



**VCAS**

# The Victorian Commercial Arbitration Scheme

## **RULES**

VCAS is endorsed by



VICTORIAN BAR

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## Introduction

1. Where the parties have agreed in writing that disputes shall be referred to arbitration under the Victorian Commercial Arbitration Scheme Rules ("**Rules**"), such disputes shall be referred and finally determined in accordance with these Rules.
2. These Rules shall apply to arbitrations in either one of the following forms:
  - (a) "Documents-Only" arbitrations without a hearing for the presentation of evidence or oral submissions on the merits of the dispute; or
  - (b) Arbitrations involving a hearing for the presentation of evidence and/or oral submissions on the merits of the dispute.
3. Where parties agree specifically to a "Documents-Only" arbitration then the arbitration shall be conducted on that basis pursuant to Rule 2(a) above. In addition, if the value of the claim and counterclaim in total (the "Sum in Dispute") is not more than \$50,000, then the arbitration shall, unless the Arbitrator otherwise orders, be conducted as a "Documents-Only" arbitration pursuant to Rule 2(a) above. All other arbitrations conducted under these Rules shall be arbitrations under Rule 2(b).
4. Arbitrations under Rule 2(b) above may, if the parties agree, or if the Tribunal in its discretion considers it appropriate, be conducted by a hybrid approach, where some issues are determined by a "Documents-Only" arbitration and other issues by oral hearing.
5. Arbitrations under Rule 2(b) above may, if the parties agree, be conducted by way of virtual hearing using Zoom or other appropriate online technology which permits a remote hearing and/or may be conducted in a manner that limits the time available for each party to present their case at the final hearing ("stop clock" arbitration)<sup>1</sup>. Unless the Arbitrator otherwise orders, or the parties otherwise agree, the procedure on virtual hearings and "stop clock" arbitrations, set out in **Appendix 2** to these Rules (virtual hearings) and **Appendix 3** to these Rules (stop clock arbitrations) shall apply to any such hearing (i.e. a hearing which the parties agree is to be carried out on a virtual or stop clock basis).<sup>2</sup>
6. Unless the parties otherwise agree, in any arbitration conducted under these Rules the place of arbitration shall be Victoria and Victorian Law shall apply.

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<sup>1</sup> In these Rules, reference to a hearing where the parties agree to limit the time available for each party to present their case at the final hearing will be known as a "stop clock" arbitration.

<sup>2</sup> The purpose of the procedures in Appendix 2 and 3 is to facilitate the use of virtual hearings and/or stop clock arbitrations where the parties agree that one or both of those procedures is to apply.

## Overriding Objective

7. The overriding objective of these Rules is to provide arbitration that is quick, cost-effective and fair, considering especially the amounts in dispute and complexity of the issues or facts involved.
8. By invoking these Rules, the parties agree to accept the overriding objective and its application by the Tribunal.

## Service of documents under these Rules

9. For the purposes of these Rules, notices, statements, submissions or other documents used in arbitration may be:
  - (a) delivered personally to the party; or
  - (b) delivered by leaving the document at his or her habitual residence, place of business or mailing address; or
  - (c) if the party is a company, by delivering the document to the company's registered place of business; or
  - (d) if none of these can be ascertained after making reasonable inquiry, then documents may be delivered by leaving them at the party's last-known residence or place of business.
10. The date that a party has notice of a document is deemed to be the date that the particular document is delivered to that party. Delivery of documents to the Victorian Commercial Arbitration Scheme ("**VCAS**") shall be in accordance with these Rules. All documents and notices shall be copied to the Chair of the Scheme<sup>3</sup> and all parties, as applicable. For the avoidance of doubt, any notice in writing required to be given by the Claimant may also be given by the Respondent should the Claimant fail to do so, copying the Chair of the VCAS and the Claimant.
11. Unless the Arbitrator otherwise orders, once the Notice of Arbitration has been delivered to the Respondent, each party shall provide to the other party (or parties), and to the Arbitrator, an email address for delivery of documents in the arbitration and delivery to that email address shall be delivery in the arbitration.

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<sup>3</sup> The Chair of the Scheme is the Chief Executive Officer of the Victorian Bar.

## Calculating time

12. For the purposes of calculating a period of time prescribed by these Rules, the period shall begin to run on the day following the day when a notice, statement, submission or other document is received or when the act prescribed takes place. If the last day of the period is a Saturday, Sunday or public holiday, the period is extended until the first day that is not a Saturday, Sunday or public holiday. Saturdays, Sundays or public holidays occurring during the running of the period of time are included in calculating the period.

