A STUDY ON WORKING OF INTERNATIONAL COMMERCIAL ARBITRATION CENTRES: WITH SPECIAL REFERENCE TO AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION (ACICA)

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ABSTRACT

With considerable increments in the number of disputes, commercial arbitration emerged as a more feasible method of dispute resolution. This solid pattern can be mostly ascribed to creating and quickly industrializing economies and the resulting rise in commercial prospects and related disputes. In any case, given that international arbitration depends fundamentally on common assent, organizations and legal professionals probably be fulfilled that resolution of disputes by arbitration was reasonable, effective, and enforceable. Parties to the contract should initially have had constructive disposition towards arbitration, and furthermore had the option to comprehend the particular elements and choices to be made which impact the specific manners by which arbitration might be led. There is always a dimension of competition between arbitral jurisdictions. Potential seats take dynamic measures to elevate their way to deal with arbitration; else there is a possibility of decrease in the aggressive global commercial center. Neglecting to display appealingly may have unavoidable adverse outcomes, particularly as far as the improvement international legal capability of jurisdiction and the association of its legal and different experts in international exchange and business is concerned. This paper will deal with different types of Arbitration- Conciliation-Mediation methods laying a special emphasis on Australian Centre for International Commercial Arbitration (ACICA). In the first instance the development of ACICA through the ages have been dealt with. It is thereafter compared with the IAA Rules. Building on the salient features of ACICA and International Arbitration Act (IAA), the paper discusses the changes that need to be made in these provisions in order to reduce delay caused due to arbitration procedure. Various suggestions are highlighted that would enable faster processing and delivery of arbitration and mediation in the International arena.

Keywords: *ACICA, IAA, Arbitration, Mediation, Model Law, UNCITRAL, ADR*

1. Introduction

Accomplishment in high cases of Commercial Arbitration is, obviously, not just dependent on authorities and arbitration professionals, the entire procedure must be very much strengthened by arbitral establishments and, critically, the courts. All concerned must have their impact in keeping up the nature of arbitral procedures and results, and in decreasing delay and cost. Courts, regardless of whether they be overseeing or upholding, are additionally entrusted with understanding and supporting arbitration in each one of these regards – and they should be unprejudiced and proficient. Arbitral organizations are likewise assuming an expanding role, and should keep up a solid dimension of skill, impartiality and effectiveness; to the degree they are associated with both managed questions, and in practicing any statutory capacities, for example, arrangement powers. These obligations are significant in an environment of concern, universally and locally, at the frequency of delay and cost. Additionally, of utmost significance is the condition of the arbitration law, the enactment controlling both local and international arbitration.

Currently, there have been noteworthy endeavors made by people and associations, open and private, to energize and create arbitration in Australia. These comprise of endeavors by the judiciary to make and encourage services of specialists and judges, huge authoritative changes, and improvement of new standards, services and training programs by arbitral organizations and institutes. Arbitrators, arbitration experts, arbitral organizations, governments and courts included or keen on arbitration are, with this force, using the opportunities to support and fortify arbitration. Arbitral establishments are thus playing the role of a guardian as well.

These endeavours are progressively utilized to beat Australia's absence of high-volume commercial arbitration business, especially where arbitration is blasting in the more extensive Asia-Pacific region. This is as opposed to the remarkable achievement of arbitration, seen over numerous years, in Europe and the United States, for instance. There are numerous purposes behind this,

which contains the role and its effect, both apparent and genuine, of the national and state lawmaking bodies, courts, and arbitral bodies.

The objective of the present arbitration revitalization procedure is to expand the utilization of both international and domestic business arbitration in Australia. International experience demonstrates that nations that have been effective in setting up occupied international arbitration institutes and pulling in noteworthy international arbitration work additionally have critical and dynamic domestic arbitration areas. The vivacious domestic arbitration area gives critical experience to its judges – and furthermore for its courts. It is even more so where the domestic arbitration law depends on an international system, for example, The United Nations Commission on International Trade Law(UNCITRAL) Model Arbitration Law (the Model Law)[1]similar to the developing position in Australia.

Recent years have witnessed Australia taking great strides forward, with an increasing acceptance of arbitration as a dispute resolution mechanism and a sharp increase in the use of Australian seats by international parties. This has coincided with reforms to both the ACICA Arbitration Rules (ACICA Rules) [2]and Australian arbitration legislation to reinforce the benefits ofarbitration; ensuring the expediency and neutrality of the process and the enforceability of the outcome.Australia is now recognized as providing a safe, neutral seat for arbitration, supported by a modern, transparent legal framework, an independent judiciary and highly experienced legal practitioners and arbitrators.

2.Development of International Commercial Arbitration in Australia

2.1 Background of ACICA

ACICA was established in 1985 as a non-profit public company. ACICA's main aim is to educate and promote the utilization of commercial arbitration as a method for the resolution of the dispute within Australia and the Asia-Pacific region. ACICA additionally looks to promote Australia as a seat for the conducting international commercial arbitrations. ACICA is headquartered at the Australian International Disputes Center (AIDC) in Sydney[3] and has registries in Melbourne and Perth. It gives a full scope of managerial and different services to help international arbitrations led in Australia and in the region. The ACICA Board, Executive and Secretariat that regulate these cases are involved experienced and surely understood arbitral experts.

