Specialist Arbitration Lists: A Victorian Supreme Court Perspective

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Introduction

As commercial arbitration continues to grow as a preferred method of dispute resolution for cross-border disputes,[1] the competition between arbitral jurisdictions similarly increases. Potential seats take active measures to promote their approach to arbitration; otherwise they risk marginalisation in the competitive global marketplace. While long-established arbitral jurisdictions, such as New York, London, Paris and other European centres, will continue to maintain an integral position in the global expansion of arbitration, the continued shift of the centre of the global economy towards the Asia-Pacific region has created an exciting level of opportunity for both arbitration practitioners, as well as arbitral institutions, in our region. Active engagement in this area can only enhance the development of a jurisdiction's international legal expertise, while the involvement of its legal and other professionals in international trade and commerce can have many beneficial flow-on effects to other areas of the economy, as well as the wider community.

Success in this respect is, of course, not only dependent on arbitrators and arbitration practitioners. The whole process must be well supported by arbitral institutions and, importantly, the courts. All concerned must play their part in maintaining the quality of arbitral processes and outcomes, and in reducing delay and expense. Legislatures must do all they can to facilitate laws that create a favourable arbitral environment. Courts, whether they be supervising or enforcing, are also tasked with understanding and supporting arbitration in all these respects – and they must be impartial and efficient. Arbitral institutions are also playing an increasing role, and must maintain a strong level of expertise, impartiality and efficiency, to the extent they are involved in both administered disputes, and in exercising any statutory functions, such as appointment powers. These "parts", shared amongst all actors in the legal field, are particularly important in an atmosphere of concern, internationally and domestically, at the incidence of delay and expense. These concerns crystallize when parties must turn to a court to resolve any issues that flow

[1] Lagerberg and Kus, 'Global survey sheds light on perceptions of international arbitration', http://www.acica.org.au/downloads/International%20arbitration%20FINAL%20sept%2025%2007.pdf

from the arbitration, which, in turn, highlights the importance of the role the courts play in supporting arbitration and, its product, the arbitral award. Also of fundamental importance is the state of the arbitration law, the legislation regulating both domestic and international arbitration.

Recently, there have been significant efforts made by individuals and organisations, public and private, to encourage and develop arbitration in Australia. These include efforts by the judiciary to create and highlight the services of specialist lists and judges, significant legislative changes and development of new rules, services and education programs by arbitral institutions and centres. Arbitrators, arbitration practitioners, arbitral institutions, governments and courts involved or interested in arbitration are, with this momentum, utilising the opportunities to bolster and reinforce both domestic and international arbitral regimes. Arbitral institutions are also playing their part as promoters, educators and guardians of ethical standards.[2]

These efforts are increasingly employed to overcome Australia's lack of high volume commercial arbitration business, particularly where arbitration is booming in the broader Asia-Pacific region. This is in contrast to the outstanding success of arbitration, seen over many years, in Europe and the United States, for example. There are many reasons for this, which no doubt include the role and impact, both perceived and real, of the national and state legislatures, courts, and arbitral bodies.

The aim of the present arbitration reinvigoration process is to increase the use of both international and domestic commercial arbitration in Australia. International experience indicates that countries that have been successful in establishing busy international arbitration centres and attracting significant international arbitration work also have significant and active domestic arbitration sectors. The two feed off each other. The vibrant domestic arbitration sector provides significant experience for its arbitrators – and also for its courts. It is all the more so where the domestic

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[2] Including the Australian Centre for International Commercial Arbitration (ACICA), the Chartered Institute of Arbitrators (Australian Branch) and the Institute of Arbitrators and Mediators Australia (IAMA).

arbitration law is based on an international regime, such as the UNCITRAL Model Arbitration Law (the Model Law)[3] – as is the emerging position in Australia.

This paper discusses these issues with reference to the international and domestic arbitration environment in Australia. In particular, the paper will focus on the role of the specialist Arbitration List in the Commercial Court of the Supreme Court of Victoria, and the manner in which the development of this list has been enhanced through the emphasis on specialised judicial management which has evolved with the expansion of the Commercial Court itself.

