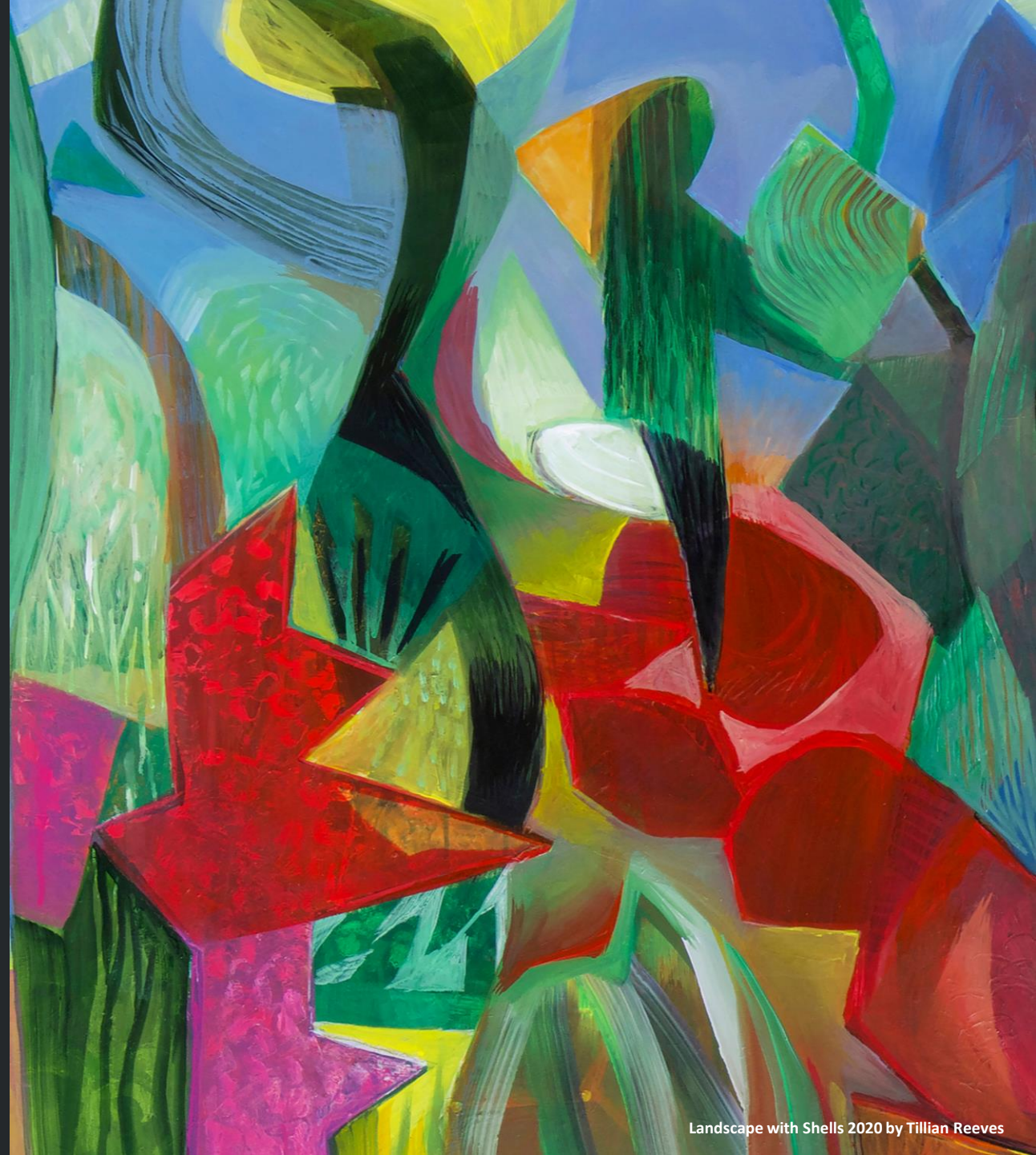


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THE UNDERTAKING ARBITRATION PROCESS



