
Introduction to arbitration

A user's guide

Second Edition
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Foreword

Arbitration has long been the dispute resolution method of choice for transactions that cross international borders.

While its use has traditionally been prevalent in construction, infrastructure and natural resources transactions, it is increasingly popular in sectors that might previously have opted for litigation, including big tech, the pharmaceutical industry, and banking and finance. It is also being progressively adopted by parties involved in M&A and other corporate transactions.

Why are these players opting for arbitration to resolve their disputes, and why is arbitration a particularly suitable choice for certain types of transactions? In short, because it can manage the risk of disputes due to its unique benefits in allowing parties to make choices up front including, for example, to control the costs, timeframes, and confidentiality of a dispute.

At its heart, arbitration is a private process, shaped by the parties involved in a transaction and often kept confidential and away from the media. The parties can agree to apply the procedural rules of their choice. They can agree on who and how many arbitrators determine the dispute. This means that the proceedings can be truncated, only involve agreed necessary steps and be uniquely structured to suit the particular transaction or issues in dispute, including the appointment of subject-matter.

The parties can elect to replace costly discovery processes with targeted document production, avoid strict application of rules of evidence, or have their dispute determined expeditiously 'on the papers' without the expense of preparing for and attending a prolonged hearing. While the choice of procedure is left to the parties, the result is a final and binding award that is enforced like a judgment domestically, and often more easily than a judgment internationally due to a common enforcement regime to which most countries in the world subscribe.

Having a common set of rules around enforcement allows an award issued in one country to be reliably recognised and enforced in another country, which makes arbitration particularly attractive for cross-border transactions. For these reasons, arbitration can effectively and responsibly be used to manage the risk of disputes across an ever-increasing number of sectors.

This guide, now in its second edition, has been developed to help users of arbitration understand the fundamental tenets of this dispute resolution method, avoid common pitfalls when drafting arbitration clauses, and successfully navigate the lifecycle of an arbitration.

Relevant to foreign investments, the guide also provides an introduction to protections and dispute resolution mechanisms available under investment treaties, many of which enable investors to recover damages in arbitration directly against the states in which they invest in the event state measures adversely affect their investment.



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This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.

The information contained in this publication is current as at October 2023.

Why arbitration

Arbitration is a consensual process for the resolution of disputes by an impartial tribunal appointed by an agreed method.

At its heart, arbitration is a private process, shaped by the parties involved in a transaction and often kept confidential and away from the media. The parties agree to resolve their disputes pursuant to a set of procedural rules of their choice and before one or more independent arbitrators instead of in court. In so doing, the process can be truncated, dispense with unnecessary steps, and be uniquely structured to suit the particular transaction or issues in dispute, including through the appointment of subject-matter experts to determine the dispute.

While the procedure is left to the parties, the result is a final and binding award that is enforced like a judgment domestically, and often more easily than a judgment internationally due to a common enforcement regime applicable in most countries around the world. In other words, in most cases, a common set of rules applies for having an award issued in one country recognised and enforced in another country. This makes arbitration particularly attractive for cross-border transactions.

Being a consensual process, arbitration occurs in accordance with the parties' agreement to submit disputes between them to arbitration. Submission to arbitration is typically made before any dispute arises. This usually takes the form of an arbitration clause in a contract which stipulates that the parties agree to resolve certain or any disputes arising out of or in connection with the contract by arbitration. Alternatively, parties may agree to resolve a dispute by arbitration after it has arisen. This form of submission to arbitration is usually done by way of a submission agreement. Either way, it is the parties' arbitration agreement that defines the scope of an arbitral tribunal's jurisdiction and its powers to resolve any dispute between the parties.

Arbitration as the preferred method of dispute resolution

Arbitration has become the dispute resolution method of choice for international transactions involving parties from different jurisdictions. In Australia, arbitration has been commonly used for the construction, infrastructure, and energy and natural resources sectors. More recently, its use has spread into sectors that traditionally opted for litigation, including big tech, the pharma industry, corporate and M&A disputes, and banking and finance.

While arbitration has been slower to develop in Australia than has been the case in a number of other jurisdictions, according to the 2020 Australian Arbitration Report, arbitrations with an Australian connection (i.e. disputes involving Australian parties, Australian projects or Australian legal or expert assistance) are 'thriving' in Australia.¹ In fact, between 2016 and 2019, there were over 223 arbitrations with an Australian connection, with a cumulative amount in dispute of over A\$35 billion. In terms of disputes by sector, the Report indicated that almost half of all the arbitrations reported were construction, engineering and infrastructure disputes.

For cross-border disputes, arbitration is even more attractive. The 2020 Australian Arbitration Report records that 111 of the 223 arbitrations commenced between 2016 and 2019 were international arbitrations. This is consistent with international arbitration surveys that have time and again confirmed arbitration to be the preferred method of dispute resolution for commercial disputes with an international character. For example, according to the Queen Mary University 2021 International Arbitration Survey, 90% of arbitration users surveyed stated that international arbitration is the preferred method of cross-border dispute settlement, both as a standalone method (31%) and in conjunction with alternative dispute resolution (59%).²

1 FTI Consulting and ACICA, [2020 Australian Arbitration Report](#) (Report, March 2021).

2 Queen Mary University of London School of International Arbitration, [2021 International Arbitration Survey: Adapting Arbitration to a Changing World](#) (Report, 2021) 5.

Why choose arbitration?

There are several features of the arbitral process that make it the preferred method of dispute resolution in many industries, for both domestic and cross-border disputes. Some of the key advantages of arbitration include:

- **Parties can select their decision-maker.** A key feature of arbitration is the ability of the parties to select their arbitrator(s) or to require the appointment of a tribunal with specific expertise that will be relevant to potential disputes between the parties. Parties can therefore ensure by agreement between them that arbitrators familiar with relevant trade usages, commercial practices, national laws or technical matters are appointed to resolve any disputes that may arise.
- **Arbitration can take place in a neutral forum.** There is no requirement to arbitrate under the laws of any particular jurisdiction. Parties are free to select a legal framework and the rules of a neutral jurisdiction. This may be particularly important in the context of cross-border commercial transactions, i.e. where the parties are located in different jurisdictions and wish to ensure that neither party enjoys a home advantage.
- **Arbitration is typically confidential.** Arbitration provides far greater privacy and confidentiality than litigation. Confidentiality is usually provided for under the chosen arbitral rules or the law governing the arbitration. Typically the parties are to keep confidential both the existence of the proceedings and the information revealed during the arbitration. This may be particularly important where the dispute involves commercially sensitive information. That said, the parties are able to calibrate the degree of confidentiality, agreeing to keep some information confidential while publicising others. There are, however, important exceptions to confidentiality (for example in Australia, where a court considers that disclosure would be in the public interest).
- **Arbitration is a party-tailored process.** The parties to an arbitration can choose the procedural rules applicable to their dispute. In this way, they can simplify the process, dispensing with unnecessary steps. For example, the parties can agree to replace costly discovery processes with targeted document production, avoid strict application of rules of evidence, or have their dispute determined expeditiously 'on the papers' without the expense of preparing for and attending a prolonged hearing. In practice, however, oral evidence from witnesses is a key feature of most international arbitrations, particularly where parties are from common law jurisdictions.
- **Arbitrations are final and more easily enforceable.** An arbitral award is final and binding on the parties, with limited grounds for challenge, compared to a domestic court judgment. As a consequence of the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*, a widely ratified treaty, foreign arbitral awards are more easily recognised and enforced in most jurisdictions around the world. This stands in contrast to the recognition and enforcement of foreign court judgments. Domestic arbitral awards are similarly easy to enforce. For example, in Australia, the federal domestic legislation relating to the recognition and enforcement of arbitral awards is based on the New York Convention with only minor amendments.
- **Arbitration agreements are respected and readily enforced by domestic courts.** The New York Convention and the *1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) (Model Law)* both provide for a mandatory stay of court proceedings and referral to arbitration where there is a matter capable of settlement by arbitration. Australian courts now give an expansive interpretation of arbitration agreements and seek to enforce them as far as possible on the basis that commercial parties did not intend to 'split' their disputes between courts and arbitral tribunals. This approach contrasts with the approach to foreign jurisdiction or choice of court clauses, where Australian courts have been more willing to allow claimants to escape such clauses by suing in a local court where, for example, they have claims under Australian statutory law.

Arbitration in Australia

The legislative framework for arbitration in Australia

In Australia, commercial arbitration is governed by federal and state legislative regimes. Both regimes have adopted the Model Law, with some amendments, which are outlined below.

The domestic arbitration regime is governed by uniform state and territory legislation, being each state or territory's Commercial Arbitration Acts (uniform **CAA**).³ An arbitration will be domestic if the places of business of the parties are within Australia at the time the agreement is concluded.⁴

International arbitrations are governed by the [International Arbitration Act 1974 \(Cth\) \(IAA\)](#). An arbitration is 'international' for the purposes of the Act if:

- the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- one of the following places is situated outside the State in which the parties have their places of business:
 - the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.⁵

In addition, the IAA implements Australia's obligations under the New York Convention and the [Convention on the Settlement of Investment Disputes between States and Nationals of Other States](#) (the **ICSID Convention**).

As is the case with the Model Law, the IAA and the CAA contain both mandatory provisions (i.e. provisions which the parties cannot contract out of) and non-mandatory 'opt-out' provisions (i.e. provisions which the parties can modify by agreement). They also contain 'opt-in' provisions (i.e. provisions which will not apply unless the parties opt-in to the application of those provisions).

An example of a mandatory provision in the IAA and the CAA is the requirement that each party be afforded a reasonable opportunity to present its case.⁶

An example of an 'opt-out' provision is the requirement that the parties and arbitral tribunal not disclose confidential information in relation to the arbitral proceedings unless disclosure is expressly allowed.⁷

While most provisions in the IAA and the CAA are uniform, there are certain differences between them, particularly in terms of the 'opt-in' provisions.

When it comes to international arbitration, an arbitral tribunal has the power to order consolidation of two or more arbitrations if certain conditions are met and the parties have 'opted in' to the application of section 24 of the IAA. Conversely, the power of consolidation under the CAA applies unless the parties have 'opted out' by agreement.

Pursuant to the CAA, the parties may preserve the power to appeal an award on a question of law (with leave of the court) if they have agreed that an appeal may be made under section 34A of the CAA. There is no comparable provision in the IAA.

As can be seen from the above, while the international and domestic regimes are similar, there are some notable differences.

3 *Commercial Arbitration Act 2010 (NSW), Commercial Arbitration Act 2011 (Vic), Commercial Arbitration Act 2011 (SA), Commercial Arbitration Act 2011 (TAS), Commercial Arbitration Act 2013 (Qld), Commercial Arbitration Act 2017 (ACT), Commercial Arbitration (National Uniform Legislation) Act 2011 (NT)*. For a comparison see Doug Jones and Janet Walker, *Commercial Arbitration in Australia: Under the Model Law* (Lawbook Co, 3rd ed, 2022) 632–669, Appendix E.

4 See e.g. *Commercial Arbitration Act 2011 (Vic) (CAA)*, section 1(3).

5 Model Law, article 1(3) as applied in Australia by *International Arbitration Act 1974 (Cth) (IAA)*, section 16.

6 IAA, section 18C; CAA, section 18.

7 IAA, section 23C; CAA, section 27E.

Arbitrability in Australia

A key issue for clients to consider is whether their matter can be settled by arbitration or in other words, is 'arbitrable'. The question of whether a matter is arbitrable is determined by national law. Typically a matter is not arbitrable if it falls within the exclusive domain of the courts. This issue typically arises when a claimant sues in an Australian court in breach of an arbitration agreement and a court is requested to stay its proceedings and refer the parties to arbitration.

Non-arbitral disputes are generally those which concern a legitimate public interest or impact on the rights of third parties, making private resolution of such disputes outside of the domestic court system inappropriate.⁸ Examples of non-arbitrable matters include criminal offences, insolvency, divorce, custody of children, property settlement, wills and some competition and intellectual property disputes.⁹ Certain legislative acts explicitly state when matters are not capable of settlement by arbitration. Some examples include:

- section 43(1) of the [Insurance Contracts Act 1984 \(Cth\)](#) provides that arbitration agreements in contracts of insurance will be void;
- arbitration clauses are prohibited in domestic building contracts in Victoria,¹⁰ New South Wales¹¹ and the Northern Territory;¹² and
- section 11(2) of the [Carriage of Goods by Sea Act 1991 \(Cth\)](#) provides that a foreign arbitration clause in a contract for the carriage of goods by sea is void.

Australian courts currently adopt a broad view of whether a commercial dispute is arbitrable and only in "extremely limited circumstances" will a dispute be held to be non-arbitrable, provided the parties have agreed on arbitration as a method to resolve their dispute.¹³ For example, parties can submit "issues involving rights conferred under statute and claims where the power to grant statutory remedies has been conferred on the court".¹⁴

Court support for arbitration in Australia

Australia is increasingly considered a 'pro-arbitration' (or 'arbitration-friendly') jurisdiction. What this means in practice is that the legislative regime clearly sets out the role of the Australian courts in relation to arbitration by specifying the boundaries for judicial intervention in arbitral proceedings, as well as by making provision for the courts to assist the

arbitral process where necessary. The pro-arbitration regime in Australia has been furthered in recent years through several significant decisions of the Australian state and federal courts.

Article 5 of the Model Law expressly prohibits court intervention "except where so provided in [the Model Law]". The Model Law provisions provide for court support of arbitration and boundaries on judicial intervention. By way of example, courts in Australia may:

- refer the parties to arbitration where the dispute is the subject of a valid arbitration agreement (article 8);
- grant interim measures of protection (articles 9 and 17(1));
- appoint arbitrators (article 11(3)), decide on challenges to appointments of arbitrators (article 13(3)) and decide on the termination of an arbitrator's mandate (article 14(1));
- decide matters of the tribunal's jurisdiction (article 16(3));
- recognise and enforce interim measures issued by an arbitral tribunal (article 17H(1)) subject to grounds for refusal (article 17I);
- assist in the taking of evidence (article 27);
- determine whether an arbitral award can be set aside (article 34); and
- recognise and enforce an arbitral award (article 35) subject to grounds for refusal (article 36).

These powers have been considered by Australian courts on a number of occasions. Some of the key recent decisions include the following:

- The recent decision of the High Court of Australia in [Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. \(2023\) 408 ALR 658; \[2023\] HCA 11](#) reinforced Australia's reputation as a 'pro-arbitration' jurisdiction by rejecting the application of foreign state immunity from suit to the recognition and enforcement of arbitral awards made under the ICSID Convention. The Court considered the extent to which Spain's entry into the ICSID Convention constituted a waiver of foreign state immunity under the *Foreign States Immunities Act 1985* (Cth) (**FSIA**) and unanimously dismissed an appeal from the Full Court of the Federal Court, confirming that Spain waived its immunity from the jurisdiction of Australian courts for the purposes of recognition and enforcement proceedings.¹⁵ The High Court also helpfully clarified the meaning of the terms "recognition", "enforcement" and "execution" in articles 53–55 of the ICSID Convention,¹⁶ which is discussed in further detail in chapter 10 of this guide.

⁸ [Comandante Marine Corp v Pan Australian Shipping Pty Ltd](#) (2006) 157 FCR 45; [2006] FCAFC 192, Allsop J at [200].

⁹ [WDR Delaware Corporation v Hydrox Holdings Pty Ltd](#) (2016) 245 FCR 452; [2016] FCA 1164, Foster J at [128]

¹⁰ [Domestic Building Contracts Act 1995](#) (Vic), section 14.

¹¹ [Home Building Act 1989 \(NSW\)](#), section 7C.

¹² [Building Act 1993 \(NT\)](#), section 54BA(2)(b). However, 54BA(3) allows parties to agree to refer the dispute to arbitration after a dispute has arisen.

¹³ [Rinehart v Welker](#) (2012) 95 NSWLR 221; [2011] NSWCA 403, Bathurst CJ at [120], [164]–[168].

¹⁴ *Ibid* [168].

¹⁵ [Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. \[2023\] HCA 11](#), [8].

¹⁶ *Ibid* [45].

- In *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584, the Federal Court of Australia considered whether the enforcement of an award rendered by the Beijing Arbitration Commission under s 8(3) of the IAA would be contrary to public policy within the meaning of section 8(7)(b) of the IAA. Referring to *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361; [2014] FCAFC 83 and the Hong Kong case of *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, the Court stated that “public policy” in the context of section 8(3) “is limited to the fundamental principles (or norms) of justice and morality (or fairness) of the state” but nonetheless “requires a degree of international harmony and concordance of approach.”¹⁷ The Court found that the applicant’s complaints about the award were not so offensive or contrary to fundamental norms of justice and fairness in Australia within the context of international commercial arbitration such as to enliven the public policy ground for resisting enforcement.¹⁸ In reaching its decision, the Court also considered the application of the procedural requirements for enforcement set out under section 9 of the IAA. These include the requirement under section 9(3) that a certified translation be produced where the original award is written in a language other than English.
- In *Beijing Jishi Venture Capital Fund (Limited Partnership) v Liu* [2021] FCA 477, the Federal Court of Australia refused to enforce an award issued by the China International Economic and Trade Arbitration Commission (CIETAC) against one of the defendants on the basis that notice was not in accordance with the arbitration agreement or the chosen institutional rules. The Court accepted that actual notice could not be inferred on the basis that the debtor’s husband had actual notice.¹⁹ The debtor had not received notice at the physical or email address identified in the shareholders agreement to which she was a party (which contained the arbitration clause). It was not sufficient that notice had been sent to an address specified in a later agreement to which her husband was a party, as he was not acting as her agent, and she had not separately signed that later agreement.²⁰
- In *Freedom Foods Pty Ltd v Blue Diamond Growers* (2021) 286 FCR 437; [2021] FCAFC 86,²¹ the Full Court of the Federal Court of Australia dismissed an appeal of a decision by the Federal Court of Australia to grant a stay of court proceedings on the basis that the parties had entered into an arbitration agreement. Freedom Foods sought, amongst other things, declarations that Blue Diamond had engaged in misleading and deceptive conduct and unconscionable conduct under the Australian Consumer Law (ACL) (and therefore was not suitable to be determined by arbitration) and that the agreement was a franchise agreement under the Franchising Code of Conduct.²² The Code prohibits arbitration clauses in franchising agreements where they require a party to commence legal proceedings in a jurisdiction outside Australia. The arbitration agreement provided for arbitration in California. The Court found that the parties’ agreement was not a franchising agreement and the matters relating to the ACL could be heard in the Californian arbitration.²³
- In *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QSC 75, the Queensland Supreme Court took an expansive approach to interpreting the scope of arbitration agreements, holding that they should be construed broadly and informed by the language used in the context of the contract as a whole.²⁴ The Court considered an arbitration clause expressed as applying to “disputes or differences arising between the Parties” and determined that claims outside the contract based on estoppel by convention or statutory unconscionable conduct under the ACL were encompassed by this wording. The Court distinguished between the quoted expression and cases in which the relevant clause was limited to disputes arising “under” the applicable agreement, which in the Court’s view would merit a narrower interpretation.²⁵ Unusually, one of the points for determination was whether the clause had been drafted too widely so that it did not fulfil the requirement of the statutory definition of ‘arbitration agreement’ which required it to apply to disputes “in respect of a defined legal relationship” (under section 7(1) of the CAA). The Court determined that the inclusion of the clause in the contract should be interpreted to mean that it applied to the defined legal relationship created by the contract.²⁶ The Court granted a stay of proceedings and referred the dispute to arbitration.

¹⁷ *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584 at [32].

¹⁸ *Ibid* [35].

¹⁹ *Beijing Jishi Venture Capital Fund (Limited Partnership) v Liu* [2021] FCA 477 at [100].

²⁰ *Ibid* [116].

²¹ See also *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172.

²² *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172 at [8].

²³ *Ibid* [87] and [140]; *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCAFC 86 at [79].

²⁴ *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QSC 75 at [29].

²⁵ *Ibid* [41]–[51].

²⁶ *Ibid* [23]–[33].

- In [*Venetian Nominees Pty Ltd v Weatherford Australia Pty Ltd* \[2021\] WASC 137](#),²⁷ the Western Australian Supreme Court dismissed an application to set aside an arbitral award based on an alleged denial of procedural fairness. Procedural fairness has increasingly been used by parties in other jurisdictions, such as Hong Kong and Singapore, as a basis to challenge arbitral awards. In this case, the arbitration was conducted remotely by telephone and the parties were given the opportunity to submit further written submissions and materials at the conclusion of the hearing. The parties did not arrange for a transcript of the proceedings. The Court emphasised the distinction between “a process grievance” (which may justify setting an award aside) and what was “just a badly run case” (which does not). The Court concluded that Venetian’s grievance was not a true process grievance but was rather a “poorly disguised attempted appeal... against a decision reached against it.”²⁸ The Court gave significant weight to the opportunity provided to the parties to provide further submissions and materials, and that Venetian had not taken up that opportunity.
- In [*EBJ21 v EB021* \(2021\) 290 FCR 325; \[2021\] FCA 1406](#), the Federal Court of Australia refused to enforce an award that had already been paid in time and in full. The Court distinguished between ‘recognition’ (recognising that an award is binding at law from the date it is rendered, without any further steps needed) and ‘enforcement’ (which requires making an order to enter judgment for the sum concerned).²⁹ Where the amount has already been paid in full, there are no longer any rights or obligations to enforce. The Court found that the enforcement proceedings had improperly been brought as “a strategy to lift the veil of confidentiality from the arbitral proceeding”, rather than because the proceedings were required to enforce the debtor’s obligations.³⁰
- In [*Transurban WGT Co v CPB Contractors Pty Ltd* \[2020\] VSC 476](#), the Victorian Supreme Court considered the extent of judicial intervention to grant interim measures allowed under the CAA in Victoria where the dispute is the subject of an arbitration agreement. The Court held that the question of whether an arbitration agreement is ‘inoperative’ under section 8 of the CAA properly lies with the arbitral tribunal.³¹ The Court considered an application for declaratory and injunctive relief which, if granted, would have restrained the defendants from progressing an arbitration against the plaintiff. The plaintiff argued that under a ‘linked claims’ provision, the determination of disputes under its subcontract with the defendants was suspended where related disputes under the plaintiff’s head contract with the principal were in progress. The Court agreed with the defendants that it was for the arbitral tribunal to determine its own jurisdiction and the validity, enforceability and applicability of the arbitration agreement.³²
- In [*Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* \[2020\] FCA 767](#), the Federal Court of Australia enforced a CIETAC award despite a challenge by the award debtor. The respondent contested the enforcement application on the basis that the applicant had not provided the Court with duly certified copies of the award or arbitration agreements (as required by section 9(1)(a) and (b) of the IAA) and that the form of the award differed from the form of the orders sought by the applicant.³³ The Court dismissed both arguments, noting that the IAA requires the enforcing court to consider the objects of the IAA which include the facilitation of the recognition and enforcement of foreign arbitral awards;³⁴ that arbitration is intended to be efficient, impartial, enforceable and timely; and that awards are intended to provide certainty and finality.³⁵ The Court disagreed that section 9(1)(a) and (b) had not been satisfied, as the applicant had provided properly certified copies of the award and arbitration agreements. While the Court accepted that the form of the orders sought did not reflect the form of the CIETAC award, it directed the parties to confer and determine an appropriate form of order, in the form of a declaration as to the award’s enforceability.³⁶ The decision demonstrates the reliance that Australian courts place on the objects of the IAA in determining whether a foreign award should be enforced.

27 Corrs Chambers Westgarth, ‘*Layers of lipstick’ not enough: Court refuses to set aside arbitral award following alleged procedural unfairness*, May 2021, available at corrs.com.au.

28 Ibid [49] and [134].

29 *EBJ21 v EB021* [2021] FCA 1406 at [30]–[39].

30 Ibid [76].

31 *Transurban WGT Co v CPB Contractors Pty Ltd* [2020] VSC 476 at [157].

