have regard to its own panel.

Is there confirmation or other process to screen qualification of arbitrators? Yes, based on ACICA or other reputable panel membership or references, verification and arbitration work experience.

How often arbitrators appointed by the parties are not confirmed or disqualified by the institution and under what grounds? Not applicable.

Any process to recommend or appoint arbitrators or experts in ad hoc arbitrations? Our list or panel is on the ACICA website (www.acica.org.au).

Any default process in case parties have not agreed on governing laws, seat of arbitration. If parties have not previously agreed on the seat or agreed within 15 days of the commencement of arbitration, the seat shall be Sydney (ACICA Arbitration Rules (Art 19.1); cf ACICA Expedited Rules (Art 10.4)).

How do you deal with challenges involving neutrality of arbitrators? If the challenged arbitrator does not resign then ACICA shall decide the challenge.

How do you deal with challenges in the arbitrability of the case? The arbitral tribunal can rule on objections to its jurisdiction.

Do you have default or recommended procedural or discovery rules? No, save to the extent that *IBA Rules on the Taking of Evidence in International Commercial Arbitration* may be applied under ACICA Rules (Art 27.3) or Expedited Rules (Art 23.3).

Filing fee schedule; advance payment requirement/ how much a complainant is expected to bear in case the value of dispute is USD one million? AUD $8000.

Are these fees recoverable? Are legal fees incurred by the prevailing party recoverable from the losing party? Is it up to the arbitral panel? What is best practice? Yes and Yes. It is up to the arbitral tribunal to order costs, but it is usual that successful party recovers its costs.

Any mechanism to ensure that a losing party pays for the arbitration costs incurred by the prevailing party? Yes — covered in Arbitration Rules (Art 41) and Expedited Rules (Art 34)).

Any mechanism to preserve confidentiality or the proceedings? Yes — covered in ACICA Arbitration Rules (Art 18) and ACICA Expedited Arbitration Rules (Art14)).

Have you received any report that certain country requires the institution to withhold taxes before fees are paid to the arbitrators? No

Is there any mechanism to shorten the period of proceedings? No, but shorter time limits than provided for in the Arbitration Rules apply under the Expedited Arbitration Rules.

Any mechanism to alert arbitrators with regard to the speed of process? No.

Does your institution encourage live hearings as compared to written submissions? Yes. It is covered in the Rules (see Arbitration Rules (Art 17.2) and Expedited Rules which discourage hearings (Art 13.2)).

Best practice to deal with hostile witnesses? It is up to the arbitral tribunal.

Is there any mechanism to force hostile witness appear before the haring? Yes, subpoenas to attend can be issued by local courts.

4. Awards

Any process to scrutinize or otherwise preview soundness of the award? No.

How long does this process take? Not applicable.

Do you permit dissenting opinion to be a part of the award? No. The majority decision is the Award (see ACICA Arbitration Rules (Art 32)).

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Overview of various aspects of the operations of ACICA (con't)

5. Post awards process

Mechanism to correct the award? Yes, see Arbitration Rules (Art 37) and Expedited Rules (Art 32).

Invalidation action? No

Any restrictions on parties' autonomy to agree on seat of arbitration? Not prior to commencement of arbitration (see Arbitration Rules (Art19.1) and Expedited Rules (Art 15.1).

Any mechanism to monitor if any awards are subject to juridical review in terms of validity, recognition and enforcement state? No.

Any mechanism to monitor if losing party has voluntarily discharged its side of liability? No.

6. Issues related to administration

Do you have a plan to form a team or task force for region-specific services. Not at present.

Most common issues you confront when you administer cases filed against or filed by Asian entitles. None at present.