ARBITRATION UNDER THE 2024 IAU

The process for an arbitration to resolve an access dispute is contained in:

- clause 3.12.5 of the 2024 IAU; and
- the Australian Centre for International Commercial Arbitration (ACICA) rules of arbitration (the ‘Rules’)

Note that ACICA is the body that administers an arbitration under the Rules

Prior to initiating an arbitration, the parties must enter into an Arbitration Agreement agreeing to be bound by the arbitration process

KEY DETAILS



There will be **one Arbitrator**, to be agreed upon by the parties or appointed by ACICA if the parties cannot agree



The determination in an arbitration is called an “**award**”



The unsuccessful party will **pay the costs** of the successful party, unless the arbitrator considers a different allocation is required



There will be **no oral hearing** unless the Arbitrator or parties require one



Matters relating to the arbitration (including its existence) are **confidential**, except that the details of the award shall be given to the ACCC



KEY DETAILS



The parties can be **legally represented**



There are limited rights to appeal an arbitration award. The appeal rights are contained in Part 7 of the *Commercial Arbitration Act 2011 (SA)*



The periods of time fixed by the Arbitrator for the communication of written statements **should not exceed 45 days**, however, these periods may be extended by the Arbitrator if necessary

STANDARD STEPS IN AN ARBITRATION

- 1 Claimant submits Notice Of Arbitration
- 2 Respondent submits Answer to Notice Of Arbitration
- 3 Arbitrator appointed
- 4 Preliminary conference - Between the parties and Arbitrator (in person or virtually) to set a procedural timetable
- 5 Pleadings - Statement of Claim, Statement of Defence, Reply
- 6 Discovery & Subpoenas
- 7 Evidence - Can be served concurrently with pleadings or in separate stages in accordance with the procedural timetable
- 8 Submissions - Can be done simultaneously or in sequence, subject to procedural orders
- 9 Hearing - The Arbitrator may convene an oral hearing (in person or virtually), or determine the matter on the papers
- 10 Award delivered by the Arbitrator



STEP 1: NOTICE OF ARBITRATION

The party initiating the arbitration, the Claimant, shall submit a Notice of Arbitration to both the Respondent and ACICA, and pay the registration fee.

The Notice of Arbitration contains:

- a) a demand that the dispute be referred to arbitration;
- b) contact information of the parties and their legal representatives (if applicable);
- c) a copy of the arbitration clause in the 2024 IAU and the separate arbitration agreement between the parties;
- d) identification of the 2024 IAU as the agreement in respect of which the dispute has arisen;
- e) the general nature of the dispute and an indication of the amount involved, if any; and
- f) the relief sought by the Claimant.

