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The need or otherwise for confidentiality in international arbitration: an Australian perspective

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One of the hallmarks of arbitration is that it provides the level of confidentiality not generally available in litigation. Unlike litigation, arbitral proceedings are, by their nature, private. The general public is excluded from the proceedings on the request of either party or the tribunal and the outcome of the proceedings is not on the public record.[1] The private character of arbitration is commonly cited as an important factor in positioning it as a preferred forum for commercial dispute resolution. Comparisons between arbitration and litigation ″invariably refer to privacy or confidentiality as an advantage of arbitration″.[2]

However, despite the perceived advantages of the privacy of arbitral proceedings, the concept of confidentiality has had a somewhat tumultuous existence in Australia within the past two decades. This has been the case with the decision of *Esso Australia Resources Ltd v Plowman*[3] (*Esso*) where the concept of confidentiality came under considerable and infamous attack. As a result, there has been a unique legislative approach in Australia with respect to confidentiality in both domestic and international arbitrations.

This paper outlines the Australian position with respect to confidentiality following *Esso* and the 2010 reforms to the domestic and international arbitration laws. The paper then discusses the policy perspectives and the need or otherwise for confidentiality in international arbitrations.

The Australian position — the Esso decision

Prior to the High Court of Australia's decision of *Esso* in 1995, it was assumed that the legal position in Australia is the same as that in the United Kingdom, where arbitral processes were confidential.[4] However, the High Court's decision in Esso found that, though they are private, arbitrations are not necessarily confidential and that privacy does not equate to confidentiality. The corollary of this was that any documents produced in the course of an arbitration would not be confidential purely because they were produced in arbitral proceedings.

The High Court in *Esso* reasoned that complete confidentiality was not possible in arbitral proceedings due to various reasons, including:[5]

- the possibility of judicial intervention and review;
- the results of which would be published;
- that witnesses were under no obligation not to disclose what they observed of the proceedings; and
- that there would be times when disclosure was necessary (such as to an insurer of the parties).

For these reasons, the High Court held that it was not justified to conclude that confidentiality was an essential attribute of private arbitration in Australia.[6]

The *Esso* decision sent a shockwave through the international arbitration community and prompted a flurry of academic analysis. It led to pre-emptive legislative reform in other jurisdictions, most notably in New Zealand where the decision was made to deem arbitral proceedings as confidential, unless otherwise agreed by the parties.[7]

In Australia however, it was not until the 2010 reforms to the domestic and international arbitration laws that the legislature responded to the concerns raised by *Esso*. Until then, the non-confidential nature of arbitral proceedings remained the legal position in Australia for both domestic and *international* arbitrations. It is important to note that domestic arbitration in Australia is governed by each state and territory, most of which have now enacted a uniform Commercial Arbitration Act (CAA) based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.[8] International arbitration on the other hand is governed by the Commonwealth, by the International Arbitration Act 1974 (Cth) (IAA), which was updated in 2010 and is also based on the UNCITRAL Model Law.

Confidentiality under the IAA and CAAs

In the course of enacting the CAAs and amending the IAA, with respect to confidentiality the arbitration laws in Australia departed from the Model Law (which is

silent on the issue of confidentiality). Instead, the CAAs and the IAA now contain provisions that regulate the disclosure of confidential information.[9] These provisions state that parties ″must not disclose confidential information in relation to the arbitral proceedings″,[10] unless it falls within certain exceptions.

Interestingly, the confidentiality provisions apply on an ″opt-out″ basis in the CAA,[11] but on an ″opt-in″ basis in the IAA.[12] In other words, parties to international arbitrations in Australia are not bound by the statutory non-disclosure regime unless they choose to be, whereas parties to *domestic* arbitrations are automatically subject to the provisions unless they elect not to be.

