

# ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions

**1 August 2011**

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# Model arbitration clause

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

## **SECTION I: INTRODUCTORY RULES**

### **1 ACICA Arbitration Rules**

These rules ("Rules") are the rules of arbitration of the Australian Centre for International Commercial Arbitration ("ACICA") and may be referred to as the "ACICA Arbitration Rules".

### **2 Scope of Application**

- 2.1 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, as in force on the date of commencement of the arbitration, subject to such modification as the parties may agree in writing.
- 2.2 These Rules shall govern the arbitration except that where any of these Rules are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.
- 2.3 By selecting these Rules the parties do not intend to exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration.

### **3 Notice, Calculation of Periods of Time**

- 3.1 For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or to the addressee's residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then to the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.
- 3.2 For the purposes of calculating a period of time under the Rules, such period shall begin to run on the day following the day when a notice, notification, proposal or other communication is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee,

the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

- 3.3 Unless the parties agree otherwise in writing any reference to time shall be deemed to be a reference to the time at the seat of the arbitration.
- 3.4 Any period of time imposed by these Rules or ACICA in respect of the Notice of Arbitration, the Answer to Notice of Arbitration and the composition of the Arbitral Tribunal may be extended by ACICA.

## **4 Notice of Arbitration**

- 4.1 The party initiating recourse to arbitration (hereinafter called the "Claimant") shall give to ACICA a Notice of Arbitration in two copies or such additional number as ACICA directs. The Claimant shall at the same time pay ACICA's registration fee as specified in Appendix A.
- 4.2 Subject to Article 4.5, the arbitral proceedings shall be deemed to commence on the date on which the Notice of Arbitration or the registration fee is received by ACICA, whichever is the later.
- 4.3 The Notice of Arbitration shall include the following:
- (a) a demand that the dispute be referred to arbitration;
  - (b) the names, postal addresses, telephone and facsimile numbers and email addresses (if any) of the parties and their counsel;
  - (c) a copy of the arbitration clause or the separate arbitration agreement that is invoked;
  - (d) a reference to the contract out of, relating to or in connection with which the dispute arises;
  - (e) the general nature of the claim and an indication of the amount involved, if any;
  - (f) the relief or remedy sought; and
  - (g) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

- 4.4 The Notice of Arbitration may also include:
- (a) the Claimant's proposal for the appointment of a sole arbitrator in accordance with Article 9.1;
  - (b) the notification of the appointment of an arbitrator referred to in Article 10.1; and
  - (c) the Statement of Claim referred to in Article 21.
- 4.5 If the Notice of Arbitration is incomplete or is not submitted in the required number, ACICA may request the Claimant to remedy the defect within an appropriate period of time and may delay the date of commencement of the arbitral proceedings until such defect is remedied. ACICA's discretion in this regard is without prejudice to the provisions with respect to emergency interim measures of protection set out in Schedule 2.
- 4.6 Subject to Article 4.5, upon receipt of the Notice of Arbitration, ACICA shall communicate the Notice of Arbitration to the other party referred to in Article 4.3(b).

## **5 Answer to Notice of Arbitration**

- 5.1 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.
- 5.2 The Answer to Notice of Arbitration shall include the following:
- (a) the names, postal addresses, telephone and facsimile numbers and email addresses (if any) of the Respondent and its counsel;
  - (b) any plea that an Arbitral Tribunal constituted under these Rules does not have jurisdiction;
  - (c) the Respondent's comments on the particulars set forth in the Notice of Arbitration;
  - (d) the Respondent's answer to the relief or remedy sought in the Notice of Arbitration; and
  - (e) the Respondent's proposal as to the number of arbitrators if the parties have not previously agreed thereon.