32 Ibid [134] and [193].

33 *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767 at [6]–[7].

34 Ibid IAA, sections 2D and 39.

35 Ibid [2]–[3] and [19].

36 Ibid [10]–[17] and [29].

- In *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514; [2019] HCA 13, the High Court of Australia affirmed that, while arbitration clauses are to be construed pursuant to the ordinary canons of contract interpretation (taking into account the language used by the parties, the surrounding circumstances and the purposes of the contract), a liberal construction should be adopted — meaning that courts will seek to give effect as far as possible to the parties’ agreement to arbitrate disputes.³⁷ Again, this issue typically arises in the context of an application to stay court proceedings brought in breach of an arbitration agreement. In that case, the Court also provided a broad interpretation of the expression “any person claiming through or under a party to the arbitration agreement” to enable third parties to enforce an arbitration agreement where their defence in a court proceeding shared an ‘essential element’ with the defence of a party to the arbitration agreement.³⁸

The Australian Centre for International Commercial Arbitration

The Australian Centre for International Commercial Arbitration (**ACICA**) is Australia’s international dispute resolution institution. ACICA was established in 1985 as an independent, not-for-profit organisation that promotes and facilitates the efficient resolution of commercial disputes throughout Australia and internationally by arbitration. As the leading Australian arbitral institution, ACICA first published its own set of arbitration rules in 2005.

The [2021 ACICA Arbitration Rules](#) (**ACICA Rules**) are the current iteration of the rules. They reflect developments in international best practice on a range of arbitration-related principles and issues and they codify several procedural innovations including:

- provisions relating to virtual and hybrid hearings (articles 10, 25, 27, 35 and 36);
- provisions relating to paperless filing (articles 4, 6 and 7);
- provisions relating to an extended scope for consolidation of arbitral proceedings and facilitating multi-party arbitrations (articles 16 and 17); and
- provisions empowering early dismissal or termination of claims, defences or counterclaims (article 25(7)).

Over the last ten years, more than 100 cases have been submitted to ACICA with a cumulative value of almost A\$24 billion. These cases have predominantly been governed by the ACICA Rules but also include a small number of ACICA-administered cases governed by the [United Nations Commission on International Trade Law Arbitration Rules](#) (**UNCITRAL Rules**) and applications for tribunal appointments. Energy and resources, construction and infrastructure and maritime account for around 69% of all ACICA-administered cases. The remainder of the caseload covers a broad range of industries including legal services, health and wellness, share sales, IT services, and the arts.

Other Australian institutions include the Resolution Institute (**RI**), which oversees and facilitates domestic arbitrations in Australia. The RI has published its own Arbitration Rules, which are modelled on the UNCITRAL Rules. The [2023 RI Arbitration Rules](#) are the current iteration. Like ACICA, the RI maintains a panel of arbitrators for parties to select from. The RI also produces an array of useful resources to assist parties in understanding the arbitral process.



³⁷ *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13 at [44] and [83].

³⁸ *Ibid* [65].

Institutional vs *ad hoc* arbitration

Generally speaking, arbitration proceedings can take two forms: 'institutional' arbitration or '*ad hoc*' arbitration.

An arbitration is 'institutional' where the proceedings are administered by a designated arbitral institution. Arbitral institutions usually provide a set of rules which govern the procedure of the arbitration and manage the administrative side of the proceedings.

'*Ad hoc*' arbitration, on the other hand, is a form of arbitration that is not managed by an arbitral institution and, as a consequence, the parties are free to determine all aspects of the arbitration procedure themselves, including for example, the manner and appointment of the tribunal and the administrative process for conducting the arbitration.

While it is impossible to track the precise number of *ad hoc* arbitrations that occur, evidence suggests that an increasing number of international arbitrations are institutional.³⁹

Typically the parties will determine whether the proceedings are to be institutional or *ad hoc* at the time of entering into the arbitration agreement by specifying (or not) the rules of a particular arbitral institution.

When determining whether to elect institutional or *ad hoc* arbitration, there are a number of factors the parties should have regard to. These factors are set out in detail below.

Institutional arbitration

There are several arbitral institutions worldwide which offer their rules and services to manage the administrative side of arbitrations. It is important for parties entering into an arbitration agreement to consider which institution is best suited to manage any potential dispute that may arise between them.

Advantages of institutional arbitration

- **Access to a pre-selected pool of highly qualified arbitrators.** A number of arbitral institutions have their own panel of arbitrators which are maintained as a resource for institutional appointments and party-nominations.
- **Increased predictability and certainty for the resolution of any dispute.** By selecting a set of tried and tested rules, the parties reduce the risk of unpredictable outcomes.
- **Some institutions offer a secondary level of oversight of the final award.** This can be particularly beneficial for complex, high-value, high-stakes disputes.
- **Institution can provide administrative assistance.** Institutions may assist in the efficient management of the arbitration process once the proceedings are on foot. For example, institutions can assist the parties in appointing the tribunal, determining the seat of the arbitration when it is not chosen in the arbitration agreement or facilitating multi-party and multi-contract disputes.

Disadvantages of institutional arbitration

- **The often significant administrative fees.** Depending on the institution, the fees associated with the administration of the arbitration can be considerable and can increase over time depending on the amount in dispute and the complexity of the proceedings.
- **Less flexibility.** A degree of flexibility in the arbitration process is removed when choosing institutional arbitration. While the majority of institutional rules are non-mandatory, there are some rules and requirements that cannot be derogated from by agreement. For example, the [International Chamber of Commerce Rules \(ICC Rules\)](#) require Terms of Reference to be produced for every arbitration. In addition, the ICC Rules provide for a mandatory scrutiny process which enables the International Chamber of Commerce (ICC) International Court of Arbitration to make modifications as to the form of the award and draw the tribunal's attention to points of substance. This is discussed further below.

A detailed list of arbitral institutions is beyond the scope of this publication. It is, however, relevant to mention some of the major arbitral institutions around the world and in Australia, which are as follows.

- in Australia, the most prominent institutions are the ACICA and the RI; and
- globally, the preferred arbitration institutions include: the ICC; Hong Kong International Arbitration Centre (HKIAC); Singapore International Arbitration Centre (SIAC); and London Court of International Arbitration (LCIA).

39 Queen Mary School of London and White & Case, [2015 International Arbitration Survey: Improvements and Innovations in International Arbitration](#) (Report, October 2015).

These institutions' rules have a significant number of similar features. However, there are several key differences and considerations which parties should bear in mind when selecting an institution and its rules. A detailed comparison of the rules of these major institutions is set out in **Annexure 2**.

By way of a summary, the key differences include the following:

- **Scrutiny of the award:** The first key difference is whether the institution provides for a review of the award issued by the tribunal before it is finalised. Only SIAC and the ICC provide that the Registrar and ICC Court, respectively, are required to approve the form of the award and may draw the tribunal's attention to points of substance which may need to be revised.
- **Costs:** The cost of running an arbitration through each of the institutions varies. Each institution provides a schedule of fees which outlines the administrative costs to be paid to the institution, usually with different amounts depending on the value in dispute. The cost of the arbitration will depend on the nature of the proceedings, however the ICC is generally the most expensive institution. It is considered by many as the leading international arbitral institution and the additional cost is implicit in the need for Terms of Reference and the scrutiny of the award by the ICC Court.
- **Administration of multi-party / multi-contract disputes:** A party may wish to use a particular institution's rules where the dispute involves multiple parties who are not all party to the same contract, or they envision that a dispute may be of a multi-party or multi-contract nature. Besides the RI Rules, all the rules considered in **Annexure 2** provide for joinder of an additional party to an arbitration or for the consolidation of multiple arbitrations into a single proceeding, subject to satisfying certain requirements. The differences in the rules concerning joinder and consolidation are discussed in further detail in chapter 7.
- **Specific procedures.** A party may prioritise a set of institutional rules which allow expedited arbitration relative to the amount in dispute. Besides the RI Rules, all the rules considered in **Annexure 2** provide for an emergency arbitrator to be appointed or an expedited arbitration procedure to be followed. The rules of ACICA, HKIAC, SIAC and the ICC provide that these procedures can apply by agreement or where the value of the dispute is under a certain threshold. Under the LCIA Rules, the application of the expedited procedure must be approved by the LCIA Court. A detailed discussion on expedited and emergency arbitration is provided in chapter 8.

- **Issues of privacy and confidentiality.** With the exception of the ICC, the institutional arbitrations considered in **Annexure 2** are private and confidential with limited exceptions for circumstances where documents are required to be produced by law. The ICC uniquely provides that awards are to be published unless the parties opt out.

Note that the above institutional rules are subject to any overriding mandatory rules of law of the seat of arbitration (for example on confidentiality).

Ad hoc arbitration

As stated previously, in contrast to institutional arbitration, an *ad hoc* arbitration is an arbitration that is not administered by an arbitral institution. This means that the parties are free to agree on the rules that will govern the arbitration including, for example, the number of arbitrators, the arbitral tribunal appointment process and the procedure by which the arbitration will be conducted.

This is not to say that in an *ad hoc* arbitration the parties will have complete free reign. Even in an *ad hoc* arbitration, it is sensible for the parties to expressly specify certain requirements, for example the seat of the arbitration. This is important because, to the extent the parties are unable to agree on the preliminary steps in an arbitration (such as the appointment of the tribunal members), the law of the seat will dictate the procedural rules that apply.⁴⁰

In practice, an arbitration agreement providing for *ad hoc* arbitration will often specify some form of applicable rules, commonly the UNCITRAL Rules. Alternatively, parties could choose to adopt a modified version of a set of established institutional rules.

The UNCITRAL Rules cover all aspects of the arbitral process, including procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award. The most recent version of the UNCITRAL Rules was published in 2021 and incorporates the [UNCITRAL Expedited Arbitration Rules](#).

The advantage of specifying a particular set of rules, such as the UNCITRAL Rules, is that it avoids the need for the parties to attempt to agree at the outset on a comprehensive set of rules that governs all possible circumstances. This limits the risk that not every eventuality is considered and that the parties fail to agree at the first hurdle.

⁴⁰ The seat of an arbitration refers to the legal location of where the arbitration proceeds. For example, where the seat of the arbitration is specified as London, England, the applicable arbitration legislation that will apply is the Arbitration Act 1996 (UK).

Advantages of *ad hoc* arbitration

- **Increased flexibility.** Subject to a level of agreement and cooperation between them, the parties have ultimate autonomy to tailor the arbitration to their needs.
- **Reduced costs.** Generally speaking, *ad hoc* arbitrations will be more cost effective due to the often considerable costs associated with institutional arbitration.

Disadvantages of *ad hoc* arbitration

- **A level of sustained cooperation between the parties is necessary.** In the event that agreement cannot be reached, parties may find that the overall process is delayed by attempts to resolve issues through the local courts. This negates the primary advantages of *ad hoc* arbitration — i.e. increased flexibility and reduced costs.
- **Increased administrative burden for the arbitrator(s).** Absent the involvement of an institution, the parties and the arbitrator are required to carry the additional administrative burden associated with the administration of the arbitral proceedings.

Practical considerations

When considering whether to enter into an arbitration agreement that provides for institutional or *ad hoc* arbitration, parties may wish to have regard to the following factors:

- **The level of expertise of arbitrator(s) required.** If the dispute is particularly complex, the parties may wish to refer it to an institution to ensure they have a pre-existing pool of qualified arbitrators to appoint, rather than go through their own process of approaching potential arbitrators to resolve the dispute.
- **The anticipated level of support required.** If the dispute is large, involves multiple parties or presents administrative challenges, institutional arbitration may be preferred.
- **The value of the dispute.** Where a dispute is high value, the administrative costs of an institution may be seen as minimal in comparison to the quantum in issue and the overall cost of the dispute. Whereas, in a moderate value dispute, the potentially high administrative cost of an institution may be regarded as disproportionate. This points to lower value disputes being more suited to *ad hoc* arbitration.

When considering which institution to use, the nature of the dispute is particularly relevant, and in relation to the institutions considered in this Guide, the parties should consider the following:

- The majority of the institutions listed above specialise in administering international arbitrations, with the exception of the RI which is designed for Australian domestic arbitrations. The RI also prioritises the appointment of sole arbitrators and is generally better suited for smaller claims.
- While the location of the institution does not determine the seat of the arbitration or where hearings can be held, ACICA is the preferred institution for arbitrations with a connection to Australia and the majority of the arbitrations administered by ACICA are international. The ACICA Rules specify Sydney (Australia) as the default seat. ACICA is known to be reliable and relatively cost-effective for resolving disputes in the Asia-Pacific region, and is increasingly used in both international and domestic arbitration agreements in Australia.
- HKIAC is commonly used for disputes involving a party from the People's Republic of China, due to Hong Kong's close legal relationship with China and because it is experienced in facilitating applications for interim measures to Mainland Chinese courts. It is also one of the fastest growing arbitration institutions and has a number of unique benefits, including generally lower administrative fees and favourable provisions on joinder and consolidation.
- SIAC is often perceived as a particularly neutral institution and has a good reputation for the quality of its rules and administration. It has also become increasingly popular as parties looking to arbitrate in the Asia-Pacific regard Singapore as a key arbitral seat of choice.
- LCIA is well suited for a range of international disputes and is widely respected, as one of the oldest international arbitral institutions. In default of any prior written agreement between the parties, the LCIA Rules specify that the seat of the arbitration shall be London (England). This is an important factor for parties to an arbitration agreement to bear in mind where the seat of the arbitration has not been agreed.
- The ICC is one of the most well-known arbitration institutions globally and is highly respected by courts around the world. It is widely recognised for the quality of its awards and proceedings, but is also the most expensive institution and so is often used for high value disputes.

Drafting arbitration clauses

The arbitration agreement – often referred to as one of the ‘midnight’ clauses – is typically included in commercial contracts with little thought. The consequences of such an approach can be significant. Poorly drafted arbitration clauses can have dramatic cost and other undesired consequences for the parties to any potential dispute.

Bearing that in mind, this chapter sets out a number of tips for drafting effective and enforceable arbitration clauses, provides an overview of the key components of an arbitration clause and its non-essential elements, and offers a helpful checklist of issues to consider when drafting an arbitration agreement.

Drafting tips – essential components of an arbitration clause

Generally speaking, there are four essential components of an arbitration clause. Additional components may be relevant depending on the nature of the parties’ commercial relationship.

The essential components are those which must be reflected in an arbitration agreement for it to be valid and enforceable. They are found in all model arbitration clauses prepared by the major arbitral institutions and are set out in **Annexure 1** of this Guide.

In summary, the essential components of an arbitration clause are the following:

1. The clause must demonstrate an intention to arbitrate

The arbitration agreement must clearly express the parties’ intention to submit their dispute to arbitration — that is, to have the dispute determined by one or more arbitrators appointed according to the parties’ agreement.

2. The clause must identify the parties

The arbitration agreement must be concluded between two or more parties who are determined or determinable. Where an arbitration agreement is entered into by a party’s agent, that agent must be duly empowered to act on behalf of the party.

3. The clause must specify the dispute(s) referable to arbitration

The arbitration agreement should identify the disputes between the parties which fall within the scope of the arbitration agreement. An arbitration agreement will not necessarily cover all disputes that arise between the parties to the agreement.

To ensure that both contractual and non-contractual disputes are covered by an agreement to arbitrate (and to avoid the risk of having to resolve disputes relating to the same factual issues in different forums), the arbitration clause should be worded broadly by referring to any disputes arising out of or in connection with a contract. Ideally the clause should use mandatory language (‘all disputes arising out of this agreement shall be submitted to arbitration’) rather than permissive wording (“may”).

Parties should also avoid including additional dispute resolution provisions in their contract, such as an exclusive jurisdiction clause, which may be interpreted to invalidate the arbitration provision.

4. The clause should identify the seat of arbitration

In principle, the arbitration agreement must either expressly or indirectly connect the arbitration to a legal system – in other words, it must either expressly or indirectly designate the ‘seat’ of the arbitration. Often the seat will be chosen by the parties (by stipulating in the arbitration clause – e.g. that “the seat of the arbitration will be Sydney, Australia”). Alternatively, the seat must be identifiable (e.g. pursuant to the chosen arbitral rules which provide for a specific seat⁴¹ or empower the tribunal to determine the seat⁴²).

41 See e.g. ACICA, *Arbitration Rules of the Australian Centre for International Commercial Arbitration* (2021) (ACICA Rules), article 27(1), which provides for Sydney, Australia.

42 See e.g. UNCITRAL, *UNCITRAL Arbitration Rules* (2021) (UNCITRAL Rules), article 16.

Non-essential elements of an arbitration clause

There are a number of other elements which are useful to include in an arbitration agreement. They are:

- **The language of the arbitration.** It is common for parties to cross-border transactions to come from different jurisdictions and to speak different languages. In such circumstances, it may be important to specify the language of the arbitration.
- **The institutional rules.** The parties may prefer to submit to institutional arbitration. Many arbitral institutions have recently amended their rules to ensure that they are in line with modern best practice and include flexible procedures. They include expedited arbitration, the ability to join parties and consolidate multiple arbitral proceedings, and the adoption of flexible hearing arrangements.
- **Expertise of the arbitrator.** Where disputes are likely to involve complex technical issues or specialised subject-matter, the parties may wish to require that arbitrators appointed have specific qualifications or experience. The parties should, however, avoid being too prescriptive or specific as this may result in it being difficult or expensive to locate an arbitrator with the requisite expertise.
- **Power to order provisional measures.** Most institutional rules provide tribunals with the power to order provisional measures. Where the parties adopt institutional rules, they will be able to seek orders for provisional measures from the tribunal. The same may not be true for *ad hoc* arbitration and the parties may need to expressly provide for that power in their arbitration agreement. That said, most national arbitration laws, as well as the Model Law, also make provision for the grant of interim measures by courts in aid of arbitration.
- **Confidentiality.** Most institutional rules and national arbitration laws contain provisions dealing with confidentiality. However, as the approaches of institutional rules and national laws vary with respect to confidentiality, it is always important for parties to consider how confidentiality claims will be dealt with during the course of the arbitration. Parties may wish to address matters of confidentiality expressly in their arbitration agreement.
- **Costs.** If parties do not specify the way in which cost allocations in the arbitration will be determined, various arbitration rules and national laws provide arbitrators with wide discretion to allocate costs between the parties. If parties wish for costs to be shared, they should specify this in the arbitration agreement. It may also be appropriate to expressly deal with cost allocation in connection with interim awards and procedural orders.



Checklist: issues to consider when drafting an arbitration clause

- What is the scope of the arbitration agreement?
 Do the parties wish to arbitrate all disputes which may arise between them?
- What is the seat of the arbitration?
- What is the law governing the arbitration agreement?
What is the law governing the merits of the dispute?
- Is *ad hoc* or institutional arbitration preferable in the circumstances?
- How many arbitrators will be needed or is it better not to specify at this stage?
- Is there an allocation of fees and costs or is this at the discretion of the tribunal?
- Are there parties from different jurisdictions? If so, what language should apply to the arbitration?
- Is there potential for a multi-party dispute? If so, do the rules or the law of the seat provide for joinder of third parties or consolidation of related arbitrations and will they assist my client when such a dispute arises?
- Is confidentiality of the essence? If so, is it provided for or does it need to be stated expressly?
- If a dispute does arise between the parties, is it likely to be of a highly technical nature in a specialised field? If so, is it preferable for the arbitrator to have certain expertise?
- Is there likely to be a need for expedited arbitration? If so, do the rules selected provide for expedited arbitration?

Unless special circumstances apply, if the parties wish to opt for institutional arbitration, it is usually recommended that the parties adopt the chosen institution's model arbitration clause.

Confidentiality

Confidentiality in Australia

Confidentiality in domestic arbitration (CAA)

The meaning of 'confidential information' is defined broadly in section 2(1) of the CAA and includes, *inter alia*, pleadings, submissions, information supplied to the arbitral tribunal by a party, documentary and other evidence, transcripts of hearings, and rulings and awards of the tribunal.

Section 27E of the CAA provides that parties to arbitral proceedings commenced in reliance on an arbitration agreement must not disclose confidential information, unless:

- the disclosure falls within one of the circumstances outlined in section 27F of the CAA;
- the tribunal makes an order allowing the disclosure in certain circumstances (s 27G) and no court has made an order prohibiting a party from disclosing confidential information (s 27H); or
- a court makes an order allowing the disclosure in certain circumstances (s 27I).

Section 27F sets out exceptions or circumstances in which confidential information in relation to arbitral proceedings may be disclosed by a party or the tribunal. They include disclosure:

- with the consent of all parties;
- to a professional or other adviser of any of the parties;
- to ensure a party has a reasonable opportunity to present their case;
- to establish or protect a party's legal rights in relation to a third party;
- to seek enforcement of an arbitral award;
- for the purposes of the CAA;
- in accordance with a court-issued order or subpoena; and
- to an authority where written details of the disclosure are provided to all other parties and/or the tribunal.

By virtue of section 27E of the CAA, the provisions on confidentiality in domestic arbitration proceedings apply on an opt-out basis; that is, unless otherwise agreed by the parties. This is in line with the general expectation that arbitration proceedings are confidential unless parties agree otherwise.

Confidentiality in international arbitration (IAA)

Sections 23C to 23G of the IAA are substantially identical to the CCA provisions set out above.

However, it is important to note that until late 2015, when section 22(2) of the IAA was amended, the IAA confidentiality provisions applied on an opt-in basis (rather than an opt-out basis). The amended section 22(2) only applies to arbitration agreements concluded on or after 14 October 2015, and any arbitration proceedings arising out of those agreements. Therefore, any arbitration initiated pursuant to an arbitration agreement that pre-dates October 2015 is not governed by the confidentiality regime in the IAA unless the parties opted in by agreement.

Australian courts have recognised the importance of preserving confidentiality in proceedings. In [EBJ21 v EBO21 \[2021\] FCA 1406](#), Stewart J noted that the exceptions under the IAA are narrow, as there is a strong public interest in respecting parties' legitimate interests to be protected by the confidentiality of arbitral proceedings.⁴³

However, while these provisions protect confidentiality of Australian-seated international arbitrations, Part III, Division 3 of the IAA (which includes the provisions governing confidentiality) may not apply to foreign-seated international arbitrations.

This was considered by the Federal Court in the [Samsung C&T Corporation, in the matter of Samsung C&T Corporation \[2017\] FCA 1169](#) in relation to orders for document production under Part III, Division 3. Gilmour J declined an application by a party to an international arbitration seated in Singapore to order subpoenas to third parties in Australia under Part III, Division 3 of the IAA. This decision rested on the grounds that the Court only had jurisdiction to make such orders in relation to international arbitrations seated in Australia. Gilmour J further found that, after interpreting the legislation, the provisions in Part III, Division 3 of the IAA only applied to parties who have commenced their arbitral proceedings in Australia and not foreign-seated international arbitrations.

Consequently, parties to foreign-seated international arbitrations may not be able to avail themselves of protections under sections 23C or 23F of the IAA and their broad prohibition of disclosure of confidential information.

43 [EBJ21 v EBO21 \[2021\] FCA 1406](#) at [68]–[70].

Rather, absent agreement on confidentiality, they may only receive the protection of confidentiality granted in [Esso Australia Resources Ltd v Plowman \(1995\) 183 CLR 10; \[1995\] HCA 19 \(Plowman\)](#); that is, only documents produced compulsorily in the arbitration have a claim to confidentiality.

Confidentiality under ACICA Rules

Parties may be able to circumvent uncertainties regarding statutory obligations of confidentiality by expressly providing for confidentiality in their arbitration agreement or adopting institutional rules that deal with confidentiality.

It is important to remember that confidentiality is not uniform across different institutional rules. Differences in the scope of confidentiality and the exceptions allowing disclosure may have significant implications depending on the circumstances of the case. Parties should therefore be mindful of which confidentiality provisions they adopt when they are drafting the arbitration agreement.