## Commencement of Arbitration

13. To commence an arbitration under these Rules, the party initiating commencement of the arbitration (the "**Claimant**") shall deliver to the other party (the "**Respondent**") a notice in writing stating their intention to commence an arbitration under these Rules (the "**Notice of Arbitration**"). A copy of the Notice of Arbitration shall, for information purposes only, be delivered at the same time to the Victorian Commercial Arbitration Scheme at the Victorian Bar, or at such other place where the Victorian Commercial Arbitration Scheme has its main premises, and be marked for the attention of the Chair of the Victorian Arbitration Scheme (the "**Chair**").
14. The Notice of Arbitration shall include:
  - (a) The names and mailing addresses of the parties to the dispute;
  - (b) A short statement that the parties are in dispute over a matter which is to be identified in brief terms;
  - (c) Reference to the agreement by which the dispute is to be arbitrated under these Rules;
  - (d) The names and professional details of 3 individuals nominated by the Claimant as candidates for the role of single Arbitrator of the dispute;
  - (e) A copy of the arbitration agreement; and
  - (f) A comprehensive Statement of Case signed by or on behalf of the Claimant.
15. The copy of the Notice of Arbitration, being a document to the effect of that set out in paragraph 6 of the User Guide, delivered to the VCAS office shall be accompanied by payment to the Victorian Bar Incorporated in such sum as may from time to time be prescribed by VCAS as the fee for commencing arbitration under these Rules.

## Appointment of Arbitrator

16. Any arbitration conducted under these Rules shall be conducted by a sole Arbitrator ("Arbitrator") whose appointment shall be agreed in writing by the parties within 7 days of the commencement of arbitration.
17. Where parties are unable to agree in writing to the appointment of an Arbitrator after 7 days of the commencement of the arbitration, the Claimant shall within 7 days thereafter notify the Chair of the same in writing and refer the appointment of an Arbitrator to the Chair. The Chair or their delegate shall use his or her best endeavours within 7 days from such notification to appoint an Arbitrator to hear and/or determine the dispute, notify the parties of the appointment, and provide the parties with the Arbitrator's name and contact address. Where an Emergency Arbitrator is appointed under Appendix 1, these timelines shall continue to run concurrently, save that the Chair shall not appoint the Arbitrator until the Emergency Arbitrator has delivered his or her interim order or Award.
18. The request for appointment of an Arbitrator shall be accompanied by a cheque drawn in favour of VCAS or payment by other means in such sum as may from time to time be prescribed by VCAS as the appointment fee.
19. The remuneration of the Arbitrator shall be in accordance with such rates and fees as may from time to time be prescribed by VCAS as the rates and fees applicable to Arbitrators' remuneration for arbitration under these Rules, subject to any rates and fees agreed between the parties and the Arbitrator. Parties are jointly and severally liable for the Arbitrator's fees and expenses, without prejudice to any order on costs that the Arbitrator may make.

## Deposits for Costs

20. As soon as practicable after the commencement of the arbitration, the Arbitrator may request the parties to each deposit an equal amount as an advance for the Arbitrator's fees.
21. If the required deposits are not paid in full within 14 days after receipt of the request, the Arbitrator shall inform the parties in order that one or another of them may make the required payment. If such payment is not made, the Arbitrator may order the suspension or termination of the arbitration or continue with the arbitration on such basis and in respect of such claim or counterclaim as the Arbitrator considers fit.
22. If a party pays the required deposits on behalf of another party, the Arbitrator may, at the request of the paying party, make an Award for reimbursement of the payment.
23. When releasing the final Award, the Arbitrator shall render an account to the parties of the deposits received. Any unexpended balance shall be returned to the parties in the shares in which it was paid by the parties, or as otherwise ordered by the Arbitrator.

## Procedure in the Arbitration

24. Subject to these Rules, the Arbitrator shall have all powers permitted by law to ensure the just, expeditious, economical and final determination of the dispute, including the power to abridge or extend time periods prescribed by these Rules. In this regard, the Arbitrator shall conduct the arbitration in such manner as he or she considers appropriate, save that at all times the Arbitrator shall ensure that the parties are treated equally and are given reasonable opportunity to present their case.

## Statement of Case

25. Each of the Statement of Case, Statement of Defence, any Counterclaim, and Reply, as described below, shall be comprehensive in nature and shall contain, as far as reasonably practicable, all the material relied on.
26. The Statement of Case shall contain the following information:
- (a) a concise statement of the facts and particulars supporting the claim;
  - (b) concise contentions of fact and law supporting the Claimant's position;
  - (c) all items of relief and remedy sought by the Claimant; and
  - (d) all quantifiable items of claim with accompanying calculations and breakdown (where applicable).
27. The Claimant shall annex to its Statement of Case all supporting materials on which it relies.
28. The Statement of Case (excluding the supporting material annexed thereto) shall not exceed fifteen (15) A4 pages;
29. The Arbitrator may vary any of the requirements in Rules 26 to 28 above as he or she deems appropriate.

