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International arbitration funding trends in Australia and APAC and the new ACICA Rules

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The Australian Centre for International Commercial Arbitration (ACICA) recently approved and adopted the 2021 Edition of the ACICA Arbitration Rules and Expedited Arbitration Rules.

The rules reflect numerous developments in international arbitration, including revisions that—for the first time—make multiple references to legal finance, or “third-party funding”. These new rules not only signify the increased adoption of legal finance in international arbitration in Australia, but also highlight important trends in the funding of international arbitration across the Asia-Pacific region.

| Key takeaways from the ACICA Rules

DEFINING “THIRD-PARTY FUNDING”

The most notable of the new rule changes is Article 54 of the ACICA Arbitration Rules and Article 41 of the ACICA Expedited

Arbitration Rules, both of which specifically address disclosure requirements of third-party funding. Both provisions define “third-party funding” broadly to include entities that fund claims as well as insurers. Article 54.2 specifies that “a party and/or its representative shall, on its own initiative, disclose the existence of third-party funding and the identity of the funder.” Article 54.3 further describes that the arbitral tribunal can order a party to disclose those details at any time during the arbitration proceedings. These provisions create a very limited disclosure obligation on the parties and do not impose any broader obligations to disclose either documents or communications relating to third-party funding.

DEFINING THIRD-PARTY FUNDING COSTS

The new rules also include provisions on third-party funding costs. Article 48 of the ACICA Arbitration Rules include third-party funding costs within the definition of “costs of arbitration”. Under Article 35 of the ACICA Expedited Arbitration Rules, “costs of arbitration” is defined to include “the costs incurred in obtaining third-party funding”. This is significant as under ACICA rules, the unsuccessful party generally bears those costs, subject to the tribunal’s discretion to determine whether apportionment of those costs is reasonable and how apportionment should occur. Given the sizeable investment needed to pursue arbitration, the inclusion of third-party funding costs in overall arbitration costs is a step towards ensuring that parties have access to the required funds.

DEFINING CONFIDENTIALITY

The confidentiality and data protection provisions in both sets of new rules have been revised to account for parties sharing confidential information with third-party funders. Specifically, Article 26.2(f) states that the parties, the Arbitrator and ACICA shall treat any matters relating to the arbitration as confidential except “to a person for purposes of having or seeking third-party funding, where the person has agreed to keep the material and information confidential”. The same language appears in Article 15.2(f) of the ACICA Expedited Arbitration Rules.

New rules compare with reforms across APAC and other arbitral institutions

SINGAPORE

In Singapore, the arbitration funding framework is provided by the Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017, and obligations of the

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parties relating to disclosure, costs and confidentiality are set out in various related instruments. The Legal Professional (Professional Conduct) Rules 2015 (as amended in 2017) deal with the disclosure requirements relating to third-party funding and is similar to those under ACICA rules as only the identity of the funder is required to be disclosed.

On parties’ costs, “the Tribunal may take into account the existence of any external funder in apportioning the costs of the arbitration”, and the tribunal “may take into account the involvement of a [funder] in ordering [...] that all or a part of the legal or other costs of a [party] be paid by another [party]”.¹ There is no elaboration on the scope of the costs in question, but a tribunal would, in practice, have the power to take into account amounts payable to a funder when awarding costs to a funded party.

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