Exceptions to non-disclosure

Where these confidentiality provisions apply (ie in international arbitrations if parties have opted-in and automatically in domestic arbitrations unless parties have opted-out), the confidentiality regime in Australia provides a list of exceptions to non-disclosure. The list of exceptions is derived from a combination of the common law developments in the United Kingdom[13] and the statutory provisions in the New Zealand arbitration law.

The general circumstances in which confidential information may be disclosed include those where the disclosure is:[14]

1) consented to by all the parties to the arbitral proceedings;
2) to be made to a professional or other advisor of any of the parties;
3) necessary to ensure that a party has a full (IAA) or reasonable (CAA) opportunity to present its case;
4) necessary for the establishment or protection of the legal rights of a party;necessary for the purpose of enforcing an arbitral award;
5) necessary for the purpose of enforcing an arbitral award;
6) necessary for the purposes of the relevant Act (ie CAA, IAA and the Model Law);
7) in accordance with an order made or a subpoena issued by the court; or
8) authorised or required by another state or territory law, Commonwealth law, or law of a foreign country (in the case of international arbitration), or is required by a competent regulatory body.

The tribunal has discretion to permit the disclosure of confidential information in circumstances beyond those listed above.[15] This discretion is important, as it allows the tribunal to approach the matter with a degree of flexibility and to give consideration to the circumstances of the particular arbitration and the parties.

Court order to prevent disclosure

In the event that the tribunal permits the disclosure and another party to the proceedings is unhappy with the ruling, that party may apply to the court for an order preventing disclosure.[16] It is critical that the tribunal rule upon the issue first before the court can intervene and order non-disclosure.[17] This is in contrast to the English position where the Court of Appeal has held that it had jurisdiction to make orders concerning disclosure of confidential information notwithstanding the fact that the tribunal had not ruled upon the issue.[18] Rather, the Australian confidentiality provisions demonstrate a preference for resolution of this issue by the tribunal, at least in the first instance. This is in line with the procedure under other statutory provisions, such as that regarding rulings on jurisdictional questions.[19]

In making this order to prevent disclosure, the court must balance the public interest in preserving the confidentiality of the information with the public interest in favor of disclosure.[20] For example, the High Court's decision in *Esso* considered the issue of public interest in refusing disclosure when governmental institutions are involved, favoring disclosure in this context. Mason CJ in *Esso* stated that ″the courts have consistently viewed governmental secrets differently from personal and commercial secrets″[21] and that this involved a reversal of the onus of proof as ″the government must prove that the public interest demands non-disclosure.″[22]

Court order to allow disclosure

The court may also, upon application by a party, allow for disclosure of confidential information where it has been prohibited by the tribunal or the tribunal's mandate has terminated.[23] The court is again required to weigh the public interest in disclosure against that in non-disclosure.[24] The public interest in disclosure dates back to *Esso* itself which is one of the reasons why arbitral proceedings are not confidential. In this respect, Mason CJ stated in *Esso* that:[25]

> For my part, if an obligation of confidence existed by virtue of the fact that the information was provided in and for the purposes of arbitration, this statement of the qualification seems unduly narrow. It does not recognise that there may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a "public interest" exception. The precise scope of this exception remains unclear.

The public interest in confidential material being disclosed is not peculiar to Australian jurisprudence. Both the privacy of proceedings and the confidentiality of material received therein has been considered in arbitrations referred under Art 1120(1)(c) of the North American Free Trade Agreement (NAFTA).[26]

In New Zealand, the Law Reform Commission cited the public interest exception to confidentiality as relevant not only to governments but also to public bodies exercising governmental functions.

Importance of confidentiality to users of arbitration

An interesting perspective can be gained from the fact that the Australian legislature adopted confidentiality on an opt-in basis for international arbitrations. The reason for the opt-in approach of the IAA was the consideration that the parties should expressly turn their minds to the issue of confidentiality, rather than have rules unknowingly imposed on them. Should the parties choose not to opt in, they retain the freedom to come to their own decision as to how confidentiality should be handled in relation to their arbitration. This availability of choice is reflective of the varying attitudes held by parties towards confidentiality.