ACICA works intimately with AIDC and its preparation and case the board task, the Australian Commercial Disputes Center (ACDC). While ACICA manages international arbitration, ACDC centers on household disputes.[4]

ACICA additionally established the Australian Maritime and Transport Arbitration Commission (AMTAC)[5], a commission of ACICA which supports and encourages the conducting of international arbitration in regard to oceanic and transport disputes.

Through the span of the most recent couple of years and since the opening of the AIDC in 2010 specifically, ACICA has directed a consistently increasing caseload. Present cases exhibit a creating pattern towards the utilization of the ACICA Rules and Australian seats by international parties, primarily those trading in the Asia- Pacific area. For instance, out of the cases recorded in 2013, in two-third of the cases both the parties, who opted for an Australian seat, were international.

2.2 Development of the ACICA Rules since 2005

After the Arbitration Rules were enforced in 2005, ACICA presented the updated ACICA Rules on 1 August 2011. The ACICA Rules reflect current international best practice and

[1] .UNCITRAL Model Law on International Commercial Arbitration ... www.uncitral.org/.../arbitration/1985Model_arbitration.html

[2].Arbitration Rules - ACICA, acica.org.au/arbitration-rules

[3].Australian Disputes Centre.<www.disputescentre.com.au

[4].Australian Commercial Disputes Centre (ACDC) - WikiMediation <en.wikimediation.org/index.php?title=Australian>.

[5]. Australian Maritime and Transport Arbitration Commission. <uk.practicallaw.thomsonreuters.com/2-520-8876>

address key issues, for example, required secrecy in arbitration procedures. The ACICA Rules likewise join Emergency Arbitrator Provisions.[6]

Intended to help a speedy resolution of international commercial disputes, this development furnishes parties with the choice to look for interim measures of security even before the council is formed. These measures are provided by an emergency arbitrator.

ACICA likewise amended its Expedited Arbitration Rules[7] in 2011. The Expedited Standards have the superseding goal to give arbitration that is fast, financially savvy and reasonable, considering particularly the disputed amounts and multifaceted nature of issues or realities involved[8]. The Facilitated Rules give a rearranged technique whereby ACICA designates a sole arbitrator who decides the issue dependent on records. In early 2011, the Australian government named ACICA as the sole appointing authority which is competent to appoint the arbitrator and works under the IAA[9]. To offer impact to this, ACICA formed the Appointment of Arbitrators Rules 2011[10](Appointment Rules) which build up a streamlined procedure for the appointment of an arbitrator to a dispute situated in Australia in conditions where the arbitration isn't being directed under the ACICA Rules or the Expedited Rules. The Appointment Rules apply to the appointment of arbitrators in accordance with a specially appointed understanding, the UNCITRAL Arbitration Rules[11], Model Law and statutory forces allowed by the IAA.

Under the sponsorship of AMTAC, explicit guidelines for the goals of oceanic and transport disputes have additionally been created (AMTAC Arbitration Rules). AMTAC gives a Rocket Docket technique to facilitated, archives just arbitration to be finished inside a quarter of a year of commencement[12].

So as to help and support the harmonization of arbitration law and technique just as its application in the Federal and State courts of Australia, ACICA has additionally worked with key judicial officers to set up the ACICA Judicial Liaison Committee, driven by the previous Chief Justice of the High Court, the Honorable Murray Gleeson AC as Chairman.

3. Guidelines and Rules governing ACICA and IAA

ACICA did not have any tailor- made rules till 2005, unlike other traditional arbitration institutions and it worked on the UNCITRAL's Recommendations for arbitral institutions. A committee was established by ACICA in 2004, after the headquarters were shifted from Melbourne to Sydney, which formed, what we today call the 2005 ACICA Rules.[13]

The provisions of ACICA Arbitration Rules are divided into two categories: in the first category there are provisions which are drawn from the UNCITRAL Arbitration Rules and the Swiss Rules[14]; while in the second category modified provisions are included.

Article 1 of the ACICA rules provides the official acronym 'ACICA' and the official title of the 'ACICAArbitration Rules'.

Article 2 of the said Rules provides the scope of application of the Rules. It states that "Where parties agree in writing that disputes shall be referred to arbitration under the ACICA Arbitration Rules then such disputes shall be resolved in accordance with these Rules subject to such modification as the parties may agree in writing."[15]The 'in writing' requirement is derived from Article II(2)of the 1958 *New York Convention on the Recognition*

[6]. ACICA Arbitration Rules incorporating the Emergency. <acica.org.au/wp-content/uploads/Rules/2016/ACICA>

[7]TACICATExpeditedTArbitrationTRules. *http://acica.org.au/acica-services/expedited-arbitration-rules*

[8]Ibid. Article 3(1)

[9]TACICATisTalsoTtheTstatutoryTappointingTauthority TunderTtheT*WaterTManagementTActT*1999T(Tas),Tthe T*WaterTIndustryTActT*1994T(Vic)TandTtheT*ConstructionTIndustryTLongTServiceTLeaveTActT*1997T(Vic).

[10]TACICATAppointmentTofTArbitratorsTRulesT2011; *http://acica.org.au/assets/media/Rules/ACICA_Appointment_ofT_Arbitrator_Rules_2.3.11.pdf*

[11]. UNCITRAL Arbitration Rules. <uncitral.un.org/en/texts/arbitration/contractual...>

[12]TACICATModelArbitrationTClause <*http://acica.org.au/acica-services/arbitration-clauses*>

[13]TLukeTNottageTandTRichardTGarnett,*T'*AustralianTCentreTforTInternationalTCommercialTArbitration'(2019)TDraftTforT*EncyclopediaTofTInternationalTProceduralTLaw(OUP)*

[14]. Swiss Rules of International Arbitration - Second Edition. <arbitrationlaw.com/books/swiss-rules>.

