



Supreme Court of Victoria

Practice Note SC CC 3

Commercial Arbitration Business

1. INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 The purpose of this Practice Note is to describe and provide guidance on the procedures to be followed in the Arbitration List.
- 1.3 This revised Practice Note revises and replaces the Practice Note issued on 30 January 2017.

2. COMMENCEMENT

- 2.1 This Practice Note was reissued on 22 March 2021, replaces the earlier version issued on 30 January 2017, and will apply to all proceedings commenced in the Arbitration List filed on or after 22 March 2021.

3. DEFINITIONS

- 3.1 In this Practice Note:
Arbitration Rules means the *Supreme Court (Chapter II Arbitration Amendment) Rules 2014 (No 205/2014)*
New York Convention means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
UNCITRAL means the United Nations Commission on International Trade Law
The Model Law means the *UNCITRAL Model Law on International Commercial Arbitration 1985*

4. COURT SUPPORT FOR ARBITRATION

- 4.1 The Court is supportive of the wishes of disputants to resolve all or part of their dispute by arbitration and will assist parties in a variety of ways, including –
 - (a) assistance and support for the arbitration process (e.g. subpoenas to witnesses or for production of documents, interim measures of protection (injunctive relief or otherwise) and orders with respect to the constitution of the arbitral tribunal);

- (b) recognition and enforcement of arbitration awards and orders of arbitral tribunals (to the extent permitted under the statutory or other bases of the arbitration process);
 - (c) determination of discrete questions of law which arbitrators or parties are able to refer to the Court (depending on the statutory or other bases of the arbitration process); and
 - (d) expeditious hearing and determination of appeals from domestic (Australian) arbitration processes (to the extent permitted under the statutory or other bases of the arbitration process).
- 4.2 Court assistance and support is provided for all arbitration proceedings, international or domestic (Australian), and whether conducted under the *International Arbitration Act 1974* (Cth) or the *Commercial Arbitration Act 2011* (Vic). Enforcement or other proceedings with respect to arbitration conducted under these statutory provisions or under legislation in other jurisdictions (international and other Australian jurisdictions) are also available in the Court, subject to the provisions of the *International Arbitration Act 1974* or the *Commercial Arbitration Act 2011*, to the extent applicable. All applications under the provisions of these Acts are provided for under the Arbitration Rules.

5. INTERNATIONAL ARBITRATION

- 5.1 The *International Arbitration Act 1974* (s 18) confers jurisdiction on the Court to provide assistance and support with respect to the matters specified in Article 6 of the UNCITRAL *Model Law* -
- (a) appointment of a sole or presiding arbitrator failing agreement by the parties or co-arbitrators (Article 11(3));
 - (b) appointment of an arbitrator or arbitrators where the appointment procedure agreed by the parties fails (Article 11(4));
 - (c) deciding on challenges to an arbitrator or arbitrators (Article 13(3));
 - (d) termination of the mandate of an arbitrator as a result of a failure or impossibility to act (Article 14);
 - (e) determining whether the arbitral tribunal has jurisdiction (Article 16); and
 - (f) setting aside arbitral awards on the limited grounds specified in Article 34.
- 5.2 In addition to providing assistance and support under Article 6 of the *Model Law*, the *International Arbitration Act 1974* confers jurisdiction on the Court to -
- (a) enforce foreign arbitral agreements by staying a proceeding or part of a proceeding that is before the Court which invites the determination of a matter capable of settlement by arbitration which is subject to such an agreement (section 7(2));
 - (b) make interim or supplementary orders for the preservation of the rights of the parties or in relation to any property for the purpose of providing effective enforcement of arbitration agreements (section 7(3));
 - (c) enforce foreign arbitral awards to which the New York Convention applies (section 8);

- (d) recognition and enforcement of interim measures of protection (*Model Law*, Articles 17H, 17I and 17J);
 - (e) issuing subpoenas for the attendance of a person before the arbitral tribunal for examination or further production of documents or for assistance to the arbitral tribunal in the taking of evidence (sections 23 and 23A); and
 - (f) prohibiting or allowing the disclosure of confidential information (sections 23F and 23G).
- 5.3 It is noted that the jurisdiction of the Court to provide interim measures of protection (e.g. interlocutory injunctive relief for the preservation of assets or evidence, *Mareva* injunctions, search orders and the like) in parallel with the arbitration process is recognised in Article 9 of the *Model Law*.

