WHAT IS ARBITRATION?

Arbitration is a private process where parties agree to resolve a dispute by referring it to an independent Arbitrator who makes a binding decision on the dispute.

In Victoria, the arbitration of commercial disputes is subject to the Commercial Arbitration Act 2010 (Vic) (**Act**). This Act puts in place a tried and tested system of arbitration law used throughout the world.

The **paramount object** of the Act is "*to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense*".

This Act seeks to achieve its paramount object by: letting the parties agree on how their disputes should be resolved (subject to statutory safeguards); and providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly (again, subject to statutory safeguards).

HOW DOES ARBITRATION VICTORIA WORK?

Arbitration Victoria has a clear philosophy for the determination of disputes by arbitration – the provision of an arbitration system that is simple, expeditious, cost-effective and fair.

Arbitration Victoria connects disputants with arbitrators who share this philosophy. Once the arbitrator is appointed, the case is managed solely by the arbitrator under the Rules.

Arbitration and Arbitration Victoria's system are explained in the following documents:

1. Arbitration Victoria's user manual (**User Manual**).
2. Arbitration Victoria arbitration rules (**AV Rules**).

The AV Rules apply to two types of arbitrations: "Documents-only" arbitrations without a hearing for the presentation of evidence or oral submissions on the merits of the dispute; and "Hearing" arbitrations with a hearing for the presentation of evidence and/or oral submissions on the merits of the dispute.

In a "Hearing" arbitration, once appointed, the Arbitrator will convene a case management hearing within the relevant timeframe for which the AV Rules provide. The parties, and their legal representatives (if any), will attend the case management hearing (in person or remotely) and the Arbitrator will make orders for the future conduct of the arbitration, including setting a date for the substantive hearing. The final hearing will take place within 90 days of the Arbitrator's appointment. At the substantive hearing the parties will present their evidence, cross-examine opposing witnesses, and make submissions to the Arbitrator. The Arbitrator will deliver the Award (the Arbitrator's final and binding decision) 30 days after the final hearing. The Award is final and binding, can be enforced in court, and there are no appeals (unless both parties agree to permit appeals **and** the Court grants leave to appeal).

WHAT ARE THE ADVANTAGES OF ARBITRATION WITH ARBITRATION VICTORIA?

There are two major advantages of arbitration with Arbitration Victoria under the AV Rules.

The first one is **certainty** – that is, certainty in terms of the following:

- the time required to resolve the dispute (under the Rules, parties can expect to have the dispute heard and determined in 120 days from the commencement of the arbitration – perhaps in less time if the parties have filed pleadings in court proceedings prior to the referral to arbitration);

- achieving finality in the resolution of the dispute – no costly appeals or lengthy disputes over costs;

- the quality of the arbitrators – each one is experienced in arbitrations, and each one understands the need to manage the arbitral proceedings to achieve the paramount object;

- the fees payable to the decision-maker (the arbitrator) – these fees are capped under the AV Rules, and they are extremely competitive (the fees are set out in paragraphs 13-18 of the User Manual);

- the costs payable to the other side under an adverse costs order (i.e. the losing party is usually ordered to pay the winning party's legal costs) – these costs are capped with a view to encouraging the efficient conduct of proceedings (by discouraging inefficiencies, interlocutory skirmishing, and unnecessary and expensive steps such as general discovery/document disclosure).

The second one is **control** – that is, control by the parties in how they want to manage the determination of their dispute. For example:

- The parties can choose the arbitrator.

- If the parties want to hold the final hearing in Ballarat or Horsham (or some other place) or conduct it over Zoom or MS Teams, for example, they can agree to do that – the arbitrator will give effect to that agreement.

- If the parties want to avoid general document disclosure (which is expensive and often unnecessary), they can agree to do that. In the event of a dispute in this regard, the arbitrator will resolve the dispute by reference to the paramount object of the Act (see above). This is discussed further below.

- The parties can narrow the issues in dispute and they can agree to limit the time available for each party to present their case.