[15]T*ACICATRules,T2016,T*ArticleT

and Enforcement of Foreign ArbitralAwards, to which Australia is a party.[16]

Article 5 states that "within 30 days after receipt of the Notice of Arbitration from ACICA each party against whom the Claimant seeks relief ("Respondent" or "Respondents") shall submit an Answer to Notice of Arbitration to ACICA. It shall be submitted in two copies or such additional number as ACICA directs." This Article draws on the first paragraph of Article 3(7) Swiss Rules. The thirty-daytimelimit for the Answer is common to the International Chamber of Commerce (ICC) Rules[17] and the London Court of International Arbitration(LCIA) Rules.[18] Significantly, theUNCITRAL Arbitration Rules do not contain rules for the Answer to the Notice of Arbitration. The thirty-day time limit is, however, common, as are short extensions. In aModel Law seat, the Article 18 'equal treatment' provision (which is mandatory) willfunction to require that any extension of time given to the Claimant in the filing of the Noticeof Arbitration be taken into account when the Respondent's compliance with the thirty daytime limit is considered'. It may be that an extension of time is required as a matter of fairness,and ACICA has the express discretionary power to do this.The express reference to *Respondents* covers multi-party proceedings and extends theAnswer requirements to all parties named in the Claimant's Notice of Arbitration.

While Article 5 deals with 'Notice of Arbitration', Article 6 talks about 'answer to the notice of Arbitration'. Article 7 deals with expedited procedure stating that, "Prior to the constitution of the Arbitral Tribunal, a party mayapply to ACICA in writing for the arbitral proceedings to beconducted in accordance with the ACICA Expedited Ruleswhere:

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

(b) the parties so agree; or

(c) it is a case of exceptional urgency."[19]

Regarding representation and assistance in arbitrations, Article 8.1 of the Rules providesthat"The parties may be represented or assisted by persons of theirchoice. The names and addresses of such persons must becommunicated in writing to the other party and ACICA.Each party shall use its best endeavors to ensure that its legalrepresentatives comply with the International Bar AssociationGuidelines on Party Representation in International Arbitration in the version current at the commencement of the arbitration.".[20]In arbitral proceedings, subject to Australian law, the parties can opt for their representative in arbitration.[21] Section 29(1) of IAA states that a party may represent himself during oral hearings before the tribunal. A party may be represented by a legalpractitioner from any jurisdiction or by any other person that they may choose.[22] In `choice of counsel,the parties are equally free: under the Model Law Plus provisions of the IAA, foreign lawyers may appear before international arbitral tribunals seated in Australia.[23]

Section II of the ACICA Rules is titled "Composition of the Arbitral Tribunal". "If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 30 days after thereceipt by the Respondent of the Notice of Arbitration theparties cannot agree, ACICA shall determine the number ofarbitrators taking into account all relevant circumstances."[24]

Under Article 10(1) of the Model Law, the parties are free to decide the number of arbitrators; there is no principle as such that the number of arbitrators shall be an 'odd number' according to the Model Law, but if there is no agreement,thenumber of arbitrators will be three.[25]The ACICA Rules provide the freedom to the parties under Article 10(1) Model Law: the ACICA Rules simply give the parties a specified time period to come to an agreement. The power given to ACICA under Article 10 is similar to that ofthepower given to Chambers of Commerce and Industry under Article 6(1)

[16]TTheTNewTYorkTConventionTformsTScheduleT1To fTtheTIAA
[17]T*ICCTRules*,TArticleT5(1).
[18]T*LCIATRules*,TArticleT2.1
[19]T*ACICATRules,T*ArticleT7
[20]T*ACICATRules,T*ArticleT8
[21]TIAA,Ts.29(1).
[22]TIAA,Ts.29(1),Ts.29(2)
[23]TIAA,Ts.29(3).
[24]T*ACICATRules,T*ArticleT10
[25]TModelTLaw,TArticleT10(2).

of the Swiss Rules.The15-day time limit is a feature of both ICC Rules,[26] and the UNCITRAL ArbitrationRules.[27]Under Article 3.4 of ACICA Rules, ACICA may extend the 15-day time limit for agreement on the numbers of arbitrators to be achieved.

Article 11 deals with appointment of sole arbitrator. Article 11.1 provides that "if a sole arbitrator is to be appointed, either party may proposeto the other the names of one or more persons, one of whomwould serve as the sole arbitrator."Article 11.2 states that 'if within 40 days after the date when the Notice of Arbitrationwas received by the Respondent the parties have not reached agreement on the choice of a sole arbitrator and provided written evidence of their agreement to ACICA, the sole arbitrator shall be appointed by ACICA."While Article 11.3 tells that "in making the appointment, ACICA shall have regard to suchconsiderations as are likely to secure the appointment ofan independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."

This Article of the ACICA Rules is similar to the regime of Article 7 Swiss Rules. The thirtyday time limit for appointment by agreement is a feature of the Swiss Rules[28] and theUNCITRAL Arbitration Rules.[29] Under Article 9.2 ACICA Rules, ACICA effectively has a reserve power to appoint the sole arbitrator, and it is only where, within thirty days, theparties both agree *and* provide written evidence of their agreement that ACICA will refrain from exercising its appointment power. This means that, even if the parties have reached an agreement, if they fail to provide ACICA with evidence of their agreement, *strictusensu*,ACICA may appoint a different sole arbitrator. In practice, however, if the parties haveagreed but have not provided written evidence of their agreement, ACICA will invoke itsArticle 3.4 power to extend the thirty-day time limit and give notice to the parties thatevidence of their appointment is required forthwith.