- 5.3 The Answer to Notice of Arbitration may also include:
- (a) the Respondent's proposal for the appointment of a sole arbitrator in accordance with Article 9.1;
  - (b) the notification of the appointment of an arbitrator referred to in Article 10.1;
  - (c) the Statement of Defence referred to in Article 22; and
  - (d) any counterclaim or claim for the purpose of a set-off, arising out of, relating to or in connection with the contract. (The provisions of Article 4.3 will apply to any such counterclaim or set-off.)
- 5.4 ACICA shall provide a copy of the Answer to Notice of Arbitration and of any exhibits included therewith to the Claimant.
- 5.5 Once the registration fee has been paid and all arbitrators have been confirmed, ACICA shall transmit the file to the Arbitral Tribunal.

## **6 Representation and Assistance**

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party and ACICA.

## **7 ACICA Facilities and Assistance**

ACICA shall, at the request of the Arbitral Tribunal or either party, make available, or arrange for, such facilities and assistance for the conduct of the arbitral proceedings as may be required, including suitable accommodation for sittings of the Arbitral Tribunal, secretarial assistance and interpretation facilities.

## **SECTION II: COMPOSITION OF THE ARBITRAL TRIBUNAL**

### **8 Number of Arbitrators**

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the Respondent of the Notice of Arbitration the parties cannot agree, ACICA shall determine the number of arbitrators taking into account all relevant circumstances.

### **9 Appointment of a Sole Arbitrator**

- 9.1 If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator.
- 9.2 If within 30 days after receipt by a party of a proposal made in accordance with Article 9.1 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.
- 9.3 In making the appointment, ACICA shall have regard to such considerations as are likely to secure the appointment of an 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.

### **10 Appointment of Three Arbitrators**

- 10.1 If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the Chairperson of the Tribunal.
- 10.2 If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request ACICA to appoint the second arbitrator. In making the appointment, ACICA shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

- 10.3 If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the Chairperson, the Chairperson shall be appointed by ACICA.

## **11 Appointment of Arbitrators in Multi-Party Disputes**

- 11.1 For the purposes of Articles 9 and 10, the acts of multiple parties, whether as multiple Claimants or multiple Respondents, shall have no effect, unless the multiple Claimants or multiple Respondents have acted jointly and provided written evidence of their agreement to ACICA.
- 11.2 If three arbitrators are to be appointed and the multiple Claimants or multiple Respondents do not act jointly in appointing an arbitrator, ACICA shall appoint each member of the Arbitral Tribunal and shall designate one of them to act as Chairperson, unless all parties agree in writing on a different method for the constitution of the Arbitral Tribunal and provide written evidence of their agreement to ACICA.

## **12 Information about Arbitrators**

- 12.1 Where the names of one or more persons are proposed for appointment as arbitrators, their names, postal addresses, telephone and facsimile numbers and email addresses (if any) shall be provided and their nationalities shall be indicated, together with a description of their qualifications.
- 12.2 When ACICA is requested to appoint an arbitrator pursuant to Articles 9 to 11, ACICA may require from either party such information as it deems necessary to fulfil its function.

## **13 Challenge of Arbitrators**

- 13.1 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 rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once appointed or chosen, shall immediately in writing disclose such circumstances

to the parties unless he or she has already informed them in writing of these circumstances. A copy of any written disclosures provided to a party by a prospective arbitrator or arbitrator shall be sent to ACICA.

- 13.2 Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
- 13.3 A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

## **14 Procedure for the Challenge of Arbitrators**

- 14.1 A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after being notified of the appointment of that arbitrator or within 15 days after becoming aware of the circumstances mentioned in Article 13.
- 14.2 The challenge shall be notified to the other party, to the arbitrator who is challenged, to the other members of the Arbitral Tribunal and to ACICA. The notification shall be in writing and shall state the reasons for the challenge.
- 14.3 When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, resign. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in Articles 9 to 13 shall be used for the appointment of a substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise its right to appoint or to participate in the appointment.
- 14.4 If the other party does not agree to the challenge and the challenged arbitrator does not resign, the decision on the challenge shall be made by ACICA.
- 14.5 If ACICA sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in Articles 9 to 13.