Under the ACICA Rules, for instance, ‘confidential information’ is defined broadly in article 26.2 as “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 arbitration proceedings and not in the public domain”.

Article 26.2 provides that the parties, the arbitral tribunal and ACICA must not disclose confidential information unless any of the exceptions apply:

- with the prior written consent of all parties;
- to make an application to a competent court;
- to make an application to the courts of any State to enforce the award;
- pursuant to the order of a court of competent jurisdiction;
- if required by the law of a State which is binding on the party making the disclosure;
- if required by a regulatory body; or
- to a person for the purposes of having or seeking third-party funding, where that person has agreed to keep the material and information supplied confidential.

While not explicitly listed as exceptions, articles 26.3 and 26.6 further contemplate the following circumstances as exceptions to confidentiality:

- where the information is in the public domain; and
- where disclosure is made to a witness for the purpose of the arbitral proceedings.

See **Annexure 3** for a comparison of the confidentiality provisions and exceptions to confidentiality under the CAA, IAA and the ACICA Rules 2021.

Confidentiality undertakings regarding documents obtained in arbitral proceedings

In 2023, in [Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd \[No 21\] \[2023\] WASC 169](#), the Supreme Court of Western Australia considered the application of the Harman confidentiality undertaking in relation to documents sourced from arbitral proceedings. A *Harman* confidentiality undertaking (or obligation) ordinarily extends to documents obtained pursuant to discovery, document production or a subpoena and requires that such documents are not used for collateral or ulterior purposes unrelated to the proceedings in which they were produced.

The Supreme Court held that, in the circumstances of the case, it was appropriate to release the co-defendants from this obligation for the purposes of conducting their defence in court proceedings that involved a party who was not a party to the arbitration agreement. The Court reasoned as follows:

- First, the Court rejected the proposition that an application for a release from a *Harman* obligation, or to obtain orders to use document(s) subject to a *Harman* obligation, cannot be made to a court that is not the court or tribunal in which the implied undertaking was given. The Court was empowered to exercise its discretion to grant leave to allow the use of the documents, even though the *Harman* obligation was owed to the tribunal.
- Second, the Court disagreed that allowing the use of the documents would ‘intervene’ in the arbitral process, as the order to use the documents were “not orders of a kind that are contemplated by the term ‘intervene’ in section 5 of the Commercial Arbitration Act. The orders sought to be made are orders that are open in the exercise of the Court’s jurisdiction in relation to proceedings between persons who have not entered into or are not otherwise bound by arbitration agreements.”⁴⁴
- Third, the Court considered that there were special circumstances that made it appropriate to grant the leave sought. Referring to *Plowman*, the Court stated: “... the fact that the [Documents] were disclosed in a private arbitration cannot give rise to an absolute prohibition on the use of those documents in the curial proceedings.”⁴⁵ The Court also noted that the exercise of its discretion was in accordance with public interest in the proper administration of justice.

⁴⁴ *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd* [No 21] [2023] WASC 169 at [122].

⁴⁵ *Ibid* [164].

Confidentiality in other jurisdictions

As discussed in this chapter, the approaches of institutional rules and national laws vary with respect to confidentiality. It is therefore important for parties to consider how confidentiality claims will be dealt with during the course of the arbitration when choosing the applicable arbitral rules and arbitral seat at the stage of drafting the arbitration agreement.

The following table sets out a high-level jurisdictional comparison of the approach to confidentiality in Hong Kong, Singapore and the United Kingdom. Not covered are the institutional rules of the HKIAC, SIAC and LCIA, which each have their own provisions regarding confidentiality.

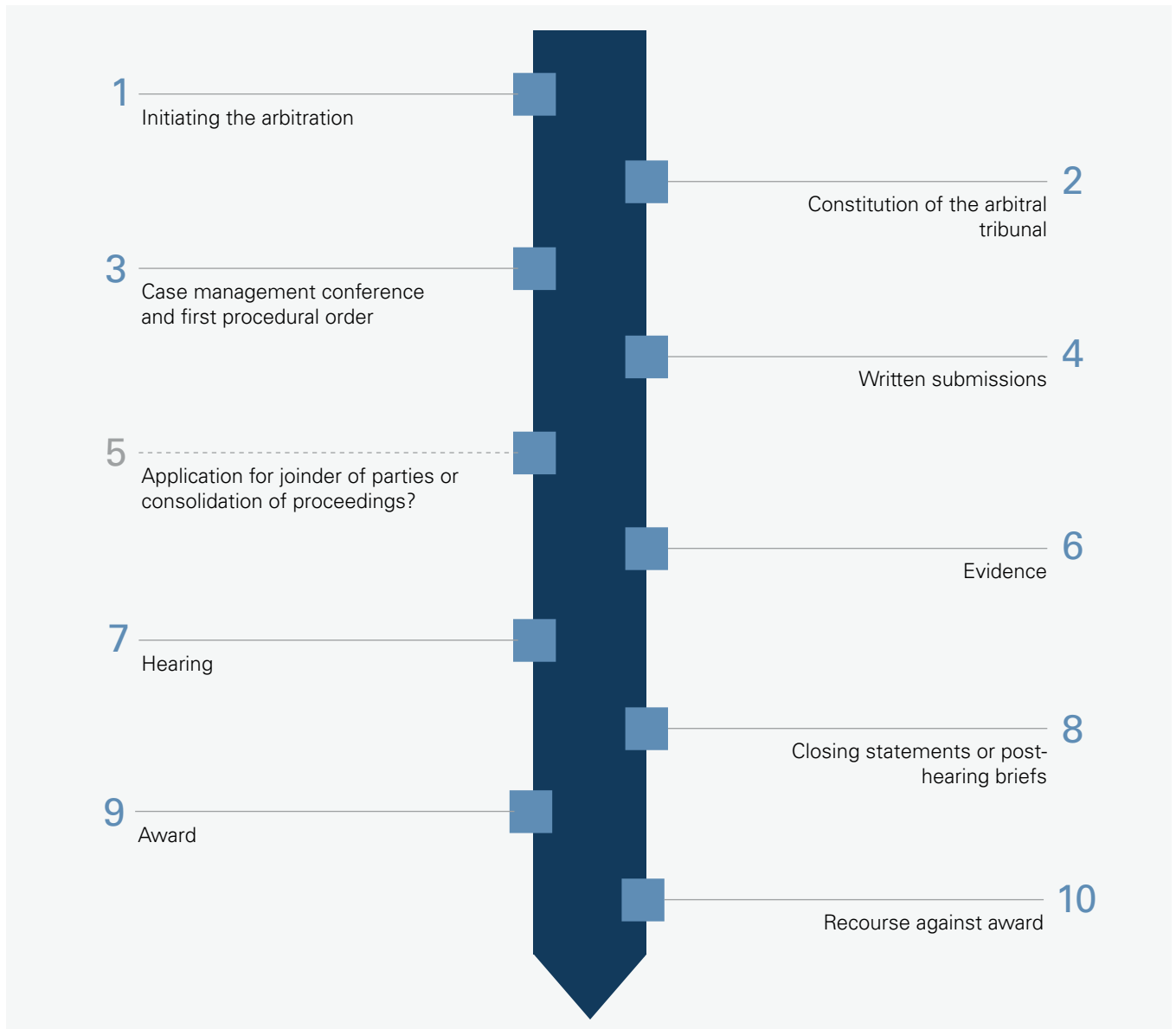
Confidentiality in other jurisdictions: a comparative perspective		
	Prohibition against disclosure	Exceptions
United Kingdom	At common law, it is an implied term of every arbitration agreement that the arbitration is private and that certain documents generated in relation to it are confidential, for example pleadings filed and evidence produced.	At common law, the disclosure of confidential information has been recognised as being permissible: <ul style="list-style-type: none"> • with express or implied consent; • by order or leave of a court; • as reasonably necessary to protect the legitimate interests of a party; • in the interest of justice; or • in the public interest.
Singapore	Confidentiality in arbitration is accepted as a general principle in Singapore, subject to exceptions. A general obligation of confidentiality is imposed on all parties, the tribunal and the arbitral institution in respect of the existence of the arbitration, the award, the arbitral proceedings, the deliberations of the tribunal and documents produced or created in the arbitration.	The disclosure of confidential information has been recognised as being permissible: <ul style="list-style-type: none"> • with express or implied consent; • by order or leave of a court; • as reasonably necessary to protect the legitimate interest of a party; • in the interest of justice; or • in the public interest.
Hong Kong	Under section 18(1) of the Hong Kong Arbitration Ordinance (HKAO), no party may publish, disclose or communicate any information relating to the arbitral proceedings or the award, or both.	Under section 18(2) of the HKAO, the disclosure of confidential information is permissible: <ul style="list-style-type: none"> • to protect or pursue a legal right or interest; • to enforce or challenge the arbitral award; • to a government body, regulatory body, or court or tribunal where obliged by law; or • to a professional or other adviser of the parties.

The lifecycle of an arbitration

A cornerstone of arbitration is party autonomy, as discussed in chapter 1 of this guide.

Parties to an arbitration are free to choose the procedural rules and process that will apply to the determination of disputes between them. For example, before or after a dispute has arisen, parties are free to agree to significant procedural matters such as the number of arbitrators and their qualifications, the governing law and place of arbitration, the prescribed time limits for procedural steps and the issuing of an award and whether specific procedures will be available for the resolution of certain types of disputes.

Having said that, arbitrations do tend to follow certain key procedural steps from the commencement of the proceedings through to the enforcement of the award. The key procedural steps – or ‘the lifecycle of the arbitration’ – are discussed below by reference to the process contemplated under the ACICA Rules.



1 Initiating the arbitration

To initiate an arbitration, a party will typically file a request or notice of arbitration.

The ACICA Rules require the Notice of Arbitration to be submitted to ACICA and a copy of the notice to be submitted at the same time to the party or parties against whom relief is sought (i.e. the respondents). Typically, the claimant will also be required, at the same time of submission, to pay a registration fee to the arbitral institution for the purpose of commencing proceedings. An ACICA arbitration is deemed to have been commenced when the Notice of Arbitration or the registration fee is received by ACICA.⁴⁶

In the case of *ad hoc* arbitration, the notice or request will need to be submitted to the opposing party.⁴⁷

The rules typically specify the matters that the request or Notice of Arbitration must contain. For example, article 6(3) of the ACICA Rules requires the Notice of Arbitration to include:

- a demand that the dispute be referred to arbitration;
- the names, postal addresses, telephone number and email addresses (if any) of the parties and their legal representatives;
- a copy of the arbitration clause or the separate arbitration agreement that is invoked. To the extent that claims are made under more than one arbitration clause or agreement, as referred to in article 18, an indication and copy of the arbitration clause or agreement under which each claim is made must also be included;
- a reference to the contract out of, relating to or in connection with which the dispute arises;
- the general nature of the claim and an indication of the amount involved, if any;
- the relief or remedy sought; and
- a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

Most arbitral institutions require a respondent to file a reply in response to the Request or Notice of Arbitration. This is known as the Answer to Notice of Arbitration. Arbitral rules will usually provide a time limit for when the Answer must be filed and specify what it must contain. For example, article 7(2) of the ACICA Rules requires that an Answer to Notice of Arbitration be filed within 30 days after receipt of the Notice of Arbitration by the Respondent(s) and include:

- the names, postal addresses, telephone numbers and email addresses (if any) of the Respondent and its legal representatives;
- any submission that an arbitral tribunal constituted under the ACICA Rules does not have jurisdiction;
- the Respondent's comments on the particulars set forth in the Notice of Arbitration;
- the Respondent's answer to the relief or remedy sought in the Notice of Arbitration; and
- the Respondent's proposal as to the number of arbitrators, if the parties have not previously agreed thereon.

For *ad hoc* arbitrations, the parties will need to decide on the procedures for commencing arbitration. Whilst parties will still generally deliver to each other a notice or request for arbitration and an answer, they will forego the guidance that an arbitration institution can provide.

An arbitration institution can ensure all procedural requirements are met before an arbitration commences, and can provide sample templates for the initiating documents.⁴⁸ An arbitration institution may also assist with other aspects which are essential for an arbitration to commence. This may include collecting deposits and assisting with the appointment of arbitrators.

In contrast to litigation, all material facts do not need to be pleaded in an originating process for arbitration. Thus, parties typically do not commence arbitration with a lengthy statement of claim and defence. There are also no strict rules of service in arbitration. For example, article 6(5) of the ACICA Rules merely requires a claimant to send the Notice of Arbitration to the Respondent and notify ACICA it has done so (with specifics regarding how the notice was communicated and the date of delivery). Notification to the respondent is, however, important to prevent the award being challenged in the seat or not recognised and enforced under the New York Convention.

In proceedings before the courts of some jurisdictions, parties may be required by law to take pre-action steps prior to or on the commencement of proceedings.⁴⁹ Similarly, in arbitration, the parties may agree to adopt pre-action steps. Depending on the seat of the arbitration, the parties may be obliged to follow these agreed pre-action steps before commencing arbitration.⁵⁰

⁴⁶ ACICA, ACICA Rules, article 6 (1).

⁴⁷ See e.g. UNCITRAL, UNCITRAL Rules, article 3 (2).

⁴⁸ See e.g. ACICA, sample Notice of Arbitration and Answer to Notice of Arbitration, available at acica.org.au.

⁴⁹ See e.g. *Civil Procedure Act 2010* (Vic) sections 9(2)(a), 70(1)(c).

⁵⁰ For example, New York courts have repeatedly held that 'conditions precedent' to arbitration must be complied with before commencing arbitration, see generally Gary B Born, *International Commercial Arbitration* (Kluwer Law, 3rd Ed, 2021) 988–9.

2 Constitution of the arbitral tribunal

Parties are free to agree on the number of arbitrators to hear and determine the dispute as well as who will be appointed as an arbitrator or member of a tribunal.

Constituting an arbitral tribunal raises several issues practitioners should be aware of, including the process for appointing arbitrators, the requirements for arbitrators to be independent and impartial, the process for challenging non-party-appointed arbitrator(s), and circumstances calling for the replacement of an arbitrator.

Appointing the arbitrator(s)

The mechanism for appointing the tribunal may be set out in the arbitration agreement or specified by the arbitral rules.⁵¹ Where the parties do not specify the appointment process in their arbitration agreement or select arbitral rules, the legislation at the seat of arbitration may specify the appointing authority. For example, ACICA has been designated as the default appointing authority under the IAA.⁵²

The number of arbitrators selected should always be uneven and will typically be one or three arbitrators. If the dispute is uncomplicated and has a small quantum involved, it may be more efficient and cost effective to appoint a sole arbitrator. On the other hand, if the dispute is more complex and involves a significant quantum, then a panel of three arbitrators should be preferred. If parties do not make a determination, the selected institution or appointment authority will typically decide on the number.⁵³

A common mechanism for the appointment of the tribunal is for each party to appoint a single arbitrator and then the party-appointed arbitrators to select the chairperson or president of the tribunal.

Alternatively, if the parties have not agreed how the chairperson or president will be appointed or the two already appointed arbitrators cannot agree, the chosen administering institution or relevant court at the seat of arbitration will typically appoint the president of the tribunal.⁵⁴ If there are more than two main parties to an arbitration, the second method is typically preferred or parties may agree to jointly appoint arbitrators.⁵⁵

As also discussed in Chapter 4, parties may also wish to stipulate specific qualifications that an arbitrator must possess in order to qualify for appointment. For example, parties may wish for expertise in a particular technical field such as engineering or environmental science. Where that is so, parties should record those qualifications in the arbitration agreement.

However, as also noted previously, it is important to avoid being too specific to avoid complications in the constitution of the tribunal. Furthermore, specifying particular qualifications of a potential arbitrator can create a possible basis for challenge to the arbitrator under the law of the seat of the arbitration.

Arbitrators' independence and impartiality

A fundamental component of arbitration is the independence and impartiality of the arbitrator(s). This obligation is borne by the arbitrator from the arbitrator's appointment through to the conclusion of their appointment. In other words, it is a continuing disclosure obligation. The obligation is enshrined in most (if not all) arbitration rules.

The International Bar Association (IBA) has published the *Guidelines on Conflicts of Interest in International Arbitration* (the **Guidelines**). The general principle espoused in those guidelines is that every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

To assist parties in identifying the types of conflicts that emerge and their significance, the Guidelines have 'traffic-light' lists containing non-exhaustive examples of conflicts. They are as follows:

- **Non-Waivable Red List.** This is the most serious level of conflict and must be disclosed. Examples include a direct professional, personal or financial connection with one of the parties.
- **Waivable Red List.** These are situations that are serious but less severe than the previous list, though in any event must be disclosed to the parties. Examples include a recent prior professional connection with a party or counsel or a close family member's connection with a party or counsel.
- **Orange List.** These are situations, facts or circumstances that, in the eyes of the parties, may give rise to doubts about the prospective appointee's independence or impartiality. An arbitrator must disclose a situation that falls within the Orange List; however, the disclosure of such a situation does not imply the existence of a conflict or in and of itself disqualify an arbitrator. Examples include professional or personal connections within three years prior to the appointment.
- **Green List.** These are situations that are permissible and, as such, do not require disclosure by the arbitrator.

51 See e.g. UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration* found in IAA, schedule 2 (**Model Law**), article 11; ICC Rules, article 13(2).

52 *International Arbitration Regulation 2020* (Cth) regulation 6.

53 See e.g. ICC Rules, article 12(2); ACICA Rules, article 11; cf. Model Law, article 10 (if no selection is made, the default position is three arbitrators).

54 See e.g. ICC Rules, article 12(5); ACICA Rules, article 13(3).

55 See e.g. ICC Rules, article 12(7); ACICA Rules, article 15(2).

Most arbitral institutions require a prospective arbitrator to sign a statement of availability, impartiality and independence, which discloses in writing any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

A failure to disclose facts or circumstances that would give rise to justifiable doubts as to an arbitrator's independence and impartiality may give a party cause to challenge the appointment of an arbitrator. This is dealt with further in the next section.

Challenges to tribunal appointments

A party may challenge the appointment of an arbitrator if there are circumstances that give rise to justifiable doubt as to an appointed arbitrator's:

- impartiality;
- independence; or
- requisite qualifications (on which the parties have agreed).⁵⁶

For party-appointed arbitrators, it follows that a party can only challenge its appointee if it becomes aware of the above reasons after the appointment.

Subject to any procedure otherwise agreed by the parties, the procedure for challenging the appointment of an arbitrator will depend on the arbitral rules chosen by the parties. The parties will generally be required to make a challenge within a stipulated period of time following notification of appointment or confirmation by the arbitrator, or alternatively within a stipulated period after becoming aware of any circumstances that may give rise to concerns about the arbitrator's impartiality, independence or requisite qualification (where the parties have specified that the arbitrator is to have specific qualifications).⁵⁷

Following a challenge, the challenged arbitrator may choose to resign or the other parties to the arbitration may agree to the challenge. If one of these outcome eventuates, some rules specifically provide that neither of those cases implies the acceptance of the validity of the grounds for the challenge.⁵⁸

If, following a challenge, either the arbitrator does not withdraw or the other parties do not agree to the challenge, the challenge will be decided by the tribunal or appointing authority.⁵⁹

Replacement of arbitrators

In the event an appointed arbitrator is disqualified, fails to act or it becomes impossible for them to act, or otherwise withdraws, a substitute arbitrator will be appointed.⁶⁰

Subject to the arbitration agreement, the process for appointing a substitute arbitrator is typically covered by the chosen institutional rules. When a substitute arbitrator is appointed, the terms of appointment are the same as those upon which the substituted arbitrator was appointed.⁶¹

3 Case management conference and first procedural order

Following the constitution of a tribunal a case management conference (**CMC**) will be scheduled.

A CMC is a pre-trial procedural hearing; it is comparable to the first directions hearing for a matter listed before the courts. The rules of most arbitral institutions provide that the first CMC should take place as soon as practicable following the constitution of the tribunal.

The CMC presents the first opportunity for the tribunal and the parties to come together to decide the process and manner in which the arbitration will be conducted, including the timing for the procedural steps to be taken. Being a consensual process, it is not unusual for the tribunal to dictate that the parties should seek to agree on procedural steps and a procedural timetable prior to the first CMC. The CMC can take place in person or via conference call or video conference.

The first CMC will typically include discussion of matters such as:

- whether to appoint a Tribunal Secretary (i.e. a person who typically assists the tribunal throughout the proceedings in the overall management of the proceedings and in producing the final award);
- how and when the parties will exchange memorials or pleadings (as the case may be), submissions, witness statements and expert reports;
- how parties should approach document disclosure, production or requests for discovery;
- scheduling the hearing;
- what, if any, further materials will be exchanged before the hearing (e.g. an agreed list of issues, hearing bundles, chronologies); and
- how and when costs and disbursements will be invoiced.

56 Model Law, article 12; ICC Rules, article 14; ACICA Rules, article 21.

57 Model Law, article 13; ICC Rules, article 14; ACICA Rules, article 22.

58 See e.g. ACICA Rules, article 22(3).

59 Model Law, article 13(2); ACICA Rules, article 22(4); cf. ICC Rules, article 14(3).

60 Model Law, articles 14–15; ICC Rules, article 15; ACICA Rules, article 23.

61 See e.g. Model Law, article 15.

These decisions are recorded in the first procedural order (PO1).

There is no requirement for all procedural steps to be determined at the first CMC. Nor is it the case that steps cannot be readdressed. Procedural matters not decided and matters to be revisited can be determined at subsequent CMCs or by agreement of all the parties.

4 Written submissions: memorials vs pleadings

There are two main ways parties typically state their case in an arbitration: memorials and pleadings.

Pleadings involve a process akin to litigation in common law jurisdictions, such as Australia, which involves a party setting out its claim by reference to all material facts.

Memorials, on the other hand, are a synthesised narrative of a party's case, setting out the party's case theory in detail supported by witness statements and expert reports. A memorial will normally include an executive summary, outline of facts, outline of legal issues and summary of requested relief. They are commonly used in public international law proceedings and are the preferred approach for the written phase of arbitral proceedings in investor-state arbitration and international commercial arbitration.

The rules of arbitral institutions do not typically indicate a preference for either memorials or pleadings. For example, the ACICA Rules provide that the Claimant "should, as far as possible, annex to its Statement of Claim all documents and other evidence on which it relies or contain references to them".⁶² The ACICA Rules therefore seem to prefer the memorials approach, although commentary explains that this is optional and parties may also take a hybrid approach of using both memorials and pleadings.⁶³

Parties can choose between the two approaches to submissions or may choose a variation or hybrid of the two approaches. It is for the parties to determine the approach best suited to their dispute.

The advantages and disadvantages of pleadings and memorials

Some of the advantages of adopting memorials over pleadings include:⁶⁴

- the arbitral tribunal is given a relatively complete picture of each party's case at the beginning of the arbitration. This promotes efficiency and speed in resolution of the dispute;
- memorials require parties and their legal counsel to consider their evidence and the strengths and weaknesses of their case early in the proceeding. This can encourage early settlement of proceedings, as each party can clearly assess the strengths and weaknesses of the other's case;
- memorials can deter frivolous claims because the preparation of memorials 'front loads' a lot of the costs of the proceedings, whereas under the pleadings approach significant costs are typically incurred later in the court process; and
- memorials can be better suited to accommodate parties and lawyers from different legal traditions.

Some advantages of adopting pleadings over memorials include:

- pleadings remove the need for parties to establish points of fact that are not in dispute because the process of admitting and denying evidence comes before any written submissions; and
- pleadings might be preferable where the parties and the arbitrator hail from common law jurisdictions as the use of pleadings will be familiar and therefore may be suitable, depending on other surrounding circumstances.

5 Consolidation and joinder applications

Consolidation and joinder are two of the mechanisms available to parties involved in multi-party disputes.

Consolidation

Consolidation sees the merging of two or more arbitration proceedings into a single proceeding. The rules of most major arbitral institutions provide for the consolidation of proceedings in certain circumstances.