1. The Creation of the Commercial Court

From the time the first Chief Justice of Victoria, the Hon. Chief Justice William a'Beckett, took his seat alongside former Justice Redmund Barry, for the first time on the bench of the newly formed Supreme Court of Victoria on 10 February 1852, commercial litigation has accounted for a significant part of the work that the Court undertakes. In the early days of the Court, much of this work involved insolvency and contract law disputes, and as the former colony of Port Phillip grew with the ensuing Gold Rush, so did the work of the Court. A number of significant cases relating to the raising of capital for large developments and infrastructure were heard, with the decisions in these cases leading to the first Company Law Acts. Commercial disputes between individual litigants remained prevalent, with the first case ever reported in the Victorian Law Reports series involving the fraudulent sale between former partners in a goldmine.[4]

While commercial business in the Court continued to grow across the next century, it was not until 1985 that the Court dedicated specific judicial and administrative resources to fast track the resolution of commercial disputes, with the issuing of a

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[3] United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration 1985 (as adopted by UNCITRAL on 21 June 1985). Adopted by the UN General Assembly 11 December 1985 (General Assembly Resolution 40/72), with revisions (as amended by UNCITRAL and adopted on 7 July 2006) adopted by the UN General Assembly on 4 December 2006 (General Assembly Resolution 61/33).

[4] Learmonth v Bailey [1875] VicLawRp 8; (1874) 1 VLR (E) 34 (6 May 1874)

Practice Note establishing the Commercial List.[5] This emphasis on commercial litigation was expanded in 2004, and again in 2007, when further Practice Notes were issued outlining comprehensive guidelines for the conduct and management of proceedings entered into the Commercial List. Two specialist judges experienced in commercial law were allocated to manage proceedings in the List, and were generally appointed for a period of around in two years.

In Practice Note 4 of 2004, the objective of the Commercial List was stated as being to "provide for the just and efficient determination of commercial disputes, by the early identification of the substantial questions in controversy and the flexible adoption of appropriate and timely procedures for the future conduct of the proceeding".[6] It was noted that proceedings in the list will, at times and when necessary, 'involve certain departures from and restraints upon the rights of litigants under the Chapter I Rules' – the Rules which would otherwise govern the conduct of the proceedings. Proceedings considered appropriate for entry into the list were matters "where the issues in dispute arise out of ordinary commercial transactions or in which there is a question which has importance in trade or commerce."[7]

On January 2009, the Supreme Court undertook what may be seen as its most significant structural reform since the formation of the Court of Appeal in 1994 when it established, within the Commercial and Equity Division, the Commercial Court. The Commercial Court initially comprised a specialist team of judges and associate judges who were tasked with the management of 5 lists; 4 being general commercial lists, with one dedicated specifically for corporations matters. A key focus of the Commercial Court was to be its flexibility, with directions tailored to suit the management appropriate to specific disputes and the views of the judicial officers to whom cases had been allocated.

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5 Supreme Court of Victoria, Practice Note 1 of 1985, *Commercial List*.
6 Supreme Court of Victoria, Practice Note 4 of 2004, *Commercial List* [1.5].
7 Supreme Court of Victoria, Practice Note 4 of 2004, *Commercial List* [2.1].

In a notice to the profession that was issued in conjunction with the launch of the Commercial Court, it was stated:[8]

> [T]he Commercial Court is to be a litigation laboratory. We, the members of the Court, have resolved to approach litigation in an innovative way and to use the Court to trial new procedures which have been recommended by the users.

Despite the introduction of the new Commercial Court, it became apparent that the increased growth in commercial litigation would soon exceed the capacity of the resources dedicated to the new Court. [9] A primary reason for this concern was the elimination of the '10-day Rule', a rule which had previously been in place for all proceedings under the former Commercial List.[10] With the elimination of the 10-day rule, trials in the Commercial Court soon doubled, while the court also began to attract larger cases that previously may have been directed to the Federal Court, including both the *Timbercorp*[11] and *Great Southern*[12] class actions. Adverse financial conditions, brought about the global financial crisis, also led to an increase in corporations matters.

One of the ongoing processes which the Court has utilised to ensure that it is meeting the needs of the public, and the profession, has been through the regular conducting of Commercial and Corporations Users' Groups meetings. Through these meetings, it was apparent to the Court that practitioners had a strong preference for longer term judicial allocations to the Commercial Court, as the "two or three-year rotation of a judge through the Commercial Court is thought to ignore the value of accumulated knowledge, and undermine the confidence of litigants, and

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8 Notice to the Profession 1/2009, *Commercial Court*.

