# Kluwer Arbitration Blog

## Is Arb-Med Un-Australian?

Luke Nottage (University of Sydney & Williams Trade Law) · Saturday, May 1st, 2021

New arbitration rules for the Australian Centre for International Commercial Arbitration (ACICA) came into force on 1 April 2021. The 2021 ACICA Rules update the 2016 Rules outlined here to bring them in line with other major institutional rules. Changes include express provisions regarding "e-arbitrations" (e.g. Rule 14) and to consolidate proceedings even in "chain of contract" situations (Rule 16(1)(c)).

When arbitral institutions announce changes to their arbitration rules, it is also useful to consider if any provisions have not made the cut. The 2021 ACICA Rules notably do not include detailed provisions on "Arb-Med", whereby hybrid arbitrators actively encourage the parties to reach settlement, thus potentially saving significant costs and delays or preserving business relationships better. Arb-Med provisions had been proposed in Draft Rule 55 of the Draft Consultation Rules (Draft Rules) released in mid-2020 by ACICA, adopting a "dual consent" approach. Under Draft Rule 55 (reproduced here) parties have to agree first to authorise arbitrators to facilitate settlement. If settlement facilitation efforts fail, and they involve caucusing (i.e. ex parte meetings) or parties provide information on some other confidential basis, any party could veto the arbitrators continuing on in the arbitration to give an award.

This approach was designed to minimise concerns and possible court challenges for violating mandatory laws on arbitrator bias or equal treatment of the parties. It is similar to the approach adopted by section 27D of the (otherwise Model Law based) uniform Commercial Arbitration Act (CAA) legislation introduced from 2010 for domestic arbitrations in all Australian States and Territories. The approach contrasts with an earlier Arb-Med provision introduced in the pre-2010 New South Wales Act, requiring consent by parties given at the initial stage, which had not proven popular in practice.

One downside in the dual-consent model is that it may lead to more delays overall, if settlement facilitation fails frequently and then the parties (especially the recalcitrant respondent) do not agree to let the tribunal revert to arbitration mode. To reduce such delays, Draft Rule 55.6 added an innovative feature. It allowed ACICA to appoint "back-up" arbitrators (if parties could not do so promptly) who are ready to step in and resume the arbitration if any party refuses to agree to the original set of arbitrators reverting to arbitration mode.

Nonetheless, feedback through public webinars was mixed regarding these draft Arb-Med provisions, in contrast to almost all other changes in the Draft Rules. This may reflect the fact that Arb-Med remains rare in Australia. It also does not seem to be much practiced even in the Asian

region, apart from China and to a lesser extent Japan. Some Arb-Med provisions were added in Hong Kong and Singapore international arbitration legislation but they seem to be little used. Attempts to promote Arb-Med by the London-based Centre for Effective Dispute Resolution (CEDR), through different 2009 Rules (and a related Report), also apparently generated little extra enthusiasm among arbitration practitioners internationally – and they in fact vanished from the CEDR website at one stage when that was revamped. This was despite strong support for the CEDR initiative from former senior British judge Lord Harry Wolff and leading arbitrator Prof Gabrielle Kaufmann-Kohler from Switzerland, where (as in other legal systems in the German legal tradition) both judges and arbitrators typically encourage settlement. Related research by Kaufmann-Kohler and others suggested little risk of successful court challenges to Arb-Med, if conducted carefully. This was borne out by the Hong Kong Court of Appeal enforcing an award from China following failed settlement facilitation, in the much-discussed case of *Gao Haiyan and Xie Heping v Keeneye Holdings and another* CACV 79/2011, although enforcement was refused at first instance.

Because the Draft Rule 55 is inspired by the CAA legislative regime for domestic arbitrations, it seems unlikely that such Arb-Med would be successfully challenged by courts in Australia if chosen as seat (as is the default under ACICA Rule 27(1)), under the federal International Arbitration Act (IAA). However, to maximise certainty and publicise the potential for Arb-Med, it would be useful for the IAA to be amended to include Arb-Med provisions along similar lines. Some sort of Arb-Med provision for the IAA has been urged by myself and other commentators for over a decade, but the IAA amendments introduced since 2010 (adopting most of the revised Model Law) have been quite limited. Chances for further legislative reform may be reduced by the 2021 ACICA Rules not having adopted provisions like Draft Rule 55. Instead, Rule 55 of the 2021 ACICA Rules limits itself to requiring the tribunal to raise for discussion with parties the possibility of separate mediation or ADR, allowing the tribunal to suspend the arbitration for such separate ADR, and requiring the parties choosing separate mediation to use the ACICA Mediation Rules (although parties could vary that requirement in writing under Rule 2(1)).

Meanwhile, users and in-house or other counsel keen to minimise costs and delays in arbitration could write into their dispute resolution clauses some Arb-Med provisions along the lines of Draft Rule 55. Draft Rule 55.6 could then be varied to allow an institution other than ACICA, if selected by parties for the arbitration, to make the back-up appointment of arbitrators when initiating Arb-Med (for example, parties could ask CEDR to assist with ad-hoc arbitrations conducted under UNCITRAL Rules); or it could be omitted completely.

Other institutions might also consider adopting or adapting Arb-Med provisions like these, particularly to deal with lower-value or less complex cases. After all, many institutions (including ACICA) already provide an expedited sole-arbitrator track for such cases, which arguably require fewer procedural justice safeguards. If such an amendment were still felt to be far-reaching, the Rules could be amended so the Arb-Med provisions only apply to arbitration agreements concluded after the amended Rules come into force.

Such innovations by arbitral institutions, parties and legislators seem particularly timely as disputes and arbitration filings have proliferated in the wake of the COVID-19 pandemic. They may also help reduce the overall formalisation of international arbitration, with consequent costs and delays despite ever-growing globalisation. Further initiatives in this field would also be consistent with the push to promote mediation techniques through the 2019 Singapore Mediation Convention and even to resolve investor-state disputes. Those developments are already pushing many arbitration

practitioners to broaden their dispute resolution skill set.

*This post reflects personal views, not necessarily those of other ACICA Rules Committee members or ACICA itself.*

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