Endnotes

1. Convention on the Recognition and Enforcement Foreign Arbitral Awards, 10 June 1958 (New York Convention).
2. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (concluded 1 February 1971; entered into force 20 August 1979).
3. 'Simply Resolving Disputes' International Commercial Arbitration Conference: 'Making it Work for Business', Attorney-General for Australia, <www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/age/Speeches_2008_21November2008Simplyresolvingdisputes-InternationalCommercialArbitrationConferenceMakingitWorkforBusiness>.
4. The Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention or ICSID Convention) 1965, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Rules_Home>.
5. UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (adopted by UNCITRAL, 1985) was adopted by UN General Assembly in 1985 (GA Resolution 40/72); with revisions (as amended by UNCITRAL and adopted 2006) adopted by UN General Assembly in 2006.
6. Hon Robert McClelland MP, 'Review of the International Arbitration Act 1974', November 2008.
7. See, for example, the *Commercial Arbitration Act 1984* (NSW) and the *Commercial Arbitration Act 1984* (Vic).
8. See the *Arbitration Act 1979* (Eng).
9. IAA, s 16.
10. IAA, s 21.
11. Legislation exists in all States and mainland Territories.
12. [2001] 1 Qd R 461.
13. See IAA, s 22; with the optional provisions contained in ss 23 to 27.
14. Arbitration Rules of UNCITRAL (adopted by UN General Assembly in 1976 (Resolution 31/98 (December 1976)).
15. For a discussion see Simon Greenberg, 'ACICA's New International Arbitration Rules; (2006) 23 *Journal of International Arbitration* 189.
16. ACICA Arbitration Rules, Art 8.
17. ACICA Expedited Arbitration Rules, Art 8.
18. ACICA Arbitration Rules, Art 32.
19. ACICA Arbitration Rules, Arts 27.2 and 27.3; ACICA Expedited Arbitration Rules, Arts 23.2 and 23.3.
20. ACICA Expedited Arbitration Rules, Art 8.6.
21. ACICA Arbitration Rules, Art 17.1; ACICA Expedited Arbitration Rules, Art 13.1.
22. ACICA Arbitration Rules, Art 2.1; ACICA Expedited Arbitration Rules, Art 2.1.
23. ACICA Arbitration Rules, Art 18.1 (Confidentiality); Art 19.1 (Seat of Arbitration); Art 20.1 (Language); Art 28.1 (Interim Measures of Protection); ACICA Expedited Arbitration Rules, Art 14.1 (Confidentiality); Art 15.1 (Seat of Arbitration); Art 16.1 (Language); Art 24.1 (Interim Measures of Protection).
24. In relation to further provisions of

this nature, see ACICA Arbitration Rules, Art 9.1 (Appointment of Sole Arbitrator); Art 10.1 (Appointment of Three Arbitrators); Art 13.3 (Challenge of Arbitrators); Art 17.2 (Evidence by Witnesses); Art 37 (Correction of Award); Art 13.2 (Evidence by Witnesses); Art 32 (Correction of Award).

25. ACICA Arbitration Rules, Art 17.2; cf Art 13.2 of ACICA Expedited Arbitration Rules.

26. See ACICA Arbitration Rules, Art 34.2; and ACICA Expedited Arbitration Rules, Art 29.

27. ACICA Arbitration Rules, Art 8 (Number of Arbitrations); Art 9.2 (Appointment of Sole Arbitrator); Arts 10.2 and 10.3 (Appointment of Three Arbitrators); Art 11.2 (Appointment of Arbitrators in Multi-Party Disputes).

28. (1995) 183 CLR 10.

29. See s 14.

30. The New Zealand Arbitration Amendment Act 2007 inserted new ss 14 to 14I in the 1996 Act, which even allow for court-conducted arbitration appeals to be conducted on a confidential basis if the High Court orders.

31. See ACICA Arbitration Rules, Art 18; and see ACICA Expedited Arbitration Rules, Art 14.

32. ACICA Arbitration Rules, Art 40; ACICA Expedited Arbitration Rules, Art 35.

33. As does Art 35 of the ACICA Expedited Arbitration Rules.

34. ACICA Arbitration Rules, Arts 40.2 and 40.4; ACICA Expedited Arbitration Rules, Arts 35.2 and 35.4.

35. ACICA Arbitration Rules, Art 41.2.

36. See para 34(e) of the ACICA Expedited Arbitration Rules.

37. See ACICA Arbitration Rules, Art 41.1; and see para 34(e) of the ACICA Expedited Arbitration Rules.

38. See ACICA Arbitration Rules, Art 19.2; ACICA Expedited Arbitration Rules, Art 15.2.

39. New York Convention, Art II(2).

40. (2006) 157 FCR 45; [2006] FCAFC 192.