## **15 Replacement of an Arbitrator**

- 15.1 In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 9 to 13 that was applicable to the appointment or choice of the arbitrator being replaced.
- 15.2 In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of him or her performing his or her functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding Articles shall apply.

## **16 Repetition of Hearings if Arbitrator Replaced**

Once reconstituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted Arbitral Tribunal.

## **SECTION III: ARBITRAL PROCEEDINGS**

### **17 General Provisions**

- 17.1 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.
- 17.2 If either party so requests, the Arbitral Tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the Arbitral Tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
- 17.3 Questions of procedure may be decided by the Chairperson alone, or if the Arbitral Tribunal so authorises, any other member of the Arbitral Tribunal. Any such decision is subject to revision, if any, by the Arbitral Tribunal as a whole.
- 17.4 All documents or information supplied to the Arbitral Tribunal by one party shall at the same time be communicated by that party to the other party.

### **18 Confidentiality**

- 18.1 Unless the parties agree otherwise in writing, all hearings shall take place in private.
- 18.2 The parties, the Arbitral Tribunal and ACICA shall treat as confidential and shall not disclose to a third party without prior written consent from the parties all matters relating to the arbitration (including the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain except:
- (a) for the purpose of making an application to any competent court;
  - (b) for the purpose of making an application to the courts of any State to enforce the award;

- (c) pursuant to the order of a court of competent jurisdiction;
  - (d) if required by the law of any State which is binding on the party making the disclosure; or
  - (e) if required to do so by any regulatory body.
- 18.3 Any party planning to make disclosure under Article 18.2 must within a reasonable time prior to the intended disclosure notify the Arbitral Tribunal, ACICA and the other parties (if during the arbitration) or ACICA and the other parties (if the disclosure takes place after the conclusion of the arbitration) and furnish details of the disclosure and an explanation of the reason for it.
- 18.4 To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

## **19 Seat of Arbitration**

- 19.1 If the parties have not previously agreed on the seat of the arbitration and if within 15 days after the commencement of the arbitration they cannot agree, the seat of the arbitration shall be Sydney, Australia.
- 19.2 The Arbitral Tribunal may decide where the proceedings shall be conducted (at the seat or other venues). In particular, it may hear witnesses and hold meetings for consultation among its members at any venue it deems appropriate, having regard to the circumstances of the arbitration.
- 19.3 The Arbitral Tribunal may meet at any venue it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.
- 19.4 The award shall be made at the seat of the arbitration.

## **20 Language**

- 20.1 Subject to an agreement by the parties, the Arbitral Tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings.

This determination shall apply to the Statement of Claim, the Statement of Defence, any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

- 20.2 The Arbitral Tribunal may order that any submissions (written or oral), documents annexed to the Statement of Claim or Statement of Defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation (or be translated) into the language or languages agreed upon by the parties or determined by the Arbitral Tribunal.

## **21 Statement of Claim**

- 21.1 Unless the Statement of Claim was contained in the Notice of Arbitration, within a period of time to be determined by the Arbitral Tribunal, the Claimant shall communicate its Statement of Claim in writing to the Respondent, each of the arbitrators and ACICA. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.
- 21.2 The Statement of Claim shall include the following particulars:
- (a) the names, postal addresses, telephone and facsimile numbers and email addresses (if any) of the parties and their counsel;
  - (b) a statement of the facts supporting the claim;
  - (c) the points at issue; and
  - (d) the relief or remedy sought.
- 21.3 The Claimant may annex to its Statement of Claim all documents it deems relevant or may add a reference to the documents or other evidence it will submit.

## **22 Statement of Defence**

- 22.1 Unless the Statement of Defence was contained in the Answer to Notice of Arbitration, within a period of time to be determined by the Arbitral Tribunal, the Respondent shall communicate its Statement of Defence in writing to the Claimant, each of the arbitrators and ACICA.