9 Justice Judd, Introducing the new Commercial Court, 31 August 2014, Supreme Court of Victoria website, http://www.supremecourt.vic.gov.au/home/contact+us/news/introducing+the+new+commercial+court

10 The '10-Day Rule' provided any proceeding where the length of trial could be expected to extend beyond ten days was not to be allocated into the Commercial Court, but rather would remain in the general list within the Commercial & Equity Division

11 *Woodcroft-Brown v Timbercorp Securities Limited (in liq) & Ors* [2011] VSC 427

12 *Clarke (as trustee of the Clarke Family Trust) & Ors v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) & Ors* [2014] VSC 516

the broader community, in the expertise of the court."[13] As part of the strategy to meet these concerns, the Supreme Court of Victoria underwent further structural reform last year, so that the Commercial and Equity Division has now been incorporated into an enlarged Commercial Court.[14]

The Commercial Court of the Supreme Court of Victoria now comprises five general commercial lists (Lists A – E), as well as the Corporations List, the Technology, Engineering and Construction List, the Intellectual Property List, the Arbitration List, the Admiralty List and the Taxation List. Each list is managed by an individual judge. Flexibility and expedition remain the cornerstone of the case-management principles which govern the Commercial Court. This flexibility and expedition is present from the time proceedings are first initiated, where all urgent enquiries are prioritised and diverted directly to a Commercial Court Registrar, where fast-track administrative proceedings are in place to ensure these applications are listed in a timely fashion. Amongst all judges sitting in the Commercial Court, a collaborative approach is taken to the allocation of all non-urgent matters, whereby weekly allocation meetings take place to ensure all proceedings entered into the Commercial Court are allocated to the appropriate judge, based on individual areas of expertise, as well as the need to ensure the matter can proceed to trial as expeditiously as possible. Moreover, the Commercial Court judges have developed a pro-active, targeted and collaborative procedure for referring matters, where appropriate, to judicial-led and other mediations.

Case management and the Commercial Court

The objective of the Commercial Court is, as stated in paragraph 2.1 of the *Green Book*,[15] to provide for the just and efficient determination of commercial disputes by the early identification of the substantial questions in controversy, and the flexible adoption of appropriate and timely procedures for the future conduct of the

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13 Justice Judd, Introducing the new Commercial Court, 31 August 2014, Supreme Court of Victoria website, http://www.supremecourt.vic.gov.au/home/contact+us/news/introducing+the+new+commercial+court.

14 Supreme Court of Victoria, Practice Note 5 of 2014, *New Structure of Trial Division*.

15 Supreme Court of Victoria, Practice Note 10 of 2011, *Commercial Court*.

proceeding which are best suited to the particular proceeding. A key aspect of the Commercial Court is that a judge is allocated to manage and hear each matter from the first directions to final determination at trial - if the matter makes it that far, which many of course do not.

A characteristic of practice in the Commercial Court is its flexibility. Directions are tailored and may vary to suit the management appropriate to specific disputes, and to reflect the views of the judges to whom cases have been allocated, to achieve the objective of providing for the just and efficient determination of commercial disputes. While there are important rules and procedures applicable to the Commercial Court which are set out in the *Supreme Court (General Civil Procedure Rules) 2005* and additionally in the *Green Book*,[16] it is in the context of the "Court Objective and Policies" of the Commercial Court that procedural issues are to be determined.[17] The *Green Book* contains detailed and specific provisions for the procedural steps of a Commercial Court proceeding – such as first directions, further directions, case management conferences and other applications. Each provision is, however, subject to the overriding requirement to give effect to the Court Objective, which is not to be triumphed over by tactical applications and delays. This need to maintain flexibility in the approach of judges to proceedings was recently highlighted by Chief Justice Bathurst AC of the Supreme Court of New South Wales during the Opening of the Law Term Address, where the Chief Justice was discussing striving for greater efficiency within a court. The Chief Justice said:[18]

> I have emphasised on previous occasions that court rules and procedure – and reforms to them – are not ends in themselves.[19] They should not, in my view, be overly prescriptive or inflexible. Put simply, this is because the judges of the Court are highly skilled and experienced. Case management should be determined by judges, drawing upon their considerable professional expertise, in conjunction with the parties involved and their

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16 See also the *Supreme Court Act 1986* (Vic) particularly s 29(2).