Under the rules of a number of institutions, parties seeking consolidation must submit a request to the relevant institution. This request should include, among other things, all the relevant party and matter details, the facts and legal arguments in support of the request, and copies of the relevant instruments.

62 ACICA, ACICA Rules, article 29 (3).

63 Australian Centre for International Commercial Arbitration, *ACICA Explanatory Note: Memorials or Pleadings?* (ACICA Practice and Procedures Board, July 2020), 5.

64 For a comprehensive note on memorials and pleadings including the advantages and disadvantages of each approach, see Australian Centre for International Commercial Arbitration, *ACICA Explanatory Note: Memorials or Pleadings?* (ACICA Practice and Procedures Board, July 2020).

While courts can compel parties to consolidate matters, institutions will only order consolidation in certain prescribed circumstances and typically only where all proceedings are being administered by that institution. For example, under the ACICA Rules, ACICA will order consolidation of two or more proceedings where:⁶⁵

- the parties to the arbitrations being consolidated have consented to consolidation;
- all the claims in the arbitrations are made under the same arbitration agreement; or
- the claims in the arbitrations are made under more than one arbitration agreement, but there is a common question of law or fact in both or all of the arbitrations; 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.

In addition, arbitration legislation at the seat of the arbitration might provide for consolidation by the tribunal or by a court in certain circumstances. For example, in Australia both the IAA and the CAA empower the tribunal to order the consolidation of proceedings in certain circumstances. The IAA provides an opt-in provision,⁶⁶ and the CAA provides an opt-out provision.⁶⁷ By comparison, the Hong Kong Arbitration Ordinance provides for court-facilitated consolidation of arbitral proceedings in certain circumstances (e.g. where the arbitration agreement stipulates the place of arbitration is Hong Kong).⁶⁸

Joinder

Joinder is the process by which a third party can be added to existing arbitral proceedings.

In the case of institutional arbitration, a request for joinder must typically be submitted to the relevant arbitral institution. However, if a tribunal has already been appointed, the request will generally be decided by the tribunal.

As with a consolidation request, a request for joinder must cover the party and matter details, facts, and legal arguments in support of an application for joinder.

Due to arbitration's consensual nature, joinder of parties to arbitral proceedings is available only if certain conditions are met (unlike joinder of parties in court proceedings). For example, under the ACICA Rules, joinder is only permitted where:

- the additional party being joined is, on the face of the matter, a party to the same arbitration agreement between the existing parties; or
- all parties, including the additional party, have consented to the joinder.

6 Evidence

Evidence in arbitration

Litigation processes are based on the formal rules of evidence and procedure of the relevant jurisdiction, which apply on a mandatory basis.

As discussed previously, one of the key attributes of arbitration is the broad discretion afforded to the parties and the tribunal to determine the applicable rules of procedure and, if relevant, evidence.

The parties' discretion is confirmed by article 19 of the Model Law, which provides that "the parties are free to agree on the procedure to be followed by the arbitral tribunal" and that, failing such agreement, the arbitral tribunal may "conduct the arbitration in such manner as it considers appropriate." Article 19(2) of the Model Law expressly confers on arbitral tribunals "the power to determine the admissibility, relevance, materiality and weight of any evidence".

Article 19 has been regarded as "the most important provision of the model law" – being a predominant source of procedural autonomy within arbitral proceedings.⁶⁹ This autonomy allows the parties and the tribunal, if they wish, to avoid the constraints and idiosyncrasies of traditional domestic rules of evidence and to proceed by reference to rules more specifically tailored to the features of the case.⁷⁰

In the exercise of their autonomy, it is not uncommon for parties to agree on an evidentiary procedure that is less than comprehensive, leaving at least some matters to be determined by the tribunal. Courts have been firm in maintaining the considerable latitude afforded to tribunals to make such determinations.⁷¹

65 ACICA Rules, article 16(1).

66 See IAA, section 24.

67 See CAA, section 27C.

68 Cap. 609 Arbitration Ordinance, Schedule 2, section 2.

69 *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration – Report of the Secretary-General*, UN Doc A/CN.9/264 (25 March 1985) 44.

70 *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006* (United Nations Publication, 2008) [35].

71 See e.g. *Hashwani v Jivraj* [2011] 1 WLR 1872, Lord Clarke JSC (with whom Lords Phillips, Walker and Dyson JJSC agreed) at [62]; *US Life Insurance Co v Superior National Insurance Co*, 591 F 3d 1167, 1175 (9th Cir, 2010); *Cour de cassation* [French Court of Cassation], *Arkhaieff v Entreprise Roumaine d'Etat pour le Commerce Extérieur Arpimex*, 10 March 1981 reported in (1981) Bull civ n° 82, 69.

The parties may also agree, either in their arbitration agreement or by adopting a set of institutional rules, that the IBA Rules on the Taking of Evidence in International Arbitration (**IBA Rules**) will govern evidentiary matters in their arbitration.⁷² For example, where parties adopt the ACICA Rules, article 35(2) provides that “[t]he Arbitral Tribunal shall have regard to, but is not bound to apply, the International Bar Association Rules on the Taking of Evidence in International Arbitration in the version current at the commencement of the arbitration.”

Although reference to the IBA Rules is not mandatory, the Rules have gained wide acceptance in international arbitration — particularly given their neutrality as between common law and civil law traditions.⁷³ The IBA Rules set out procedures in relation to, amongst other things:

- disclosure and the exchange of documentary evidence (article 3);
- the giving of evidence by lay witnesses (termed ‘witnesses of fact’) (article 4);
- the giving of evidence by party-appointed and tribunal-appointed experts (articles 5 and 6); and
- the conduct of evidentiary hearings (article 8).

The tribunal typically retains discretion in relation to evidence. Article 19(2) of the Model Law (as well as article 9(1) of the IBA Rules) confers upon the arbitral tribunal “the power to determine the admissibility, relevance, materiality and weight of any evidence.” Tribunals exercising this discretion tend to permit the presentation of the facts that a party desires to raise, rather than applying technical rules found in domestic litigation — such as rules regarding hearsay evidence that prevail in common law countries.⁷⁴ Defects in evidence tend to affect the weight or value that the material is afforded, rather than its admissibility.⁷⁵

In this way, evidentiary rules in arbitration are more flexible, and often more pragmatic, than the equivalent rules in domestic litigation.

Burden and standard of proof

As a general principle, each party bears the burden of proving the propositions that it asserts in support of its case.⁷⁶ This general principle is occasionally reflected in arbitral rules, such as article 27(1) of the UNCITRAL Arbitration Rules which provides that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence.”⁷⁷

In many cases, the standard of proof is assumed to be the ‘balance of probabilities’, familiar to common law traditions.⁷⁸ Less often, and depending heavily on the circumstances of the case, a lower⁷⁹ or higher⁸⁰ standard of proof may be applicable.

Court assistance in taking evidence

An area of some complexity is the role of national courts in assisting the taking of evidence in arbitration. The starting point is article 27 of the Model Law,⁸¹ which empowers the arbitral tribunal or parties (with the approval of the arbitral tribunal) to request from a competent court assistance in taking evidence. If such a request is received, the competent court may execute it according to its rules on taking evidence.

This general provision is supplemented in Australia by the IAA, which sets out in sections 23 to 23J, a series of specific processes by which a ‘court’ (defined in section 22A) may assist in the production of documentary evidence in arbitral proceedings. Equivalent processes are set out for the purposes of domestic arbitral proceedings in the CCA.⁸²

Foremost amongst these processes is a court’s power in section 23 of the IAA (and equivalent state and territory provisions⁸³) to issue, upon application by a party with the permission of the tribunal, a subpoena requiring a person to attend for examination before the tribunal or to produce documents to the tribunal.

While this power operates with little difficulty where the arbitral proceeding in question is seated in Australia, there is some controversy as to a court’s power to issue a subpoena in order to assist a tribunal seated in a foreign jurisdiction.

72 See *IBA Rules on the Taking of Evidence in International Arbitration* (2020) (**IBA Rules**).

73 The *Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)* provide an alternative procedural code more closely resembling that found in civil law jurisdictions – in particular, by encouraging the arbitral tribunal itself to take a proactive role in fact-finding and evidence-gathering processes: See articles 2–6.

74 See Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) 377–8 [6.81]–[6.83]. See also SI Strong and James J Dries, ‘Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?’ (2005) 21(3) *Arbitration International* 301, 306–7.

75 See Gary B Born, *International Commercial Arbitration* (Kluwer Law, 3rd Ed, 2021) 2484–6.

76 See generally UNCITRAL, *Report on the Work of its Ninth Session*, UN Doc A/31/17 (1976) Annex II, [116]; J Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 762.

77 See also ACICA Rules, article 35(1).

78 See Gary B Born, ‘On Burden and Standard of Proof’ in Meg Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law, 2015) 50.

79 Such as ‘prima facie’: See, e.g. *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990) [56].

80 Such as ‘clear and convincing’: See, e.g. *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) [325]–[326]; cf *Libananco Holdings Co Limited v Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011) [125].

81 See also CAA, section 27.

82 See e.g. CAA, sections 27A–27I.

83 CCA, section 27A.

As discussed in chapter 5, in [Re Samsung C&T Corporation \[2017\] FCA 1169](#), Gilmour J of the Federal Court of Australia denied an application to issue a subpoena in a Singapore-seated arbitral proceeding on the grounds that the Federal Court did not have jurisdiction — relying on a narrow interpretation of sections 22A and 23 of the IAA. Referring to the language of the provisions, their context and other explanatory materials, his Honour concluded that the power of the Federal Court to issue a subpoena was limited to any case in which arbitral proceedings were conducted in a state or territory of Australia, not a foreign seat.

This decision has received mixed reactions in subsequent commentary.⁸⁴ It has since been publicised that, in the course of the same arbitral proceeding, the Western Australian Supreme Court took the opposite view (albeit in an unreported decision), and ultimately issued subpoenas to assist the taking of evidence in a Singapore-seated arbitration.⁸⁵

Separately from the application of section 23 of the IAA, parties may be able to seek much the same assistance from Australian courts in relation to foreign arbitral proceedings by resort to the [Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters \(Hague Convention\)](#).⁸⁶

Article 1 of the Hague Convention provides that a ‘judicial authority’ of one Contracting State may send a Letter of Request to the ‘competent authority’ of another Contracting State in order to facilitate the taking of evidence.⁸⁷ This provision is given force and operation in all Australian states and territories through statutes and procedural rules identifying the relevant ‘judicial authorities’ (typically, state and territory supreme courts) and empowering them to issue Letters of Request.⁸⁸

In this way, the supervisory court is able to act on behalf of the arbitral tribunal in circumstances where the latter would not amount to a ‘judicial authority’ under the Hague Convention.⁸⁹ It ought to be kept in mind, however, that the court is not a ‘mere rubber stamp’ – it will retain a discretion whether or not to issue a subpoena, even where the arbitral tribunal has permitted the party to apply to the court for such assistance.⁹⁰

Documentary evidence

In international arbitration proceedings, it is important to be aware of differences in expectations based on differing jurisdictional norms.⁹¹

In common law litigation proceedings, the disclosure or discovery process allows parties to obtain from opponents all documents relevant to the issues in dispute, even if prejudicial to that party’s case.⁹²

In civil law proceedings, the approach is much more restrictive and places a high burden on the individual to keep documentary records. Some civil lawyers will have an aversion to any type of common law disclosure other than (at most) a system seeking specific or tightly defined categories of documents.

The extent of document production in international arbitration can be seen as a middle ground. It is common practice for the initial portion of document production to be provided early in the proceedings with the parties’ written submissions. Parties can then make specific requests for further documentary evidence according to the procedure of the arbitration.

84 Criticising the decision, see Doug Jones and Janet Walker, *Commercial Arbitration in Australia: Under the Model Law* (Lawbook Co, 3rd ed, 2022) 310–11 [8.920]. In support of the decision, see Albert Monichino and Alex Fawke (2019) 29 *Australasian Dispute Resolution Journal* 215, 223–4.

85 Jones Day, *Court Limits Australia’s Jurisdiction to Assist International Arbitrations* (October 2017).

86 [Re Samsung C&T Corporation \[2017\] FCA 1169](#), [50]–[51].

87 Article 2 provides, relatedly, that each Contracting State shall designate a ‘Central Authority’, which will undertake to receive Letters of Request from the judicial authority of the other Contracting State and transmit them to the authority competent to execute them. The designated Central Authority in Australia is the Secretary to the Attorney-General’s Department of the Commonwealth of Australia.

88 See, e.g. *Evidence on Commission Act 1995* (NSW) section 6; *Uniform Civil Procedure Rules 2005* (NSW) rr 24.1, 24.5. See also *Panayiotou v Sony Music Entertainment (UK) Ltd [1994] Ch 142*.

89 See e.g. *Commerce and Industry Insurance Co of Canada v Certain Underwriters at Lloyds of London [2002] 1 WLR 1323*; [BF Jones Logistics Inc v Rolko \(2004\) 72 OR \(3d\) 255](#). Compare [Primarius Capital LLC v Jayhawk Capital Management LLC \[2009\] HKCFI 304](#); Nigel Blackaby et al, Redfern and Hunter on International Arbitration (Oxford University Press, 6th ed, 2015) 393–4 [6.131].

90 [Aurecon Australasia Pty Ltd v BMD Constructions Pty Ltd \(2017\) 52 VR 267](#), Croft J at [5]; [UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd \[2018\] VSC 316](#), Croft J at [11].

91 See Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) 380–381 [6.93]–[6.94].

92 There is significant variance within common law jurisdictions. For example, the US discovery process allows parties to obtain all documents ‘relevant to the subject matter involved in the action’ (Federal Rules of Civil Procedure, rule 16) and involves production of documents, deposition of witnesses and experts and inspection of the subject-matter of the dispute. In the UK, the term ‘discovery’ is no longer used. A party ordered to give ‘standard disclosure’ is under a wide duty to disclose all relevant documents it intends to rely on and those which adversely affect its case (Civil Procedure Rule 31.6).

Parties are free to determine the procedure applicable for document production, failing which the tribunal will do so. This will typically be set out in a procedural order. Arbitral rules will commonly provide for a CMC early in the proceedings, in which matters such as the process for document production can be determined. Tribunals commonly have regard to international standards as reflected in the IBA Rules, which provide guidance on the factors that a tribunal may consider when determining a document production request.

Under article 3 of the IBA Rules, a party seeking disclosure may submit a Request to Produce in which they:

- describe the specific documents requested, or narrow and specific categories of documents;
- state how they are relevant to the case and material to its outcome; and
- explain that the documents are not in the possession, custody or control of the requesting party (or cannot be produced by that party) and why that party believes that the documents are in the other party's possession, custody or control.

The requirement to identify 'narrow and specific' categories or individual documents constrains the scope of document production, making it less costly and time consuming than the broader processes found in common law litigation. As parties must show relevance and materiality, there is less scope for 'fishing' expeditions. To be material, a document must be likely to provide clarity or influence the tribunal's decision on issues in dispute.⁹³

Parties are given the opportunity to object to document production requests based on grounds such as lack of materiality or relevance, privilege and commercial or technical confidentiality.⁹⁴ A request to produce documents can also be refused where there is an unreasonable burden to produce the requested evidence. This requires the tribunal to balance relevance and materiality with the potentially burdensome nature of the discovery request.⁹⁵

Where the parties are not able to resolve the objection by consultation, the tribunal will make a ruling.⁹⁶

It is common for this process to be organised and presented in a 'schedule' — most typically a 'Redfern schedule', although other forms of schedules are coming into wider use. A Redfern schedule typically contains at least four columns, the first three being completed by the parties setting out the requested documents and categories, the reasons why they are material and relevant and any grounds for objection from the opposing party. The fourth details the tribunal's response. This process increases efficiency by concisely recording the parties' views so that the tribunal can make an informed decision.

Expert evidence

Where there are complex technical issues, experts are commonly appointed to assist the tribunal's decision-making.

Common and civil law jurisdictions take different approaches, with party-appointed experts almost always used in common law litigation,⁹⁷ while civil law jurisdictions favour the use of court-appointed experts. This reflects historical cultural differences about adversarial and inquisitorial approaches.⁹⁸

Arbitration draws from both traditions, although party-appointed experts are more commonly used.⁹⁹

The IBA Rules and the Chartered Institute of Arbitrators' [Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration](#) require experts to provide statements confirming their independence and disclosing any relationships that could call this into question.¹⁰⁰

This requirement seeks to ensure impartiality and avoid party-appointed experts being hired to advocate the cause of the party that appointed them.

Tribunal-appointed experts are considered less likely to be partisan, as the appointment by the tribunal reinforces the expert's independent role. The lack of party control may be a source of concern for parties from common law jurisdictions where the adversarial approach favours party autonomy. This may be partially addressed by appointment processes in which both parties can exchange preferred lists of experts to identify a commonly agreed person, with both parties having the opportunity to raise objections.

93 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 859.

94 IBA Rules, article 9(2).

95 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 866.

96 IBA Rules, article 3(6)–(7).

97 In Australia, while party-appointed expert witnesses are more common, civil procedure rules contemplate both court-appointed and party-appointed experts. See *Uniform Civil Procedure Rules 2005* (NSW), Part 31, Division 2.

98 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 932.

99 Doug Jones, 'Methods for Presenting Expert Evidence' in *The Guide to Evidence in Arbitration* (Global Arbitration Review, 1st ed, 2021).

100 Chartered Institute of Arbitrators, [Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration](#), article 8; IBA Rules, article 5(2).

Parties may also prefer a process that provides the tribunal with more than one perspective and allows for debate. Witness conferencing or ‘hot tubbing’ is a process that facilitates such discussion. This involves a roundtable discussion with experts from similar disciplines appointed by both parties. In this setting, experts are able to engage directly with differing views. It is particularly useful in cases where complex technical questions require the appointment of multiple experts, which may be confusing when presented separately over a period of time.¹⁰¹

Lay witness evidence

In arbitration, witness evidence is usually presented in the form of written witness statements, with the witness then subject to cross-examination by the parties or questioning by the tribunal.

The IBA Rules provide guidance on the form of written statements. Where a witness fails to appear for testimony at the hearing without a valid reason, the tribunal has the power to disregard the witness statement.

Tribunals — especially those composed of arbitrators trained in civil law jurisdictions — commonly view lay witness evidence as less reliable than contemporaneous documents, as they will often have had involvement in the transaction and have a direct or indirect interest in the outcome of the case.¹⁰² Civil law systems often view documentary evidence as having greater probative value.¹⁰³

Prior to the oral hearing, lawyers will usually spend time helping witnesses prepare to be cross examined. In international arbitration, it is well recognised that witnesses may be interviewed and prepared before providing evidence.¹⁰⁴ This is recognised by article 4(3) of the IBA Rules, which states that “[i]t shall not be improper” for a party’s legal advisors “to interview its witnesses or potential witnesses and to discuss their prospective testimony with them”.

There are, however, jurisdictional differences in the attitudes towards witness preparation, which may influence the approach taken by individual practitioners. It is often said that the US approach tolerates more extensive witness ‘coaching’, including rehearsing with the witness their answers to anticipated cross-examination questions, for example. This is not supported by the English courts, which take a much more restrictive approach,¹⁰⁵ and this position is similar in Australia.

The difference in approach has raised concerns about the potential for an uneven playing field in arbitration where practitioners have been admitted in different jurisdictions, especially as there is not always a clear dividing line between behaviour that is appropriate or inappropriate.

Typically, national bar codes will not have extraterritorial effect to regulate the behaviour of counsel in foreign jurisdictions, but this is not always clear where the rules are silent.¹⁰⁶ From a practical point of view, practitioners need to strike a balance by ensuring that witnesses are sufficiently familiar with the process (and their own evidence where there has been a lengthy gap since their written statements were prepared) without influencing the wording or content of their evidence.

It is also advisable for counsel to agree in advance on the rules governing witness preparation that will apply in an arbitration.

7 Hearing

The consent-based nature of arbitration means that it is often characterised by shorter, less prescriptive hearings than a litigation trial. At one end of the spectrum, a dispute submitted to arbitration may be determined solely on the documents submitted by each party to the tribunal where parties agree to dispense with the hearing all together (often referred to as a ‘documents-only’ procedure). If the parties elect to have the arbitration determined following an oral hearing, such hearing may be conducted in person, via telephone or via audio-visual link. The hearing typically takes place in a hotel, conference centre or even a private office.

When selecting a hearing type, parties may be attracted to the time and cost efficiency of a documents-only procedure. Equally, a party may feel that the evidence submitted will not be appropriately considered unless an oral hearing format is adopted.

In deciding whether a documents-only procedure is suitable for the resolution of some or all of the issues in contention, the parties should consider a range of matters including:

- the nature of the dispute;
- the complexity of the issues in dispute;
- the amount at stake (financial or otherwise);
- the nature of the evidence and arguments to be adduced and by whom;
- any time and costs savings;

101 Doug Jones, ‘Methods for Presenting Expert Evidence’ in *The Guide to Evidence in Arbitration* (Global Arbitration Review, 1st ed, 2021).

102 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) 389 [6.120].

103 See Siegfried H Elsing and John M Townsend, ‘Bridging the Common Law-Civil Law Divide in Arbitration’ (2002) 18(1) *Arbitration International* 59, 62.

104 See e.g. Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) 391 [6.124], referring to Nigel Blackaby, ‘Witness preparation: A key to effective advocacy in international arbitration’ (2010) 15 *ICCA Congress Series* 118.

105 See e.g. *R v Momodou* [2005] EWCA Crim 177: “There is no place for witness training in this country, we do not do it. It is unlawful”.

106 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law, 2012) 901, 910.

- whether it is an effective and efficient way of resolving all, or some, of the issues in dispute in the arbitration; and
- where allegations of fraud and dishonesty are made (oral examination of witnesses is valuable in this case).

If the parties wish to have their dispute determined following an oral hearing, the typical proceeding will involve:

- opening statements by each party;
- witness direct examination (which is typically short, as witness statements are usually submitted prior to the hearing and take the place of or significantly reduce the time spent on oral examination-in-chief), followed by cross-examination and the possibility of a re-direct examination of witnesses;
- expert direct examination (which is often done via brief presentations by experts, aided by demonstratives), followed by expert cross-examination and the possibility of a re-direct examination; and
- closing statements (where applicable — oral closing submissions can and are often replaced by written post-hearing briefs).

As strict rules of evidence do not typically apply in arbitration (unlike civil proceedings before domestic courts), the hearing and taking of evidence in arbitral proceedings is flexible and can be tailored to the parties' dispute and individual preferences.

Arbitral proceedings are also generally shorter than proceedings before a court. The duration of the hearing is strictly prescribed in advance (usually in PO1), and each party is accorded an equal amount of time (subject to rules of procedural fairness) to use during the hearing as it sees fit (whether by opening or closing statements, direct examination, or cross-examination). Some time is reserved for questions of the tribunal. Once a party has exhausted the allocated time, no further submissions or evidence are allowed. This is referred to as the 'stop-clock' procedure.

8 Closing statements or post-hearing briefs?

In an arbitration, the closing argument is the last opportunity for a party to weave together and present its submissions and evidence. Closing arguments are often presented in writing by way of an exchange of post-hearing briefs.

A post-hearing brief is a crucial piece of advocacy through which a party seeks to persuade the tribunal to find in its favour. An effective post-hearing brief will often be a draft for the award sought by a party.

The tribunal will typically decide, in consultation with the parties, whether closing arguments should be delivered through closing statements, post-hearing briefs or a combination of the two. In all cases, a party's primary objective is to identify and deliver the submission type that will most effectively assist the tribunal.

In identifying the most appropriate type of closing submissions, the tribunal and parties might consider:

- whether post-hearing briefs are genuinely useful or necessary for a party to deliver its submissions to the tribunal;
- the estimated cost of preparing the post-hearing briefs, as compared to an oral closing statement; and
- whether the benefit of reviewing post-hearing briefs outweighs the time and monetary cost to prepare them.