- 22.2 The Statement of Defence shall reply to the particulars (b), (c) and (d) of the Statement of Claim (Article 21.2). The Respondent may annex to its Statement of Defence the documents on which it relies for its defence or may add a reference to the documents or other evidence it will submit.
- 22.3 Unless put forward in the Answer to Notice of Arbitration, the Respondent may in its Statement of Defence, or at a later stage in the arbitral proceedings if the Arbitral Tribunal decides that the delay was justified under the circumstances, make a counterclaim or claim for the purpose of a set-off, arising out of, relating to or in connection with the contract.
- 22.4 The provisions of Article 21.2 (b) to (d) shall apply to a counterclaim and a claim relied on for the purpose of a set-off.

## **23 Amendments to the Claim or Defence**

During the course of the arbitral proceedings either party may amend or supplement its claim or defence unless the Arbitral Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances it considers relevant. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

## **24 Jurisdiction of the Arbitral Tribunal**

- 24.1 The Arbitral Tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
- 24.2 The Arbitral Tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of this Article 24, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of

the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

- 24.3 A plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Statement of Defence referred to in Article 22, or, with respect to a counterclaim, in the reply to the counterclaim.
- 24.4 In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in its final award.

## **25 Further Written Statements**

The Arbitral Tribunal shall decide which further written statements, in addition to the Statement of Claim and the Statement of Defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

## **26 Periods of Time**

The periods of time fixed by the Arbitral Tribunal for the communication of written statements (including the Statement of Claim and Statement of Defence) should not exceed 45 days. However, the Arbitral Tribunal may extend the periods of time if it concludes that an extension is justified.

## **27 Evidence and Hearings**

- 27.1 Each party shall have the burden of proving the facts relied upon to support its claim or defence.
- 27.2 The 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.
- 27.3 An agreement of the parties and the Rules (in that order) shall at all times prevail over an inconsistent provision in the International Bar Association Rules on the Taking of Evidence in International Arbitration.

## 28 Interim Measures of Protection

- 28.1 Unless the parties agree otherwise in writing:
- (a) a party may request emergency interim measures of protection to be issued by an arbitrator (the Emergency Arbitrator) appointed prior to the constitution of the Arbitral Tribunal in accordance with the provisions set out in Schedule 2; and
  - (b) the Arbitral Tribunal may, on the request of any party, order interim measures of protection. The Arbitral Tribunal may order such measures in the form of an award, or in any other form (such as an order) provided reasons are given, and on such terms as it deems appropriate. The Arbitral Tribunal shall endeavour to ensure that the measures are enforceable.
- 28.2 An interim measure of protection is any temporary measure by which the Arbitral Tribunal orders a party to:
- (a) maintain or restore the status quo pending determination of the dispute;
  - (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;
  - (c) provide a means of preserving assets out of which a subsequent award may be satisfied;
  - (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
  - (e) provide security for legal or other costs of any party.
- 28.3 Before the Arbitral Tribunal orders any interim measure, the party requesting it shall satisfy the Arbitral Tribunal that:
- (a) irreparable harm is likely to result if the measure is not ordered;
  - (b) such harm substantially outweighs the harm that is likely to result to the party affected by the measure if the measure is granted; and
  - (c) there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the liberty of decision of the Arbitral Tribunal in making any subsequent determination.
- 28.4 The Arbitral Tribunal may require a party to provide

appropriate security as a condition to granting an interim measure.

- 28.5 The requesting party shall promptly disclose in writing to the Arbitral Tribunal any material change in the circumstances on the basis of which that party made the request for, or the Arbitral Tribunal granted, the interim measure.
- 28.6 The Arbitral Tribunal may modify, suspend or terminate any of its own interim measures at any time upon the request of any party. In exceptional circumstances the Arbitral Tribunal may, on its own initiative, modify, suspend or terminate any of its own interim measures upon prior notice to the parties.
- 28.7 If the Arbitral Tribunal later determines that the measure should not have been granted, it may decide that the requesting party is liable to the party against whom the measure was directed for any costs or damages caused by the measure.
- 28.8 The power of the Arbitral Tribunal under this Article 28 shall not prejudice a party's right to apply to any competent court or other judicial authority for interim measures. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated, in writing, by the applicant to the Arbitral Tribunal, all other parties and ACICA.