## Statement of Defence (and Counterclaim, if any)

30. Within 28 days of the commencement of arbitration, or within some other time period fixed by the Arbitrator, the Respondent shall deliver to the Arbitrator and the Claimant a statement of defence ("Statement of Defence") to the Claimant's claim signed by or on behalf of the Respondent. Where the Respondent desires to advance a counterclaim against the Claimant, a statement of the counterclaim signed by or on behalf of the Respondent must be included in the same document as the Statement of Defence and such document shall be titled "Statement of Defence and Counterclaim".

31. The Statement of Defence (and Counterclaim, if any) shall contain the following information:
  - (a) a confirmation or denial of the Claimant's claim;
  - (b) a concise statement of the facts and particulars supporting the Respondent's position in defending the claim;
  - (c) concise contentions of fact and law supporting the Respondent's position; and
  - (d) where a counterclaim or set-off defence is advanced, the same kind of information that a Claimant is obliged to give in their Statement of Case.
32. The Respondent shall annex to its Statement of Defence (or Statement of Defence and Counterclaim) all supporting materials on which it relies.
33. Each of the Statement of Defence (excluding the supporting material annexed thereto) and any Counterclaim (excluding the supporting material annexed thereto) shall not exceed fifteen (15) A4 pages.
34. The Arbitrator may vary any of the requirements in Rules 31 to 33 above as he or she deems appropriate.

## **Statement of Reply (and Defence to Counterclaim, if applicable)**

35. Within 14 days of receipt of the Respondent's Defence (and Counterclaim, if any), or within some other time period fixed by the Arbitrator, the Claimant shall (if it so chooses) deliver to the Arbitrator and the Respondent a concise statement of reply ("Statement of Reply") to the Respondent's defence signed by or on behalf of the Claimant. Where the Respondent has advanced a counterclaim against the Claimant, a comprehensive statement of the defence to the Respondent's counterclaim signed by or on behalf of the Claimant must be included in the same document as the Statement of Reply and such document shall be titled "Statement of Reply and Defence to Counterclaim".
36. The Statement of Reply (and Defence to Counterclaim, if applicable) shall contain the following information:
  - (a) a confirmation or denial of the Respondent's defence;
  - (b) a concise statement of the facts and particulars supporting the Claimant's position in replying to the defence;
  - (c) concise contentions of fact and law supporting the Claimant's position; and

- (d) where a defence to counterclaim is advanced by the Claimant, the same kind of information that a Respondent is obliged to give in their Statement of Defence.
37. The Statement of Reply (and Defence to Counterclaim, if applicable) shall not exceed fifteen (15) A4 pages;
38. The Arbitrator may vary any of the requirements in Rules 36 and 37 above as he or she deems appropriate.

## **“Documents-Only” Arbitration: for Disputes under \$50,000 or as agreed**

39. Where parties agree specifically to a “Documents-Only” arbitration or where the Sum in Dispute is not more than \$50,000 (subject to Rule 3), the Arbitrator shall, upon receipt of the Statements referred to in paragraphs 25 to 38 above (where applicable) and such other documents as he or she may direct or require, proceed to consider the dispute and publish the Award in accordance with these Rules.
40. A hearing for the presentation of evidence or oral submissions on the merits of the dispute (for disputes under \$50,000 or as agreed) is not required unless, in exceptional circumstances, the Arbitrator deems it necessary for the resolution of the dispute.

## **Status Hearing**

41. Where the arbitration is not a “Documents-Only” arbitration pursuant to Rule 39, the Arbitrator shall convene a hearing to be attended by both parties (the “Status Hearing”), which shall proceed, unless the Arbitrator otherwise orders, no later than 6 weeks from the date of commencement of the arbitration. The Arbitrator may conduct the Status Hearing by way of virtual hearing using Zoom or other appropriate online technology.
42. At the Status Hearing, the Arbitrator shall enquire into the status of the arbitration and shall consider directions for the further conduct of the arbitration, including:
- (a) Directions for exchange of statements of case, defence or reply (if parties have not been able to exchange such statements within the time prescribed by these Rules);
  - (b) Directions for the exchange of witness statements;
  - (c) A direction that all or any applications for interim rulings, interim relief, awards and/or directions be delivered to the Arbitrator no later than 7 days from the date of the Status Hearing (if such applications have not by such time already been delivered to the Arbitrator); and for a resumed Status Hearing to be held within 14 days of the original

Status Hearing at which all applications for interim relief, awards and/or directions are to be heard and disposed; and

- (d) Directions, as may be appropriate for the presentation of evidence by witnesses, including expert witnesses, if any, and for oral submissions to be made on behalf of the parties.

