



## **Practice Note No 2 of 2010**

### **Arbitration Business**

#### *Court Support for arbitration*

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) determination of discrete questions of law which arbitrators or parties are able to refer to the Court (depending on the statutory or other basis of the arbitration process);
  - (c) expeditious hearing and determination of appeals from the arbitration process (to the extent permitted under the statutory or other basis of the arbitration process);
  - (d) enforcement of arbitration awards and orders of arbitral tribunals (to the extent permitted under the statutory or other basis of the arbitration process); and
  - (e) referring a proceeding or a question to arbitration under Chapter I Rule 50.08.

2. Court assistance is provided for all arbitration proceedings, international or domestic, and whether conducted under the *International Arbitration Act 1974* (Cth) or the *Commercial Arbitration Act 1984* (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 1984*, to the extent applicable.

### ***International Arbitration***

3. The *International Arbitration Act 1974* (s 18) confers jurisdiction on the Court to provide assistance with respect to the matters specified in Article 6 of the United Nations Commission on International Trade Law (“UNCITRAL”) *Model Law on International Commercial Arbitration 1985* (“the 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.
4. In addition to providing assistance 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)); and
  - (c) enforce foreign arbitral awards to which the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (“the New York Convention”) applies (section 8).
5. 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 partnership with the arbitration process is recognised in Article 9 of the *Model Law*.

#### ***Domestic (Australian) Arbitration***

6. Domestic (Australian) arbitration is currently subject to the operation of the uniform commercial arbitration acts. The Victorian legislation is contained in the *Commercial Arbitration Act 1984*.
7. The *Commercial Arbitration Act 1984* confers jurisdiction on the Court to provide assistance to the arbitration process in a variety of matters and circumstances, including –
- (a) appointment or removal of arbitrators (sections 8, 10, 11, 13 and 44);
  - (b) ordering the attendance of witnesses or the production of documents (sections 17 and 18);
  - (c) consolidation of arbitration proceedings in some circumstances (section 26);
  - (d) correction of arbitration awards (section 30);
  - (e) enforcement of arbitration awards (section 33);

- (f) taxation of any costs of an arbitration that are directed to be paid by an award and which are not taxed or settled by the arbitrator (section 34);
- (g) assessment of the arbitrator's fees and expenses (section 35);
- (h) orders in relation to the costs of an abortive arbitration (section 36);
- (i) review of awards where there is a manifest error of law on the face of the award or there is strong evidence of an error of law where determination of the question dealt with by the award may add or be likely to add substantially to the certainty of commercial law (section 38);
- (j) determination of a preliminary point of law with the consent of the arbitrator or of all the parties (section 39);
- (k) setting aside an award where there has been misconduct by the arbitrator or setting aside the award in whole or in part where the arbitrator has misconducted the arbitration proceedings (section 42);
- (l) remitting any matter for reconsideration by the arbitrator (section 43);
- (m) termination of arbitration proceedings and, possibly, removing the dispute to the Court in the event of undue delay (section 46);
- (n) the making of interlocutory orders for the purposes of and in relation to arbitration proceedings; to the same extent as may be done for the purposes of and in relation to proceedings in the Court (section 47);
- (o) extension of time periods under the *Commercial Arbitration Act 1984* or the arbitration agreement (section 48); and
- (p) staying Court proceedings to allow the arbitration to proceed (section 53).