- The parties can control the timeframes for the steps required leading up to the final hearing – a quick resolution of the dispute will save costs compared with litigation which could take much longer.

In summary, subject to the Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. By adopting the AV Rules, the parties have agreed upon the procedure to be followed.

DISCOVERY/DOCUMENT DISCLOSURE

The parties can establish an efficient, fair and cost-effective discovery regime. In this regard, they are not bound by Court Rules or common law principles. If they cannot agree on how to do this, the arbitrator will determine the applicable regime – subject to the requirements of the CAA Act and the AV Rules.

Where the amount in dispute is not large, it is common practice for the arbitrator to limit discovery – at least initially. There are many techniques that an arbitrator may adopt. For example:

- It is commonplace in arbitrations, in the event of disagreement between the parties, for the arbitrator to put in place discovery categories.

- Where emails are prevalent, the scope for 'smoking gun' documents is often very limited or non-existent. In these types of cases, subject to hearing from the parties, and subject

to further order, skilled arbitrators sometimes limit discovery (in the first instance) to the documents identified in the parties' witness statements, pleadings or tender bundles. Under this approach, if a party can identify further documents that ought to be discovered, the arbitrator may allow that party to seek (and obtain) further, targeted discovery.

The adoption of these techniques saves time and money – and they do not compromise the ability of the parties to receive a fair hearing.

EVIDENCE

The Act and the AV Rules give Arbitration Victoria's arbitrators the power to determine the admissibility, relevance, materiality and weight of any evidence. The Evidence Act 2008 (Vic) and common law evidence rules do not apply and hearsay evidence is likely to be admissible subject to weight. This approach helps to ensure the dispute is resolved efficiently, inexpensively and fairly.

In places where arbitration is commonly used to resolve commercial disputes, parties resort to arbitration "*precisely because they wish to avoid the national laws of countries shackling their quest for a speedy, commercial and practical outcome to their dispute, and preclude the application of laws and procedures which may be alien to them*" (see BQP v BPP [2018] SGHC 55 at [127] to [129], a decision of Quentin Loh J, a judge of the High Court of Singapore).

For arbitrations conducted under the AV Rules, what safeguards apply to ensure that the dispute is resolved fairly (and in accordance with the paramount object of the Act)? In summary:

- The Act contains relevant and effective safeguards to ensure fairness. These safeguards include the right to receive a reasonable opportunity to present a case (s. 18). The Act does not require the parties and the arbitrator to follow exclusionary rules of evidence applicable in Victorian courts.
- The same safeguards work effectively and fairly in places like Singapore and Hong Kong – that is, jurisdictions where the arbitration sector is mature.
- All of Arbitration Victoria's panel arbitrators are experienced lawyers and each one has significant experience in arbitrations – as an arbitrator or as an advocate in arbitrations. Each one is capable of ensuring that, in terms of dealing with evidence, the process adopted is consistent with the paramount object.
- The parties are not prevented from making available objections to the admission of evidence.

OUR ARBITRATORS

There are six members of Arbitration Victoria's panel of arbitrators. Each one is an appropriately qualified arbitrator with substantial experience in relation to arbitrations; and each one supports the principles and values on which the AV Rules is based. The panel arbitrators are as follows:

(a) **Bronwyn Lincoln**: https://www.linkedin.com/in/bronwynlincoln/

(b) **Monique Carroll**: https://www.linkedin.com/in/monique-carroll-fciarb-1182243b/

(c) **Donna Ross**: https://www.linkedin.com/in/donnarossdr/

(d) **Huw Watkins**: https://www.linkedin.com/in/huw-r-watkins/

(e) **Adam Rollnik**: https://www.linkedin.com/in/adam-rollnik-43348419/

(f) **Robert Heath QC**: https://www.linkedin.com/in/robert-heath-qc-56282471/

FURTHER INFORMATION

Parties can obtain further information from Arbitration Victoria's website: www.arbitrationvictoria.com