

# NEW ACICA 2021 ARBITRATION RULES

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Legal Briefings - By **Brenda Horrigan, Chad Catterwell, Guillermo Garcia-Perrote, Imogen Kenny and Nicholas Brewer**

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The Australian Centre of International Commercial Arbitration (**ACICA**) has unveiled revised Arbitration Rules due to enter into force in April 2021. As arbitration continues to be on the rise in Australia, and ACICA enjoys record caseloads, the 2021 ACICA Rules set out ACICA's vision for the future of arbitration.

The 2021 Rules further strengthen ACICA's status as the preeminent arbitral institution in Australia. The revision modernises the ACICA Rules by codifying recent practices in relation to technology, virtual and hybrid hearings, and anticipating the needs of the arbitration community in key areas such as consolidation and multi-contract arbitrations, effective case management and costs.

We set out below the salient features of the 2021 ACICA Arbitration Rules (which are broadly similar to those made to the ACICA Expedited Rules).

## NOTABLE AMENDMENTS IN THE 2021 ACICA RULES

### **NEW PROVISIONS EMBRACING THE DIGITALISATION OF ARBITRATION: VIRTUAL HEARINGS AND PAPERLESS FILING**

The new rules include timely revisions expressly allowing Tribunals to hold conferences and hearings virtually or in a combined (or 'hybrid') form. The holding of virtual hearings has become the norm during the present COVID-19 pandemic, and the revision modernises the ACICA Rules in line with recent trends and practices.

Under the new rules, if a hearing is held virtually it will be deemed to be held at the seat.

ACICA has moved to a default electronic position of requiring e-filing of a Notice of Arbitration and Answer by email or through its dedicated online portal. Notices may also be delivered electronically or by “*any other appropriate means that provides a record of its delivery*” reflecting evolving practices. The provision on delivery addresses for notices has been extended to include an address “*according to the parties' practice in prior dealings*”.

Recognising the increased movement of sensitive information electronically, the Tribunal may adopt measures to protect information shared in the arbitration and ensure any personal data produced or exchanged in the arbitration is processed and/or stored with regard to any applicable law.

Under the new rules, unless the parties agree otherwise, or the Tribunal or ACICA directs otherwise, any award may be signed electronically and/or in counterparts and assembled into a single instrument.

### **EXTENDED SCOPE FOR CONSOLIDATION AND MULTI-CONTRACT ARBITRATIONS**

The 2021 Rules adopt a more liberal approach to consolidation. In this regard, the compatibility of the relevant arbitration agreements has become central in order to allow for consolidation in relation to a vertical chain of contracts.

Article 16 (Consolidation of Arbitrations) states that ACICA may consolidate two or more arbitrations into a single arbitration, if:

- a. the parties have agreed to the consolidation;
- b. all the claims in the arbitrations are made under the same arbitration agreement; or
- c. the claims in the arbitrations are made under more than one arbitration agreement, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and ACICA finds the arbitration agreements to be compatible. (Emphasis added.)

ACICA’s power to consolidate proceedings therefore encompasses proceedings arising out of the same transaction or series of transactions, where ACICA finds the arbitration agreements to be compatible.

The 2021 Rules also present a streamlined approach for multi-contract arbitration. Article 18 (Single Arbitration under Multiple Contracts) now allows for composite Notices of Arbitration, which means that parties can commence a single arbitration in respect of disputes under multiple contracts. An arbitration can therefore be commenced under multiple contracts with a single Notice of Arbitration, provided that the Notice includes an application to ACICA addressing the threshold issues for consolidation, together with identifying and providing a copy of each contract and arbitration agreement invoked. In the event ACICA rejects the application for consolidation, the claimant is required to file a separate Notice of Arbitration for each arbitration that has not been consolidated.

In addition, the new Article 19 (Concurrent Proceedings) empowers the Tribunal to manage related proceedings, following consultation with the parties. The Tribunal can exercise case management powers to conduct related proceedings concurrently, or suspend a proceeding, where the same Tribunal is constituted in each arbitration and there is a common question of law or fact. This allows Tribunals to manage related proceedings in a time and cost efficient way.

## **EARLY DISMISSAL PROCEDURE**

The new Article 25.7 (General Provisions) expressly empowers the Tribunal to make an award granting early dismissal or termination of any claim, defence or counterclaim. Consistent with other developments, this provision enhances the Tribunal's broad powers under the ACICA Rules, now expressly including summary dismissal and early termination.

## **EFFECTIVE CASE MANAGEMENT**

### ***Time limit for rendering awards***

An Arbitral Tribunal is required, absent a shorter period being required by law or the parties, to render an award no later than the earlier of 9 months from the date the file is transmitted to the Tribunal, or 3 months from the date the Tribunal declares the proceedings closed, under the new Article 39.3 (Closure of Arbitration Proceedings).

ACICA may extend these time frames following a reasoned request from the Tribunal, or if ACICA otherwise deems it necessary.

### ***Alternative dispute resolution***

The previous version of Article 25 (General Provisions) already required Tribunals to raise for discussion with the parties, as soon as practicable after being constituted, the possibility of using other techniques to facilitate the settlement of the dispute. The 2021 Rules supplement this mandate by specifying that such other techniques to facilitate the settlement of the dispute include mediation and other forms of alternative dispute resolution (ADR).

In any case, under the new Article 55 (Alternative Dispute Resolution), Tribunals must discuss with the parties the possibility of using mediation, or other forms of ADR, “to facilitate the quick, cost effective and fair resolution of the dispute.” Further, parties can apply for the suspension of the arbitration to allow for mediation or other form of ADR on such terms as the Tribunal considers appropriate, with the arbitration resuming at any time upon the written request of any of the parties.

### **THIRD-PARTY FUNDING DISCLOSURES**

There is a new requirement, under Article 54 (Third Party Funding), to disclose third-party funding and a continuing obligation to disclose any changes to the third-party funding arrangement. In this regard, the Tribunal has the power to order a party to disclose the existence and identity of a third-party funder at any time during the proceedings.

### **COSTS AND FEES**

There are new substantive provisions on deposits for costs and costs decisions by the Tribunal and by ACICA. The new Article 48 (Costs of Arbitration) sets out a detailed list of the items comprising the term “costs of the arbitration” and subsequent Articles govern, in detail, the deposit of costs and the decisions on costs of the arbitration by ACICA and by the Tribunal.

The revised rules state that the Tribunal may make costs decisions at any time during the arbitration, and expressly stipulate the default position that the unsuccessful party shall bear the costs of the arbitration, subject to a Tribunal’s discretion to apportion costs having regard to the circumstances of the case.

Further, under the new Article 49 (Deposit of Costs), the Tribunal will not proceed with the arbitration without ascertaining at all times from ACICA that ACICA is in possession of the requisite funds. In the event that any deposit of costs directed to be paid by ACICA remains unpaid (in whole or in part), the Tribunal may, after consulting ACICA, order the suspension or termination of the whole or any part of the arbitration.

The rules also prohibit the Tribunal from charging additional fees for interpretation, correction, or completion of the award.

If you have any questions about the new rules or how they might affect you, please reach out to the contacts below or your usual Herbert Smith Freehills contact.

## **KEY CONTACTS**

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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