STEP 2: ANSWER TO THE NOTICE OF ARBITRATION

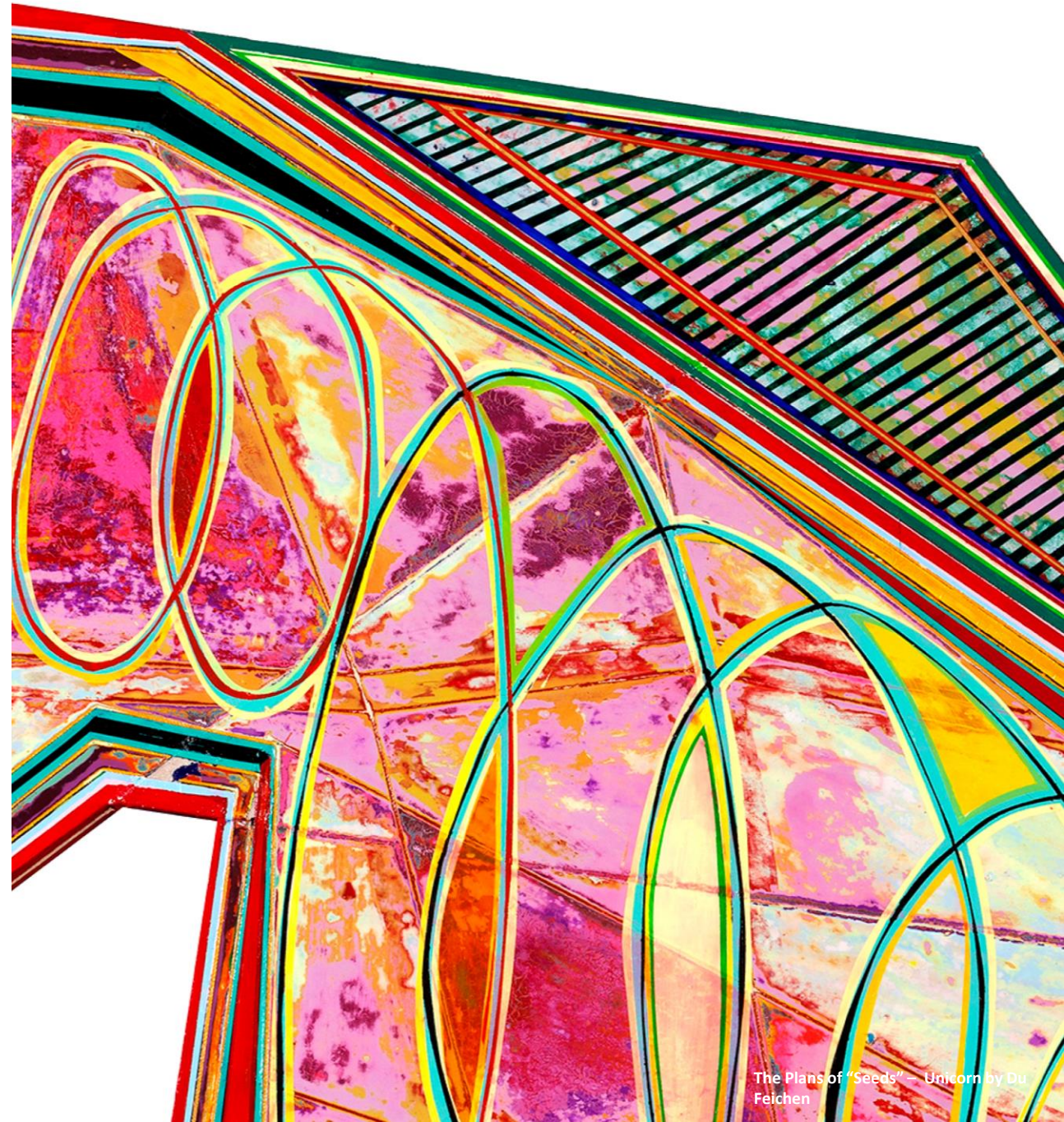
Within 30 days of receiving the Notice of Arbitration, the Respondent is to submit an Answer to the Notice of Arbitration to the Claimant and ACICA.

The Answer to Notice of Arbitration contains:

- a) contact information of the Respondent and its legal representatives (if any);
- b) any submission that the Arbitrator does not have jurisdiction to determine the dispute;
- c) comments on the particulars of the dispute contained in the Claimant's Notice of Arbitration; and
- d) comments on the relief sought by the Claimant in its Notice of Arbitration.

STEP 3: APPOINTMENT OF ARBITRATOR

- The ARTC and the Applicant will seek to agree on the choice of Arbitrator
- If the parties cannot reach agreement within 10 Business Days of the referral of a dispute to arbitration under the 2024 IAU, the Arbitrator will be appointed by ACICA and either party may write to ACICA notifying ACICA that the parties have not been able to agree on the choice of Arbitrator and requesting that ACICA make that appointment
- The Arbitrator is required to observe the rules of natural justice and will have power to grant all legal, equitable and statutory remedies



STEP 4: PRELIMINARY CONFERENCE



- As soon as practicable, the Arbitrator will hold a preliminary meeting with the parties in person or virtually by conference call, videoconference or using other technology with participants in one or more geographical places
- During this conference, a procedural timetable for the Arbitration will be determined and this may include provisional hearing dates
- The Arbitrator may, at any time, on application by either party, extend or vary the procedural timetable

STEP 5: PLEADINGS:

A) CLAIMANT'S STATEMENT OF CLAIM

The Claimant is required to submit a Statement of Claim, which must include:

- a) a statement of the facts supporting its position in the dispute;
- b) the Claimant's view on the points in issue between the parties;
- c) the relief sought; and
- d) the legal grounds or arguments supporting the Claimant's position in the dispute.