### *Procedural Matters*

8. Applications under the *International Arbitration Act 1974* (Cth) must be commenced by originating motion. In determining whether an arbitration is international, reference should be made to the provisions of the *International Arbitration Act 1974* and also to the *UNCITRAL Model Law* (which the provisions of this Act apply) – particularly, Article 1 of the *Model Law*. Applications under the *Commercial Arbitration Act 1984* (Vic) must also be commenced by originating motion and must comply with Chapter II, Order 9.
9. Parties seeking to bring an application must first consult with the Associate to the Judge managing Commercial Court, List G – Arbitration proceedings, to establish a hearing date and to appoint a Judge or Associate Judge to hear the application. The Prothonotary will only accept a summons with a return date authorised by this Associate.
10. An application to enforce a foreign award pursuant to the *International Arbitration Act 1974* (section 8), should, as far as possible, comply with the requirements of Chapter II, Rules 9.04 and 9.05. An application to enforce a domestic (Australian) award pursuant to the *Commercial Arbitration Act 1984* must comply with the requirements of Chapter II, Rules 9.04 and 9.05.
11. 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 1984*) should, as far as possible, comply with the requirements of Chapter II, Rules 9.04 and 9.05.
12. An application for leave to appeal against an arbitrator’s award under the *Commercial Arbitration Act 1984* must comply with the requirements of Chapter II, Rule 9.06 and Chapter I, Rules 4.06 and 4.07.
13. Subject to any direction of the Judge or Associate Judge hearing the application, practitioners must deliver to the Judge or Associate Judge, not less than two clear days before the time appointed for the hearing of the application, a copy of all

affidavits including exhibits together with a brief outline of argument in support of the application.

14. From time to time urgent interlocutory applications arise in the course of arbitrations. The Court will be available on very short notice to hear and promptly determine these applications. The following provisions shall apply to applications which are accepted by the Judge managing Commercial Court, List G, as urgent.

- (a) The applicant should deliver to the Associate to this Judge at the time of seeking to bring the application a copy of the application and of all affidavits including exhibits and a brief outline of argument in support of the application.
- (b) The practitioner for the respondent should as soon as practicable and in any event on the day prior to the hearing of the application (if possible in all the circumstances) deliver to the Associate to the Judge or Associate Judge appointed to hear the application, a copy of all affidavits including exhibits filed in opposition together with a brief outline of argument.
- (c) If all parties to the application so request, the judicial officer appointed to hear the application may agree to determine the application within 24 hours of the completion of argument provided that in such a case no reasons for the decision will be provided at the time of determination. Any party requiring reasons must so advise the judicial officer at the time of the determination and the judicial officer will provide reasons, but they will be in short form. Reasons in short form will be simply statements, without elaboration, of the findings of fact and principles of law which lead to the determination.
- (d) If the application is one that is properly made *ex parte*, this should be clearly stated in all communications with the Associate to the Judge. Such communications need not be copied to the respondent until the interim determination of the application.

- (e) Where an application for an interlocutory order offers, or the court accepts, or an order or other Court document records the giving of “the usual undertaking as to damages”, this shall be taken to mean the following undertaking given to the Court:

To abide by any order which this Court might make as to damages, in case this Court shall be of the opinion that any person shall have sustained any loss, by reason of this order, which the party giving the undertaking ought to pay.

15. These procedural arrangements will apply notwithstanding the Commercial Court Practice Note No. 1 of 2010. Otherwise, the Commercial Court Practice Note is applicable.

***Commercial Court – Arbitration Proceedings***

16. The Chief Justice has appointed the Hon. Justice Croft to manage Commercial Court, List G – Arbitration proceedings. All arbitration proceedings, any applications in arbitration proceedings, and any urgent applications with respect to arbitration matters, should be directed to His Honour’s Associate (telephone: 03.9603 7731).
17. Arbitration matters arising in proceedings already allocated to the Technology, Engineering and Construction List (TEC List) will continue to be managed within that List by the Hon. Justice Vickery, though they may be transferred to List G 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 List G to the TEC List.
18. Any changes in these arrangements will be notified from time to time on the Commercial Court website – [www.commercialcourt.com.au](http://www.commercialcourt.com.au)
19. This Practice Note takes effect on and from 1 January 2010.

20. This Practice Note is in substitution for Practice Note No. 7 of 2006 which is hereby revoked.

Vivienne Macgillivray  
Executive Associate to the Chief Justice  
17 December 2009