## **29 Default**

- 29.1 If, within the period of time fixed by the Arbitral Tribunal, the Claimant has failed to communicate its Statement of Claim without showing sufficient cause for such failure, the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the Arbitral Tribunal, the Respondent has failed to communicate its Statement of Defence without showing sufficient cause for such failure, the Arbitral Tribunal shall order that the proceedings continue.
- 29.2 If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause

for such failure, the Arbitral Tribunal may proceed with the arbitration.

- 29.3 If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Arbitral Tribunal may make the award on the evidence before it.

## **30 Closure of Hearings**

- 30.1 The Arbitral Tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.
- 30.2 The Arbitral Tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

## **31 Waiver of Rules**

A party that knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.

## **SECTION IV: THE AWARD**

### **32 Decisions**

When there are three arbitrators, any award or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators. Failing a majority decision on any issue, the opinion of the Chairperson shall prevail.

### **33 Form and Effect of the Award**

- 33.1 In addition to making a final award, the Arbitral Tribunal shall be entitled to make interim, interlocutory, or partial awards.
- 33.2 The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.
- 33.3 The Arbitral Tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
- 33.4 An award shall be signed by the arbitrators and it shall contain the date on which and the place (which shall be in conformity with Article 19.4) where the award was made. If any arbitrator refuses or fails to sign the award, the signatures of the majority or (failing a majority) of the Chairperson shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or Chairperson.
- 33.5 The Arbitral Tribunal shall communicate copies of the award signed by the arbitrators to the parties and ACICA.
- 33.6 Before communicating the award to the parties, the Arbitral Tribunal shall inquire of ACICA whether there are any outstanding monies due to it. The award shall not be communicated to the parties until ACICA certifies that there are no monies due to it.
- 33.7 If the arbitration law of the place where the award is made requires that the award be filed or registered by the Arbitral Tribunal, the Tribunal shall comply with this requirement within the period of time required by law.

## **34 Applicable Law, Amiable Compositeur**

- 34.1 The Arbitral Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Arbitral Tribunal shall apply the rules of law which it considers applicable.
- 34.2 The Arbitral Tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have, in writing, expressly authorized the Arbitral Tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
- 34.3 In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

## **35 Settlement or Other Grounds for Termination**

- 35.1 If, before the award is made, the parties agree on a settlement of the dispute, the Arbitral Tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the Tribunal, record the settlement in the form of an arbitral award on agreed terms. The Arbitral Tribunal is not obliged to give reasons for such an award.
- 35.2 If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in Article 35.1, the Arbitral Tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The Arbitral Tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.
- 35.3 Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the Arbitral Tribunal to the parties and ACICA. Where an arbitral award on agreed terms is made, the provisions of Articles 33.2, and 33.4 to 33.7, shall apply.

## **36 Interpretation of the Award**

- 36.1 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.
- 36.2 The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of Articles 33.2 to 33.7, shall apply.

## **37 Correction of the Award**

- 37.1 Within 30 days after the receipt of the award, either party, with notice to the other party, may request the Arbitral Tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The Arbitral Tribunal may within 30 days after the communication of the award make such corrections on its own initiative.
- 37.2 Such corrections shall be in writing, and the provisions of Articles 33.2 to 33.7 shall apply.

## **38 Additional Award**

- 38.1 Within 30 days after the receipt of the award, either party, with notice to the other party, may request the Arbitral Tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
- 38.2 If the Arbitral Tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within 60 days after the receipt of the request.
- 38.3 When an additional award is made, the provisions of Articles 33.2 to 33.7, shall apply.