41. *Recommendations regarding interpretation of art II para 1 and art VII para 1 of Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York 10 June 1958, adopted by UNCITRAL, 7 July 2006.

42. See IAA, s 16.

43. See General Assembly Resolution 40/72 (11 December 1985)

44. An exception is New Zealand which adopted the modifications to Model Law Art 17 in its *Arbitration Amendment Act* 2007 (2007); the 2006 modifications have also been adopted (or are in the process of adoption) in Ireland (2008-draft), Mauritius (2008), Peru (2008) and Slovenia (2008) (see <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>).

45. Adopted by the General Assembly by Resolution 31/98 (15 December 1976).

46. Case 77: MAL 1(1) and (3)(a); 5; 9; 27; High Court of Hong Kong (Kaplan J) 15 August 1994

47. Yves Derains and E A Schwartz, *A Guide to the ICC Rules of Arbitration*(2nd ed, 2005) Kluwer Law International ('Derains and Schwartz'), 298.

48. See similarly broad provisions in Art 24 of the Arbitration Rules of the Singapore International Arbitration Centre (2007); Art 24 of the Hong Kong International Arbitration Centre Administered Rules (2008); Art 25 of the LCIA Arbitration Rules (1998); Art 21 of the AAA/ICDR International Arbitration Rules (2008); and Art 26 of the Swiss Rules of International Arbitration (2004).

49. And see the provisions of the various rules referred to in the preceding footnote.

50. Yves, Derains and EA Schwartz, above note 47, 296–7.

51. Julian Lew, 'Commentary on Interim and Conservatory Measures in ICC Arbitration Cases', *ICC Bulletin 11* (2000), 23.

52. Simon Greenberg, 'ACICA's New International Arbitration Rules; (2006) 23 *Journal of International Arbitration*; 189. The revised (2006) provisions of the Model Law are now in Chapter IVA, Arts 17 to 17J (set out and discussed below).

53. Above note 52; and see below.

54. See ACICA Arbitration Rules, Art 28.2 and ACICA Expedited Arbitration Rules, Art 24.2 and cf the proposed revisions to Art 26 of the UNCITRAL Arbitration Rules, discussed below.

55. See ACICA Arbitration Rules, Art 28.3 and ACICA Expedited Arbitration Rules, Art 24.3, and cf the proposed revisions to Art 26 of the UNCITRAL Arbitration Rules, discussed below.

56. Cf the revised provisions of the Model Law, now contained in Chap IVA, particularly Art 17(2) (discussed below).

57. Donald F Donovan, 'The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal' in Albert Van den Berg (ed), *International Council for Commercial Arbitration — New Horizons for International Commercial Arbitration and Beyond*, (Kluwer, 2005) 207.

58. Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (4th ed, 2004) 339.

59. See s 43. There are limits on the provisions' scope, noted in Harris, Platerose and Tecks, *The Arbitration Act 1996 – A Commentary* (4th ed, 2007) 211: The section may not be used to obtain disclosure from a third party. The documents to be produced must be identified individually or by a compendious description that enables each to be specifically identified: *Tajik Aluminum Plant v Hydro Aluminium AS and Ors* [2006] 1 Lloyd's Rep 155, approving *BNP Paribas v Deloitte & Touche LLP* [2004] 1 Lloyd's Rep 233 and *Assimina Maritime Ltd v Pakistan Shipping Corporation* [2005] 1 Lloyd's Rep 525.

60. See Art 5.

61. Part I of the Act includes s 43.

62. See s 7, set out above.

63. Above note 58, 340.

64. Above note 58, 340.

65. Above note 58, 342.

66. Above note 58, 342.

67. But cf Art 23 of the ICC Rules of Arbitration, Art 28 of the ACICA Arbitration Rules and Art 24 of the ACICA Expedited Rules.

68. Derains and Schwartz, above note 47, 297.

69. See above.

70. See ACICA Arbitration Rules, Art 28.2(e); ACICA Expedited Arbitration Rules, Art 24.2(c); and see above.

71. See, for example, ACICA Arbitration Rules, Art 28.3; and ACICA Expedited Arbitration Rules, Art 24.3 where these tests are provided for, specifically; and see above.

72. Above note 58, 345.