Article 17 of the Rules provide 'Challenge of Arbitrators'. "A prospective arbitrator shall in writing disclose to those who approach him or her in connection with his or her possible appointment any circumstances likely to give riseto justifiable doubts as to his or her impartiality or independence. An arbitrator, onceappointed or chosen, shall immediately in writing disclose such circumstances to theparties unless he or she has already informed them in writing of these circumstances. Acopy of any written disclosures provided to a party by a prospective arbitrator orarbitrator shall be sent to ACICA."[30]

This Article adopts the language of Article 9 UNCITRAL Arbitration Rules and Article 9(2) Swiss Rules. The expression "circumstances likely to give rise to justifiable doubts as to hisor her impartiality or independence" is the language of Article 12 Model Law, and is alsoused in General Standard 2 of the International Bar Association (IBA) Guidelines onConflicts of Interest in International Arbitration (IBA Guidelines). The LCIA Rules usesimilarlanguage.The ACICA form makes an institutional addition to the text of Article9(2) UNCITRAL Arbitration Rules, requiring that disclosure be made to ACICA as well asthe parties. This provision of the ACICA Rules may imply an obligation to investigatepotential conflicts of interest – if the arbitrator was under no such obligation, there might be an argument that the disclosure obligation would be rendered ineffective. However, if thearbitration is subject to Australian law, it is important to note that there is as yet no bindingauthority for the proposition that an arbitrator is under such a duty. The position is similar inHong Kong where, in the *China Harbour*case, the Court of Appeal held that the arbitrator was under no duty to check his files for potential conflicts of interest.[31] The position may be slightly different in England, where there is some authority for the position that arbitrators are under a limited duty to investigate potential

[26]TICCTRules,TArticleT8(1).
[27]TUNCITRALTArbitrationTRules,TArticleT5
[28]TSwissTRules,TArticleT7
[29]TUNCITRALTArbitrationTRules,TArticleT6(2).

[30]TACICATRulesTArticleT17.1
[31]T*SuenTWahTLingTvTChinaTHarbourTEngineeringTCo*.T[2007]TBLRT435THKTCA.

conflicts of interest, but that this limited duty ends once the proceedings start.[32]

As under the UNCITRAL Arbitration Rules and Article 5.3 LCIA Rules[33] (and Article 12Model Law), the ACICA Rules disclosure obligation is *ongoing*, meaning that if new circumstances arise after the arbitrator has entered onto the reference, then the arbitrator must give fresh disclosure of the same. A failure to do so will constitute a procedural irregularity and may constitute grounds for challenge under Article 13.2 ACICA Rules.

Section III is titled "Arbitral Proceedings", with Article 21 stating "subject to these Rules, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated equally and that each party is given a full opportunity of presenting its case."

Article 21.1 ACICA Rules is an amalgamation of Articles 18 and 19 Model Law. Article18 Model Law states that, "The parties shall be treated with equality and each party shall begiven a full opportunity of presenting his case." Article 19(2) Model Law provides that thearbitral tribunal "may, subject to the provisions of this Law, conduct the arbitration in suchmanner as it considers appropriate."[34] Thus, under the Model Law the tribunal has 'considerable latitude' in deciding upon procedural rules.[35]Article 21.1 ACICA Rules is aclose approximation to both Article 15(1) ICC Rules and Article 15(1) UNCITRALArbitration Rules. It differs, however, from Article 15(1) ICC Rules. Whereas Article 17.1ACICA Rules gives the tribunal the power to conduct the proceedings as it deemsappropriate, Article 15(1) ICC Rules mandates that the arbitral tribunal shall conductproceedings in accordance with the ICC Rules, and, where the ICC Rules are silent, in accordance with agreement of the parties. It follows that it is only when the ICC Rules are silent, and the parties fail to agree on a procedure to be followed that the tribunal can decide which rules to apply to the conduct of proceedings.

Article 22 provides for confidentiality in terms that largely mirror Australian law. Regarding the seat of arbitration, Article 23.1 provides that the default seat would be Sydney, Australia, unless the parties otherwise agree. Articles 23.2 and23.3 recognise an important distinction between the seat of the arbitration meetings, seat of hearing witnesses or seat of inspecting property.

This Article is incorporated in the Rules because ACICA's goal is to promoteAustralia in general, and in particular, Sydney as the seat of arbitration. ACICA's intention isto compete with the well-known arbitral centers of Singapore and Hong Kong. This provision seems to prevent the arbitral tribunal from fixing another seat. This Article might potentially be abused "by an Australian party to the arbitration who refuses to agree on a foreign seat." In any event, the parties, exercising their rights under the Doctrine of Party Autonomy, mayagree on the seat of arbitration. There are provisions similar to Article 23.1 ACICA Rules inother arbitration rules [such as Section 18.1 Singapore International Arbitration Centre (SIAC) Rules], but they are usually qualified bythe statement that the arbitral tribunal is authorised to fix another or a different arbitration seat "in view of the circumstances". Article 16(1) Swiss Rules and Article 16(1) LCIA Rulesare examples of this qualification. Under Article 20(1) Model Law, the parties may agreeupon the place of arbitration - if they do not agree, the tribunal will determine the place of arbitration, taking into account "the circumstances of the case, including the convenience ofthe parties".[36] Modern jurisprudence confirms that the place (or 'seat') of arbitration must be distinguished from the 'venue of hearing',[37] and where the parties have agreed upon the seatof arbitration, that

[32]T*LocabailT(UK)TLtdT&TWaldorfTInvestmentTCorp.T&TOrsT*[2000]T1TAllTERT65TperTLordTWoolfTpara T481.