Post-hearing briefs may be preferred where there are complex facts in dispute and the examination of witnesses or experts has been intensive. Conversely, the time and monetary cost of preparing such briefs may not be justified for simpler, less factually and technically complex disputes.

9 Award

The formal requirements for an arbitral award are spread across the New York Convention, national arbitration laws and national arbitration rules. National arbitration laws and rules will differ; however, generally speaking, these instruments provide that an arbitral award must:

- be in writing (i.e. not delivered orally);
- be signed by the arbitrator(s);
- state the date of the award;
- state the place of arbitration; and
- state the reasons for the award.

National arbitration legislation does not tend to set a time limit for the delivery of an award. However, some arbitration rules require a final award to be rendered within a certain timeframe. For example, the ACICA Rules provide that, unless the parties agree otherwise, the final award should be rendered within nine months from the date the file was transmitted to the arbitral tribunal or no later than three months from the date the arbitral tribunal declares the arbitration proceedings are closed, whichever is earlier.¹⁰⁷ The time limit may be extended where there is a reasoned request from the arbitral tribunal or if ACICA otherwise deems it necessary.¹⁰⁸

In terms of content, an arbitral award will often include the following information:

- details of the parties and their counsel;
- the procedural history;
- details of the principal or 'matrix' contract, as well as the arbitration agreement;

¹⁰⁷ ACICA Rules, article 39(3).

¹⁰⁸ Ibid.

- details of the background facts and circumstances;
- the claims and arguments advanced by each party;
- a list of issues in contention, where appropriate;
- the arbitral tribunal's detailed reasoning regarding jurisdiction (if applicable);
- the arbitral tribunal's detailed reasoning regarding the substantive merits of the case, dealing with each disputed issue discretely; and
- the operative part of the award.

Several arbitral institutions and industry bodies (like the ICC and the Chartered Institute of Arbitrators) have issued best practice guidelines regarding the content of arbitral awards.¹⁰⁹ These guidelines often set out more onerous specifications than the minimum content requirements for an arbitral award to be considered valid and enforceable.

10 Recourse against awards

An important feature of arbitration is that it produces an award that is binding on the parties and, in principle, final. There are limited circumstances in which an arbitral award may be set aside or appealed.

Setting aside an award

Grounds for setting aside an award

A party may apply to the courts at the seat of the arbitration to have an award set aside based on one or more of the grounds prescribed in national arbitration legislation, which are typically limited and narrow.

Importantly, arbitral awards are not reviewable on the merits, and there are no prescribed grounds for setting awards aside on the basis of a merits review.

The limited circumstances in which a court may set aside an award are set out in article 34 of the Model Law and include the following:¹¹⁰

- the underlying agreement to arbitrate is invalid;
- the party seeking to set aside the award was not given proper notice of the proceedings or was unable to present their case;¹¹¹
- the arbitrator purports to decide matters outside the scope of the arbitration agreement;
- the composition of the tribunal or arbitral procedure was not in accordance with the parties' agreement;
- the subject-matter of the dispute is not arbitrable; or
- the award is contrary to public policy.

109 See, e.g. ICC International Court of Arbitration, *ICC Award Checklist*; Chartered Institute of Arbitrators, *Drafting Arbitral Awards Part 1 – General*.

110 Model Law, article 34(2).

111 For an award debtor to show that it was unable to present its case, generally, a breach of the rules of natural justice in the form of a real unfairness or practical injustice will be required: *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [55].

112 CAA, sections 2(1) and 34.

113 Model Law, article 34 as applied in Australia by IAA, section 16. See also IAA, section 3(1).

114 *Malicorp Ltd v Government of the Arab Republic of Egypt* [2015] EWHC 361 (Comm) (Walker J).

The grounds for setting aside an award are identical to the grounds for refusing recognition and enforcement (as discussed in chapter 6).

Process for setting aside an award

In Australia, applications to set aside a domestic award are made in the state or territory supreme courts,¹¹² while applications relating to international arbitration awards can be brought in either the supreme courts or the Federal Court of Australia.¹¹³

To set aside an arbitral award, a party has three months to bring an application from the date on which the party has received the award or, if a request for a correction or interpretation of an award has been made under section 33 of the CAA, from the date on which the request was disposed of by the tribunal.

Consequences and effect of setting aside an award

Where an award has been set aside, it no longer has the effect of a final and binding decision between the parties. The dispute is available to be arbitrated again, as the setting aside has no impact on the effectiveness of the underlying arbitration agreement. However, the decision of the court setting aside the award could affect the scope of adjudication before a new arbitral tribunal, as a party may be prevented or 'estopped' from reopening certain matters in any subsequent arbitration.

While an award that has been set aside is no longer enforceable in the jurisdiction where the application for setting aside was made, it may be possible (although in very limited circumstances) that the award is still enforceable in other jurisdictions. In a number of jurisdictions (including in the UK), courts have enforced awards set aside at the seat of the arbitration in circumstances where the judgment in which the award was set aside was found to be in violation of basic norms of justice or contrary to the public policy of the enforcing forum.¹¹⁴

Appealing an award

Subject to provisions in national arbitration legislation, there is no ability to appeal an arbitral award on a question of law or fact.

In Australia, under the IAA, international arbitral awards are not subject to an appeal.

The rules are different for domestic arbitral awards. Under section 34A(1) of the CAA, parties may appeal a domestic arbitral award on a question of law if the parties have agreed that an appeal may be made and if a court grants leave.

For a court to grant leave to appeal an award, it needs to be satisfied that:

- the appeal will substantially affect the rights of one or more parties;
- the question is one that the arbitral tribunal was asked to determine;
- the decision of the arbitral tribunal on the question was obviously wrong, or the question is one of general public importance and the decision is open to serious doubt; and
- despite the parties' agreement to resolve the dispute by arbitration, it is just and proper for a court to determine the question.

The party seeking to appeal an award must apply for leave to appeal and identify the question of law to be determined and the grounds on which the court should grant the leave to appeal. An application for leave to appeal must be made within three months of the date on which the party making the application received the award or, if a request for a correction or interpretation of an award is made under section 33 of the CAA, from the date on which the request had been disposed of by the tribunal.

Upon determining an appeal, the court may confirm the award, vary the award, remit the award back to the tribunal for reconsideration with the court's opinion on the question of law, or set aside the award in whole or in part. This last option is only available if the court is satisfied that it would be inappropriate to remit the matter to the arbitral tribunal for reconsideration.

Where the court remits the matter back to the arbitral tribunal, the tribunal has three months from the date of the order to make an award.

If an arbitral award is varied on an appeal under section 34A of the CAA, the new award has effect as if it were the award of the arbitrator.



Recognition and enforcement of arbitral awards

One of the attractions of international arbitration is the (comparative) ease with which arbitral awards can be recognised and enforced around the world. This is a direct consequence of the New York Convention, which at present has over 172 countries party to it. This stands in contrast to the recognition and enforcement of foreign court judgments, for which at present there is no widely ratified global convention — there remain some countries that do not recognise and enforce foreign court judgments at all.

As discussed in chapter 2, the New York Convention is given force of law in Australia under sections 8 and 9 of the IAA. The New York Convention approach is replicated in articles 35 and 36 of the Model Law, which is reflected in sections 35 and 36 of the CAA.

The New York Convention operates as a minimum standard for the recognition and enforcement of arbitral awards; it does not, other than in the specific circumstances outlined above, limit the ability of national courts to recognise and enforce arbitral awards, and courts have consistently held that the New York Convention does not allow refusal to recognise and enforce an award on grounds other than those listed.¹¹⁵

As such, in Australia, it remains open for parties to seek enforcement of an arbitral award under common law, although in practice this is unlikely to be needed given the pro-enforcement bias of the New York Convention.

Grounds for refusing recognition and enforcement

There are only limited circumstances in which recognition and enforcement of an arbitral award may be refused. These are as follows:¹¹⁶

- **Incapacity of parties to the agreement or invalidity of the agreement under the applicable law.**¹¹⁷ ‘Incapacity’ is not defined in the New York Convention or equivalent Model Law, IAA and CAA provisions. It can refer to either a natural person or legal entity. The incapacity ground has been of limited relevance in practice.¹¹⁸ In the case of companies, incapacity may relate to alleged lack of representative authority. The ground of invalidity is, on the other hand, invoked more often. It was considered by the Federal Court of Australia in *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd*.¹¹⁹ The Court held that the award debtor resisting enforcement must affirmatively prove that an agreement governed by foreign law is invalid under the governing law. There is still contention regarding whether ‘validity’ is to be construed in the narrow sense (i.e. absence of illegality, fraud and duress) or broadly to include all questions related to the conclusion of the agreement.¹²⁰
- **Lack of proper notice of the arbitrator or proceedings to the party against whom the award is invoked.** This ground addresses due process requirements. Australian courts have typically applied high standards for the burden of proving that notice was not properly given. For example, in *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd*,¹²¹ the Federal Court of Australia accepted that valid notice had been given where the claimant asserted that the notice was sent to the address specified for notice in the contract by registered mail and the defendant could not provide contrary evidence that it had not received it. The Court did not accept arguments that the notice was not received or signed for by a legal representative or authorised person to receive it. However, there have also been cases where courts have found that deemed notice was not enough to satisfy the requirement of proper notice.¹²² Further, actual notice does not automatically mean a debtor has received ‘proper notice’ for the purpose of section 8(5)(c) of the IAA.¹²³

115 See e.g. *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303; [2011] VSCA 248.

116 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (New York Convention), Article V; Model Law, article 36(1).

117 *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* (No 2) [2018] VSC 741 (Croft J); *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223.

118 See e.g. *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* (No 2) [2018] VSC 741 (Croft J).

119 [2017] FCA 1223.

120 See e.g. *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303; [2011] VSCA 248.

121 (2011) 277 ALR 415; [2011] FCA 131.

122 When there is only deemed notice, the court may find that the requirement of proper notice is not satisfied: see e.g. *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] HKCFI 1611.

123 *LKT Industrial Berhad (Malaysia) v Chun* [2004] NSWSC 820 at [73]; *Beijing Jishi Venture Capital Fund (Limited Partnership) v Liu* [2021] FCA 477 at [29].

- **The award deals with matters outside the submission to arbitration.** This ground applies where the arbitral tribunal has considered matters that were not encompassed by the arbitration agreement, and were therefore not within the arbitral tribunal's jurisdiction. The Victorian Supreme Court considered this ground in *Giedo van der Garde BV v Sauber Motorsport AG*,¹²⁴ in which the Court was asked to enforce a Swiss arbitral award under which Sauber Motorsports had been ordered to reinstate one of its drivers for the Formula 1 Grand Prix. This was resisted on the basis the award dealt with matters outside the submission to arbitration, being wrongly based on the assumption that the claimant had a personal contractual right enforceable against the respondent. The Court rejected this argument on the basis that the contractual arrangements were intended to facilitate the claimant's position as a driver, so his rights were within the scope of the submission to arbitration. The Court emphasised that in making this determination, the Court was not engaging in a merits review of the award but was merely investigating the issue to determine that it was open to the arbitrator to make the relevant findings. This is consistent with international jurisprudence that this ground must be construed narrowly and does not permit an enforcing court to engage in a merits review.¹²⁵
- **The composition of the arbitral tribunal was not in accordance with the parties' agreement.** This ground emphasises the primacy of party autonomy. It was recently considered by the Full Court of the Federal Court of Australia in *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company*¹²⁶ (as discussed in Chapter 2). Globally, in the majority of reported cases in which this ground has been raised, parties have been unsuccessful because it is unusual for the composition of the tribunal to deviate from the parties' agreement or the applicable rules.¹²⁷
- **The award has not yet become binding on the parties or has been set aside in the country where the award was made.** This ground may be invoked where the award has been set aside in the place where it was made. Where an award has been set aside in the country or under the law of which it was made,

Australian courts (like English courts¹²⁸) retain discretion to enforce the award,¹²⁹ but that discretion is exercised judiciously. English courts have enforced awards where the decision by the seat court to set it aside was found to be in violation of basic notions of justice or otherwise contrary to public policy.¹³⁰ Where an application to set aside an award is pending at the seat of the arbitration, award debtors may apply for an adjournment of enforcement proceedings pending the resolution of the set aside application. Australian courts have the discretion to adjourn enforcement proceedings or order security against the award debtor when the award is being challenged at the seat of arbitration.¹³¹ Courts will weigh several competing factors when exercising their discretion.¹³² The award debtor resisting enforcement will typically need to establish that an application to set the award aside has been made appropriately and/or that, at least prima facie, it has prospects of success.¹³³

- **The subject-matter of the award is not arbitrable under the law of the country where recognition and enforcement is sought.** As discussed in chapter 2, arbitrability relates to whether the subject matter of the dispute can be resolved through arbitration or can only be resolved by courts. In the context of this ground, arbitrability is determined by reference to the law of the enforcing country, not the law of the country where the arbitration took place.
- **The recognition or enforcement of the award would be contrary to the public policy of the country in which recognition and enforcement is sought.** Infringement of public policy typically involves situations where the core values of a legal system have been deviated from. In *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*,¹³⁴ the Federal Court of Australia determined that "it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in [the] jurisdiction [where enforcement is sought] which enliven this particular statutory exception to enforcement". In some circumstances, public policy objections may relate to only part of the award. Where an award is void in part, it is possible to apply to sever and enforce part of an award, provided that the void portion of the award is clearly separate and divisible and the severance will not cause injustice.¹³⁵

124 (2015) 317 ALR 792; [2015] VSC 80.

125 See also *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 which sets out the parameters of the equivalent ground under article 34 of the Model Law.

126 (2021) 290 FCR 298; [2021] FCAFC 110

127 UNCITRAL New York Convention Guide, V(1)(d) at [6].

128 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763; [2010] UKSC 46, [126].

129 IAA, section 8(5).

130 *Yukos Capital S.a.r.l v OJS Oil Company Rosneft* [2014] 2 Lloyd's Rep 435; [2014] EWHC 2188 (Comm), [20]; *Malicorp Ltd v Government of the Arab Republic of Egypt & Ors* [2015] EWHC 361 (Comm), [26].

131 IAA, section 8(8).

132 Doug Jones and Janet Walker, *Commercial arbitration in Australia under the Model Law* (Thomson Reuters, 3rd ed) at [11.170].

133 *Toyo Engineering Corp v John Holland Pty Ltd* [2000] VSC 553; *Hallen v Angledal* [1999] NSWSC 552.

134 (2012) 201 FCR 535; [2012] FCA 276.

135 *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* (2014) 290 FLR 233; [2014] NSWSC 1403.

Process for recognition and enforcement

Under the CAA, domestic awards are enforced in the state or territory supreme courts.¹³⁶ Under the IAA, a foreign award may be enforced in either a state or territory supreme court or the Federal Court of Australia.¹³⁷

Applications to enforce awards are subject to limitation periods in national law. In Australia, limitation periods apply to arbitral awards in all states except South Australia. The limitation period is usually six years, unless the agreement was made by a deed, in which case a longer period is granted.

To have an award enforced, applicants are required to supply the authenticated original award and the arbitration agreement (or certified copies thereof). The party opposing recognition and enforcement has the burden of raising and proving the grounds for non-enforcement. The procedure for enforcement is provided for in court rules and practice notes.¹³⁸ The applicant must file an originating application in accordance with the court's prescribed requirements, attach the authenticated award and agreement, attach an affidavit stating the extent to which the foreign award has not been complied with at the date the application is made, and include the debtor's usual or last-known place of residence or business or registered office in the case of a company. Applications for enforcing arbitral awards in the Federal Court can be made *ex parte* if certain requirements are met (including where the award creditor has not been formally notified of an award debtor's intention to object to enforcement and is not otherwise aware of any reasonably arguable basis for objection).¹³⁹ In Victoria, Queensland, South Australia and Western Australia, the state supreme court rules do not explicitly provide that an application for enforcement can be made *ex parte*, but the courts' originating application forms enable the applicant to apply for orders without notice.¹⁴⁰ In New South Wales, an applicant must file a summons seeking leave of the court to enforce the award.

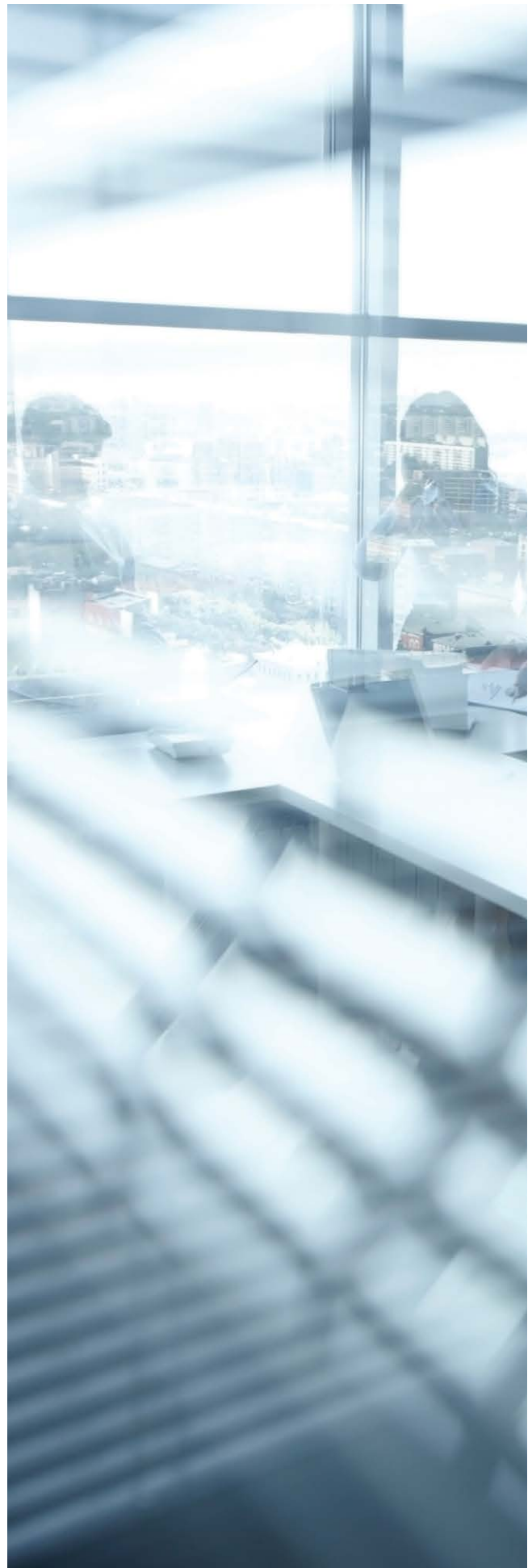
136 CAA, section 2(1), which defines "the Court" as the Supreme Court.

137 IAA, section 18(4)–(5).

138 See e.g. in the Supreme Court of Victoria: *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Vic)*, order 9; Practice Note SC CC 3 *Commercial Arbitration Business*. In the Federal Court: *Federal Court Rules 2011 (Cth)*, division 28.5; Commercial Arbitration Practice Note CA-1.

139 *Federal Court Rules 2011 (Cth)* rules 28.44(3), 28.49(3); Federal Court Commercial Arbitration Practice Note, Annexure B.

140 See Supreme Court of Victoria, Form 2-9B; Supreme Court of Queensland, Form 137B; Supreme Court of South Australia, Form 2H; Supreme Court of Western Australia, Form 2 – Originating summons to enforce foreign award.



Specific procedures

Expedited arbitration

Cost and delay are becoming discouraging characteristics of arbitration, and there has been a need to simplify the arbitral process, particularly for lower-value disputes. As a result, over the past decade several arbitral institutions have closely examined how their rules and proceedings could be streamlined to reduce any unnecessary cost and delay. Several of these institutions have released separate 'Expedited Arbitration Rules', such as the [ACICA Expedited Arbitration Rules](#) and the [ICC Expedited Procedure Rules](#). Other institutions have incorporated provisions within their rules that allow access to simplified procedural steps and strict time limits to complete the arbitration quickly and at a reduced cost, such as the [HKIAC Administered Arbitration Rules 2018](#).

Expedited arbitration is not suitable for every dispute. It is only seen as appropriate in circumstances where the quantum in dispute is below a particular monetary threshold and there is a low level of complexity involved. For example, the ICC Expedited Procedure Rules can be utilised by parties where the dispute does not exceed US\$2 million or US\$3 million, depending on the date of the arbitration agreement. Parties can apply to ACICA to use the ACICA Expedited Arbitration Rules if the value in dispute is less than A\$5 million.

However, the requirement for a dispute to be under a certain monetary value is not prescribed by all institutions or all rules. For example, it is not required under the [2021 UNCITRAL Expedited Arbitration Rules](#). Therefore, it is important that parties contemplating arbitration check whether an expedited framework is applicable to their matter when entering into an arbitration agreement.

Key differences between expedited and non-expedited arbitration

Expedited arbitration primarily aims to simplify procedures to minimise cost and shorten the time required to reach a final award. The key features of expedited arbitration include:

- **Use of a sole arbitrator.** Generally, expedited arbitration provides for the appointment of one arbitrator (unlike a three-person tribunal in standard arbitrations). Alternatively, some arbitral institutions give the parties the option to agree to a three-person tribunal or defer the decision to the President of the institution.
- **No oral hearing.** It is common for the decision to be made on the documents in expedited arbitrations, without any oral hearing. For instance, ACICA and HKIAC set documents-only arbitration as the default procedure under their expedited rules unless otherwise determined by the arbitrator.
- **Shorter timeframes and truncated procedures.** Expedited arbitrations often adopt shorter timelines for procedures, including for the appointment of the arbitrator and delivery of the award. It is also standard to cap the number of amendments to the statement of claim or defence and to give the tribunal discretion to permit further written statements.

Factors for considering the suitability of a dispute to expedited arbitration

An expedited arbitration proceeding may, depending on the circumstances, be appropriate for a dispute to minimise cost and delay, without compromising the quality of the dispute resolution process. This requires carefully determining whether a speedy resolution will still ensure that the parties have been sufficiently heard and the issues in dispute have been properly examined.

To determine if a matter should embrace an expedited procedure, the following ought to be considered:

- **Whether the use of a sole arbitrator is in the best interests of your client.** On one view, it has the potential to save time when appointing arbitrators and makes the award process more efficient. However, on another view, it limits the award to the opinion of one person.
- **Whether the arbitration agreement permits or facilitates an expedited procedure.** There is a risk that an award will be rendered unenforceable if there is a discrepancy between the chosen arbitration rules and the arbitration agreement.¹⁴¹
- **Whether the nature of the dispute requires an oral hearing.** A documents-only arbitration is often cheaper and quicker; however, there are times when an oral hearing is preferable. For instance, where testing a witness' credibility or recollection or explanations of highly technical expert evidence are required, these circumstances may warrant an oral hearing. An oral hearing may also be necessary where there is a lack of written evidence to substantiate the material facts of the case.

¹⁴¹ See e.g. the Shanghai No. 1 Intermediate Court decision in [Nobles Resources Pte. Ltd. v. Good Credit International Trade Co. Ltd. \(2016\)](#) in which the Court refused to enforce a SIAC award on the basis that the expedited arbitration rules were applied and the hearing was conducted before a sole arbitrator, contrary to the arbitration agreement which provided for a three-member arbitration panel.

- **Whether short deadlines and a truncated procedure is desirable.** On one view, a streamlined timeline limits cost and avoids unnecessary delay. However, that may not be desirable if it will compromise a party's capacity to properly present their case, impact the enforceability of the award or encroach on broader concepts of natural justice.

Additionally, parties should take into account the urgency of resolving the dispute, the complexity of the issues in dispute, the number of parties involved, the financial resources available to meet the expedited process, and the likelihood of an award being rendered within the timeframes provided for in the expedited rules.

Emergency arbitration

Interim or provisional measures in arbitration are decisions that protect parties from harm during the course of proceedings.

