

The Courts and Arbitration in Victoria

The Hon. Marilyn Warren AC
Chief Justice of Victoria
Commercial Arbitration Seminar
30 November 2011

I am very pleased to be invited to speak to you today regarding the *Commercial Arbitration Act 2011*.

The Act commenced in Victoria on 17 November 2011. Uniform legislation has also been enacted or introduced into Parliament in New South Wales, Queensland, South Australia, Western Australia, Tasmania and the Northern Territory.

My colleague, the judge in charge of the Victorian Supreme Court Arbitration List, the Honourable Justice Clyde Croft, has described the new law as 'the arbitration law against which all other arbitration laws are judged'.

The enactment of the uniform law in Victoria places Victoria, and Australia at the forefront of best practice in this field internationally. The Act is substantially based on the UNCITRAL Model Law on International Commercial Arbitration. You will see references throughout the Act to

the equivalent provisions of the Model Law and points of difference where they arise. The Act has helpfully maintained the numbering of the Model Law for the benefit of those experienced in its application and those searching across jurisdictions for cases applying specific provisions.

My topic today is the Courts and Arbitration. You may consider this topic, perhaps even the presence of a judge at this seminar as somewhat misplaced. Isn't arbitration all about staying away from the courtroom in favour of an alternative means of dispute resolution? Some might say that the role of the Court in relation to arbitration is to 'butt out'.

You certainly do not have to go far into the *Commercial Arbitration Act 2011* before you see the first indication that the role of the courts is limited. Section 5 sets out clearly and simply 'In matters governed by this Act, no court must intervene except where so provided by this Act'.

What then is the role of the Court in relation to arbitration?

The Court is not a mere service provider in a dispute resolution market. The Court is not a commercial enterprise seeking to increase its market share and volume. The Court's role may best be compared to an essential services provider.

Just as a large part of the modern energy supplier's role lies in encouraging energy conservation and alternative energy sources, a large part of the modern court's role is to support alternative means of resolving disputes.

The Court supplies an essential service. Where necessary the Court will determine disputes regarding the rights of parties. However, it also aims to support those who opt for measures that reduce demand on court services, because that allows the Court to better serve those matters where there is no alternative. The Court is supportive of parties opting for the advantages of going 'off the litigation grid' as it were, whether that be in the form of mediation, arbitration or another form of appropriate dispute resolution.

Therefore when it comes to arbitration, the role of the Court is not to intervene but to support. The Victorian

Supreme Court is strongly committed to promoting and supporting the use of arbitration in Victoria.

Much emphasis has been placed on non-adjudicative forms of dispute resolution in recent years. Undoubtedly mediation and other ADR process play a very significant role in modern dispute resolution. There is however a danger of falling into a mindset that seeking agreement is always the solution, ignoring that there are situations of genuine and legitimate disagreement where third party determination is the appropriate form of dispute resolution. A swift arbitral process can often resolve a matter faster than drawn out attempts to find common ground. It can also lead to better outcomes when compared to a proceeding that eventually settles under the weight of legal costs or commercial pressures.

Arbitration occupies that space in commercial relationships where sophisticated parties in agreeing a set of obligations, anticipate the potential for future disagreement, and with that foresight agree on a means of resolving disputes should they arise. While it arises in times of dispute, arbitration is fundamentally rooted in

agreement between parties and gives them a greater degree of control of their affairs.

One of the principal benefits of arbitration is the speed with which disputes can be resolved. Parties can determine when and where hearings are to take place and the procedures to be adopted. There is no need to wait for a trial date or rely on public facilities. This is reflected in the paramount object of the new Act in s 1AC 'to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.'

The importance of expedition is one recognised by the Court. When there is an application to the Court in relation to an arbitration, the Court acknowledges the need for it to be dealt with quickly.

While one of the signs of a thriving and successful arbitration environment is that the Court is called upon to do comparatively little in relation to arbitration. The message from the Supreme Court is that where there is Court involvement, the Court will deal with applications brought before it expeditiously. The Court is directed to

the paramount object in interpreting the Act, but the Court has gone further and committed itself through its processes and procedures, to reflect that object.

Those engaging in arbitration can rely on the fact that applications will be dealt with swiftly to limit disruption of the process. They can be confident there will be no opportunity to use court processes for the collateral purpose of delaying arbitral proceedings.

The commitment of the Court to expedition was embodied in the formation of List G of the Commercial Court, the Arbitration List, established on 1 January 2010. This is a specialised list, with a designated judge in charge, Justice Croft, hearing the full range of both domestic and international arbitration matters.

In List G, matters may be heard throughout all stages of an arbitral dispute – including very urgent matters. A specialist judge is available 365 days of the year.

Practice Note No 2 of 2010 sets out the current procedures in that List but more importantly begins with a statement of the Court's support for arbitration.

The Court, with the assistance of the new Arbitration Users Group, is in the process of developing its new Arbitration Practice Note and Rules to reflect the new Act. These will continue to emphasise the supporting role of the Court in arbitration matters. The Users Group met last week and included leading members of the Victorian Bar and the profession in the field and also national and international participants.

The support of the Court under the revised Practice Note and Rules may take a number of forms. The jurisdiction of the Court under the Act includes:

- staying Court proceedings to allow arbitrations to proceed;
- the appointment or removal of arbitrators;
- recognising or enforcing interim measures;
- enforcing a procedural determination of the arbitral tribunal;
- assistance in obtaining evidence including orders to attend or produce documents;
- determination of a preliminary point of law; and
- enforcement of arbitral awards.

One significant aspect of the new Act is the provision limiting the circumstances in which an arbitral award may be challenged. The *Commercial Arbitration Act 1984* provided for an appeal on a question of law to the Supreme Court by consent of the parties or with the leave of the Court, subject to parties making an exclusion agreement. The *Commercial Arbitration Act 2011* limits appeals to circumstances in which the parties consent. Finality of the arbitral award is the default position under the new Act. The primacy of the agreement of the parties to the process is reinforced by its inclusion as a necessary condition for any appeal.

The grounds on which an award may be set aside or refused recognition also centre on the agreement of the parties.

A former colleague, and now sometime arbitrator was often heard to say 'a trial is not a dress rehearsal for the Court of Appeal'. The new Act makes clear that arbitrations are to be anything but a dress rehearsal for an appeal to the Court.

With the introduction of the *Commercial Arbitration Act 2011* Victoria takes a major step in promoting the use of arbitration. The final piece of the puzzle is to provide a world class facility for the conduct of arbitrations.

The Victorian Supreme Court has pressed very strongly for necessary infrastructure here in Melbourne to support arbitration. I have said on many occasions that we need to learn from our Singapore neighbours. Anyone who has visited Maxwell Chambers in Singapore will appreciate how Singapore, with the support of the Singaporean government and the Supreme Court of Singapore has positioned itself as a very significant international centre for arbitration.

The announcement this morning by the Attorney-General is excellent news. I thank him for the support given to the Victorian Courts, Bar and the profession. I expect the new facilities in the William Cooper Justice Centre will enable Melbourne to stand as the next venue on the national arbitration grid.