As far as possible, the Claimant must annex to its Statement of Claim all documents and other evidence on which it relies (or contain references to them). However, there will often be a separate stage of evidence exchange under the procedural timetable, subject to the orders made by the Arbitrator.



STEP 5: PLEADINGS:

B) RESPONDENT'S STATEMENT OF DEFENCE

The Statement of Defence shall reply to the following details as contained in the Statement of Claim:

- a) a statement of the facts supporting the Respondent's position in the dispute;
- b) the Respondent's view the points in issue between the parties;
- c) the Respondent's view on the relief claimed by the Claimant; and
- d) the legal grounds or arguments supporting the Respondent's views.

The Respondent must, as far as possible, annex to its Statement of Defence the documents and other evidence on which it relies for its defence (or contain references to them). However, there will often be a separate stage of evidence exchange under the procedural timetable, subject to the orders made by the Arbitrator.



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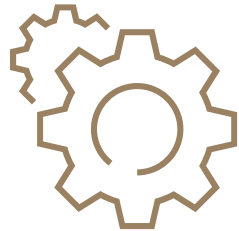
STEP 5: PLEADINGS:

C) CLAIMANT'S REPLY

- The procedural timetable may make provision for the Claimant to provide a Reply
- A Reply is generally limited in scope to responding to matters raised in the Respondent's Statement of Defence, rather than raising new matters



Can the parties amend their statements or make further written statements?



- Yes, unless the Arbitrator considers it inappropriate to allow an amendment, either party may amend or supplement its claim or defence
- The Arbitrator shall decide if further written statements, in addition to the claim and defence, shall be required from the parties and shall fix the periods of time for submitting those

STEP 6: DISCOVERY & SUBPOENAS

- There is no express provision for discovery or disclosure in either the ACICA Rules or the 2024 Undertaking, but discovery can be ordered by the Arbitrator as part of the procedural timetable
- Either party may apply to the Arbitrator for leave to approach the Supreme Court of South Australia to issue a subpoena (ie an order of the Court requiring production of certain specified documents) to any relevant third parties