[33].LCIA Arbitration Rules (2014). <www.lcia.org/.../lcia-arbitration-rules-2014.aspx>

[34]TArticleT19(1)TModelTLawTstipulatesTthatTtheTtribunal'sTpowerTtoTconductTitselfTinTaTmannerTthatTitTconsidersappropriateTisTsubjectTtoTtheTparties'TrightT"toTagreeTonTtheTprocedureTtoTbeTfollowedTbyTtheTarbitralTtribunalTinconductingTtheTproceedings."

[35]T*JardineTLloydTThompsonTCanadaTIncTvTWesternTOilTSandsTIncT*(2006)T380TART121,T[28];T264TDLRT(4th)T358;T2006TABCAT18.

[36]Model Law ArticleT20(1)

[37]T*PTTGarudaTIndonesiaTvTBirgenTAirT*[2002]T1TSLRT393

seat does not change even though the tribunal conducts all of the hearings in another country.

Article 23.1 ACICA Rules does not limit itself to declaring that, subject to a modification by the parties, Sydney will be the seat of arbitration. It goes further by indicating that, when the parties have not previously agreed, the parties have an additional opportunity to agree on a seat other than Sydney. Indeed, parties are given "15 days after thecommencement of the arbitration" to decide on a different seat. This technique is also used inArticle 8 ACICA Rules in the context of determining the number of arbitrators. Thisprovision is clearly different from other arbitral rules, for example, Article 14 ICC Rules,Article 16 Swiss Rules, and Section 16(1) SIAC Rules.

Article 28 embodies the jurisdiction of arbitral tribunal.

Article 28 ACICA Rules contains the familiar *Kompetenz-Kompetenz*principle, according towhich an arbitral tribunal has authority to rule on its own jurisdiction. The *Kompetenz-Kompetenz*principle is codified in Article 16(1) Model Law, which confirms that the arbitral tribunal "may rule on its own jurisdiction, including any objections with respect to theexistence or validity of the arbitration agreement." For this purpose, "an arbitration clausewhich forms part of a contract shall be treated as an agreement independent of the other termsof the contract": this is known as the 'Doctrine of Separability'. A consequence of theDoctrine of Separability is that "A decision by the Arbitral tribunal that the contract is null,and void shall not entail *ipso jure* the invalidity of the arbitration clause." The arbitrationclause will only be invalid if the defect is such as to render void *ab initio* the entirety of thecontract, including the arbitration clause.[38] In practice, a finding of jurisdiction assumes thestatus of a preliminary decision, not a decision on the merits. This is the case despite thedecision being described as an 'interim award'.[39]Article 24 ACICA Rules is identical to Article 21(1)-(4) Swiss Rules, and Article 21(1) UNCITRAL Arbitration Rules. Interestingly, the ACICA Rules do not contain any equivalentof Article 21(5) Swiss Rules according to which the tribunal has "jurisdiction to hear a set-offdefense even when the relationship out of which this defense is said to arise is not within thescope of the arbitration clause or is the object of another arbitration agreement or forumselectionclause." This provision of the Swiss Rules has proven controversial, and as such itsomission from the ACICA Rules is understandable.

Article 31 states provisions related to evidence and hearings. ACICA Rules is a verbatim adoption of Article 24(1) Swiss Rules and Article24(1) UNCITRAL Arbitration Rules. It draws on the maxim of Roman procedural law *actoriincumbitprobatio*– 'the burden of proof of each fact is on the party alleging that fact'sexistence'. Adherence to this general principle of proof is central in arbitration conductedunder the ACICA Rules; it is supplemented by more specific rules of evidence derived fromthe Model Law. Under the Model Law, the tribunal may appoint experts to report to itregarding specialist matters. The tribunal may also require a party to provide information tothe expert, or to permit the inspection of property by the expert.[40] If a party requests, theexpert shall appear at an oral hearing so that they may be questioned about their evidence.[41]The use of experts is especially common in engineering and construction arbitrations, where procedures such as 'Hot-Tubbing' (a form of expert conclave) are used to inform the tribunaland narrow the technical issues in dispute.

In a Model Law seat such as Australia, the tribunal may request the assistance of a competentcourt in taking evidence. The court may assist the tribunal as permitted by its jurisdiction andsubject to its rules concerning the taking of evidence.[42] Under this procedure, the assistingcourt may take discovery evidence from third parties.[43] The grant of a subpoena also fallswithin this procedure for judicial

[38]T*YearbookTofTtheTUnitedTNationsTCommissionTonTInternationalTTradeTLaw(UN) 1985* p21.

[39]T*IncorporatedTOwnersTofTTakTTaiTBuildingTvTLeungTYauTBuildingTLtdT*[2005]T2THKLRDTD2.

[40]TModelTLaw,TArticleT26(1).

[41]TModelTLaw,TArticleT26(2).