Singapore is another jurisdiction in which the choices available to the parties suggest the varying attitudes held by parties in different circumstances. Under Singapore's International Arbitration Act, a party may apply for an order (in court proceedings concerning arbitration) to restrict the publication of information relating to those proceedings in law reports and professional publications.[27] Notwithstanding this option of applying for a restricted publication, of the approximately 150 cases cited in the 2011 edition of the *Halsbury's Laws of Singapore — Arbitration*, only six had anonymised party names.[28] These statistics suggest that parties do not always choose the path that will secure them the maximum level of confidentiality.

The Queen Mary University of London (QMUL) studies are also indicative of the importance users of arbitration place on confidentiality. For example, a QMUL study in 2010 found that confidentiality, though important to users of arbitration, is not the essential reason for recourse to arbitration.[29] The in-depth interviews conducted in the study revealed how commercial arbitration matters are not of great interest to outsiders and do not always involve sensitive commercial information, and, as a result, confidentiality is not an extremely serious concern in many cases.[30]

The users' views with respect to the position of confidentiality in the scheme of importance can be gleaned from another QMUL study in 2013.[31] This study asked arbitration users in the energy, construction, and financial services sectors about the perceived benefits of arbitration. Although confidentiality was one of the benefits of arbitration many considered to be important, it was not the most important factor. Significantly, the expertise of the decision-maker and neutrality were considered to be far more important than confidentiality, especially in the construction and financial services sectors.

Conclusion

Contrary to the often heated debate surrounding confidentiality in the international arbitral community, it is perhaps the case for some users of international arbitration that confidentiality is not of paramount importance. Instead of having confidentiality dictated by national laws, parties have (and appear to often value) the choice to adopt a confidentiality regime that suits their interests and needs, such as by adopting institutional rules containing a provision on confidentiality.[32]

There are also some commonly used institutional rules which do not provide a confidentiality regime. One notable example is the UNCITRAL Rules, which instead provide only for the confidentiality of the award itself unless the parties agree otherwise.[33] UNCITRAL's silence on this issue appears to be due to the disparity in national laws with regard to the extent to which the participants in an arbitration are under a duty to observe the confidentiality of various aspects of an arbitration.[34] Rather than providing a comprehensive confidentiality regime, UNCITRAL instead advises that ″the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality″.[35]

Given the varying attitudes held by users of international arbitration, the parties are best placed to deal with the issue of confidentiality by including an express contractual provision setting out the circumstances in which information relating to the proceedings may be disclosed. The parties are able to tailor the arbitral proceedings based on the importance they themselves place on confidentiality and, in this way, they are able to secure the desired level of confidentiality to suit their circumstances.

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Footnotes

1. *Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals)* (1995) 183 CLR 10 at 26; 128 ALR 391; [1995] HCA 19; BC9506416 (Mason CJ); *Oxford Shipping Co Ltd v Nippon Yusen Kaisha (The Eastern Saga)* [1984] 3 All ER

835; [1984] 2 Lloyd's Rep 373; *Bibby Bulk Carriers Ltd v Cansulex Ltd* [1989] QB 155 at 166–7; [1988] 2 All ER 820; [1989] 2 WLR 182; [1988] 1 Lloyd's Rep 565. The decision may form part of the public record where the tribunal's award is made an order of the court, or some other application is made to the court during or subsequent to the proceedings.