## Interim Relief

43. Subject to Rules 42(c) above and 44 below, at any stage of the arbitration prior to the Status Hearing, parties may deliver to the Arbitrator and the Respondent applications for interim rulings, awards and/or directions signed for or on behalf of the party making the application. Such applications must be supported by a statement signed by or on behalf of the parties setting out the grounds for the application and all supporting documents.
44. Applications for interim relief, awards and/or directions delivered to the Arbitrator after the time limit stipulated in Rule 42(c) above may be refused by the Arbitrator on the sole ground that they are not delivered in accordance with the said time limits. The Arbitrator may consider applications for interim relief, awards and/or directions delivered after the time limit stipulated in Rule 42(c) above if the Arbitrator is of the view that the application is necessary for the fair disposal of the arbitration.
45. A party that wishes to seek emergency interim relief prior to the appointment of the Arbitrator may apply for such relief pursuant to the procedures set out in Appendix 1.
46. A request for interim relief made by a party to a judicial authority prior to the appointment of the Arbitrator, or in exceptional circumstances thereafter, is not incompatible with these Rules.

## Substantive Hearing

47. The Arbitrator shall where applicable, direct that the hearing be heard as soon as reasonably practicable and, in any event, unless the parties otherwise agree or the Arbitrator otherwise orders, the hearing shall be completed no later than 90 days from the commencement of the arbitration.
48. In the absence of witness statements or evidence given orally at the hearing, the parties' signed Statement of Case, Statement of Defence (and Counterclaim, if any) and Statement of Reply (and Defence to Counterclaim, if applicable) shall serve as the parties' evidence at the hearing.
49. Unless the party entitled to cross-examine dispenses with that right, any witness who has provided a witness statement or given oral evidence and/or the party or parties identified in

the statements and/or supporting evidence must be made available for cross-examination at the hearing. If a witness fails to attend, the Arbitrator may elect:

- (a) To proceed with the hearing and place such weight on the witness statement or evidence as the Arbitrator deems just and appropriate; or
- (b) To proceed with the hearing and exclude the statement or evidence altogether.

50. Unless the parties otherwise agree, consistently with s. 19 of the *Commercial Arbitration Act 2011* (Vic), each party has the burden of proving the facts relied upon to support their claim or defence and the Arbitrator shall determine the relevance, materiality and admissibility of any evidence.

## Awards

51. A party shall be entitled to apply for an interim ruling or Award (as the case may be) and shall as far as possible do so in accordance with these Rules.

52. Applications for interim rulings or awards must be supported by a statement signed by or on behalf of the party making the application setting out the grounds for the application and relevant facts and documents. The Arbitrator may hear such applications for interim rulings or awards and shall be empowered to determine such applications including the following:

- (a) Objections that the Arbitrator has no jurisdiction, including any objections in respect of the validity of an arbitration agreement;
- (b) Applications to correct any contract or arbitration agreement in accordance with the substantive rules of law applicable;
- (c) Preliminary questions or points of law arising in the arbitration by which determination the arbitration may be disposed of;
- (d) Applications for permission to amend the aforesaid Statements or other documents delivered in the arbitration;
- (e) Applications for extension or abridgment of time periods prescribed by these Rules;
- (f) Applications for disclosure of documents and facts;
- (g) Such further or other applications for directions as may appear to the Arbitrator to be necessary for the fair and expedient resolution of the dispute under arbitration; and
- (h) Without prejudice to the general powers conferred on the Arbitrator under these Rules, make orders as to costs in relation to or for the purposes of Rules 52(a) to 52(g) above.

53. The Award shall state the reasons upon which it is based, be signed by the Arbitrator and shall specify the date on which and place in which the Award was made.
54. The Arbitrator shall upon payment of all outstanding fees due to the Arbitrator deliver the Award to the parties and a copy thereof to the Chair. Awards shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out any such Award without delay.
55. With regard to a "Documents-Only" arbitration, the Arbitrator shall publish his or her final Award expeditiously and as far as practicable no later than 90 days from the commencement of the arbitration.
56. With regard to an arbitration with a substantive hearing, the Arbitrator shall publish his or her final Award expeditiously and as far as practicable no later than 120 days from the commencement of the arbitration.
57. With a view to saving costs and expenses, the parties to an arbitration may agree in writing that:
  - (a) the Arbitrator is not required to give reasons for his or her Award; or
  - (b) the Arbitrator may give only summary reasons for his or her Award.

