



## **Practice Note No 8 of 2014**

### **Commercial 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) 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).
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 *Supreme Court (Chapter II Arbitration Amendment) Rules 2014* (No 205/2014) (“the *Arbitration Rules*”).

### ***International Arbitration***

3. 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 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 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 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (“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. 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*.

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

6. 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*.
7. 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).

8. 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.

### ***Procedural Matters***

9. All applications under the *International Arbitration Act 1974* must be commenced in accordance with the *Arbitration Rules* and in the prescribed form of application. 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* (the provisions of which are applied by the *International Arbitration Act 1974*) – particularly, Article 1 of the *Model Law*. Applications under the *Commercial Arbitration Act 2011* must also be commenced in accordance with the *Arbitration Rules* and in the prescribed form of application. Some of the more significant provisions of the *Arbitration Rules* are as follows -

- (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 1984*) 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).

Applications under miscellaneous provisions of the *International Arbitration Act 1974* and the *Commercial Arbitration Act 2011* are provided for under Rules 9.09 (Form 2-9J) and 9.17 (Form 2-9U), respectively.

10. Parties seeking to bring an application must first consult with the Associate to the Judge managing the Commercial Court – Arbitration List to establish a hearing date and to appoint a Judge to hear the application. The Commercial Court Registrar will only accept a summons with a return date authorised by this Associate.
11. Subject to any direction of the Judge hearing the application, practitioners must deliver to the Judge, not less than two clear days before the time appointed for the hearing of the application, a copy of all affidavits, including exhibits, as required by the *Arbitration Rules*, together with a brief outline of argument in support of the application.
12. From time to time urgent interlocutory applications arise in the course of arbitration proceedings. The Court is available on very short notice and at any time (during business hours or at any other time) to hear and promptly determine these applications. The following applies to applications which are accepted by the Judge managing the Commercial Court – Arbitration List, as urgent -
  - (a) The applicant must deliver to the Associate to the Judge managing the Commercial Court – Arbitration List at the time of seeking to bring the application a copy of the application and of all affidavits including exhibits as required by the *Arbitration Rules* 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 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 Judge 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 Judge at the time of the determination and the Judge 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 managing the Commercial Court

– Arbitration List or the Judge appointed to hear the application, as the case may be. Such communications need not be copied to the respondent until the interim determination of the application; and

- (e) Where an applicant 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.

13. These procedural arrangements will apply notwithstanding the Commercial Court Practice Note No. 10 of 2011. Otherwise, the Commercial Court Practice Note is applicable to the extent that it is not inconsistent with these procedural arrangements.

#### ***Commercial Court – Arbitration Proceedings***

14. The Chief Justice has appointed the Hon. Justice Croft to manage 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 to His Honour’s Associate.

(Telephone: 03 9603 7731 or email [croftj.associates@supremecourt.vic.gov.au](mailto:croftj.associates@supremecourt.vic.gov.au)).

15. 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 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.

16. Any changes in these arrangements will be notified from time to time on the [Commercial Court section of the Supreme Court website](#).

17. This Practice Note takes effect on and from 1 December 2014 – which is also the date of commencement of the *Arbitration Rules*.
  
18. This Practice Note is in substitution for Practice Note No. 2 of 2010 which is hereby revoked.

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28 November 2014