[42]TModelTLaw,TArticleT27

[43]T*JardineTLloydTThompsonTCanadaTIncTvTWesternTOilTSandsTIncT*(2006)T380TART121

assistance.[44] If a subpoena is issued in aid of the arbitrationby an Australian court, and the person named is in another country, then TheHagueConvention on Service Abroad [45]may be applicable depending upon the state in which servicewill be affected.

Consistent with the prohibition against unilateral communications, all of the informationcommunicated to the tribunal by a party must be given to the other party, and the tribunal isrequired to give to the parties any expert reports and evidentiary documents that it may rely upon in reaching its decision.[46] According to New Zealand jurisprudence – often treated as persuasive by Australian courts – the evidentiary material that must be disclosed by thetribunal under Article 24(3) Model Law is that which was created by *third parties*, and doesnot include the research materials prepared by the tribunal in the process of making itsdecision.[47]

Article 41 provides interpretation of the award. "Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the Arbitral Tribunal give an interpretation of the award."

This Article is identical to Article 35(1) UNCITRAL Arbitration Rules. It also closely reflects Article 35(1) Swiss Rules. However, the Swiss Rules also allow the arbitral tribunal to set a time-limit in which the other party can comment on the request.[48] The Model Law isdifferent to Article 36.1 ACICA Rules, in that under Article 33(1)(b) Model Law the partiesmust first agree that an interpretation may be requested before the tribunal can issue any interpretation. The purpose of this provision of the Model Law is to prevent dilatory requests.

However, Article 33(1) Model Law is derogable, and where the ACICA Rules are used in aModel Law seat, it is likely that a court would take it as excluded by incorporation ofinstitutional rules. Even where the parties have not agreed on, or requested an interpretation, if there is ambiguity in the award such that it might not be enforceable, thengiven that the tribunal is under a general duty to render an enforceable award, the tribunal may conclude that it is not yet *functus officio* and issue an interpretation on its owninitiative.It is important to note that an interpretation is *not* a correction (or a supplementation) anddoes not change the substance of the award: it merely elucidates its effect. In practice, it isquite rare for international arbitral tribunals to issue interpretations of their awards, andinterpretations (sometimes called 'clarifications')290 are usually only sought where there isambiguity in a material part of the final award. A rare example of an interpretation being issued can be found in the case of *Wintershall AG v Government of Qatar.*[49]

4. Confidentiality in International Commercial Arbitration Rules in Australia

The concept of confidentiality is provided under Article 22 of the ACICA Rules. It states as follows:

According to Article 22.1, Unless the parties agree otherwise in writing, all hearings shall take place in private. Whereas according to Article 22.2, the parties, the Arbitral Tribunal and ACICA shall treat as confidential and shall not disclose to a third party without prior written consent from the parties all mattersrelating to the arbitration (including the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain except:

(a) for the purpose of making an application to any competent court;

(b) for the purpose of making an application to the courts of any State to enforce theaward;

(c) pursuant to the order of a court of competent jurisdiction;

(d) if required by the law of any State which is binding on the party making thedisclosure; or

(e) if required to do so by any regulatory body.

According to Article 22.3, any party planning to make disclosure under Article 18.2 must

[44]T*VibroflotationTAGTvTExpressTBuildersTCoTLtdT*[1995]T1THKLRT239

[45].For details see -HCCH | #14 - Full text<www.hcch.net/en/instruments/conventions/full...>

[46]TModelTLaw,TArticleT24(3).

[47]T*MethanexTMotunuiTLtdTvTSpellmanT*[2004]T3TNZLRT454.

[48]TSwissTRules,TArticleT35(1).

[49]T*PepsiCo,TIncTvTIslamicTRepublicTofTIran*,TDecisionTNo.TDECT55-18-1T(19TDecemberT1986).

within a reasonable time prior to the intended disclosure notify the Arbitral Tribunal, ACICA and the other parties (if during the arbitration) or ACICA and the other parties (if the disclosure takesplace after the conclusion of the arbitration) and furnish details of the disclosure and an explanation of the reason for it.

The Article 22.4 is explicit to the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of theparty."

This provision creates an 'opt-out' rule of privacy for arbitral hearings – it does not create arule of confidentiality for ACICA Rules arbitration generally. Documents created for thedispute are not covered by this provision. This is because Article 22.1 ACICA Rules speaksonly to *privacy*, not confidentiality. Privacy and confidentiality are different qualities ofarbitration; the former being more often associated with the exclusion of the public from theactual hearings; and the latter with a duty not to disclose the content of the dispute ordocuments relating to it to third parties. Under Article 22.1, privacy is the rule, and anyagreement by the parties to the contrary is the exception. Article 22.1 ACICA Rules reflectsArticle 25(4) Swiss Rules, which provides that "hearings shall be held *in camera* unless theparties have agreed otherwise".[50] A similar approach is taken by the ICC Rules, Article 21 ofwhich creates a specific duty of confidentiality with respect to hearings. Australian Common law has attracted a good deal of attention for its approach toconfidentiality in arbitration. Article 18 ACICA Rules is informed by the decision of theHigh Court of Australia in *Esso Australia Resources Ltd &Ors v The Honourable Sidney JPlowman (Minister for Energy & Minerals) &Ors*.[51] In this case, the High Court ofAustralia held that arbitral proceedings are private but not confidential, and alloweddisclosure of certain documents created in the arbitration. The first Australian decision to apply the rule in *Esso* was *Commonwealth of Australia v Cockatoo Dockyard Pvt Ltd*.[52]Theratio in *Esso* is to be contrasted with the decision of the English Court of Appeal in *AliShipping v Shipyard Trogir*,[53] where the court held that there is an implied duty ofconfidentiality in arbitral proceedings. The *Esso* shift towards non-confidentiality can, on one view, be seen as part of a broader trend towards greater transparency in international arbitration. Decisions similar to*Esso*have been made in other jurisdictions, including theUnited States[54] and Sweden;[55] and ICSID hearings are increasingly public.[56]