17 See *Green Book*, Paragraph 2, pp. 3 and 4.

18 The Hon. T F Bathurst AC, "Reformulating Reforms; Courts and the Public Good", *Opening of Law Term Address*, (Sydney, 4 February 2015) at 39.

19 See the Hon. T F Bathurst AC, "Accessing justice and dispensing it justly: some assorted thought", *Salvos Legal Lecture Series* (Sydney, 8 November 2014) at [44]ff.

> legal representatives. Case management must be tailored to the matter in question, rather than simply being determined by static written procedures.

The Role of the Commercial Court Judge

Comments such as those of Chief Justice Bathurst articulate precisely what it is that judges of the Commercial Court in Victoria are striving to achieve through the implementation of flexible case management principles. In pursuing this objective, the work of the Commercial Court exemplifies the fact that the modern judicial task 'requires skills and imposes burdens that historically formed no part of the judicial role.'[20]

The *Green Book* provides the framework in which the Commercial Court judge will operate. But, as has been recognised by Professor Zuckerman, '[t]he presence of a management infrastructure is not sufficient to deliver the hoped for results. These can be delivered only by managers willing to use the management tools to best effect.'[21] Thus the task of the Commercial Court judge inherently requires an understanding of the unique circumstances of a case from the commencement of proceedings. Having surveyed the issues, the challenge for the judge then becomes one of 'striking the right balance' as to the deployment of procedures that will deliver a just resolution in the most efficient way. This requires frank acknowledgement that, at times "demands which arise in managing a dispute are frequently irreconcilable and push or pull in different directions."[22] It also requires an appreciation of the fact that speed does not necessarily equate with efficiency[23]

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[20] The Hon. Ronald Sackville AO, "The future of case management in litigation", (2009) 18 *Journal of Judicial Administration* 211, 217.

[21] Adrian Zuckerman, "Litigation Management under the CPR: A Poorly-used Management Infrastructure" in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 89, 94.

[22] The Hon. Justice Pagone, "The Role of the Modern Commercial Court", a paper presented to the Supreme Court Law Conference on 12 November 2009, 12.

[23] The Hon. Justice Byrne, "Promoting the efficient, thorough and ethical resolution of commercial disputes: A judicial perspective" a paper presented at the LexisNexis Commercial Litigation Conference, Melbourne on 20 April 2005, p 2.

and that 'there also remain limitations necessarily and rightly founded in the judicial fundamentals of impartiality and procedural fairness.'[24]

2. The Role of Courts in Arbitration

The importance of judicial support for the development and growth of arbitration on both the domestic and international level cannot be overestimated. In the past, there may have been a perception that Australian courts hindered effective commercial arbitration by being unduly interventionist in a number of ways. Regardless whether this was warranted, it may be said that Australian courts were sometimes inconsistent in their approaches. In response to this perception, sweeping changes were introduced by Australian federal and state legislatures which adopted the 2006 revised Model Law[25] to provide a modern legislative framework for both international and domestic arbitration. These legislative developments, at both the Commonwealth[26] and State[27] levels, have now meant that Australian courts have clear guidance in the direction of a more supportive approach to arbitration. Australian courts, in turn, have continued to demonstrate a more positive, pro-arbitration position in a growing number of cases.[28]

How much intervention is too much?

Commentators have observed that:[29]

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24 The Hon. Michael Black AC, "The role of the judge in attacking endemic delays: Some lessons from Fast Track" (2009) 19 *Journal of Judicial Administration* 88, 91.

25 UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on 21 June 1985, and as amended by UNCITRAL on 7 July 2006).

26 See *International Arbitration Act* 1974 (Cth).

27 See the *Uniform Commercial Arbitration Acts*

28 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; *DampskibsselskabetNorden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696; *Eoply New Energy Technology Co Ltd v EP Solar* Pty Ltd [2013] FCA 356; and see also *Emerald Grain Australia Pty Ltd v Agrocorp International Pty Ltd* [2014] FCA 414 (Pagone J).

29 John Lurie, "Court Intervention in Arbitration: Support or Interference" (2010) 76(3) *The International Journal of Arbitration, Mediation and Dispute Management* 447.