## **39 Costs**

The Arbitral Tribunal shall fix the costs of arbitration in its award. The term "costs of arbitration" includes only:

- (a) the fees of the Arbitral Tribunal, to be stated

- separately as to each arbitrator, and to be fixed in accordance with Article 40;
- (b) the travel (business class airfares) and other reasonable expenses incurred by the arbitrators;
  - (c) the costs of expert advice and of other assistance required by the Arbitral Tribunal;
  - (d) the travel (business class airfares) and other reasonable expenses of witnesses to the extent such expenses are approved by the Arbitral Tribunal;
  - (e) the legal and other costs directly incurred by the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the Arbitral Tribunal determines that the amount of such costs is reasonable;
  - (f) ACICA's administration fee;
  - (g) fees for facilities and assistance provided by ACICA in accordance with Articles 7 and 42.5;
  - (h) ACICA's registration fee; and
  - (i) the costs associated with any request for emergency interim measures of protection made pursuant to Article 28.1(a).

## **40 Fees of the Arbitral Tribunal**

- 40.1 Unless otherwise agreed, the arbitrators shall be remunerated on the basis of an hourly rate.
- 40.2 The hourly rate shall be agreed between the parties and the arbitrators or, failing agreement, shall be determined by ACICA.
- 40.3 Unless otherwise agreed in writing, the hourly rate will be exclusive of GST, value added tax or any other like tax which may apply.
- 40.4 Where ACICA is requested to determine the hourly rate, it shall take into account, inter alia:
- (a) the nature of the dispute and the amount in dispute, insofar as it is aware of them; and
  - (b) the standing and experience of the arbitrator.

## **41 Apportionment of Costs**

- 41.1 Except as provided in Article 41.2, the costs of arbitration shall in principle be borne by the unsuccessful party.

However, the Arbitral Tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

- 41.2 With respect to the costs referred to in Article 39(e), the Arbitral Tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.
- 41.3 When the Arbitral Tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in Article 39 in that order or award.
- 41.4 No additional fees may be charged by an Arbitral Tribunal for interpretation or correction or completion of its award under Articles 36 to 38.

## **42 Deposit of Costs**

- 42.1 The Arbitral Tribunal, on its establishment, shall request each party to deposit an equal amount as an advance for the costs referred to in Article 39 (a), (b), (c), (f) and (g).
- 42.2 Where a Respondent submits a counterclaim, or it otherwise appears appropriate in the circumstances, the Arbitral Tribunal may in its discretion establish separate deposits.
- 42.3 During the course of the arbitral proceedings the Arbitral Tribunal may from time to time request supplementary deposits from the parties.
- 42.4 The Arbitral Tribunal shall fix the amount of any deposit or supplementary deposits only after consultation and with the approval of ACICA.
- 42.5 With the consent of ACICA, the Arbitral Tribunal may lodge the deposits in a trust account maintained by ACICA. ACICA shall disburse those funds on the instructions of the Arbitral Tribunal. ACICA may make a charge for its trust account services.
- 42.6 If the required deposits are not paid in full within 30 days after the receipt of the request, the Arbitral Tribunal shall

so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the Arbitral Tribunal may order the suspension or termination of the arbitral proceedings.

- 42.7 After the award has been made, the Arbitral Tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

## **SECTION V: GENERAL**

### **43 Decisions Made by ACICA**

- 43.1 Decisions made by ACICA will be made by the ACICA Board of Directors, or by any person(s) to whom the Board of Directors has delegated decision making authority.
- 43.2 Decisions made by ACICA with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. ACICA shall not be required to give any reasons.
- 43.3 To the extent permitted by the law of the seat of the arbitration, the parties shall be taken to have waived any right of appeal or review in respect of any such decisions made by ACICA to any State court or other judicial authority.
- 43.4 Neither ACICA nor its members, officers, servants or agents shall be liable for making any decision or taking any action or failing to make any decision or take any action under these Rules.

### **44 Liability of the Arbitral Tribunal**

The Arbitral Tribunal shall not be liable for any act or omission in connection with any arbitration conducted by reference to these Rules save where the act or omission is fraudulent.