## **Extension of Time for the Award**

58. If it appears to the Arbitrator that the final Award may not be published within the time limits provided in these Rules, the Arbitrator shall, before the lapse of the said time limit, notify the Chair and the parties, in writing of the revised estimated date of publication of the Award, for the purpose of information only.

## **Interpretation or Correction of the Award**

59. Within 30 days after the receipt of the Award, any party, with notice to the other parties, may request the Arbitrator to interpret the Award or correct any clerical, typographical or computation errors or make an additional Award as to claims presented but omitted from the Award.
60. If the Arbitrator considers such a request justified, after considering the contentions of the parties, the Arbitrator shall comply with such a request within 30 days after the receipt of the request.

## Costs

61. In making any Award under these Rules, the Arbitrator shall, at his or her discretion, which shall be exercised judicially, order by whom and in what proportion the parties shall pay the costs of the arbitration, including the Arbitrator's fees, provided that, where there is a sum in dispute, costs awarded shall, unless the Arbitrator otherwise orders, not exceed 25% of the sum in dispute (claim plus counterclaim), including disbursements but excluding the Arbitrator's fees.

## Confidentiality

62. Subject to rule 63 below, all matters disclosed during the proceedings, whether by the parties or by witnesses, and all matters relating to the arbitration or the Award shall be kept confidential by the Arbitrator (including an Emergency Arbitrator), VCAS, and the parties, save for the following exceptions:
- (a) Where otherwise agreed by the parties in writing;
  - (b) Where disclosure is made to a party's professional advisors, insurers or third-party funders or as required by law. Where a party discloses such matters to its professional advisors, insurers or third-party funders, it shall ensure that these persons are subject to confidentiality obligations that are similar to this paragraph;
  - (c) Where a party makes an application to a court of competent jurisdiction:
    - (i) In relation to the enforcement or challenge of the Award; or
    - (ii) To pursue its legal rights under applicable law.
  - (d) Pursuant to the order of a court of competent jurisdiction;
  - (e) If compelled or required by the law of any state which is binding on the party making the disclosure;
  - (f) If required to do so by any regulatory body;
  - (g) Where such matters have come into the public domain through no fault or breach of these Rules by either party.
63. On the expiration of 24 months from the date of the final Award made under these Rules, but subject to: (a) any order to the contrary made by the Arbitrator; and/or (b) any request in writing by a party to the Arbitrator or VCAS prior to the publication of the final Award (including as to interest and costs), VCAS shall be at liberty to publish the Award provided that

reasonable steps are taken by VCAS to anonymise the Award so that the parties cannot reasonably be identified.

## Exclusions

64. Notwithstanding the delivery of documents to VCAS for its information and the appointment of an Arbitrator where parties cannot agree, VCAS, the Victorian Bar, its officers, employees, agents and committees are not, for the purpose of these Rules, a body administering the arbitration and are under no duty or obligation to administer or control the arbitration. Parties agree not to hold VCAS or the Victorian Bar, its officers, employees, agents and committees responsible or liable for anything done or omitted to be done in the discharge or purported discharge of any power, function or duty under these Rules or in connection with any Arbitrator or arbitration under these Rules.

## Commercial Arbitration Act 2011

65. Nothing in these Rules is taken to be an agreement by the parties that any appeal may be made under the provisions of s 34A of the *Commercial Arbitration Act 2011* (Vic).

## Exclusion of liability and indemnity

66. Except in the case of fraud, each of the Arbitration parties agrees:
- (a) that the Arbitrator is not liable for any act or omission done in the exercise or purported exercise of powers or duties as an Arbitrator in, arising out of or in connection with this reference; and
  - (b) to forever release, indemnify and keep indemnified the Arbitrator against any and all actual or threatened claims, demands, actions, suits or proceedings of whatever kind made by that party and for all costs and expenses incurred or suffered by the Arbitrator whether such claims arise:
    - (i) under or in connection with any contract;
    - (ii) in tort for negligence, negligent advice or otherwise;
    - (iii) for breach of any fiduciary relationship or obligation, actual or implied; and/or
    - (iv) otherwise at law (including by statute to the extent it is possible so to release, exclude or indemnify) and in equity generally, including without limitation for restitution for unjust enrichment –
- in, arising out of or in connection with this reference.

67. Without limiting Clause 66, each of the Arbitration parties agree that the Arbitrator shall have the same protection and immunity as given by Section 27A of the *Supreme Court Act 1986* (Vic) as a Judge of the Supreme Court of Victoria has in the performance of his or her duties as a Judge.
68. The provisions of this agreement are to be construed as additional to and not in any way derogating from the application, operation and effect of any applicable statutory provisions or arbitration rules conferring immunity on or otherwise releasing or indemnifying the Arbitrator in, arising out of or in connection with this reference.