> The courts have an important role to play through their intervention at various stages of the arbitral process. In the absence of such intervention the fair resolution of disputes before an impartial tribunal, without unnecessary delay or expense, may not be achieved. Whether court intervention is viewed as supporting or interfering with the arbitral process will depend upon a range of factors including the timing, manner and degree of such intervention. Much will also depend upon the relative importance of the competing concepts of party autonomy and due process. Consequently the question of whether intervention supports or interferes with the arbitral process is often hotly debated.
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> There is a view, particularly amongst those involved with international arbitration, that the involvement of courts in the arbitral process general constitutes unwanted interference. But the reality is that arbitration would not survive without the courts. Indeed, as Lord Mustill observed, it is only a court with coercive powers that could rescue an arbitration which is in danger of foundering.

I have previously expressed similar views, namely that the development of international arbitration and arbitration generally requires "minimum court intervention, maximum court support."[30] That said, judicial intervention at some level is a necessary and significant aspect in safeguarding the integrity of international arbitration. Without courts and judges in many jurisdictions now taking a pro-arbitration approach, international arbitration would not have the same level of attractiveness as an alternative – or, in many cases, the primary – mechanism for resolving cross-border disputes. The real issue, which remains hotly debated, is the degree to which courts should intervene in the arbitration process itself; in addition to providing assistance such as the enforcement of arbitral awards. It is in this context and within this debate that it becomes clear of the importance of having judges experienced in the arbitration process available to manage any proceedings that may involve the court becoming involved in the arbitral process becomes very clear. Equally, having a framework that provides clear guidelines – through the use of specialist lists with special rules, practice notes and directions – can provide greater clarity and certainty to all involved in the process.

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[30] See a paper presented at the Arbitrators' and Mediators' Institute of New Zealand Annual Conference, 25 – 27 July 2013 (Auckland) entitled "How the Judiciary can support domestic and international Arbitration."

3. The Supreme Court of Victoria's Arbitration List

On 1 January 2010, the Arbitration List of the Supreme Court of Victoria commenced operation as part of the newly formed Commercial Court. Previously, a panel of two judges had been allocated responsibility for all arbitration business. However, prior to establishment of this list, little direction had been provided to practitioners as to how to proceed when seeking judicial support for the arbitration process. The establishment of the List, and the accompanying Practice Note, clarified the position in this regard.[31]

As the evolving nature of the Commercial Court has shown, a great deal can be gained by constantly engaging with users in order to seek ways to improve the performance of the Court, and the processes which it uses in dispensing justice. This is particularly so in area such as arbitration, where, as has previously been discussed, competition on a global scale is fierce. With this in mind, on 1 December 2014, the Supreme Court of Victoria introduced the *Supreme Court (Chapter II Arbitration Amendment) Rules* 2014 ("the Arbitration Rules"), together with a new Commercial Arbitration Practice Note ("the Practice Note"). The Arbitration Rules follow the approach of the Federal Court Rules, both in terms of the language and structure used, as well as in the manner by which they provide a comprehensive set of rules and forms. Maintaining consistency with the Federal Court accords with the approach recommended by both the Supreme Court of Victoria's Arbitration List Users Group, as well as that of the Australian Centre for International Commercial Arbitration ("ACICA") Judicial Liaison Committee, a committee chaired by the Hon. Murray Gleeson AC QC, and comprised of the arbitration judges from Australian Supreme Courts, and the Federal Court. The introduction of the Arbitration Rules is an aspect of the significant developments in recent years towards building a more "arbitration-friendly" environment in Australia.

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[31] At this point in time, the Supreme Court of New South Wales is the only other Australian jurisdiction which has developed a specialised Arbitration List.

The Victorian Arbitration Rules

The Arbitration Rules, together with the Practice Note, provide a clear and comprehensive guideline to proceedings entered into the Supreme Court of Victoria's Commercial Court – Arbitration List. Their structure is, as far as possible, "transactional" in that the content of the Arbitration Rules and the forms provided in effect produce, and are designed to produce, a user's guide to the appropriate procedure or procedures for the variety of applications that may arise with respect to arbitration proceedings. This means that it is extremely easy and clear for a party, or their advisers, to find the relevant rule and appropriate form or forms – an improvement which will go a long way to saving time and money for parties, as well as court time; all of which provide more cost-effective dispute resolution for all concerned.

Although space does not permit discussion of the provisions of the Arbitration Rules in detail, there are a number of key points which should be emphasised and which highlight how extensive the improvements are when compared to the previous regime.[32] Before turning to some detail a general point which should be made is that the previous rules made no distinction between international arbitration and domestic arbitration. Although this is unsurprising given the time from which they date it is now important to provide clear and comprehensive guidelines in rules which accommodate the distinction and any particular requirements which flow from it. Failure to do so does not provide appropriate support at the judicial and infrastructural level for international arbitration and may create negative perceptions with respect to Australian jurisdictions as arbitration fora.