STEP 7: EVIDENCE

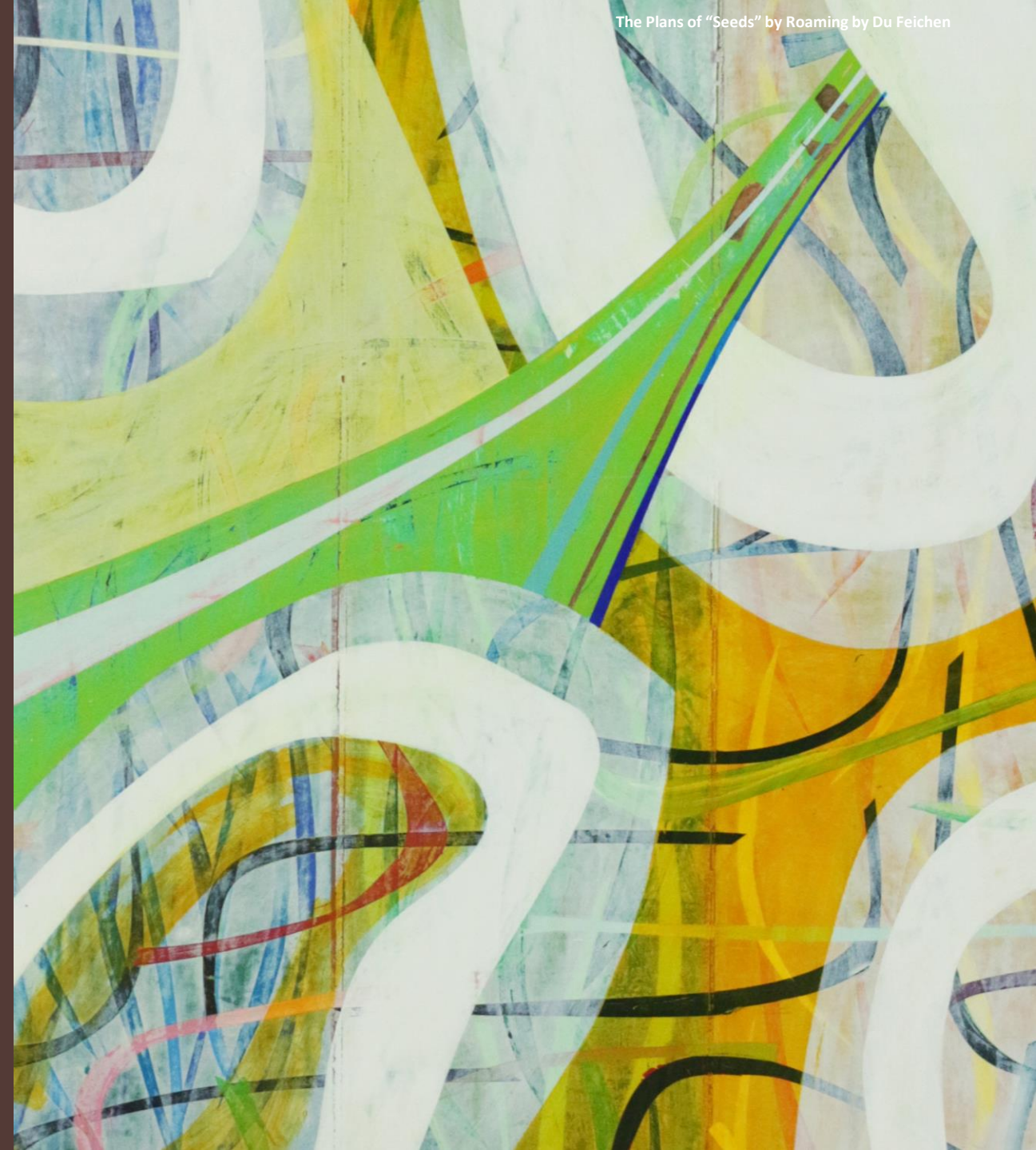
- Each party has the burden of proving the facts relied upon to support its claim or defence
- Whilst the parties are required, to the extent possible, to include or refer to documents and other evidence on which they rely in their pleadings, there are often orders made for a separate stage of evidence exchange, which can follow a similar sequence to the pleadings - i.e. 1) Evidence In-Chief, 2) Evidence in Response, and 3) Evidence in Reply
- The Arbitrator may also order a party to produce documents they believe to be relevant and any failure to produce any relevant document without good reason permits the Arbitrator to draw an adverse inference from such failure

STEP 8: SUBMISSIONS

- In the lead up to a hearing, further procedural orders may be made about the exchange of submissions and conduct of the hearing
- Submissions are documents that summarise the parties' respective factual and legal arguments
- 'Opening submissions' are usually exchanged, either simultaneously or sequentially, shortly before the commencement of a hearing
- Parties to an arbitration are often then required to make 'closing submissions' either orally or in writing at the end of the hearing or shortly after it has concluded

STEP 9: HEARINGS

- Upon request from either party, the Arbitrator can hold hearings for the presentation of evidence by witnesses, including expert witnesses, and/or for oral argument
 - Otherwise, the Arbitrator shall decide whether to hold such hearings or whether to determine the matter on the basis of the documents and other materials provided by the parties
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STEP 10: AWARD



- An 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
- The Arbitrator shall state the reasons upon which an award is based, unless the parties have agreed that no reasons are to be given
- Note that in addition to making a final award, the Arbitrator shall be entitled to make interim and interlocutory awards as needed in the circumstances of the Arbitration



QUESTIONS