## Authority to sign

69. In the event that any of the Arbitration parties is a corporation, then the signatory on behalf of that corporate party covenants with the Arbitrator and each of the other Arbitration parties that he or she is entitled to sign this Agreement on behalf of that corporate party.

## Jurisdiction

70. Unless the parties otherwise agree in writing, or the Arbitrator otherwise orders, the County Court is to have jurisdiction under the *Commercial Arbitration Act 2011* (Vic).

**Dated: 20 August 2020**

## Appendix 1 to the VCAS Rules – Emergency Interim Relief

1. The application for emergency interim relief shall include:
  - (a) The nature of the relief sought;
  - (b) The reasons why the party is entitled to such relief; and
  - (c) A statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken to provide a copy of the application or notification to all other parties.
2. Any application for emergency interim relief shall be accompanied by payment of the non-refundable administration fee of \$500 (plus applicable GST) and deposit of \$2,500 towards the Emergency Arbitrator's fees and expenses. The Emergency Arbitrator's fees shall be determined according to the Victorian Arbitration Scheme Scale Fees for Arbitrators for the time being in force.
3. The Chair of VCAS shall, if he / she determines that the application for emergency interim relief should proceed, seek to appoint an Emergency Arbitrator within 2 (two) working days after receipt by VCAS of such application and payment of the administration fee and deposit. Prior to accepting appointment, a prospective Emergency Arbitrator shall disclose to the Chair of VCAS any circumstances that may give rise to justifiable doubts as to his or her impartiality or independence. Any challenge to the appointment of the Emergency Arbitrator must be made within one day of the communication to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed.
4. An Emergency Arbitrator may not act as an Arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties.
5. The Emergency Arbitrator shall, as soon as possible but, in any event, within two days of his or her appointment, establish a timetable for consideration of the application for emergency interim relief. The Emergency Arbitrator may provide for proceedings by telephone or video conference or on written submissions as alternatives to a hearing in person. The Emergency Arbitrator shall have the powers vested in the Arbitrator pursuant to these Rules, including the authority to rule on his or her own jurisdiction, without prejudice to the Arbitrator's determination.
6. The Emergency Arbitrator shall make his or her interim order or Award within 14 days from the date of his or her appointment unless the Chair of VCAS extends the time. The Emergency

Arbitrator may modify or vacate the interim order or Award for good cause, until the appointment of the Arbitrator.

7. The Emergency Arbitrator shall have no power to act after the Arbitrator is appointed. The Arbitrator may reconsider, modify or vacate any interim order or Award issued by the Emergency Arbitrator, including a ruling on his or her own jurisdiction. The Arbitrator is not bound by the reasons given by the Emergency Arbitrator. Any interim order or Award issued by the Emergency Arbitrator shall, in any event, cease to be binding if the Arbitrator is not appointed within 90 days of such order or Award or when the Arbitrator makes a final award or if the claim is withdrawn.
8. Subject to paragraph 8 of this Appendix, the Emergency Arbitrator shall have the power to order or award any interim relief that he or she deems necessary, and shall deliver brief grounds for his or her decision in writing.
9. The parties agree that an order or Award by an Emergency Arbitrator shall be binding on the parties from the date it is made and undertake to carry out the interim order or Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any court in any State or other judicial authority with respect to such Award insofar as such waiver may be validly made.
10. Subject to paragraph 8 of this Appendix, the Emergency Arbitrator shall have the power to apportion costs of emergency interim relief applications, subject to the power of the Arbitrator to re-allocate and make a final determination as to the apportionment of such costs.
11. If the parties fail to pay the fees of the Emergency Arbitrator when they fall due, the Chair of VCAS shall have the discretion to delay the appointment of the Arbitrator until the relevant fees have been paid.

## Appendix 2 to the VCAS Rules – VCAS guidelines for virtual hearings

1. Where agreed<sup>4</sup>, the arbitration (or parts of the arbitration), including the final hearing, may be conducted remotely using online video technology such as Zoom or other appropriate technology which permits a remote hearing (Rule 5).
2. The following guidelines are designed to facilitate the efficient and cost-effective remote conduct of arbitrations under the VCAS Rules. The parties may adopt or adapt these procedures by agreement. If the parties have agreed to adopt the use of online video technology, but they cannot agree on any aspect of the use of that technology in the arbitration, (including the adoption of these guidelines) the Arbitrator will decide that matter.
3. The purpose of this document is directed to the use of online video technology in connection with the final hearing; electronic discovery and document exchange, on the other hand, can be dealt with using similar procedures as agreed, adapted or directed by the Arbitrator.