Historically, a party seeking urgent relief prior to the constitution of the arbitral tribunal only had recourse to national courts. With the introduction of emergency arbitration provisions by many arbitral institutions, parties requiring interim measures of protection can now seek an order from an emergency arbitrator who is appointed by the institution before the tribunal is constituted.

In most jurisdictions, including Australia, courts retain residual authority to grant interim measures of protection. In other words, emergency arbitrators and national courts have concurrent jurisdiction to grant interim relief.

Emergency relief in arbitration

To be granted interim relief by an emergency arbitrator, a party must demonstrate a number of elements. Under article 3(5) of the [Emergency Arbitrator Provisions incorporated into the ACICA Rules](#) (Schedule 1 of the ACICA Rules), the requesting party must show that:

- irreparable harm is likely to occur if interim measures are not ordered;
- the harm substantially outweighs the likely harm to the party affected by the interim measure; and
- there is a reasonable possibility that the requesting party will succeed on the merits.

An emergency arbitrator is appointed by ACICA within one business day, and a decision on the application must be handed down by the emergency arbitrator within five business days of the arbitrator's receipt of the application.

The interim measures ordered may vary widely in scope, including orders to preserve evidence or assets, provide security for costs, maintain or restore the status quo pending determination of the dispute, or refrain from action likely to cause harm to the other party.

There are also various forms that the granting of interim relief by an emergency arbitrator can take. This can be in the form of a direction or an interim or partial award. Some rules (like the ICC Arbitration Rules) require the decision to be rendered in the form of an order to ensure its expediency. Others, like the ACICA Rules, allow interim measures of protection to be either 'ordered' or 'awarded'.

Many other institutions have incorporated into their institutional rules emergency arbitrator mechanisms, including for example the ICC,¹⁴² ICDR,¹⁴³ SIAC,¹⁴⁴ SCC¹⁴⁵ and LCIA.¹⁴⁶

The advantages and disadvantages of seeking urgent relief in arbitration vs before a court

To determine if an emergency arbitration proceeding should be used, the following should be considered:

- **Speed.** How quickly urgent relief can be granted is a critical question. The speed of court proceedings varies widely between jurisdictions. Parties may prefer emergency arbitration over going to court where the time limits specified by institutional rules for the issuance of a decision are short in comparison with court proceedings.
- **Cost.** The cost of emergency arbitration varies between institutions, whose rules usually require the requesting party to pay fixed fees to cover the institution's administrative expenses and the emergency arbitrator's fees and expenses. For example, an emergency arbitration under the ACICA Rules requires payment of an emergency arbitrator fee of A\$10,000, with a further A\$2,500 application fee payable to ACICA. The requirement to pay upfront may deter some parties from making an emergency arbitrator application. However, this may be more cost effective than court proceedings where the order is to be enforced in multiple jurisdictions, which would necessitate multiple court proceedings.
- **Confidentiality.** The departure from the arbitral process often means a loss of confidentiality, one of the key reasons why parties choose to arbitrate. Parties may wish to pursue an emergency arbitration proceeding rather than a court process so that confidentiality can be maintained.

¹⁴² ICC Rules, article 29, Appendix V (Emergency Arbitrator Rules).

¹⁴³ International Centre for Dispute Resolution, *International Dispute Resolution Procedures (including Mediation and Arbitration Rules)* (2021), article 7.

¹⁴⁴ *Arbitration Rules of the Singapore International Arbitration Centre* (2016), article 30, Schedule 1 (Emergency Arbitrator).

¹⁴⁵ *Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce* (2023), Appendix II (Emergency Arbitrator).

¹⁴⁶ *LCIA Arbitration Rules* (2020), article 9B.

- **Ex parte relief.** Courts may be the only viable option for parties seeking interim measures without giving notice of the application to the other party. If there is a risk that a party is likely to dissipate or divest assets or destroy information, the secrecy and urgency of an *ex parte* application to a court will best preserve the assets or information.
- **Third parties.** As arbitration only binds the contracting parties, there is no authority to compel non-contracting parties to obey interim orders (e.g. by way of a freezing injunction against accounts held at third-party banks). This is a significant disadvantage given the ease with which evidence and assets can be transferred across borders.
- **Enforcement and compliance.** While orders for interim relief granted by emergency arbitrators will be contractually binding on the parties, there are limited steps that can be taken if the respondent does not comply. For example, an emergency arbitrator has no power to impose contempt sanctions on a defaulting party. As discussed below, it remains uncertain whether a decision by an emergency arbitrator can be enforced as an award under the New York Convention.

Enforceability of emergency arbitrator decisions

There are two potential hurdles to obtaining enforcement of an emergency arbitrator's decision.

First, the nature of the relief is that it is interim and not final. The arbitral tribunal subsequently appointed to determine a dispute can review, modify, terminate or annul an emergency arbitrator's decision.

Second, the form of relief is commonly rendered as an order rather than as an award. The New York Convention does not say anything about arbitral interim orders or awards. The Convention does, however, apply only to 'awards', which is not a defined term in the Convention, but it is generally considered that an award is defined by its finality and binding characteristic (neither of which applies to interim orders or awards). Whether an emergency arbitrator's interim decision can be properly characterised as an 'award' for the purpose of the New York Convention is therefore uncertain.

The approach adopted by courts when ruling on the enforceability of emergency arbitrator decisions differs across jurisdictions. Article 17 H of the Model Law (as amended in 2006) provides that an arbitral interim measure, no matter the format (as an award, an order or a decision), "shall be recognised as binding and...enforced upon application to the competent court".

The Model Law, as amended in 2006, has been adopted in Australia. In Australia, therefore, interim measures will be recognised as binding and enforced irrespective of the country in which they have been issued, unless one of the enumerated grounds for refusing recognition in article 17 I of the Model Law is met. However, the same may not be true in other jurisdictions; the position will depend on the individual jurisdiction's national arbitration legislation.

Virtual arbitration

The COVID-19 pandemic has normalised virtual arbitrations, prompting procedural adaptations specific to online formats. For example, the ACICA Rules include provisions providing for e-filing of submissions as a default, allowing electronic signing of awards, allowing tribunals to hold conferences and hearings virtually, and measures to protect data in line with the applicable law.

In addition, in 2020, ACICA released a [Guidance Note for Online Arbitration](#), which covers a range of matters that need to be addressed in advance of an arbitration being conducted on an online platform with parties participating from different physical locations. These include the choice of video-conferencing platform, use of a third party online arbitration provider, methods of internal communications within legal teams and considerations for the remote participation of witnesses.

Pros and cons of virtual hearings

The option to conduct hearings virtually has a number of benefits, including:

- **Reduced need for travel.** Virtual hearings are likely to be useful where parties are in relatively inaccessible parts of the world or the cost of travel renders physical hearings difficult.
- **Reduced cost.** A virtual format reduces cost associated with travel for parties, counsel and witnesses.
- **Sharing of documents.** Technologies allowing the easy sharing and reading of large volumes of text may provide efficiencies. Electronic filings and exchanges have been widely used since before the COVID-19 pandemic.
- **Communication.** It may be easier for legal teams to communicate using online technologies where they would usually be separated in a physical courtroom.

However, parties should also be mindful of potential limitations of virtual hearings, which may include:

- **Uneven access to technology.** Witnesses in developing and least-developed countries may not have access to the same technology equipment or internet speed as those in developed countries. Parties should manage potential limitations by clarifying and settling the procedural and technical arrangements at an early stage, including arrangements for equipment, software and connectivity.
- **Witness and expert testimony.** There is a risk that the tribunal might subconsciously take into account the shortcomings of virtual hearings, such as technological difficulties or the more limited ability to analyse body language when evaluating witness or expert testimony. A 2021 study by Berkeley Research Group found that remote proceedings were associated with psychological side effects including bias against those with technical issues and 'Zoom fatigue'.¹⁴⁷ Expert witnesses reported juries, judges and arbitrators taking less interest in their testimonies, with decisions being reached more quickly compared to in-person hearings. However, the study did not find that the psychological impact was enough to have a significant impact on the outcome of proceedings.
- **Security and confidentiality:** There is an increased risk of security breaches where multiple parties, witnesses and experts are using their home networks to attend virtual hearings. It may also be more challenging to confirm that witnesses are alone when giving testimony and that the hearing link has not been shared beyond those with whom the parties have agreed.

Do parties have a right to a physical hearing?

In May 2022, an International Council for Commercial Arbitration (ICCA) taskforce completed an investigation into the right of parties to a physical hearing in international arbitration.

The report surveyed 78 jurisdictions, finding that none contained an express provision granting parties a right to a physical hearing, although in some cases a right could be inferred.

In Australia, the IAA does not provide for an express right to a physical hearing, but section 18C of the IAA requires that parties are given a reasonable opportunity to present their case. Australian courts have held that arbitral tribunals may decide whether or not to hold evidentiary hearings and determine the format of hearings,¹⁴⁸ and have rejected challenges to awards issued after remote hearings.¹⁴⁹



147 Berkeley Research Group, *The Psychological Impact of Remote Hearings* (Report, 2021) at 8.

148 See e.g. *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* (2020) 386 ALR 632; [2020] WASCA 77, [317].

149 See e.g. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131. See also Lucy Martinez and Jay Tseng, *Does a Right to a Physical Hearing Exist in International Arbitration? National Report - Australia* (ICCA Research Project, 2020).

Green arbitrations

The environmental footprint of arbitration processes has recently come under increased scrutiny.¹⁵⁰

Arbitrations can result in a number of carbon-producing activities, from travel to and from the hearing by witnesses, counsel, experts and tribunal members to the printing of lengthy submissions and even the use of multiple disposable coffee cups. The stated purpose of the Campaign for Greener Arbitration is to promote awareness of the environmental impact of arbitrations and produce best practice guides on the ways in which arbitration practitioners can act to minimise their carbon footprint. The campaign sets out three areas in which practitioners can substantially reduce carbon emissions. These include:

- adopting clean forms of energy;
- reducing the use of long-haul travel; and
- reducing waste (such as by eliminating hard copy filings).

The campaign established 'Green Protocols',¹⁵¹ which set out specific measures designed to reduce the environmental footprint of a new or existing arbitration, such as the use of virtual conferences, hearings and witness preparation as the default format, and electronic filing of all submissions and document production. The "Model Green Procedural Order" provides draft language that can be adopted by tribunals to implement sustainability measures in the procedural conduct of arbitration.

Almost 1,500 individual practitioners, arbitrators, law firms, arbitral centres, arbitration service providers and corporates have signed the Green Pledge, a commitment to introducing greener practices by implementing the principles set out by the campaign. In May 2023, the Scottish Arbitration Centre became the first institution to reference the Green Protocols in its arbitration rules, requiring parties, counsel, the tribunal and the Centre to consider the application of the Green Protocols at the commencement of proceedings.¹⁵²

The Campaign for Greener Arbitrations is encouraging in-house counsel to demand a more environmentally friendly approach to arbitration from external counsel though the publication of its 'Model Clause for Outside Counsel Retention' (**Model Clause**). The Model Clause requires external counsel to "make efforts ... to minimise the impact of the resolution of disputes on the environment," such as by minimising air travel and prioritising virtual meetings and hearings. The Model Clause provides draft language that in-house legal teams can implement in their external counsel retention letters and policies.¹⁵³

While the broader movement for greener arbitration has gained traction, procedural efficiency and costs savings remain a priority for arbitration participants. Recent surveys conducted by the Queen Mary University of London School of International Arbitration indicate that conducting arbitration hearings, conferences and interviews virtually and exchanging digital documents are now more widely implemented practices but primarily for reasons of the cost, efficiency and accessibility benefits they provide.¹⁵⁴

Outside of Australian court rulings rejecting challenges to awards issued after remote hearings,¹⁵⁵ it remains untested in Australia as to whether an obligation to run a greener arbitration through virtual interactions takes precedence over any inferred right of a party to a physical hearing.

150 See Campaign for Greener Arbitrations, *A significant impact*, available at greenerarbitrations.com

151 See Campaign for Greener Arbitrations, *Green Protocols*, available at greenerarbitrations.com

152 *Scottish Arbitration Centre Rules* (2023), article 23.

153 See Campaign for Greener Arbitrations, *Model Clause for Company Outside Counsel Retention* (Web Page).

154 See Queen Mary University of London and Pinsent Masons, *Future of International Energy Arbitration Survey Report* (Report, 2022) at 36–37; Queen Mary University of London School of International Arbitration and White & Case, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (Report, 2021) at 28–30.

155 See e.g. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131. See also Lucy Martinez and Jay Tseng, *Does a Right to a Physical Hearing Exist in International Arbitration? National Report - Australia* (ICCA Research Project, 2020).

Third-party funding

Australia was one of the first jurisdictions to permit third-party funding for litigation and arbitration in the 1990s, which has allowed a robust third-party litigation funding industry to develop in Australia.¹⁵⁶ The developments in Australia have influenced other common law countries (including Canada, Hong Kong, India, New Zealand, the United Kingdom and the United States) and some civil law jurisdictions (such as France, Germany and the Netherlands) to partially or completely permit third-party funding for litigation and arbitration.

Third-party funding has been legalised in Victoria, New South Wales, South Australia, Tasmania, Western Australia and the Australian Capital Territory through the abolishment of the crimes and torts of maintenance and champerty and legislated allowances for insolvency claims. Furthermore, the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*¹⁵⁷ held that litigation funding serves a legitimate purpose and is not contrary to public policy or an abuse of process (at least where maintenance and champerty had been abolished by statute). While the legality of third-party funding of arbitration in Australia has yet to be clarified, there is some jurisprudence and commentary that Australian courts would substantially extend this reasoning to third-party funding of arbitration.¹⁵⁸

The position in Queensland and Northern Territory is less clear. The torts of maintenance and champerty have not been abolished in both jurisdictions, and both doctrines may still be considered a crime under Northern Territory's common law. However, the Queensland Court of Appeal's decision in *Murphy Operator Pty Ltd v Gladstone Ports Corporation Ltd*¹⁵⁹ provides some guidance as to how these jurisdictions might approach the issue, with the Court finding that neither the torts of maintenance and champerty, nor public policy, did not prohibit the enforceability of the litigation funding agreement the subject of the case.

The confidential nature of arbitration makes it difficult to gauge the full extent of reliance on third-party funding in arbitration. However, it is understood to be regularly and widely used in commercial and investment treaty arbitration. In particular, third-party funding is frequently used in commercial arbitration and M&A arbitration, and it is growing in use in investment treaty arbitration¹⁶⁰ – including arbitration commenced by Australian investors.

In acknowledgement and response to the increased use of third-party funding for arbitration, several arbitral institutions have introduced rules and practice notes regarding the obligations of funder and funded party. Such institutions include ACICA, the Bahrain Chamber for Dispute Resolution, the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, the Dubai International Arbitration Centre, the ICC, the International Centre for the Settlement of Investment Disputes (ICSID), HKIAC, SIAC and the Vienna International Arbitration Centre.

Specifically, these institutions have introduced rules dealing with the disclosure of the existence and details of the financing agreement and/or the funding party's identity. The objective of these rules is the identification of conflicts of interests with the arbitrators or the arbitral tribunal, and minimising the control or influence of the third-party funder on the proceedings and their access to confidential information.

For example, article 54 of the ACICA Rules 2021 introduced obligations requiring parties to disclose the existence of third-party funding and the identity of the funder when submitting a Notice of Arbitration or Answer to Notice of Arbitration, or as soon as practicable after entering such an arrangement. The parties are also subject to a continuing obligation to disclose any changes to such arrangements. If necessary, the Tribunal can order the disclosure of the above information.

156 Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Consultation Paper, July 2017) 25 [2.70]. See generally Darcy Gannon, *Litigation Funding in Australia* (Industry Report OD5446, IBISWorld, May 2023). For a list of third-party funders operating in Australia, see Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, December 2018), Appendix G.

157 (2006) 229 CLR 386; [2006] HCA 41.

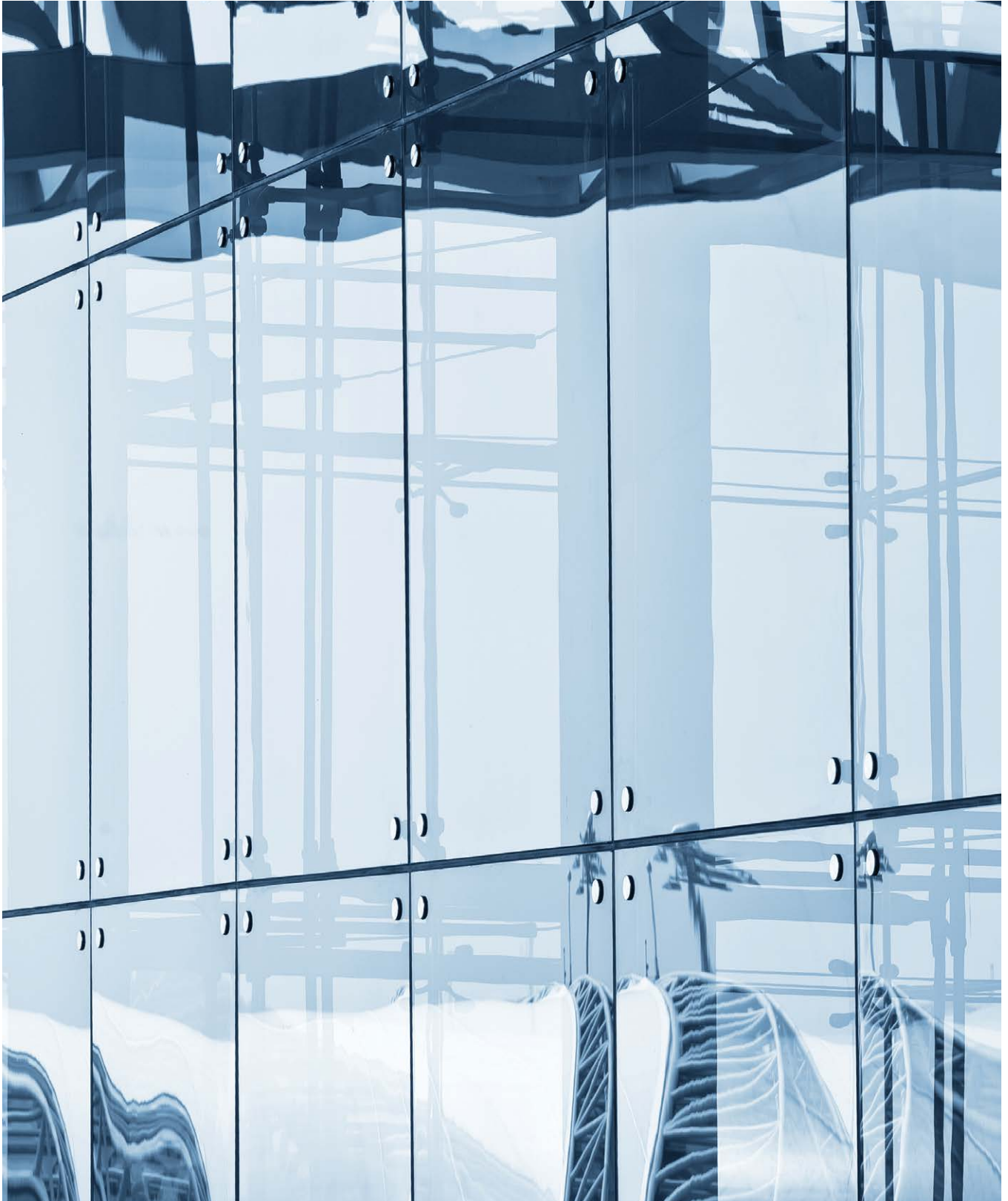
158 See *Minister for Transport for Western Australia v Civcon Pty Ltd (in Liq)* [2003] WASC 99, [5]; Max Bonnell and Peter Megens, 'Third Party Funding: Snapshots from Around the Globe: Australia' (online, 5 March 2012).

159 (2020) 384 ALR 725; [2020] QCA 250.

160 James MacKinnon, 'Using Legal Finance for M&A Arbitrations' in Edward Poulton (ed), *Arbitration of M&A Transactions: A Practical Global Guide* (Globe Law and Business, 2nd ed, 2020) 447.

Rules on third-party funding vary in the scope of their definition of 'third-party funder'. For instance, according to a report published by a joint ICCA and Queen Mary University of London taskforce, the 2021 ACICA Rules adopt a broad definition of 'third-party funding' that extends beyond commercial funding to any third party who provides funding or support for an arbitration, including respondent-side funding, contingency fees by law firms and certain types of insurance.¹⁶¹

Regardless of any disclosure obligation, disclosure will be required if the funded party seeks to claim the payment to the third-party funder as damages or costs.



¹⁶¹ ICCA, [Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration](#) (Report, April 2018). This report contains further analysis on how the definition of 'third-party funding' varies across jurisdictions and institutions.

Investment treaty arbitration between foreign investors and Host States

What is investment treaty arbitration?

Investment treaty arbitration is a dispute settlement mechanism for resolving disputes between a company or individual investor from one State and the country in which they invest (**Host State**) concerning the investment made in or acts or omissions of the Host State in relation to that investment. This type of arbitration is also commonly referred to as ‘Investor-State Dispute Settlement’ or **ISDS**.

The ability of an investor to commence an arbitration directly against the Host State derives from the consent of the Host State given under an investment treaty to submit itself to arbitration in the event of a dispute with a foreign investor.¹⁶²

What are investment treaties?

Investment treaties are agreements between two or more States that give investors from one State party certain legal protections when investing in another State party to the treaty. Investment treaties are intended to promote cross-border direct investment by giving investors greater certainty in their investments and reducing the risk involved in investing in foreign countries.

Investment treaties are generally either standalone bilateral investment treaties (**BITs**) or take the form of investment chapters within multilateral free trade agreements (**FTAs**).

BITs are agreements between two States where each State agrees to protect the investments of investors from the other, with their primary focus being the protection of private direct investment. The substantive protections afforded under BITs are discussed in further detail below, but they generally entail protecting qualifying investors from unfair, inequitable, discriminatory and expropriatory treatment by the Host State.

In contrast, FTAs are agreements between two or more countries with a broader focus designed to reduce or eliminate certain barriers to trade and investment, which may include a chapter on investment protection with a similar reach to BITs.

Dispute resolution under investment treaties

Many BITs and FTAs allow foreign investors who qualify for protection to bring a claim directly against the Host State for breaches of treaty provisions. These treaties contain a legal mechanism that allows parties to bring claims outside of the Host State’s court system and before an independent international arbitral tribunal.

Generally, investment treaty arbitration will proceed before a panel of three arbitrators: one selected by each party and the president of the tribunal selected by the party-appointed arbitrators or an arbitral institution (a process not dissimilar to that adopted in commercial arbitration).

There, however, differences between ISDS and commercial arbitration. One way in which the two are distinguished is by the increasing adoption of transparency requirements in ISDS. Increasingly, parties may be required to publish awards, submissions and evidence (with sensitive or confidential information redacted), and third party participation as *amici curiae* may be allowed.



¹⁶² See, generally, C. L. Lim, Jean Ho and Mārtinš Pāparinskis, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (Cambridge University Press, 2nd ed, 2021) 1.

