

Managing the Impact of COVID-19: Use of Arbitration to Mitigate Risk

The COVID-19 pandemic is presenting unique challenges for the fair, efficient and orderly disposition of commercial disputes in Australia and world-wide. The social and economic impact of the virus will likely continue to have legal and access-to-justice implications for some time, giving rise to new disputes and delaying the progress of existing disputes before the courts. The depth of this crisis creates a need for parties and their legal representatives to consider carefully appropriate and alternative options for the efficient, timely and cost-effective resolution of disputes.

In that regard arbitration offers a high degree of flexibility, enables effective accommodation of social distancing measures and can provide commercial entities with faster resolution times and greater certainty with regard to outcome and cash flow. Arbitration can be utilised effectively to finally resolve the entirety of a dispute or to deal with a particular aspect of a dispute (eg. threshold legal issues or significant disputes as to discovery and legal professional privilege). The range of subject-matters that are capable of resolution by arbitration is very broad including the kind of disputes likely to emerge from the current crisis attributable to force majeure, frustration of contracts, material adverse changes clauses in M&A and loan agreements and cross default provisions.

As an independent not-for-profit organization, ACICA's objective is to assist parties with the conduct of arbitration proceedings to enable them to draw on these many benefits and to manage current uncertainties. ACICA has over 30 years' experience assisting parties to effectively resolve disputes.

Benefits of Arbitration during COVID-19

Arbitration offers particular advantages in the current environment. Some of these have been outlined below.

Flexibility

Arbitration enables parties to readily tailor and adapt processes to meet the specific requirements of the dispute, having regard to value and complexity. The ACICA Rules reflect international best practice, offering a high degree of flexibility to parties in dispute.

The flexibility of the arbitral process enables parties and counsel to take creative and innovative approaches to case management, including the use of virtual hearings. ACICA has issued [Sample Submission Agreements](#) which illustrate the flexibility that parties have to tailor aspects of the arbitration to suit their particular needs, including in relation to virtual hearings and timeframes from commencement of the arbitration to final award.

ACICA has made available a sample [Procedural Order for the Use of Online Dispute Resolution Technologies](#) which provides guidance on how hearings may be conducted with the use of online technology. This resource is currently being updated and further guidance will also be issued in the near future in relation to virtual hearings.

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Speed

Arbitration empowers parties to implement effective time management strategies. Early fixing of case timelines through to hearing, regular case management conferences and stop-clock hearings are just some of the commonly used mechanisms to monitor and control time frames in arbitration.

The overriding objective of the [ACICA Rules](#) is to provide arbitration that is timely, cost-effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved. The Rules require each Tribunal to adopt suitable procedures for the conduct of arbitration to avoid unnecessary delay or expense.

ACICA also offers a set of [Expedited Rules](#) as a cost-effective and quick alternative for smaller value or less complex disputes. The Expedited Rules provide for a sole arbitrator, no hearing unless exceptional circumstances exist and a final award within four months of appointment where there is no counterclaim. Because the parties control the process, however, they can agree to modify these provisions of the Rules (e.g. to allow for a short hearing in appropriate cases). ACICA's Sample Submission Agreements provide sample language for adaptation and the use of the Expedited Rules in this manner.

Two other aspects of arbitration also ensure its relatively greater speed than court proceedings. First, the duration of hearing time to resolve a dispute is usually substantially shorter than a court proceeding. Secondly, arbitral awards have much greater certainty because of the very restricted procedural grounds on which an award can be challenged.

Certainty

In such an uncertain time, arbitration offers parties and legal representatives a high degree of control in the resolution of disputes. Parties can agree to a process and manage its conduct, giving rise to greater certainty with regard to outcomes and managing risk profiles.

It is expected that COVID-19 will give rise to new disputes in many areas and across all business sectors. There will also be court proceedings that currently face postponement or other delays as a result of COVID-19 where the dispute may be arbitrable. It is possible for parties to agree to arbitration of these disputes, in whole or in part, and to have that arbitration

agreement supersede and replace any prior dispute resolution agreement between the parties. As mentioned above, ACICA encourages parties to make use of (and adapt as needed) its Sample Submission Agreements for relevant referrals where appropriate.

Finality

Arbitration of a dispute provides a final and binding award that is readily enforceable within Australia in accordance with the provisions of the State and Territory *Commercial Arbitration Acts* and the *International Arbitration Act (Cth)* 1974, and globally pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. There is limited recourse available to challenge an award, providing confidence in outcome and finality to a dispute. This enables appropriate business planning and budgeting.

Expertise

ACICA offers a streamlined administrative service, taking an active approach to case management to ensure that arbitration proceedings are conducted efficiently. ACICA draws on established pools of experienced arbitrators for ACICA appointments (parties remain able to agree to their choice of arbitrator/s) and has procedures in place to confirm arbitrator independence, impartiality and availability to hear a matter. ACICA's administrative services covers financial management of deposits in trust and payments to the tribunal.

ACICA has streamlined its own processes in response to COVID-19. ACICA remains open and is moving matters forward (see [Important Information for Users](#)). New filings may be made through ACICA's online [E-filing system](#) and support is readily available from the Secretariat.

Recognising the extraordinary toll that the crisis is having on individuals and businesses and to support the community in this time, ACICA is offering a **25% discount on all case registration fees for arbitrations commenced between 1 May and 31 October 2020.**

ACICA maintains a [Resource centre](#) on its website containing model clauses, sample pleadings and guidelines, as well as links to useful external resources to aid in the conduct of arbitration. ACICA's resources are being further developed to support the dispute resolution community in some of the unique issues currently facing it and further information will be made available on the website.

All inquiries should be directed to the ACICA Secretariat on secretariat@acica.org.au.

