



CountyCourt
VICTORIA

Arbitration List

Practice note

DOCUMENT CONTROL

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1. Introduction

- 1.1 The Head of the Commercial Division 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.

2. Commencement

- 2.1 This Practice Note was issued on 7 July 2021 and commences on 7 July 2021 and will apply to relevant proceedings commenced in the Arbitration List.

3. Definitions

- 3.1 In this Practice Note:
 - (a) **'Arbitration Rules'** means Order 9 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2018* (SR 57/2018) (as amended), to the extent they are applicable to domestic commercial arbitration under the *Commercial Arbitration Act 2011* (Vic), with necessary modifications including references to the Supreme Court of Victoria being references to the County Court of Victoria.
 - (b) **'Court'** is the County Court of Victoria. 'Court' is defined in the *Commercial Arbitration Act 2011* (Vic) as the "Supreme Court". That definition is subject to s 6(2) which provides that the functions performed by the Supreme Court are to be performed by the County Court if an arbitration agreement provides that the County Court is to have jurisdiction under the Act or the parties to the arbitration agreement agree in writing that the County Court is to have jurisdiction.
 - (c) **'The Model Law'** means the UNCITRAL Model Law on International Commercial Arbitration 1985.
 - (d) **'UNCITRAL'** means the United Nations Commission on International Trade Law.

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);
 - (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); and
 - (e) referral of existing proceedings to arbitration under section 66(1) of the *Civil Procedure Act*

2010 (Vic) (see 6.3 – 6.5 below).

- 4.2 Court assistance and support is provided for domestic arbitration proceedings, conducted under the *Commercial Arbitration Act 2011* (Vic). Enforcement or other proceedings with respect to arbitration conducted under these statutory provisions are also available in the Court, subject to the provisions of the *Commercial Arbitration Act 2011* (Vic), to the extent applicable. All applications under the provisions of this Act are provided for under the Arbitration Rules.

5. Domestic (Australian) arbitration

- 5.1 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* (Vic).
- 5.2 The *Commercial Arbitration Act 2011* (Vic) 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).

5.3 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* (Vic), 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.

6. Procedural matters

6.1 All applications under the *Commercial Arbitration Act 2011* (Vic) must 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 for referral to arbitration under section 8(1) of the *Commercial Arbitration Act 2011* (Vic) must comply with the requirements of Rule 9.13 (Form 2-9N);
- (b) an application to enforce a domestic (Australian) award pursuant to the *Commercial Arbitration Act 2011* (Vic) must comply with the requirements of Rule 9.21 (Form 2-9Y);
- (c) an application to set aside a domestic (Australian) award pursuant to section 34 of the *Commercial Arbitration Act 2011* (Vic) must comply with the requirements of Rule 9.19 (Form 2-9W);
- (d) an application under section 27J of the *Commercial Arbitration Act 2011* (Vic) 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
- (e) an application for leave to appeal against a domestic (Australian) award under section 34A of the *Commercial Arbitration Act 2011* (Vic) must comply with the requirements of Rule 9.20 (Form 2-9X) and
- (f) an application for leave to issue a subpoena 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).

- (g) applications for leave to issue a subpoena will usually be dealt with on the papers ex parte.¹ Nothing in this Practice Note affects:
- (i) 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
 - (ii) 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.
- 6.2 Parties seeking to bring an application must first consult with the Associate to the Judge in Charge of the Arbitration List (JIC) to establish a hearing date and to appoint a Judge to hear the application. The Commercial Registry will only accept an application with a return date authorised by this Associate.
- 6.3 Where parties agree to refer an existing proceeding to arbitration including in a matter not previously the subject of an arbitration agreement, the Court may make an order under section 66(1) of the *Civil Procedure Act 2010* (Vic) referring the proceeding to arbitration.²
- 6.4 Parties seeking referral to arbitration under s66(1) of the *Civil Procedure Act 2010* (Vic) are to:
- (a) sign proposed consent orders annexing a copy of the existing arbitration agreement or the arbitration agreement entered into by the parties for this purpose; and
 - (b) email the proposed consent orders and arbitration agreement to the Commercial Registry. (commercial.registry@countycourt.vic.gov.au). Template consent orders are available on the County Court [Arbitration List](#) webpage.
- 6.5 Where parties agree that the County Court is to have jurisdiction to provide arbitration assistance and supervision under the *Commercial Arbitration Act 2011* (Vic) in respect of the referred proceeding, any arbitration agreement must provide for the County Court to have jurisdiction or the parties must have agreed in writing that the County Court is to have jurisdiction under the Act.³
- 6.6 These procedural arrangements will apply notwithstanding the [Commercial Division practice note](#). Otherwise, the Commercial Division Practice Note is applicable to the extent that it is not inconsistent with these procedural arrangements.

¹ *John Holland Pty Ltd v The Commonwealth* [2021] VSC 77.

² A matter to which the *Commercial Arbitration Act 2011* (Vic) will apply can be referred to arbitration.

³ Section 6(2) *Commercial Arbitration Act 2011* (Vic)

7. Operation of the Commercial Division's Arbitration List

- 7.1 Judge Brimer has been appointed to manage the Commercial Division's 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 Judge Brimer's Associate (telephone 03 8636 6690 or email arbitration.list@countycourt.vic.gov.au). Failing this, parties should refer to the procedure set out in the [Commercial Division practice note](#).
- 7.2 Arbitration matters arising in proceedings already allocated to another List will be transferred to the Arbitration List in accordance with the usual practice applied in the Commercial Division with respect to the transfer of matters between Lists in the Court. The same position applies with respect to the possibility of transfer of arbitration matters from the Arbitration List to another list.
- 7.3 Any changes in these arrangements will be notified from time to time on the [Commercial Division](#) section of the County Court website.