Advantages of investment treaty arbitration

There are a number of advantages of ISDS:

- **Extra-contractual treaty relief.** Relief available under an investment treaty is extra-contractual and is entirely separate from and additional to any relief available under any contract(s) the investor might have entered into, or under the Host State's domestic law. Therefore, a claim under an investment treaty can arise in circumstances where no contractual relief is available. Indeed, no contractual relationship between the Host State and the investor is required before investor-state arbitration can be invoked, as the right to arbitrate emanates from the relevant treaty. Also, because a treaty claim is extra-contractual, it will not be frustrated by a limitation of liability period under domestic law.
- **Neutral decision-maker.** Disputes will be heard before a neutral arbitral tribunal, the appointment of which the parties can usually participate in. In this sense, the parties are able to avoid having to litigate before national courts. This is particularly important where the national court before which the dispute would proceed has questionable judicial independence.
- **Damages.** Claims under investment treaties may entitle an investor to a greater quantum of damages than claims advanced under contract or domestic law. For example, investment treaty tribunals have awarded expectation damages for profits lost as a consequence of a contract not being performed, which may not be available under domestic laws. Moreover, there is no requirement to apply a particular valuation methodology when calculating damages, which leaves this choice up to the tribunal and can result in significant awards.
- **Leverage in settlement discussions.** The ability to invoke treaty protections can be a powerful negotiating tool in early settlement discussions, as Host States are more likely to engage with an investor where the alternative means having to defend an expensive treaty claim. The existence of an investment treaty claim against a Host State is also generally publicised, and, increasingly, transparency requirements are imposed resulting in the publication of written submissions, evidence and the ultimate award. Host States are also mindful that the amounts of compensation awarded in investment treaty cases are often large and are on the increase, with many awards ranging in the billions of dollars.

When is investment treaty arbitration available?

Investment treaty arbitration will be available if a number of requirements are met, including most importantly that:

- there is an applicable investment treaty between the home State of the investor and the Host State of the investment;
- the claimant is a qualifying 'investor' under the applicable treaty; and
- the claimant's assets in the Host State are a qualifying 'investment' under the treaty.

Is there a relevant investment treaty?

The first question an investor must consider is whether there is an applicable investment treaty that provides an avenue for an ISDS claim. An applicable investment treaty will be one to which the home State of the investor and the Host State of the investment are parties, and which contains consent of the Host State to submit itself to arbitration.

Australia is a party to 15 BITs currently in force with the following countries: Argentina; China; the Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, the Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay.

Australia has entered into bilateral FTAs with the following countries: Chile, China, Hong Kong, India, Indonesia, Japan, Korea, Malaysia, New Zealand, Peru, Singapore, Thailand, the UK and the USA.

Australia also is a party to several multilateral FTAs, including:

- the ASEAN–Australia–New Zealand Free Trade Agreement (**AANZFTA**) (with: Brunei Darussalam, Burma, Cambodia, Indonesia, Laos, Malaysia, New Zealand, the Philippines, Singapore, Thailand and Vietnam);
- the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) (with: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam); and
- the Pacific Agreement on Closer Economic Relations Plus (**PACER Plus**) (with: Cook Islands, Kiribati, Nauru, New Zealand, Niue, Samoa, Solomon Islands, Tonga and Vanuatu, who have signed the agreement but have not yet ratified it).¹⁶³

Several of these BITs and FTAs contain ISDS provisions, but not all.

¹⁶³ For a current list of the FTAs to which Australia is a party, see 'Trade Agreements' section on dfat.gov.au. For a more detailed overview see International Comparative Legal Guides, *ICLG Investor-State Arbitration Laws and Regulations Australia 2023* (Report, 2023).

What if there is no investment treaty between the Host State and the investor's home state?

An investor can still have a treaty claim if there is no investment treaty between the Host State and the investor's home State, but the investment will have to be structured through a corporate vehicle incorporated in a country that has a relevant investment treaty with the Host State.

The time of corporate structuring is important in this context. A company is not entitled to bring a treaty claim where it changed its corporate structure and restructured its investment only to gain access to treaty protections in relation to a specific dispute. If an investment is structured — or restructured — too late, the treaty tribunal might determine that the bringing of a treaty claim is an abuse of process and inadmissible. What is 'too late' will depend on the point in time when the dispute in question with the Host State was 'reasonably foreseeable'. This point in time may be before the Host State actually adopted the measures that the investor claims were in violation of the relevant treaty.

This issue arose in the Philip Morris case against Australia under the Hong Kong-Australia BIT in relation to plain packaging legislation – and it was the reason why Philip Morris lost its case in 2015.¹⁶⁴ Australia argued that the Phillip Morris Group decided to restructure its investment in Australia and transfer its shares to its corporate entity in Hong Kong, PM Asia, after it became aware of possible claims in relation to Australia's future plain packaging legislation and solely for the purpose of obtaining protection under the Hong Kong–Australia BIT if the plain packaging legislation came to pass.

The Tribunal agreed with Australia, having regard to the political developments around the time of the restructuring, even though the legislation in question had not yet been passed. The Tribunal explained that "there was no uncertainty about the Government's intention to introduce plain packaging as of that point. Accordingly, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted, which would trigger a dispute."¹⁶⁵ On this basis, the Tribunal held that the commencement of treaty arbitration by Phillip Morris was an abuse of process and dismissed the claim.

Is the claimant a qualifying investor with a qualifying investment?

Certain jurisdictional hurdles must be met for a company or an individual investor to be afforded protection under an investment treaty.

The two primary hurdles are the requirement that the party meet the definition of an 'investor' in the relevant treaty (i.e. be a 'qualifying investor') and the requirement that the party's assets in the Host State meet the definition of an 'investment' under the relevant treaty (i.e. be a 'qualifying investment'). These terms are more broadly defined than the typical narrow sense of the holder of shares or equity.

The broad definition of 'investor'

There is no general definition of an 'investor', but to qualify as an 'investor' an individual or entity will usually need to be a national of a State party to the investment treaty that is not the State against which the dispute is being brought (the Host State).

For companies, nationality is typically determined by the place of incorporation. It may suffice to simply have a holding company incorporated within the relevant jurisdiction, although the precise requirements will depend on the individual treaty. Some treaties require that the company have real economic activity in its home jurisdiction before it can be considered to be its 'investor' for the purposes of the treaty.

In the case of Australian companies with investments overseas, they must be incorporated in Australia, and their asset(s) must be located in a State with which Australia has concluded an investment treaty. Or it can be the other way around if it is a foreign entity doing work or investing in Australia.

The broad definition of 'investment'

Whether there is a qualifying 'investment' again depends on the specific terms of the applicable treaty.

Today most treaties use a broad asset-based definition of 'investment' which is not limited to shares or debt instruments in an enterprise but includes 'every kind of asset', be it tangible or intangible. This includes assets like a long-term contracts, licenses, permits, intellectual property rights and other properly rights like leases.

In some cases (in particular where an investment claim is brought before ICSID) additional criteria may apply, including that:

- the investor made a substantial contribution in money or kind to the Host State, for example in capital, know-how, resources or labour;
- the investment was made for a certain duration;
- the investor took on risks relating to the investment; and
- the investment contributes to the economic development in the Host State.

¹⁶⁴ *Philip Morris Asia Limited v The Commonwealth of Australia*, PCA Case No 2012–12.

¹⁶⁵ *Award on Jurisdiction and Admissibility* (17 December 2015) [566].

In addition to the requirements of a qualifying investor and investment, investment treaties may contain further conditions that could hinder a treaty claim. For example, some investment treaties require that the investment be made in accordance with local laws for it to be protected under the treaty. This requirement is increasingly being invoked by Host States to allege that an investment procured by fraud or corruption, or where the necessary licences had been obtained in violation of domestic laws, cannot be the subject of ISDS.

Overview of substantive protections

Investment treaties afford a range of substantive protections. The following are some of the most common protections that form the basis of investment treaty claims.

Expropriation

Investment treaties usually prohibit Host States from expropriating an investment without prompt, adequate and effective compensation.

Expropriation can be direct (in the form of nationalisation, formal transfer of title or outright seizure of the investor's assets) or indirect (in the form of one or a series of measures adopted by the Host State without formal transfer of title or seizure of assets but which, alone or in combination, reduce the economic value of the investment).

Increasingly, investment treaties expressly prohibit indirect expropriation. Recent investment treaties negotiated by Australia specify that whether an indirect expropriation has occurred requires a case-by-case, fact-based inquiry that considers, among other factors:

- the economic impact of the government's action (although the fact that an action or series of related actions by a state party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an indirect expropriation has occurred);
- whether the government action breaches the government's prior binding written commitment to the investor, whether by contract, license or other legal document; and
- the character of the government action, including its objective and whether the action is disproportionate to its public purpose.¹⁶⁶

Fair and equitable treatment

Investment treaties usually obligate Host States to protect investors against unfair, arbitrary and discriminatory treatment. This obligation is commonly referred to as the obligation to afford 'fair and equitable treatment' (FET).

As part of the FET obligation, Host States will often be prohibited from acting contrary to a commitment previously made by the State's government that gave rise to the investor's 'legitimate expectations'. This standard is commonly relied upon in treaty cases and may be breached when, for example, the Host State gave the investor a legitimate expectation that it would be allowed to proceed with a project (by, for example, providing specific assurances that the investor would be granted necessary permits) but then breached that expectation. State assurances may be contained in an authorisation or approval, or in a contract or a statement by public officials, or they may be implied from the Host State's conduct, including where the Host State carries out certain administrative processes like an assessment of a project's environmental impacts.

'National treatment' and 'Most favoured nation'

Investment treaties commonly prohibit Host States from treating foreign investors in a way that is discriminatory or less favourable than treatment afforded to comparable domestic investors or investments, and investors or investments from third countries. These protections are referred to as the 'national treatment' and 'most favoured nation (MFN) treatment' obligations.

A MFN provision in an investment treaty may require the Host State to afford the investor from the other state party to the treaty certain protections even where such protections are not expressly provided for in that treaty. This is the result of an interpretation of MFN clauses that allows foreign investors to rely on standards of protection contained in another treaty to which the Host State is a party (i.e. not the treaty between the Host State and the investor's home state), where such standards require more favourable treatment than that prescribed under the treaty with the investor's home State.

Whether such an argument is available will depend on the treaty pursuant to which a claim is brought. Where it is available, the investor will be able to benefit from an expanded breadth of applicable investment protections.

¹⁶⁶ See e.g. *Australia-Indonesia Comprehensive Economic Partnership Agreement*, Chapter 14, Annexure 14-B.

Full protection and security

Investment treaties also commonly obligate Host States to provide ‘full protection and security’ (FPS) to foreign investments.

The application of this obligation has divided investment tribunals and commentators. Traditionally, it has been interpreted as requiring Host States to exercise diligence and protect foreign investors from violence and physical harm caused by State actors and private parties.¹⁶⁷ On this interpretation, it is understood that the FPS standard is meant to protect “specifically the physical integrity of an investment against interference by use of force” and obligates the Host State to take “all measures of precaution to protect the investments of [the foreign investor] in its territory.”¹⁶⁸

However, other tribunals have interpreted the FPS standard more liberally to include an obligation to guarantee to foreign investors and investments not only physical but also legal and commercial security.¹⁶⁹ However, other tribunals have interpreted the FPS standard more liberally to include an obligation to guarantee to foreign investors and investments not only physical but also legal and commercial security.¹⁷⁰

Umbrella clause

Umbrella clauses oblige Host States to observe contractual undertakings and other obligations or commitments they have assumed towards foreign investors or with regard to foreign investments.

There is a divergence of views regarding the content of this obligation, and a variety of interpretations have emerged in practice. On one extreme, umbrella clauses have been interpreted to require the Host State to carry out its contractual and other undertakings under domestic laws, and failing to do so may result not only in a breach of any contract with the foreign investor or a violation of domestic legislation but also a breach of the relevant investment treaty.¹⁷¹

The above interpretation could result in contractual breaches being elevated to treaty breaches where the applicable investment treaty contains an umbrella clause. However, a number of tribunals have expressly disagreed with this interpretation,¹⁷² while others have suggested that contractual breaches will only be elevated to an investment treaty breach where the Host State has acted in a sovereign capacity (and not in a purely private, commercial capacity).¹⁷³

The significance of umbrella clauses remains heavily debated and no consistent view has emerged so far. Ultimately the interpretation of the umbrella clause will depend on the language used in a particular treaty.

Common defences and counterclaims by Host States

A claim brought by a foreign investor can and often is met with defences and counterclaims raised by the Host State

Defences

Broadly speaking, Host State defences fall into three categories:

1. **Jurisdictional and admissibility defences.** Host States may argue that the claimant is not a qualifying investor (e.g. because it was incorporated in a state party to the treaty after the dispute arose only to gain treaty protection), that it does not hold a qualifying investment (because the asset does not meet the treaty’s definition of an ‘investment’), or that the investment was procured illegally in breach of local laws or through corruption or fraudulent conduct.
2. **Customary international law.** Under customary international law, Host States may contend that circumstances exist that preclude wrongfulness under international law of their treaty breaches. Examples of such defences include the defence of necessity (where the challenged measure was “the only way” to safeguard “an essential interest” of the Host State against some form of “grave and imminent peril”¹⁷⁴),

167 See e.g. *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* ICSID Case No ARB/87/3.

168 *Saluka Investments B.V. v Czech Republic*, PCA Case No 2001–4, Partial Award of 17 March 2006 [483]–[484]; *American Manufacturing & Trading, Inc. (AMT) (USA) v Republic of Zaire*, ICSID Case No ARB/93/1, Award of 21 February 1997 [6.05].

169 See e.g. *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No ARB/05/22; *Vivendi v Argentina*, ICSID Case No ARB/97/3, Award of 20 August 2007 [7.4.15]; *Azurix Corp v Argentina*, ICSID Case No ARB/01/12; *Global Telecom Holding S.A.E. v Canada*, ICSID Case No ARB/16/16, Award of 27 March 2020 [664]–[665].

170 See e.g. *Frontier Petroleum Services Ltd v The Czech Republic*, Award of 12 November 2010 [272]–[273].

171 See e.g. *Noble Ventures Inc v Romania*, ICSID Case No.ARB/01/11, Award of 12 October 2005 [53]–[61].

172 See e.g. *Oxus Gold v Uzbekistan*, Ad Hoc Arbitration, Award of 17 December 2015 [371]; *Joy Mining Machinery Limited v Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction of 6 August 2004 [81].

173 See e.g. *CCMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Award of 15 May 2005 [299]–[303].

174 International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) (‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’) Article 25 (Articles on State Responsibility). There have been cases where the Host State argued that civil unrest in opposition to the investment gave rise to a state of necessity justifying the measures resulting in the alleged breach. See *South American Silver Limited v Bolivia*, PCA Case No 2013-15, Award of 22 November 2018.

or force majeure (where the measure in question was introduced in response to an unforeseen event that was beyond the State's control and made it materially impossible for the Host State to comply with its treaty obligations¹⁷⁵).

3. **Defences on the merits.** A commonly invoked defence is the police powers doctrine, which allows Host States to rely on their inherent power to regulate in the public interest and to protect the safety of their people and public order. On this basis, a Host State might not be liable for expropriatory measures if they are the consequence of general regulation in the public interest that is necessary and legitimate to protect human life, safety or public order.¹⁷⁶

States also increasingly rely on the concept of 'social license to operate'. This principle invokes the notion that investors must secure a level of community acceptance and approval to carry out their investment projects.

Host States raise the absence of a social licence in a variety of contexts. They may challenge the admissibility of a claim, arguing that the claimant cannot claim as against the Host State when it had failed to obtain local support for the project, which was the cause of its demise. Or they can rely on the absence of a social license to argue that the challenged measure was necessary and legitimate to protect the rights of local communities. Finally, the lack of a social licence has also been raised in the context of damages assessment. Tribunals can reduce the amount of damages to reflect the claimant's contributory negligence in failing to consult with local residents, which contributed to community opposition to the project.¹⁷⁷

Counterclaims

Whether the Host State is permitted to bring a counterclaim in an investment treaty arbitration depends on the applicable treaty. Not every tribunal will have jurisdiction to hear a Host State counterclaim.

Where arbitral jurisdiction to hear counterclaims has been provided for under the relevant investment treaty, examples of Host State counterclaims have included:

- claims for environmental damage caused by the investment;¹⁷⁸ and

- claims based on alleged human rights violations committed by the claimant investor.¹⁷⁹

Despite difficulties in bringing a successful counterclaim, they are becoming increasingly more common, and the evolution in treaty drafting in modern BITs and FTAs provides for new avenues for Host States to bring counterclaims by incorporating environment protection and corporate social responsibility requirements applicable to foreign investments.

Enforcement of investment treaty awards

Like awards issued in commercial arbitration, ISDS awards benefit from international conventions that govern the recognition and enforcement of awards in various jurisdictions around the world. The two most important conventions include:

- the ICSID Convention (governing the enforcement of ICSID awards); and
- the New York Convention (governing the enforcement of non-ICSID awards).

The recognition and enforcement of ICSID awards is governed by Part IV of the IAA. Non-ICSID awards are enforced under Part II of the IAA.

With the exception of some States, voluntary compliance with awards is not uncommon and therefore no enforcement proceedings are necessary.

Under the ICSID Convention, Contracting States are obliged to recognise an ICSID award as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State.¹⁸⁰ In order to seek recognition of an ICSID award in an ICSID Convention State, all that the successful investor must do is to furnish to the competent court (in Australia, a state or territory supreme court or the Federal Court of Australia¹⁸¹) a copy of the award certified by the Secretary-General of ICSID.¹⁸²

Contrary to recognition and enforcement, execution is governed by national laws concerning execution of judgments,¹⁸³ subject to the application of national laws relating to foreign state immunity.¹⁸⁴

175 Articles on State Responsibility, article 23.

176 See e.g. *Chemtura Corporation v Canada*, PCA Case No 2008-01, Award of 2 August 2010 [266]; *LG&E Energy Corp. and others v Argentina*, ICSID Case No ARB/02/1, Decision on liability of 3 October 2006 [195].

177 *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No 2012-2, Award of 15 March 2016; *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award of 30 November 2017.

178 See e.g. *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim of 11 August 2015; *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Ecuador's Counterclaims of 7 February 2017.

179 *Urbaser S.A and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentina* ICSID Case No ARB/07/26, Award of 8 December 2016.

180 ICSID Convention, article 54(1).

181 IAA, section 35.

182 ICSID Convention, article 54(2).

183 ICSID Convention, article 54(3).

184 ICSID Convention, article 55.

Because ISDS awards are rendered against States, recognition and enforcement proceedings will often be met by sovereign immunity defences raised by respondent States. Sovereign award debtors may contend that the enforcement court lacks subject matter jurisdiction against States or that its property is protected against execution.

The interaction between sovereign immunity laws and enforcement and recognition regimes is a complex area of law. It was most recently dealt with by the High Court of Australia in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* (2023) 408 ALR 658; [2023] HCA 11, where the Court held that sovereign immunity cannot be relied upon to prevent a foreign investor from seeking recognition and enforcement of an ICSID award.¹⁸⁵

The case originated in applications commenced in the Federal Court by Eiser Infrastructure Ltd (**Eiser**) and Energia Solar Luxembourg S.à.r.l., on the one hand, and Infrastructure Services Luxembourg S.à.r.l. (**Infrastructure Services**) and Energia Termosolar B.V., on the other, for the recognition and enforcement of their respective awards won against Spain under the Energy Charter Treaty (*ICSID Case No ARB/13/36* and *ICSID Case No ARB/13/31*, respectively). The applications were heard together (but the former was ultimately discontinued upon annulment of the underlying ICSID award).

Spain contested the jurisdiction of the Federal Court on the basis that it was immune from suit pursuant to section 9 of the FSIA, which provides that “[e]xcept as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding”. One exception to an assertion of foreign state immunity is where a State has submitted itself to jurisdiction, including by agreement in writing (FSIA, section 10(2)). The Federal Court found that, by ratifying the ICSID Convention, Spain had waived its ability to rely on foreign state immunity to prevent recognition and enforcement of the arbitral awards. The Federal Court made orders, among others, that Spain pay the awarded sums and that Eiser and Infrastructure Services have leave to have the awards enforced.

After the award granted in favour of Eiser was annulled, Spain appealed the lower court’s decision in respect of Infrastructure Services. The Full Court of the Federal Court of Australia upheld the lower court’s decision but departed from its judgment in one respect. The Full Court held that Spain’s entry into the ICSID Convention amounted to waiver of immunity from a proceeding for the recognition of an award. However, this was not the case for execution and perhaps not for enforcement. The Full Court corrected the

orders of the Federal Court because they went beyond the scope of “recognition only”. The Full Court made new orders, including for the award to be recognised as binding and for judgment to be entered against Spain.

On 12 April 2023, the High Court dismissed Spain’s appeal and upheld the orders of the Full Court with one clarification. The High Court concluded that Spain’s entry into the ICSID Convention did amount to waiver of foreign state immunity from the jurisdiction of Australian courts in proceedings to recognise and enforce an ICSID award but not in respect of execution.

The High Court found that a waiver by agreement for the purposes of section 10(2) of the FSIA can be inferred even if an international agreement does not expressly use the word ‘waiver’, provided that the implication is clear from the words used and the context.¹⁸⁶ Applying this test, the High Court found that Spain’s waiver for the purposes of section 10(2) was “unmistakable” and arose out of Spain’s agreement to articles 53–55 of the ICSID Convention.¹⁸⁷

The High Court also helpfully clarified the meaning of the terms ‘recognition’, ‘enforcement’ and ‘execution’ in articles 53–55 of the ICSID Convention. The Court adopted the definitions used in the recently approved version of the proposed *Restatement of the Law: The US Law of International Commercial and Investor-State Arbitration* published by the American Law Institute.¹⁸⁸

- **Recognition** is the court’s “determination ... that an international arbitral award is entitled to be treated as binding”; involving the court’s “acceptance of the award’s binding character and its preclusive effects”.
- **Enforcement** is “the legal process by which an international award is reduced to a judgment of a court that enjoys the same status as any judgment of that court”.
- **Execution** is “the means by which a judgment enforcing an international arbitral award is given effect. The execution process commonly involves measures taken against the property of the judgment debtor by a law-enforcement official ... acting pursuant to a writ of execution”.

The Court concluded that the orders made by the Full Court were properly characterised as orders for recognition and enforcement, and that they should remain undisturbed as such.¹⁸⁹

The process for seeking recognition and enforcement of non-ICSID awards is the same as that discussed in chapter 6 regarding commercial arbitration.

185 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* (2001) 284 FCR 319; [2021] FCAFC 3; *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157.

186 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* (2023) 408 ALR 658; [2023] HCA 11 at [26].

187 *Ibid* [29].

188 *Ibid* [45].

189 *Ibid* [8].

Australia as a respondent in ISDS proceedings

Until 2023, Australia was a party to only one reported investor-state arbitration that ran its course. Two further cases against Australia were threatened or notified but were not ultimately pursued. In 2023, at least one further case was commenced against the Australian Government.

In terms of Australian claimants, since 2010, a number of arbitrations have been registered by investors whose home country is Australia. Known arbitrations have been brought against the Dominican Republic, Egypt, Georgia, India, Indonesia, Mongolia, Pakistan, Papua New Guinea, Poland and Thailand. Several proceedings remain pending. Two disputes have been decided in favour of the investor and one in favour of the Host State.

2012 Philip Morris case: a lesson on treaty shopping

In 2012, Philip Morris commenced UNCITRAL arbitral proceedings against Australia under the Hong Kong–Australia BIT. The dispute arose out of Australia’s implementation of tobacco plain-packaging laws. Philip Morris alleged, among other things, that Australia had not afforded Philip Morris fair and equitable treatment and that Australia had indirectly expropriated its assets. Ultimately, the Tribunal dismissed Philip Morris’ claims for jurisdictional reasons.

As discussed above, the Tribunal disallowed the claim on the basis that it constituted inappropriate treaty shopping. It found that the Phillip Morris Group restructured its investment in Australia and transferred its shares to its corporate entity in Hong Kong after it became aware of possible claims in relation to Australia’s future plain packaging legislation and solely for the purpose of obtaining protection under the Hong Kong–Australia BIT if the plain packaging legislation came to pass.

The Tribunal considered that the dispute was “reasonably foreseeable” at the time of the restructuring even though the legislation had not yet been passed, given that the Government’s intention to introduce plain packaging had already been clear as of that point. The claim was dismissed on this basis.