2. *DJA Cairns, "Confidentiality and State Party Arbitrations"* (2002) NZLJ 125 at 126. See also White & Case and Queen Mary University of London School of International Arbitration *2010 International Arbitration Survey: Choices in International Arbitration* p 29 www.whitecase.com.
3. *Esso Australia Resources Ltd v Plowman,* above n 1.
4. *Dolling-Baker v Merrett* [1991] 2 All ER 890; [1990] 1 WLR 1205; *Hassneh Insurance Co of Israel v Steuart J New* [1993] 2 Lloyd's Rep 243.
5. *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 28–9; 128 ALR 391; 69 ALJR 404; BC9506416.
6. Above, n 5, at 30.
7. Arbitration Act 1996 (NZ), s 14.
8. All States and Territories, except for the Australian Capital Territory, have adopted the UNCITRAL Model Law: Commercial Arbitration Act 2010 (NSW); Commercial Arbitration Act 2011 (SA); Commercial Arbitration Act 2011 (Vic); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT); Commercial Arbitration Act 2011 (Tas); Commercial Arbitration Act 2013 (Qld); Commercial Arbitration Act 2012 (WA) (collectively, Commercial Arbitration Act).
9. IAA, ss 23C–G; CAA, ss 27E–I.
10. IAA, ss 23C(1); CAA, s 27E(2).
11. Section 27E of the CAA applies "unless otherwise agreed by the parties".
12. IAA, s 22(3)(a).
13. See, *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314; [1998] 1 Lloyd's Rep 643; *Emmott v Michael Wilson & Partners Ltd* [2008] 1 Lloyd's Rep 616; [2009] 2 All ER (Comm) 856; [2008] EWCA Civ 184; *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272.
14. IAA, s 23D(2)–(9); CAA, s 27F(2)–(9).
15. IAA, s 23E; CAA, s 27G.
16. IAA, s 23F(3); CAA, s 27H(3).
17. IAA, s 23F(3); CAA, s 27H(3).
18. See *Emmott v Michael Wilson & Partners Ltd*, above n 13.
19. UNCITRAL Model Law, Art 16; CAA, s 16.
20. IAA, s 23F(1); CAA, s 27H(1).
21. *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 31; 128 ALR 391; 69 ALJR 404; BC9506416.
22. Above, n 21, at 31.
23. IAA, s 23G(3); CAA, s 27I(3).
24. IAA, s 23G(1); CAA, s 27I(1).
25. *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 31; 128 ALR 391; 69 ALJR 404; BC9506416. See also Brennan J at 36–7.
26. United States of America Department of State *Methanex Corporation v United States of America* 2005 available at www.state.gov/s/l/c5818.htm; United States of America Department of State *United Parcel Service of America v Government of Canada* 2007 available at www.state.gov/s/l/c3749.htm; See A Tweeddale "Confidentiality in Arbitration and the Public Interest Exception" (2004) 21(1) *Arbitration International* 59 at 60.
27. International Arbitration Act (Singapore, ch 143A, 2002 rev ed), s 23(4).
28. These are described as "sanitised" reports in *Halsbury's Laws of Singapore — Arbitration*, for example *VV v VW* [2008] 2 SLR(R) 929; *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546; *AJT v AJU* [2010] SGHC 201.
29. White & Case and Queen Mary University of London School of International Arbitration, above n 2, at p 29.
30. Above, n 29.
31. PwC and Queen Mary University of London School of *International Arbitration International Arbitration Survey 2013: Corporate Choices in International Arbitration* at 8 www.pwc-.com.
32. See, for example the arbitration rules of the London Court of International Arbitration (LCIA), Art 30(1); the Milan Arbitration Chamber, Art 8; the German Institution of Arbitration, Art 43(1); the Netherlands Arbitration Institution, Art 55; the Kuala Lumpur Regional Centre for Arbitration, Rule 15; the World Intellectual Property Organization, Arts 75–8; the Singapore International Arbitration Centre (SIAC), Art 35(1)–(4); the Australian Centre for International Commercial Arbitration (ACICA), Art 18 and the Hong Kong International Arbitration Centre (HKIAC), Art 42(1).
33. UNCITRAL Arbitration Rules 2010, Art 34(5).
34. UNCITRAL *Notes on Organizing Arbitral Proceedings* (1996) 13 at [31] www.uncitral.org.
35. Above, n 34 at [31].

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