### Documents

4. All documents in the arbitration are to be provided, as far as possible, electronically, and the parties should agree upon an appropriate means or protocol for electronic discovery and electronic document exchange (if appropriate).
5. Evidence in chief will ordinarily be given by witness statements and witness statements should contain hyperlinks to the documents referred to therein<sup>5</sup>.
6. The parties should agree upon a digital platform<sup>6</sup> to be used for the transmission and / or storage of documents, (shared or otherwise), and, where appropriate, access restrictions may be agreed or ordered by the Arbitrator.

### Directions hearings

7. The parties should agree that directions hearings will be conducted remotely using online video technology<sup>7</sup>, or by telephone in exceptional circumstances. The parties should agree on the technology to be used, and if no agreement can be reached, the Arbitrator will decide<sup>8</sup>.

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<sup>4</sup> The agreement to proceed by way of virtual hearing should be recorded in writing.

<sup>5</sup> So that exhibits referred to in the witness statements can be opened, electronically, within the document.

<sup>6</sup> For example, Dropbox or iCloud.

<sup>7</sup> Participants must ensure a video camera is working and available for video conferencing.

<sup>8</sup> Once the technology platform has been determined, each party must ensure they have appropriate hardware and software to access and use the technology.

8. Ordinarily the claimant should take responsibility for ensuring that an appropriate online technology platform<sup>9</sup> is available and that the parties and the Tribunal have adequate notice of log-in details for directions hearings<sup>10</sup>.
9. Ordinarily, it shall not be necessary for the parties to organise the transcription of directions hearings. If the parties cannot reach agreement in this regard, the Arbitrator will decide the matter, taking into account the parties' submissions and the amount(s) in dispute.

### **Venue and internet access**

10. If the parties have agreed to conduct the arbitration (or any part of the arbitration) using online technology, the parties are each responsible for ensuring that they, and the witnesses they will call to give evidence, have a high quality internet connection so as to properly facilitate a remote hearing.
11. If:
  - (a) a party's internet connection (including that of any witness called by that party) is of poor quality; and/or
  - (b) a party is unable to properly proceed with the virtual hearing because of some other reason,so as to cause delay, disruption or disadvantage to the other party, subject to argument, the Arbitrator may make any order he or she considers appropriate – including (without limitation) adjourning the hearing and that any costs thrown away be paid by the party in default.
12. Where possible, rooms occupied by participants in virtual hearings, whether in their own homes (not preferred), offices or in special hearings rooms, should be completely separate from non-participants in the arbitration.

### **Technology use**

13. Prior to the hearing the parties should take steps to ensure that they, and any witnesses they intend to call, are familiar with and able to use, properly, the relevant virtual technology platform to be used for the final hearing.
14. The parties may agree upon the use of neutral assistants to provide technical support during the hearing.

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<sup>9</sup> Zoom, BlueJeans, Cisco WebEx Meetings, or Microsoft Teams may be appropriate.

<sup>10</sup> Ordinarily, at least 48 hours' notice of the log-in details for directions hearings should be provided.

## Final hearing

15. If the parties decide to conduct the final hearing remotely with online technology, they should consider (and seek to resolve by agreement or by a determination of the Arbitrator absent agreement) the following matters:
- (a) The provision (in advance of the hearing)<sup>11</sup> of the following:
    - i. the names and roles of each participant (including counsel, instructing solicitors, witnesses, interpreters and any other person) in the virtual hearing;
    - ii. a list of documents to be provided by each party at the hearing.
  - (b) A technology platform (including a virtual hearing room) to be used for the final hearing that will allow:
    - i. documents to be viewed simultaneously (shared) during the hearing;
    - ii. for virtual breakout rooms so that parties and their witnesses can communicate confidentially during breaks or other allocated periods.
  - (c) An electronic tribunal book that is prepared by the claimant (for example, with the use of <https://www.bundledocs.com>).
  - (d) Electronic bundles of documents to be used for cross-examination of lay and expert witnesses, and these will usually be provided immediately before cross-examination.
  - (e) Whether they want to organise a transcript of the final hearing.
  - (f) Logistical issues such as whether each party should:
    - i. be “in attendance” in the virtual hearing room 5 minutes prior to the allocated commencement time;
    - ii. ensure a representative of that party is in the hearing at all times;
    - iii. brief any remote witness who is to give evidence about the process that will take place, including in relation to cross-examination.

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<sup>11</sup> The parties are to agree on the time prior to hearing by which lists of participants are to be provided (and the Arbitrator shall rule in the absence of such agreement).