Enhanced support of the International and Domestic Legislative Regime

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[32] These issues were discussed at a recent Commercial CPD Seminar held at the Monash University Law Chambers on 16 December 2014 in a presentation by Mr Martin Scott QC, of the Victorian Bar, and Ms Bronwyn Lincoln, Partner, Herbert Smith Freehills, "2014 Amendments to the Commercial Arbitration Rules".

Court rules have tended not to keep pace with the legislative developments facilitating international and domestic arbitration in recent years. Failure to support these legislative developments creates the potential for significant uncertainty and delay. Most notably, the previous Victorian Arbitration Rules provided no guidance to parties looking to preserve their rights by having a proceeding before the Court, which was the subject of an arbitration agreement, stayed and referred to arbitration.[33] The Arbitration Rules now clearly articulate the procedure, for both an international or domestic arbitration agreement. [34] Moreover, the rules provide guidance as to the documents which must accompany any application, while also directing the parties to the correct form to use when making the application – a significant improvement on previous rules. The forms themselves are also explanatory of the rules and the supporting materials. So the new rules assist the user from whichever direction they are approached – via the rules or the forms.

One of the more common applications brought before the court is one made under the limited grounds provided for under s 34 of the *Commercial Arbitration Act* 2011 (Vic) ("CAA") to set aside a domestic award. Despite this, no direction was provided to parties under the superseded rules with respect to such an application, and on what grounds it is made. While it is, of course, incumbent upon the parties to ensure that any application brought before the court is properly made and upon a proper basis, courts may assist this process by providing clearly articulated rules and appropriate forms, where possible. Not only does this assist the parties, but also facilitates the efficient operation of the courts by ensuring that procedural steps are dealt with quickly and efficiently before any hearing takes place, greatly reducing time and costs to all involved. Under the Arbitration Rules, clear and comprehensive language now provides parties with a detailed, step-by-step users' guide to the making of an application to set aside a domestic award,[35] including the information which must be provided in an affidavit in support, as well as the appropriate form.

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33 Pursuant to s 7 of the IAAA; s 8 of the CAA.

34 See rule 9.03 for applications under s 7 of the IAA; rule 9.13 for applications under s 8 of the CAA.

35 See rule 9.19

The same applies to all other applications, with respect to international or domestic arbitral proceedings, which are also provided for in the same comprehensive manner.

One final provision which merits particular attention relates to applications made under s 27A of the CAA, for the issuing of a subpoena for a person to attend for examination before an arbitral tribunal, produce a document to the tribunal, or both. While it is, in my view, clearly inappropriate for a court, in an application under s 27A of the CAA, to embark upon a process which would, in effect, "second guess" the arbitral tribunal which has already given permission for the application to obtain a subpoena under these provisions, that is not to say that a provision such as s 27A is to be treated lightly by the courts.[36] The sanctions for a breach of a Court issued subpoena are potentially very serious indeed, and so the basis upon which these powers are sought to be invoked must be established to the satisfaction of the Court. Despite the seriousness of such an application, the superseded rules did not provide a process by which an application under s 27A of the CAA was to be brought before the Court. The practice which developed under the previous domestic arbitration legislation, the *Commercial Arbitration Act* 1984, was that, upon production of the appropriate documentary evidence, a subpoena would be issued by the Prothonotary. Under the new Arbitration Rules, this practice has been abolished, and in its place are detailed provisions for the issuing of subpoenas for both international[37] and domestic[38] arbitration proceedings, with direction to the appropriate forms again being provided. Just how effective these new rules can be was demonstrated in the first proceeding which came before the Commercial Court – Arbitration List – shortly after the Arbitration Rules commenced. The proceeding also highlighted how effective case-management is greatly enhanced by the establishment of specialist lists, particularly in the area of arbitration.

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36 *Chief Executive Officer of the Australian Sports Anti-Doping Authority and Australian Football League v 34 Players and One Support Person* [2014] VSC 635, [63].