## **APPENDIX A: ACICA's Fees**

### **1 Registration Fee**

- 1.1 The reference in these Rules to "dollars" or "\$" is to Australian currency.
- 1.2 When submitting the Notice of Arbitration the Claimant shall pay to ACICA a registration fee of \$2,500. The registration fee is not refundable.

### **2 Administration Fee**

- 2.1 The parties shall pay to ACICA an administration fee as specified in Schedule 1.
- 2.2 For the purposes of determining the amount in dispute:
  - (a) claims, counterclaims and set-off defences shall be added together;
  - (b) amounts claimed for interest shall not be taken into account, unless the interest claim exceeds the principal amount claimed, in which case the interest claims alone shall be considered in calculating the amount in dispute;
  - (c) claims expressed in currencies other than in Australian dollars shall be converted into Australian dollars at the rate of exchange applicable on the day when ACICA received the Notice of Arbitration; and
  - (d) if the amount in dispute is not specified in the Statement of Claim or counterclaim, the amount in dispute shall be determined by the Arbitral Tribunal taking into account all relevant circumstances.

### **3 Emergency Arbitrator Fee**

- 3.1 The party applying for the appointment of an Emergency Arbitrator must pay the costs of the emergency proceedings upon filing the application. These costs include:
  - (a) the Emergency Arbitrator Fee - \$10,000; and
  - (b) the application fee - \$2,500.
- 3.2 ACICA may decide to increase or reduce the costs having regard to the nature of the case, the work performed by the Emergency Arbitrator and ACICA, and other relevant circumstances.

## SCHEDULE 1

Amount in Dispute	Administration Fee
\$1 to \$500,000	1% of the amount in dispute
\$500,001 to \$1,000,000	\$5,000 plus 0.5% of the amount in dispute above \$500,000
\$1,000,001 to \$10,000,000	\$7,500 plus 0.25% of the amount in dispute above \$1,000,000
\$10,000,001 to \$100,000,000	\$30,000 plus 0.01% of the amount in dispute above \$10,000,000
over \$100,000,000	\$39,000 plus 0.02% of the amount in dispute above \$100,000,000 up to a maximum of \$60,000

## **SCHEDULE 2**

### **1 Application for Emergency Interim Measures of Protection**

- 1.1 A party in need of emergency interim measures of protection may make an application to ACICA for emergency interim measures of protection prior to the constitution of the Arbitral Tribunal.
- 1.2 The application for emergency interim measures of protection shall:
  - (a) be made to ACICA in writing;
  - (b) be made concurrently with or following the filing of the Notice of Arbitration;
  - (c) if possible, be communicated to all other parties prior to or at the same time as making the application; and
  - (d) include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify the other parties of the application.
- 1.3 The application shall contain details of:
  - (a) the nature of the relief sought;
  - (b) the reasons why such relief is required on an emergency basis; and
  - (c) the reasons why the party is entitled to such relief.
- 1.4 The party making the application shall at the same time pay ACICA the Emergency Arbitrator Fee and the application fee as specified in Appendix A.

### **2 Appointment of Emergency Arbitrator**

- 2.1 Upon receipt of an application for emergency interim measures of protection ACICA shall use its best endeavours to appoint an Emergency Arbitrator within 1 business day from the receipt of the application and shall notify the parties of the appointment as soon as possible thereafter. A prospective Emergency Arbitrator shall immediately in writing disclose to ACICA any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A party who intends to challenge an Emergency Arbitrator shall send notice of its challenge within one business day after being

notified of the appointment of that arbitrator and the circumstances disclosed.

- 2.2 The time period for the appointment of the Emergency Arbitrator does not commence until ACICA has received:
  - (a) the application in compliance with Article 1 above; and
  - (b) payment of the Emergency Arbitrator Fee and the application fee.
- 2.3 Unless the parties otherwise agree in writing, the Emergency Arbitrator shall not act as an arbitrator in the proceedings.
- 2.4 Once the Emergency Arbitrator has been appointed, ACICA shall refer the application to the Emergency Arbitrator.