6. DOMESTIC (AUSTRALIAN) ARBITRATION

- 6.1 Domestic (Australian) arbitration is currently subject to the operation of the substantially uniform commercial arbitration acts of the various States and Territories. The Victorian legislation is contained in the *Commercial Arbitration Act 2011*.
- 6.2 The *Commercial Arbitration Act 2011* confers jurisdiction on the Court to provide assistance and support for the arbitration process in a variety of matters and circumstances, including –
- (a) reference to arbitration (section 8);
 - (b) appointment of a sole or presiding arbitrator failing agreement by the parties or co-arbitrators (section 11(3));
 - (c) appointment of an arbitrator or arbitrators where the appointment procedure agreed by the parties fails (section 11(4));
 - (d) deciding on challenges to an arbitrator or arbitrators (section 13(4));
 - (e) termination of the mandate of an arbitrator as a result of a failure or impossibility to act (section 14);
 - (f) determining whether the arbitral tribunal has jurisdiction (section 16(a));
 - (g) recognition and enforcement of interim measures (sections 17H and 17I);
 - (h) Court ordered interim measures (section 17J);
 - (i) enforcement of an order or directions of an arbitral tribunal (section 19(6));
 - (j) Court assistance in the taking of evidence in arbitral proceedings (section 27);
 - (k) Court assistance in issuing subpoenas requiring a person to attend before the arbitral tribunal for examination or for production of documents to the arbitral tribunal (sections 27A and 27B);
 - (l) prohibition of the disclosure of confidential information (section 27H);
 - (m) allowing the disclosure of confidential information (section 27I);
 - (n) determination of a preliminary point of law (section 27J);
 - (o) assessment of costs of an arbitration (other than the fees and expenses of an arbitrator) (section 33B);
 - (p) orders in relation to the costs of an abortive arbitration (section 33D);

- (q) application for setting aside as exclusive recourse against arbitral award (cf *Model Law*, Article 34) (section 34);
 - (r) appeal on a question of law (with party agreement and leave of the Court) (section 34A); and
 - (s) recognition and enforcement of arbitral awards (sections 35 and 36).
- 6.3 Maintenance of arbitration proceedings, rather than Court proceedings, with respect to matters the subject of an arbitration agreement and Court assistance and support for the arbitration process in the form of interim measures of protection are expressly provided for in sections 8 and 9 of the *Commercial Arbitration Act* 2011, as follows:

8. Arbitration agreement and substantive claim before Court (cf *Model Law* Art. 8)

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

9. Arbitration agreement and interim measures by Court (cf *Model Law* Art. 9)

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the measure.

7. PROCEDURAL MATTERS

7.1 All applications under the International Arbitration Act 1974 must be commenced in accordance with the Arbitration Rules and in the prescribed form of application.

- (a) an application to enforce a foreign award pursuant to the International Arbitration Act 1974 (section 8) must comply with the requirements of Rule 9.04 (Form 2-9B). An application to enforce a domestic (Australian) award pursuant to the Commercial Arbitration Act 2011 must comply with the requirements of Rule 9.21 (Form 2-9Y);
- (b) an application to set aside a foreign award pursuant to Article VI of the New York Convention or Article 34 of the Model Law (see Part II and sections 16 and 20 of the International Arbitration Act 1974) must comply with the requirements of Rule 9.10 (Form 2-9K). An application to set aside a domestic (Australian) award pursuant to section 34 of the

- Commercial Arbitration Act 2011 must comply with the requirements of Rule 9.19 (Form 2-9W);
- (c) an application under section 27J of the Commercial Arbitration Act 2011 for leave to apply for determination of a question of law arising in the course of a domestic (Australian) arbitration must comply with the requirements of Rule 9.18 (Form 2-9V); and
 - (d) an application for leave to appeal against a domestic (Australian) award under section 34A of the Commercial Arbitration Act 2011 must comply with the requirements of Rule 9.20 (Form 2-9X); and
 - (e) an application for leave to issue a subpoena:
 - (i) under section 23 of the International Arbitration Act 1974 must comply with the requirements of Rule 9.06 (Forms 2-9E, 2-9F or 2-9G); and
 - (ii) under section 27A of the Commercial Arbitration Act 2011 must comply with the requirements of Rule 9.14 (Forms 2-9P, 2-9Q or 2-9R).

Applications for leave to issue a subpoena will usually be dealt with on the papers ex parte. Nothing in this Practice Note affects:

- A. the obligation on the issuing party to serve a copy of the subpoena to produce on each other party as soon as practicable after the subpoena has been served on the addressee under r 42.05(2) of Chapter I; and
- B. the right of a party or of any person with a sufficient interest to apply, in the proceeding, to set aside the subpoena on notice to the issuing party under r 42.04 of Chapter I.

8. COMMERCIAL COURT - ARBITRATION PROCEEDINGS

- 8.1 The Chief Justice has appointed the Hon. Justice Riordan and the Hon. Justice Lyons to manage as the judges in charge of the Commercial Court – Arbitration List. All arbitration proceedings, any applications in arbitration proceedings, and any urgent applications with respect to arbitration matters, should be directed at first instance to the Hon. Justice Riordan’s Associates (telephone (03) 8600 2503 or (03) 8600 2504 or email chambers.riordanj@supcourt.vic.gov.au). Failing this, parties should refer to the procedure set out in SC CC 1.
- 8.2 Arbitration matters arising in proceedings already allocated to the Technology, Engineering and Construction List (TEC List) will continue to be managed within that List, though they may be transferred to the Arbitration List in accordance with the usual practice applied in the Commercial Court with respect to the transfer of matters between Lists in that Court. The same position applies with respect to the possibility of transfer of arbitration matters from the Arbitration List to the TEC List.

8.3 Any changes in these arrangements will be notified from time to time on the Commercial Court section of the Supreme Court website.

AMENDMENT HISTORY

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced Practice Notes 2 of 2010 and 7 of 2006. It was amended on 22 March 2021.

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22 March 2021