Arbitral proceedings are, by their nature, private butnot necessarily confidential. In 1995 the AustralianHigh Court ruled in *Esso Australia Resources Ltd. Plowman*[57] that a general obligation of confidencein arbitration proceedings did not arise by way of implication in Australia. The express agreement ofthe parties, including by incorporating reference to procedural rules containing confidentiality provisions, was required. Section 22(3)(a) of theIAA now provides the parties with the option toagree to a statutory duty of confidence (imposedunder section 23C). If parties opt into this regime, they are required to refrain from disclosing confidential information except in the limited circumstances set out in the IAA[58].

As noted later in the article, the ACICA Rulesprovide a comprehensive confidentiality regime
such that in practice the confidentiality ofproceedings can be assured by adopting those rules.

The optional provisions added by the IAA Amendment Act in sections 23C to 23G were directed at addressing a perceived deficiency in Australia in relation to the confidentiality of

[50]TArticleT25(4),TSwissTRules.

[51]T*Esso Australia Resources Ltd & Ors v The Honourable Sidney JPlowman (Minister for Energy & Minerals) &Ors* [1995]T128TALRT391

[52]T*Commonwealth of Australia v Cockatoo Dockyard Pvt Ltd.* [1994]T35TNSWLRT704

[53]T *AliShipping v Shipyard Trogir* [1999]T1TWLRT314

[54]T*USTvTPanhandleTEasternTCorp.T*(D.TDelaware,T1988)T118TF.R.D.T346.

[55]T*BulgarianTForeignTTradeTBankTLtdTvTALTTradeTFinanceTIncT*(SwedishTSupremeTCourtTdecision,T27TOctoberT2000).

[56]*UnitedTParcelTServiceTofTAmerica,TInc.TvTGovernmentTofTCanada.* [December 2005]

[57]T*Esso Australia Resources Ltd v. Plowman* [1995]T183TCLRT10.

[58]TSection 23C-23GTIAA

arbitral proceedings as a result of the decision in *Esso Australia Resources Ltd v Plowman*[59], where the High Court of Australia decided that arbitrations were private but not confidential.

Section 23C prohibits parties and the arbitral tribunal from disclosing confidential information[60]except as provided for by the Act. Section 23D specifies the situations when confidential information can be disclosed such as by consent of all the parties, for the purpose of obtaining professional advice or when required to disclose by a court. Section 23E gives the arbitral tribunal the power, on application of a party, to allow disclosure of confidential information in circumstances outside s 23D. Sections 23F and 23G give the court the power to prohibit disclosure or allow disclosure,respectively, after an application under section 23E has already been made.[61]The court must apply a public interest test – does the public interest lie in preserving confidentiality or in disclosure?

These sections give some protection but considering the international perception of the treatment of confidentiality in Australia, it may have been desirable to adopt a more comprehensive approach such as that adopted in sections 14A to 14I of the *Arbitration Act 1996* (New Zealand). The IAA confidentiality provisions are based on sections 14B to 14E of the New Zealand Act. However, the New Zealand provisions go further and make the distinction between privacy and confidentiality. Under section 14A arbitrations must be private. In sections 14F to 14I the New Zealand Act sets up a regime which allows for the possibility of court proceedings relating to an arbitration being conducted in private. A party must apply for the court proceedings to be conducted in private (sub-section 14F(2)(a)) and state their reasons for doing so (section 14G). The court needs to balance the public interest and must consider the factors set out in section 14H. These are:

(a) the open justice principle;

(b) the privacy and confidentiality of arbitral proceedings;

(c) any other public interest considerations;

(d) the terms of any arbitration agreement between the parties to the proceedings; and

(e) the reasons stated by the applicant under section 14G(b).

As Australia has no private arbitral appeal mechanism[62]provisions that allow private court proceedings would be beneficial.

Considering that confidentiality has always been one of the most important claimed benefits of commercial arbitration it seems surprising that the confidentiality provisions of the IAA are applied on an opt-in rather than an opt-out basis. Nevertheless, any problems with confidentiality can be alleviated by practitioners being aware of these problems and making sure the parties opt into the confidentiality provisions and also choose arbitration rules that provide for confidentiality and deal with confidentiality issues in a reasonable and practical way.

5. Suggested changes to ACICA and IAA to ease the process of Arbitration and Mediation in the International arena

The Australian Centre for International Commercial Arbitration(ACICA) and the International Arbitration Act (IAA) have, no doubt, eased the problems of people who desiredto resort to international arbitration in Australia and could not do so due to the absence of properly enacted laws, but could still not prove to be time and cost effective way of dispute resolution, as many a times while appointing arbitrators the parties are not able to come to a consensus at the number of arbitrators to be appointed or who should be appointed as arbitrator(s). Also, if more than one arbitrator is appointed, it further adds to the cost of arbitration. In such circumstances, it is more likely to be in the interest of parties if they appoint a mediator and try to resolve the dispute with his help.