16. If important factual matters are in dispute, and the Arbitrator determines that he or she would be assisted by direct (oral) evidence-in-chief about those matters, the Arbitrator may order that limited oral evidence in chief may be given<sup>12</sup>.
17. All submissions and chronologies filed by the parties should, where possible, include hyperlinks to the relevant document in the electronic version of the Hearing Book and List of Authorities.
18. Nothing in this procedure limits the Arbitrator’s discretion to determine how the virtual hearing is to proceed so as to ensure that the parties are treated equally and to enable the Arbitrator to determine the dispute in accordance with the paramount object of the *Commercial Arbitration Act 2011 (Vic)*, that is, “to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense” (see section 1AC).

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<sup>12</sup> Nothing in this procedure limits the Arbitrator’s discretion to determine how the evidence is to be given so as to ensure that the parties are treated equally and to enable the Arbitrator to properly determine the dispute.

## Appendix 3 to the VCAS Rules – VCAS procedure for “stop clock” arbitrations<sup>13</sup>

19. Where the parties agree that the dispute is to be heard and determined by way of “stop clock” arbitration then this procedure shall, unless the Arbitrator otherwise orders, apply to the arbitral hearing.
20. A stop clock arbitral hearing<sup>14</sup> shall, unless the Arbitrator otherwise orders, be conducted as follows:
  - (a) The duration of the hearing shall be determined, by agreement, or by arbitral order, in advance of the final hearing. If the parties cannot agree on the duration, then the Arbitrator, in determining the duration, shall ensure that each party is given a reasonable opportunity to present their case and that the parties are treated equally.<sup>15</sup>
  - (b) The time available is to be allocated between the tribunal (to question the parties or witnesses or to attend to procedural matters and the like) and each party.
  - (c) The time allocated to each party is to be equal (subject to rules of procedural fairness).
  - (d) The parties are entitled to use their time as they see fit (whether by opening or closing submissions, evidence in chief, cross-examination, or otherwise).
  - (e) Either a person shall be appointed by agreement to keep track of each party’s time used and the time available, or each party may appoint a representative and each representative shall liaise and agree the amount of time used and time remaining (with the Arbitrator to rule on, usually each day, any disagreement).
  - (f) Unsuccessful objections to evidence, and a party resisting a successful objection, shall have that time debited to the party’s account (unless the Arbitrator otherwise orders).
  - (g) The Arbitrator maintains a discretion in the debiting of time.
  - (h) Absent agreement between the parties, time for the final hearing will not be extended, save in exceptional circumstances.

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<sup>13</sup> This procedure has been prepared by reference to, among other things, the article prepared by Albert Monichino entitled “*Stop Clock Hearing Procedures in Arbitration*”, Asian Dispute Review, July 2019.

<sup>14</sup> Usually only the final hearing is conducted by way of stop clock arbitration.

<sup>15</sup> Ultimately, if the allocation of a fixed time is likely to produce injustice, the Arbitrator may decide not to conduct the hearing on a stop clock basis.

- (i) Failure to cross-examine a witness (at all, or on a particular matter) does not, of itself, amount to acceptance of the evidence.<sup>16</sup>

21. A draft procedural order for a stop clock arbitration is set out below.

**Draft procedural order for use in stop clock arbitration hearings**

- (1) The hearing of the arbitration shall commence on [insert date] and shall conclude on [insert date] in [insert city].
- (2) The sitting hours shall be 9.30 am to 5.00 pm each day with one hour for lunch and a morning and afternoon break of 15 minutes each.
- (3) The time fixed for the hearing, (after allowing one hour each day for the Tribunal's interventions and for administrative and procedural matters), will be apportioned equally between the parties such that:
- (a) the claimant shall have a total of [insert] hours; and
  - (b) the Respondent shall have a total of [insert] hours.
- (4) Each party is responsible for the manner in which it uses its available time.
- (5) Usually, the following matters will be charged against each party's time allocation:
- (a) Examination of witnesses (examination in chief or cross-examination);<sup>17</sup>
  - (b) Oral submissions;
  - (c) Unjustified interruption;<sup>18</sup>
  - (d) Setting up displays or presentations while the Tribunal is sitting;
  - (e) Other unjustified delay.
- (6) Each party shall designate a person to keep track of time who shall, jointly if possible, report to the Arbitrator each day or as required as to the usage of time.
- (7) A party is not bound by opposing evidence that it does not challenge by cross-examination but is expected to cross-examine at least one witness with respect to any significant matter which the other party should be given the opportunity to answer.

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<sup>16</sup> Although cross-examination may be expected on significant matters in dispute.

<sup>17</sup> Subject to adjustment in the event of consistent unresponsiveness.

<sup>18</sup> For example, unsuccessful objection or resisting a justified objection.

# VCAS