37 Rule 9.06

38 Rule 9.14

In early December 2014, an application was made by the Chief Executive Officer of the Australian Sports Anti-Doping Authority (ASADA) for the issuing of subpoenas with respect to non-parties attending before and producing documents before the Australian Football League ("AFL") Anti-Doping Tribunal.[39] The application was issued in the Supreme Court the day after the new arbitration rules came into effect. The application was brought pursuant to s 27 of the *Commercial Arbitration Act* ("the Act"), which provides for the issue of a subpoena for the purpose of arbitration to require a person to attend for examination before an arbitral tribunal, to produce documents before an arbitral tribunal, or to do both those things. An application may only be made to the Court with the permission of the arbitral tribunal. The scope of the application of the Act is set out in s 1 of the Act, which states that the Act only applies to domestic commercial arbitrations. Considerable urgency attended to the making of the application, as the AFL Anti-Doping Tribunal was due to commence the hearing to which the subpoenas related shortly after the proceeding was issued in the Supreme Court.

The main question for determination in the proceeding was whether the AFL Anti-Doping Tribunal could be regarded as an arbitral tribunal for the purposes of the Act. If it were to be considered an arbitral tribunal, the applicants then would have had to show the Court that it also satisfied the requirements of being both domestic and commercial, as prescribed by the Act.

In support of their contention, the applicants turned to the "definition" suggesting essential attributes of arbitration which is found in Mustill and Boyd's text, *Commercial Arbitration*.[40] This definition provides for a number of qualities which, according to the authors, are necessary if the process is to be considered an arbitration. These are that the agreement pursuant to which the process is to be carried out ("the procedural agreement") must contemplate that the tribunal which

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[39] *Chief Executive Officer of the Australian Sports Anti-Doping Authority and Australian Football League v 34 Players and One Support Person* [2014] VSC 635

[40] Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed., Butterworths, London and Edinburgh, 1989), 41-42.

carries on the process will make a decision binding on the parties; that the procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are to be determined by the tribunal; that the jurisdiction of the tribunal must derive either from the consent of the parties, from an order of the court, or from statute; the tribunal must be chosen by the parties or by a method to which they have consented; the agreement must contemplate that the rights of the parties will be determined in an impartial manner with an equal obligation of fairness towards both sides; the decision of the tribunal must be intended to be enforceable in law; and the agreement must contemplate a process whereby the tribunal will make a decision upon a dispute already formulated at the time when the tribunal is appointed.

This "definition" was adopted by Justice Thomas in the English decision in *Walkinshaw v Diniz*,[41] where his Lordship added three additional factors, namely, that it is first, a characteristic of arbitration that the parties should have proper opportunity of presenting their case; secondly, it is a fundamental requirement of an arbitration that the arbitrators do not receive unilateral communications from the parties, and disclose all communications with one party to the other party; and thirdly, the hallmarks of an arbitral process are the provisions of proper and proportionate procedures for the receipt of evidence.[42]

Moreover, the result of an adjudicative dispute resolution process, if it is to be considered to be an arbitral process, must produce a preclusive effect in the result. Thus Williams and Kawharu observe:[43]

> One of the fundamental objectives of arbitration is to provide a final and binding resolution of disputes. The binding nature of arbitration is the corollary of party autonomy and consent. There are two aspects to the enforceability of arbitral proceedings: first, an agreement to arbitrate is an enforceable agreement to refer a particular dispute to arbitration; and secondly, arbitral awards are binding and have a

41 *Walkinshaw v Diniz* [2000] 2 All ER (Comm) 237

42 [2000] 2 All ER (Comm) 237 at 255.

43 Williams and Kawharu, *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011), 5, [1.1.3].

> preclusive effect in the same way that court judgments do by virtue of the principles of res judicata and estoppel. The power to make a binding decision distinguishes arbitration from other dispute resolution procedures such as mediation and conciliation, which aim to arrive at a negotiated settlement [footnotes omitted].

The jurisdiction of the AFL Anti-Doping Tribunal is established through a somewhat complex set of Regulations, Codes and Rules, to which a player becomes bound upon signing a contract to play in the AFL. It was this complex set of arrangements, it was submitted by the applicants, that gave rise to the Anti-Doping Tribunal taking on the status of an arbitral tribunal. After consideration of these arrangements that established jurisdiction, and with reference to what I shall refer to as the *Wilkinshaw* criteria, it was held that the Anti-Doping Tribunal was not in fact an arbitral tribunal but, rather, these arrangements were indicative of a domestic disciplinary tribunal established under rules of an association to which members or participants in that association are contractually bound.[44] The decision was not found to be one which would have the necessary preclusive effect.

