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Using a fused process in international commercial arbitration

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This is the third briefing note on the use of a fused process involving both arbitration and mediation to resolve an international commercial dispute that has been referred to arbitration. This note considers the possibility of a fused process being used under the 2017 ICC Arbitration Rules, the DIS Arbitration Rules and the ACICA Arbitration Rules.

ICC Rules:

Globally, arbitrators are increasingly being recognised as 'dispute managers' with an obligation to exercise their arbitral powers to act as a 'settlement facilitator'. Under Art 22(1) of the ICC Arbitration Rules, 2017 edition, the arbitrator and the parties, are under an obligation to 'make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.' In order to achieve such an objective arbitrators are vested with the power under Art 22(2) to adopt 'such procedural measures as [they] consider appropriate, provided that [such measures] are not contrary to any agreement of the parties.' Appendix IV to the ICC Rules then sets out a number of 'Case Management Techniques' which the arbitral tribunal and the parties may consider with a view to 'controlling time and cost'.

The arbitrator's initiative as a settlement facilitator is expressly listed in Appendix IV as one of the recognised case management techniques. Paragraph (h)(ii) of Appendix IV provides that 'where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.' Steps or measures to facilitate settlement may include suggesting that a form of fused process be considered or agreed. Such measures reflect a cultural tradition not always seen in Common Law based jurisdiction.

DIS Rules:

A stronger emphasis on an agreed resolution being reached in an arbitration is seen in the German Institution of Arbitration Rules, 1998 edition, the DIS Rules, where Section 32.1 states that '[a]t every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of the individual issues in dispute.'

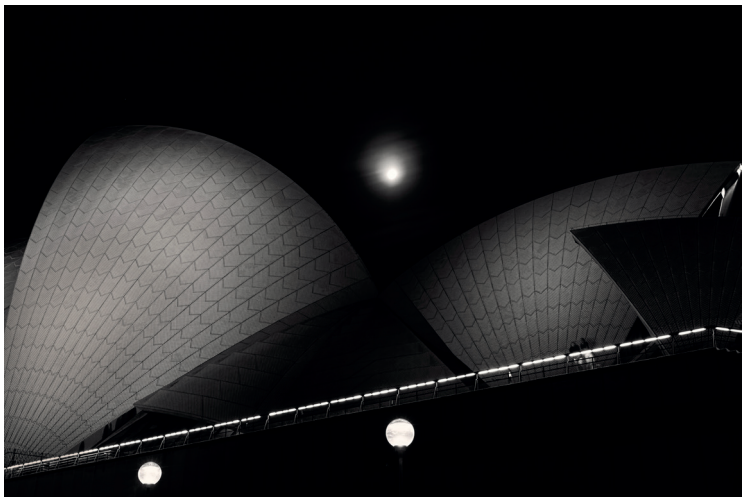
ACICA Rules:

The only attempt to introduce mediation into the international arbitration process in Australia has been a tentative and recent recognition that there are a range of ADR options open to parties that the parties should consider when involved in an arbitration. The parties should not be wedded to the idea of only proceeding with an arbitration process. This is seen in the current Arbitration Rules of the Australian Centre for International Commercial Arbitration ('ACICA') which require the arbitrator at the first case management conference, to request that the parties consider the use of other dispute resolution processes to

resolve their dispute. Article 21.3 of the ACICA Arbitration Rules provides as follows:

21.3 (at the first case management conference) … the Arbitral Tribunal … shall make a procedural timetable for the arbitration which may include provisional hearing dates. …. The Arbitral Tribunal shall raise for discussion with the parties the possibility of using other techniques to facilitate settlement of the dispute.'

This provision however, operating as it does in a common law jurisdiction, does not appear to have resulted in any arbitrations being resolved by the use of a fused arbitration/mediation process.



Conclusion

As highlighted in the previous update regarding the use of a fused arbitration-mediation process, increasingly corporate counsel and executives are looking for a speedy and less costly resolution of their disputes and arbitration institutions are crafting their arbitration rules to enable a combined process to be used. Arbitrators need to have a flexibe approach when faced with parties who may have long ago agreed to arbitrate but find themselves in circumstances where mediation may be a more appropriate mechanism to resolve their dispute.

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Malcolm is a chartered arbitrator primarily based in Sydney. He is a member of the LCIA, a former member of the Board of Trustees of CIArb, a director and Fellow of ACICA and a Fellow of the IAMA. He is a member of the panel of ICDR, SIAC, CIETAC, HKIAC, AMINZ and KCAB. He has also acted as an arbitrator with the CAS based in Lausanne, Switzerland since 1995 and was a member of the Ad Hoc Division of CAS at the Athens Olympic Games in 2004 and at the Torino Olympic Games in 2006.

This briefing is based on a lecture series Malcolm presented in Beijing, PRC in May 2017.

If you require advice on any of the topics discussed in this briefing from Malcolm or any member of 20 Essex Street please contact clerks@20essexst.com

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