### **3 Decisions on Emergency Interim Measures of Protection**

- 3.1 Any decision on an application for emergency interim measures of protection shall be made not later than 5 business days from the date upon which the application was referred to the Emergency Arbitrator pursuant to Article 2.4 above. ACICA may extend this time limit upon a request from the Emergency Arbitrator.
- 3.2 Any decision on an application for emergency interim measures of protection shall:
  - (a) be made in writing;
  - (b) state the date when it was made;
  - (c) contain reasons for the decision; and
  - (d) be signed by the Emergency Arbitrator.
- 3.3 The Emergency Arbitrator shall have the power to order or award any interim measure of protection on an emergency basis (the "Emergency Interim Measure") that he or she deems necessary and on such terms as he or she deems appropriate.
- 3.4 The Emergency Arbitrator may modify or vacate the Emergency Interim Measure for good cause shown at any time prior to the constitution of the Arbitral Tribunal.
- 3.5 Before the Emergency Arbitrator orders or awards any Emergency Interim Measure, the party requesting it shall satisfy the Emergency Arbitrator that:

- (a) irreparable harm is likely to result if the Emergency Interim Measure is not ordered;
  - (b) such harm substantially outweighs the harm that is likely to result to the party affected by the Emergency Interim Measure if the Emergency Interim Measure is granted; and
  - (c) there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the liberty of decision of the Arbitral Tribunal in making any subsequent determination.
- 3.6 The Emergency Arbitrator may require a party to provide appropriate security as a condition of any Emergency Interim Measure.
- 3.7 The Emergency Arbitrator shall promptly deliver a copy of the decision on emergency interim measures of protection and any Emergency Interim Measure to each of the parties and ACICA.

## **4 Compliance with the Emergency Interim Measure**

- 4.1 Any Emergency Interim Measure shall be binding on the parties.
- 4.2 The parties undertake to comply with any Emergency Interim Measure without delay.
- 4.3 Any Emergency Interim Measure shall, in any event, cease to be binding if:
- (a) the Arbitral Tribunal makes a final award;
  - (b) the claim is withdrawn;
  - (c) the Emergency Arbitrator or the Arbitral Tribunal (whichever applies) so decides; or
  - (d) the Arbitral Tribunal is not appointed within 90 days of the Emergency Interim Measure being made.

## **5 Powers after Arbitral Tribunal Appointment**

- 5.1 The Emergency Arbitrator's jurisdiction and powers cease forthwith on the appointment of the Arbitral Tribunal.
- 5.2 The Arbitral Tribunal may reconsider, vacate or modify any Emergency Interim Measure.

- 5.3 The Arbitral Tribunal is not bound by any decision or the reasons of the Emergency Arbitrator.

## **6 Costs**

- 6.1 The costs associated with the emergency interim measures of protection proceedings include:
- (a) the Emergency Arbitrator Fee and the application fee; and
  - (b) the legal and other costs directly incurred the parties.
- 6.2 If the time for a decision on an application for emergency interim measures of protection is extended pursuant to Article 3.1 above, ACICA may request an increase to the Emergency Arbitrator Fee specified in Appendix A.
- 6.3 The costs associated with any emergency interim measures of protection proceedings may initially be apportioned by the Emergency Arbitrator and are subject to the Arbitral Tribunal's determination of the costs of arbitration under the Rules.

## **7 Other**

- 7.1 The power of the Emergency Arbitrator under this Schedule 2 shall not prejudice a party's right to apply to any competent court or other judicial authority for emergency interim measures. If any such application or any order for such measures is made after the referral of an application for emergency interim measures of protection to an Emergency Arbitrator, the applicant shall promptly notify the Emergency Arbitrator, all other parties and ACICA in writing.
- 7.2 The Emergency Arbitrator shall not be liable for any act or omission in connection with any arbitration conducted by reference to these Rules save where the act or omission is fraudulent.