4. Benefits of Specialist Lists

The experience in the Supreme Court of Victoria shows that it is clear that there are substantial benefits that flow from providing a specialist list, with a specialist judge or judges. A court that has established an arbitration list is likely to be more aware of the specific issues that arise in the arbitration context. Also, a consistent body of arbitration related decisions can be developed by judges that have an interest and expertise in arbitration. Given that the legislation governing Australia's arbitral regime is relatively new, there will be great importance placed upon court decisions interpreting these provisions, which are largely based on the Model Law. It is essential that consistent interpretation and application is given to both the

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[44] *Chief Executive Officer of the Australian Sports Anti-Doping Authority and Australian Football League v 34 Players and One Support Person* [2014] VSC 635, [23].

international and the domestic legislative provisions – contained in the *International Arbitration Act* (IAA) and the *Commercial Arbitration Act* (CAA), respectively – not only to conform with international thinking and arbitral practice (particularly having regard to the Model Law's international heritage), but also to assist in developing sound arbitration law expertise and to promote Australia's reputation as an arbitration-friendly jurisdiction.

As part of so doing, courts need to ensure that any procedures to be applied with respect to the making of and dealing with applications under both the IAA and the CAA are clear and easily accessible. In this context, procedure must also include listing procedures and expedition.[45] Specialist courts with arbitration lists assist in this respect. The procedural approach to applications under the IAA and the CAA will have a major impact on the way that Australian arbitration law is viewed. For example, staying court proceedings in favour of an arbitration is a pro-arbitration step, but if it takes an excessive time for the stay application to be heard and determined, the arbitration process has probably been thwarted anyway. Procedural consistency and expediency is far more likely to be achieved when there are specialist arbitration lists and judges; as the experience in leading commercial arbitration centres such as London, Singapore and Hong Kong shows. Specific arbitration practice notes and rules are essential to this process.

Liaison between courts and with arbitration users

If the objectives of the IAA and the CAA are to be fully realised, the courts need to communicate with and receive feedback from commercial arbitration stakeholders. Specialist courts with arbitration lists are particularly well placed to do this as they are in contact with the relevant parties and practitioners to the greatest extent possible. The Arbitration Users' Group for the Supreme Court of Victoria has beenespecially useful in discussing and developing the procedures for commencing and disposing of applications under the IAA and the CAA.

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[45] Noting in this respect that the Arbitration List – Commercial Court is available 24 hours per day, seven days per week and hearings can and do take place outside court hours as required.

The courts in a federal state like Australia, where the jurisdiction is spread between a number of different courts, need to liaise with each other to develop and share their arbitration expertise and experience. The existence of specialist arbitration lists will help in this regard by directing arbitration business to particular judges within a court who can then share their knowledge and experience with the arbitration judges from other courts. The ACICA Judicial Liaison Committee has provided much of the impetus for a number of the positive developments which have taken place in Australian jurisdictions. In my view this process would be enhanced significantly if the expertise and experience of New Zealand and its courts could also be brought within it.

Raising the expectations on arbitrators and practitioners

In order to achieve the general objectives discussed, courts need, and value, assistance from parties and their representatives. Solicitors and counsel are able to provide significant assistance to the courts in applying the Model Law provisions, as applied by the IAA or as adopted by the CAA, in a manner consistent with international and domestic jurisprudence. Assistance by reference to commentaries and case law in submissions informed by comprehensive research, including consideration of the broader policy considerations underlying the legislation – policy considerations which may have an international dimension, for the purposes of both the IAA and the CAA – is essential. The existence of a specialist arbitration list with a specialist judge or judges can provide a focus for arbitrators and arbitration practitioners, both for the purpose of educating arbitrators and practitioners in this respect and providing an understood level of knowledge and expectation having regard to the expertise of the court.

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Supreme Court of Victoria – Website materials

http://www.supremecourt.vic.gov.au/

Arbitration List Practice Note

http://assets.justice.vic.gov.au//supreme/resources/78928aa8-743a-4be9-b116-3df4736baa85/practice+note+8+of+2014+commercial+arbitration+business.pdf

Arbitration Rules

http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/b05145073fa2a882ca256da4001bc4e7/484724691AEABBA2CA257D820013D0CC/$FILE/14-205sra%20authorised.pdf