Mediation is basically an arrangement encouraged by a neutral third party. In contrast to arbitration, which is a process of ADR to some degree like court trials, mediation doesn't include basic leadership by the neutral third party. ADR methods can be started by the

[59]Ibid op cite 47T

[60]TSubsectionT15(1)TIAA.

[61]TSection 23G(3)(a)TIAATAmendmentTAct.T

[62]TSuchTasTtheTprivateTArbitrationTAppealTTribunal TsystemTestablishedTbyTtheTArbitrators'TandTMediators'TInstituteTofTNewTZealandT

parties or may be constrained by law, the courts, or legally binding terms. In mediation, the contesting parties work with a neutral third party, the mediator, to determine their disputes. The mediator encourages the goals of the parties' disputes by administering the process of bargaining. The mediator enables the parties to discover shared conviction and manage impracticable desires. The person in question may likewise offer inventive arrangements and help with drafting the terms of the final settlement. The job of the mediator is to translate concerns, exchange of information between the parties, outline issues, and characterize the issues.

Once the resolution is reached, mediation agreements may be oral or composed, and substance changes with the kind of mediation. Regardless of whether a mediation agreement is restricting relies upon the law in the individual locales, yet most mediation agreements are viewed as enforceable contracts. In some court-requested mediation, the agreement turns into a court judgment. In the event that an agreement isn't reached, notwithstanding, the parties may choose to seek after their cases in different discussions. The mediation process is commonly viewed as progressively immediate, modest, and procedurally straightforward than a formal suit. It enables the parties to concentrate on the hidden conditions that added to the dispute, instead of on legal issues. The mediation process does not concentrate on truth or shortcoming. Inquiries of which party is correct or wrong are commonly less significant than the issue of how the issue can be settled.

Section 27 of the uniform Acts enables an arbitrator act as 'a mediator, conciliator or a non-arbitral intermediary' if he is approved to do as such. Similarly, section 27D of the CAA Model Bill contains an arrangement which enables an arbitrator to go about as a mediator or conciliator gave the arbitration agreement gives to this, then again each gathering later agrees recorded as a hard copy to the arbitrator so acting.

The new section explicitly gives that an arbitrator acting as a mediator may discuss independently with the parties (Section 27D(a))- at the end of the day, may lead private mediation sessions. Where mediation proves to be fruitless, the arbitrator can't proceed with the arbitration except if every one of the parties to the arbitration gives their consent in writing to him doing as such (section 27D (4)).

If the arbitrator decides to continue with the arbitration, he must disclose any confidential information obtained from another party to all other parties in the arbitration proceedings during the mediation (section 27D (7))- in particular during any private session.[63]

The IAA Act and the IAA Amendment Act of 2010 does not include any ‘Med-Arb’ provision, that is, a provision which provides that the arbitrator may act as both arbitrator and mediator (or conciliator). The international arbitration laws ofalmostall of Australia’s Asia- Pacific neighbours (including Hong Kong and Singapore) provide for an arbitrator to promote settlement of disputes amicably by engaging the parties in negotiation. Mediation andnegotiationare not only legislated in Asian countries but is part and parcel of their cultural ethos. Moreover, the promotion of amicable settlement by international arbitrators is now called as ‘international best practice’.[64]Not containing this provision in the IAA Amending Act is somewhat disappointing.[65]

Therefore, it is need of the hour that this provision should also be included in the International Arbitration Act, so that parties can be more benefitted in the seat of Australia.

6. Conclusion

From the afore mentioned arguments, one can easily figure out that the set of rules as prescribed in ACICA, suffers from a plethora of pitfalls. These problems are vast, deep and widespread, and have been a source of bickering and resentment for those taking commercial initiatives. At the same time, such issues have put the entire structure of international commercial arbitration at stake. This daunting challenge has caused ripples at international forums of arbitration. It would not be, therefore, wrong to say that if these matters

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[63]Section 27D (7), IAA, *DerivedTfromTsectionT17TofTtheTSingaporeTInternationalTArbitrationTActT(CapT143A)*

[64]TCEDRTRulesTforTtheTFacilitationTofTSettlementTinTInternationalTArbitrationT(NovemberT2009)

[65]TJohnTHatzistergos,T‘ArbitrationTreformTmustTcontinue’,T*FinancialTReview*,T18TJuneT2010,TpT33.T

of utmost concerns are not addressed, it would jeopardize the very concept of international arbitration. This is a thought-provoking fact for the global leaders. Consequently, it is time that we should not only rectify such problems but also present a roadmap for the betterment.

Time is the essence of any commercial activity. Any unnecessary hiccups, procedural delays and superfluous processes will shatter the very foundation of commercial arbitration. However, simultaneously we cannot overlook the confidentiality of the whole process. The professional secrets of commercial enterprises must not be crucified at the altar of speedy arbitration. Both efficiency and credibility are the two important pillars of mutual trust and harmony which support the whole edifice of commercial laws. Any lapse in the prompt and quick disposal of justice is in fact denial of justice. Similarly, the loss of confidentiality puts the question mark on the credibility of the complete legal regime. Therefore, both have to be run along with each other.

The present paper strives to suggest practical recommendations that could pave way for the early settlements of disputes. These measures, if adopted, can surely remove the obstacles in the smooth running of the system. Also, such steps would ensure confidentiality of the commercial enterprise. Such an approach would not only save precious time of the stakeholders involved in this significant exercise but also reinsure the mutual trust of the parties on International law.