Other ISDS claims

In late 2015, US shareholders in NuCoal, an Australian mining company, expressed intention to pursue claims against Australia under several FTAs, including the Australian–United States Free Trade Agreement (**AUSFTA**), over legislation enacted by the New South Wales Government that cancelled the company’s mining license without compensation. In November 2016, another US investor, power generation company APR Energy, notified a dispute against Australia under the AUSFTA. Broadly, the dispute related to the seizure of the claimant investor’s power turbines by one of Australia’s major private banks. Australia responded to the Notice of Dispute stating that APR Energy could not bring a dispute under the AUSFTA because, inter alia, the treaty does not provide for investor-state arbitration. In neither case was arbitration formally commenced.

In 2023, Zeph Investments Pty Ltd (**Zeph**), the Singaporean parent company of Australia-incorporated Mineralogy Pty Ltd (**Mineralogy**), commenced UNCITRAL arbitral proceedings against Australia under the AANZFTA for alleged breaches over the passing of legislation by the Western Australian State Parliament, the [Iron Ore Processing \(Mineralogy Pty Ltd\) Agreement Amendment Act 2020 \(WA\) \(2020 Amendment Act\)](#). The legislation unilaterally amended an agreement between the State of Western Australia and Mineralogy, with the effect of extinguishing rights and preventing Zeph’s ultimate owner, Clive Palmer, from seeking compensation in an arbitration over a Pilbara iron ore project. In October 2021, the High Court considered a challenge to the 2020 Amendment Act and found in favour of the State of Western Australia, stating that Australia’s arbitration legislation allowed changes to the law applicable to the arbitration agreement, including by the legislation at issue.¹⁹⁰

There have been reports of a second investment treaty arbitration commenced under the AANZFTA in 2023 by Zeph against Australia, this time in relation to certain mineral exploration permits held by Mr Palmer’s Australian company, Waratah Coal Pty Ltd (owned, indirectly, by Zeph), in the Galilee Basin of Queensland.

190 [Mineralogy Pty Ltd v Western Australia](#) [2021] HCA 30 at [162]–[165].

Annexure 1: Model arbitration clauses

ACICA¹⁹¹

“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/Melbourne/Perth/Brisbane/Adelaide], 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 11 of the ACICA Arbitration Rules].”

RI¹⁹²

“Any dispute or difference whatsoever arising out of or in connection with this contract or the performance or non-performance of the obligations of the parties under it shall be submitted to arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules.”

HKIAC¹⁹³

“Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

The law of this arbitration clause shall be ... (Hong Kong law).

The seat of arbitration shall be ... (Hong Kong).

The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language).”

SIAC¹⁹⁴

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].

The Tribunal shall consist of _____ arbitrator(s).

The language of the arbitration shall be _____.”

LCIA¹⁹⁵

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of [].”

ICC¹⁹⁶

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

191 ACICA, ACICA Model Arbitration Clause, available at acica.org.au.

192 Resolution Institute, Resolution Institute Arbitration Rules, available at resolution.institute/Web.

193 HKIAC, Model Clauses, available at hkiac.org.

194 SIAC, SIAC Model Clause, available at siac.org.sg

195 LCIA, Arbitration and ADR Worldwide, available lcia.org.

196 ICC, Arbitration: Standard ICC Arbitration Clauses (English Version), available at iccwbo.org.

Annexure 2: Comparison of arbitration institutional rules

	ACICA Rules 2021	RI Rules 2020	HKIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Seat of arbitration	If the parties cannot agree, the seat is Sydney, Australia (r 27).	If the parties cannot agree, the seat is determined by the arbitrator having regard to the circumstances of the case, including by reason of convenience (r 18).	If the parties cannot agree, the seat is Hong Kong unless the Tribunal determines that another seat is more appropriate, having regard to the circumstances of the case (r 14).	If the parties cannot agree, the seat is determined by the Tribunal, having regard to the circumstances of the case (r 21).	If the parties cannot agree, the seat is London, England unless the Tribunal considers that another seat is more appropriate (r 16).	If the parties cannot agree, the seat is determined by the ICC Court (r 18).
Language	Unless otherwise agreed by the parties, the language is determined by the Tribunal (r 28).	Unless otherwise agreed by the parties, the language is English (r 19).	Unless otherwise agreed by the parties, the language is determined by the Tribunal (r 15).	Unless otherwise agreed by the parties, the language is determined by the Tribunal (r 22).	Unless otherwise agreed by the parties in writing, the language is the prevailing language of the arbitration agreement or otherwise determined by the LCIA Court if the arbitration agreement is written in more than one language of equal standing (r 17).	Unless otherwise agreed by the parties, the language or languages of the arbitration is determined by the Tribunal, having regard to all relevant circumstances including the language of the contract (r 20).
Method of commencing arbitration	Party initiating arbitration submits a Notice of Arbitration to ACICA and the respondent(s) pays the registration fee (r 6).	Party initiating arbitration submits a Notice of Arbitration to the respondent(s) (r 3).	Party initiating arbitration submits a Notice of Arbitration to HKIAC and the respondent(s) (r 4).	Party initiating arbitration submits a Notice of Arbitration to the Registrar of the Court of Arbitration of SIAC and the respondent(s) (r 3).	Party initiating arbitration submits a Request for Arbitration to the Registrar of the LCIA Court and the respondent(s) (r 1).	Party initiating arbitration submits a Request for Arbitration to the ICC Secretariat, and the ICC Secretariat will notify the respondent(s) (r 4).
Number of arbitrators	If the parties cannot agree, ACICA determines the number of arbitrators taking into account all relevant circumstances (r 11).	Dispute decided by a sole arbitrator, unless the parties otherwise agree (r 7).	If parties have not agreed, HKIAC determines whether the case is referred to a sole arbitrator or three arbitrators, taking into account the circumstances of the case (r 6).	Dispute decided by a sole arbitrator, unless parties otherwise agree or it appears to the Registrar that the circumstances warrant the appointment of three arbitrators (r 9).	Dispute decided by a sole arbitrator, unless parties otherwise agree in writing or the LCIA Court determines that three arbitrators is more appropriate (or exceptionally, more than three arbitrators) (r 5.8).	Dispute decided by a sole arbitrator or three arbitrators. If parties cannot agree, the ICC Court will appoint a sole arbitrator except where it decides that the dispute warrants appointment of three arbitrators (r 12).
Appointment of the arbitrator(s)	If a sole arbitrator, parties can agree or ACICA appoints the arbitrator if there is no agreement (r 12). If three arbitrators, each party nominates one arbitrator and the two arbitrators nominate a third arbitrator, who will act as Chairperson of the Tribunal (r 13).	Parties can agree, otherwise the arbitrator is the nominee of the RI if there is no agreement (r 8).	If a sole arbitrator, parties can agree or HKIAC appoints the arbitrator if there is no agreement (r 7). If three arbitrators, each party nominates one arbitrator and the two arbitrators appointed designate a third arbitrator, and HKIAC shall appoint any arbitrator if either of the parties or the two appointed arbitrators fail to do so (r 8).	If a sole arbitrator, parties can agree or the President of SIAC appoints if there is no agreement (r 10). If three arbitrators, each party nominates an arbitrator and the third arbitrator is appointed by the President of SIAC, except where the parties have agreed upon another procedure (r 11).	The LCIA Court appoints the arbitrator(s), but will take into account any written agreement or nomination by the parties (r 5.9).	If a sole arbitrator, parties can agree or the ICC Court appoints the arbitrator if there is no agreement (r 12.3). If three arbitrators, each party nominates one arbitrator and the ICC Court appoints the third arbitrator who will act as president of the Tribunal, except where the parties have agreed upon another procedure (r 12.4).

	ACICA Rules 2021	RI Rules 2020	HKSIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Challenges to jurisdiction of the Tribunal	The Tribunal has the power to rule on its own jurisdiction (r 32).	If seated in Australia or New Zealand, the applicable legislation applies, otherwise the arbitrator has the power to rule on their own jurisdiction (r 23).	The Tribunal has the power to rule on its own jurisdiction (r 19).	The Tribunal has the power to rule on its own jurisdiction (r 28). If the Tribunal is not constituted, the Registrar shall refer a challenge to the validity of the arbitration agreement or competence of SIAC to the Court of Arbitration of SIAC, which considers whether it is prima facie satisfied that the arbitration should proceed (r 28).	The Tribunal has the power to rule on its own jurisdiction (r 23).	The Tribunal has the power to rule on its own jurisdiction but the Secretary General may refer the matter to the ICC Court for determination (r 6.9).
Confidentiality and privacy	Unless the parties otherwise agree in writing, all hearings take place in private (r 26.1). The parties, the Tribunal and ACICA shall treat the award, all materials created for the purpose of the arbitration and documents produced by another party in the proceedings as confidential and will not disclose this information except in specific circumstances (r 26.2).	If seated in Australia or New Zealand, the applicable legislation applies, otherwise the parties, the arbitrator and RI undertake to keep confidential all materials related to the arbitration, except in specific circumstances (r 46).	Unless the parties otherwise agree, no party or party representative may disclose any information relating to the arbitration under the arbitration agreement or the award or emergency decision except in specific circumstances (r 45.1). Confidentiality rules also apply to the Tribunal, an emergency arbitrator, experts, witnesses, tribunal secretaries and the HKSIAC (r 45.2).	Unless the parties otherwise agree, any party involved in the arbitration shall at all times treat all matters relating to the proceedings and the award as confidential (r 39.1). All parties shall not disclose any matters relating to the proceedings and the award to a third party without prior written consent of the parties, except in specific circumstances (r 39.2).	The parties undertake to keep confidential all awards, materials created for the purpose of the arbitration and all other documents produced by the other party for the arbitration, except in specific circumstances (r 30.1). Confidentiality rules also apply to the Tribunal, any tribunal secretary and any expert (r 30.2). LCIA will only publish any award or part of an award with the prior written consent of all parties and the Tribunal (r 30.3).	No provision on confidentiality of information or materials relating to the arbitration. However, upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information (r 22.3). The ICC Practice Note on the Conduct of the Arbitration under the ICC Rules of Arbitration provides that un-redacted awards may be published within two years unless the parties object to the publication or require award be anonymised.
Procedure	Subject to the Rules, the Tribunal can conduct the arbitration in such manner as it considers appropriate, provided the parties are treated equally and each party is given a reasonable opportunity of presenting its case (r 25.1). The Tribunal shall adopt suitable procedures to avoid unnecessary delay or expense, having regard to the complexity of the issues and amount in dispute (s 25.2).	The arbitrator can conduct the arbitration in such manner it considers appropriate, provided that the parties are to be treated equally and each party is given a reasonable opportunity to know the case to be presented by every other party and to present its case (r 17.1). The arbitrator, in exercising their discretion, shall conduct the arbitration to avoid unnecessary delay and expense, and provide a fair and efficient process for resolving the parties' dispute (r 17.1).	Subject to the Rules, the Tribunal will adopt suitable procedures for the conduct of the arbitration to avoid unnecessary delay or expense, having regard to the complexity of the issues, amount in dispute and effective use of technology, ensuring equality of the parties and affording the parties a reasonable opportunity to present their case (r 13.1).	The Tribunal can conduct the arbitration in a manner it considers appropriate after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute (r 19).	The Tribunal has discretion to discharge its general duties to act fairly and impartially as between all parties, giving each a reasonable opportunity to present its case and adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense (r 14).	The Tribunal can adopt procedural measures as it considers appropriate, provided they are not contrary to any agreement of the parties, making every effort to conduct the arbitration in an expeditious and cost-effective manner (r 22).

	ACICA Rules 2021	RI Rules 2020	HKIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Multi-party disputes (joinder, consolidation, concurrent hearings)	<p>Provides for joinder where the joining party is bound by the same arbitration agreement as the existing parties, or all parties expressly agree (r 17).</p> <p>Provides for consolidation of multiple arbitrations pending under the ACICA Rules, subject to certain requirements (r 16).</p> <p>Provides for multiple arbitrations to be conducted at the same time, one immediately after the other, or to suspend any arbitration until after determination of another arbitration where the same Tribunal is constituted in each arbitration and a common question of fact or law arises in all arbitrations (r 19).</p> <p>Provides for claims arising out of or in connection with more than one contract to be made in a single arbitration, subject to certain requirements (r 18).</p>	<p>No provision on joinder or multi-party disputes.</p> <p>Provides for consolidation or concurrent hearing where a further dispute arises under the same contract and under the RI Rules (rr 22.3–22.4).</p>	<p>Provides for joinder where joining party is bound by an arbitration agreement under the HKIAC Rules, or all parties expressly agree (r 27).</p> <p>Provides for consolidation where parties agree to consolidate, all claims are made under the same arbitration agreement, or a common question of law or fact arises in all the arbitrations or the rights to relief are in respect of the same transaction and the arbitration agreements are compatible (r 28).</p> <p>Provides for concurrent proceedings where the same Tribunal is constituted in each arbitration, and a common question of law or fact arises in all the arbitrations (r 30).</p> <p>Provides for claims arising out of or in connection with more than one contract to be made in a single arbitration, subject to certain requirements (r 29).</p>	<p>Provides for joinder where joining party is prima facie bound by the arbitration agreement or all parties have consented to the joinder (r 7).</p> <p>Provides for consolidation where all parties agree, all claims in the arbitration are made under the same arbitration agreement, or the arbitration agreements are compatible and either the disputes arise out of the same legal relationship(s), out of contracts consisting of a principal contract and its ancillary contract(s) or out of the same transaction(s) (r 8).</p> <p>Provides for claims arising out of or in connection with more than one contract to be consolidated into one arbitration (r 6).</p>	<p>Provides that the Tribunal can allow third persons to be joined to the arbitration where all parties have expressly agreed to such joinder (r 22.1(x)).</p> <p>Provides for consolidation if the parties all agree or the arbitrations are all subject to the LCIA Rules, commenced under the same or compatible arbitration agreements, and are either between the same disputing parties or arising out of the same transaction, provided that no Tribunal has been formed or, if already formed, the Tribunals are composed of the same arbitrator(s) (r 22A).</p> <p>Provides for concurrent arbitrations where arbitrations have already been constituted with the same Tribunal, are all subject to the LCIA Rules, commenced under the same or compatible arbitration agreements and either between the same disputing parties or arising out of the same transaction (r 22A).</p>	<p>Provides for joinder after constitution of the Tribunal where all parties agree or joining party accepts the constitution of the Tribunal and agrees to the terms of reference and the Tribunal decides to grant the request for joinder. The Tribunal will take into account all relevant circumstances, including whether the Tribunal has prima facie jurisdiction over the additional party, the timing of the request, possible conflicts of interest and impact of joinder on the procedure (r 7).</p> <p>Provides for consolidation where the parties have agreed, all of the claims are made under the same arbitration agreements or the claims are not under the same arbitration agreements but the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the ICC Court finds the arbitration agreements to be compatible (r 10).</p> <p>Provides for claims arising out of or in connection with more than one contract to be made in a single arbitration, irrespective of whether the claims are made under one or more arbitration agreement under the ICC Rules (r 9).</p>

	ACICA Rules 2021	RI Rules 2020	HKIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Emergency or expedited procedure	Provides for expedited procedure in accordance with the ACICA Expedited Rules if the amount in dispute is under AU \$5,000,000, the parties agree, or it is a case of exceptional urgency (r 8).	Provides for expedited procedure in accordance with the RI Expedited Arbitration Rules where the arbitration agreement was made before 1 January 2023 if all parties agree, or where the arbitration agreement was made on or after 1 January 2023 and the amount in dispute is under AU \$2,000,000 (unless all parties opt-out) (r 48).	Provides for expedited procedure if the amount in dispute is under HK \$25,000,000, the parties agree or it is a case of exceptional urgency (r 42).	Provides for expedited procedure if amount in dispute is under S \$6,000,000, the parties agree or it is a case of exceptional urgency (r 5).	Provides for expedited procedure and appointment of an emergency arbitrator if approved by the LCIA Court (rr 9A, 9B).	Provides for emergency arbitration upon application of a party in accordance with the ICC Emergency Arbitrator Rules (r 29). Provides for expedited procedure if the amount in dispute is under US \$2,000,000 if the arbitration agreement was concluded between 1 March 2017 and 1 January 2021, or under US \$3,000,000 if the arbitration agreement was concluded after 1 January 2021, or the parties so agree (r 30).
Time limits on awards	Unless agreed otherwise, the final award shall be made no later than 9 months from the date the file was transmitted to the Tribunal or no later than 3 months from the date the Tribunal declares the arbitration proceedings closed, whichever is earlier (r 39.3).	The arbitrator must use its best endeavours to deliver all awards within 365 days of its appointment, and provide reasons to the RI and the parties if there is delay (r 16).	No limit on time for making an award.	The Tribunal must submit a draft award to the Registrar for review within 45 days from the date on which the Tribunal declared the proceedings closed (r 32.3).	The Tribunal will seek to make its final award as soon as reasonably possible and will endeavour to do so no later than three months following last submission from the parties, in accordance with a timetable notified to the parties and Registrar as soon as possible (r 15.10).	The Tribunal must make its final award within six months from the date of signature of the Terms of Reference (r 31.1). The ICC Court may fix a different time limit or extend the time limit following a request from the Tribunal (r 31.2).
Review of the award	No review of the award.	No review of the award.	No review of the award.	The Tribunal must submit a draft of the award to the Registrar, who approves the form of the award, may suggest modifications and can draw the Tribunal's attention to points of substance (r 32.3).	No review of the award.	The Tribunal must submit a draft of the award to the ICC Court, which approves the form of the award, may lay down modifications and can draw the Tribunal's attention to points of substance (r 34).

	ACICA Rules 2021	RI Rules 2020	HKIAC Rules 2018	SIAC Rules 2016	LCIA Rules 2020	ICC Rules 2021
Costs						
Administrative fees	Costs are outlined in the Schedule of Fees effective 1 April 2021, including fees for registration, consolidation, joinder, emergency arbitrator, arbitrator replacement and cancellation.	A fee of A\$550.00 (including GST) is payable by the applicant for nominating an arbitrator.	Costs are determined according to an hourly rate outlined in Schedule 2 or schedule of fees based on sum in dispute outlined in Schedule 3, depending on the parties' agreement (r 10).	Costs are outlined in the Schedule of Fees effective 1 August 2016, including fees for case filing, administration, arbitrator(s), appointment and assessment (r 34).	Costs are determined by the LCIA Court in accordance with the Schedule of Costs effective 1 October 2020, including fees for registration and hourly rates for the Secretariat of the LCIA and the LCIA Court (r 28.1).	Costs are determined by the ICC Court and outlined in schedule of fees, including fees for filing the arbitration, arbitrator's fees and administrative expenses (r 38).
Security for costs	The Tribunal can make an order requiring a party provide security for costs as a condition for granting an interim measure (r 37.4).	The arbitrator can make an order requiring a party to provide security for costs (r 43.4(c)).	The Tribunal can make an order requiring a party to provide security for costs (r 24).	The Tribunal can make an order requiring a party to provide security for all or any amount in dispute (r 27(j)).	The Tribunal can make an order requiring a party provide security for costs as a condition for granting an interim measure (r 25.2).	The Tribunal can make an order requiring a party provide security for costs as a condition for granting an interim measure (r 28.1).
Decision on costs of arbitration	Costs are fixed by the Tribunal either in the final award, in a separate award on agreed terms, or in an order for the termination of the arbitration (r 51.1). In principle, the costs of the arbitration shall be borne by the unsuccessful party, but the Tribunal may apportion costs as it determines reasonable (r 51.3).	Costs are at the discretion of the arbitrator (r 40).	Costs are determined by the Tribunal (r 34).	Costs are determined by the Tribunal, unless otherwise agreed by the parties (r 35).	Costs are determined by the LCIA Court in accordance with the Schedule of Costs (r 28.1). The Tribunal has the power to decide by an order or award that all or part of the legal or other expenses incurred by a party be paid by another party (r 28). In principle, the costs of the arbitration and legal costs should reflect the parties' relative success and failure in the award or arbitration or under different issues, except where the Tribunal considers it would be inappropriate (r 28.4).	Costs are determined by the ICC Court, taking into account circumstances it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner (r 38).
Third party funding	Provides for disclosure of third party funding (r 54).	No provision.	Provides for disclosure of third party funding (r 44).	No provision.	No provision.	Provides for disclosure of third party funding (r 11.7).

Annexure 3: Comparison of confidentiality provisions

	CAA	IAA	ACICA Rules 2021
Basis for application	Opt out (s 27E(1))	Opt out (s 22(2))	Opt out (art 26.1)
Language	Unless otherwise agreed by the parties, the language is determined by the Tribunal (r 28).	Unless otherwise agreed by the parties, the language is English (r 19).	Unless otherwise agreed by the parties, the language is determined by the Tribunal (r 15).
Confidentiality obligation	<p>Section 27E prohibits disclosure of confidential information by the parties and the tribunal unless:</p> <ul style="list-style-type: none"> an exception under section 27F applies; disclosure is allowed under an order made by the tribunal under section 27G, and there is no court order prohibiting disclosure under section 27H; or disclosure is allowed under a court order made under section 27I. 	<p>Section 23C prohibits disclosure of confidential information by the parties and the tribunal unless:</p> <ul style="list-style-type: none"> an exception under section 23D applies; disclosure is allowed under an order by the tribunal made under section 23E, and there is no court order prohibiting disclosure under section 23F; or disclosure is allowed under a court order made under section 23G 	<p>Article 26.2 extends the obligation of confidentiality to the parties, the arbitral tribunal and ACICA and covers "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 arbitration proceedings and not in the public domain" unless any of the exceptions under article 26.2 apply.</p> <p>Article 26.3 prohibits the disclosure of any information or documents provided by another party in the proceedings otherwise than for purposes of the arbitration.</p> <p>Article 26.5 provides that to the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling on the witness is responsible for the witness' maintenance of the same degree of confidentiality as required of the parties.</p>
Expectations	<p>Section 27F sets out the circumstances in which confidential information may be disclosed including:</p> <ul style="list-style-type: none"> with parties' consent; where disclosure is to a professional or other adviser of any of the parties; where disclosure is required to ensure a party has a reasonable opportunity to present their case; where disclosure is necessary to establish or protect a party's legal rights in relation to a third party; where disclosure is necessary to enforce an arbitral award; where disclosure is necessary for purposes of the CAA; where disclosure is in accordance with a court-issued order or subpoena; where disclosure is authorised or required <p>Section 27H provides that the Court may prohibit disclosure of confidential information based on, inter alia, public interest and unreasonableness.</p> <p>Section 27I allows the Court to make an order allowing disclosure on the basis of public interest, provided that the disclosure is reasonable. This order may only be made upon application by a party to the arbitration, and after each of the parties have had an opportunity to be heard.</p>	<p>Section 23D contains the same exceptions as in CAA section 27F.</p> <p>Section 23G is substantially the same as CAA section 27H.</p> <p>Section 23G is substantially the same as CAA section 27I.</p>	<p>Article 26.2 allows disclosure:</p> <ul style="list-style-type: none"> for the purpose of making an application to any competent court; for the purpose of making an application to the courts of any State to enforce the award; pursuant to the order of a court of competent jurisdiction; if required by the law of any State which is binding on the party making the disclosure; if required to do so by any regulatory body; or to a person for the purposes of having or seeking third-party funding, where that person has agreed to keep the material and information supplied confidential. <p>Articles 26.2, 26.3 and 26.6 also contemplate the following exceptions to confidentiality:</p> <ul style="list-style-type: none"> with parties' prior written consent; where the information is in the public domain; where disclosure is made to a witness for the purpose of the arbitral proceedings.

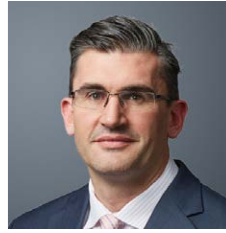
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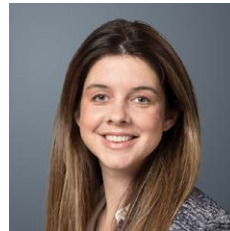
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