Kluwer Arbitration Blog

Australian Arbitration Week Recap: When Does Privacy Become Secrecy in Commercial Arbitrations?

Nick Papadimos · Sunday, October 31st, 2021

On 19 October 2021, Mr Bret Walker AO SC delivered the 2021 CIArb Australian Annual Lecture as part of ACICA's Australian Arbitration Week 2021. Mr Walker's lecture, titled '*Privacy or Secrecy? Open Justice Values as a Challenge to Arbitral Procedure*', offered a thought-provoking examination of what he termed the 'problematic nature' of secrecy in commercial arbitrations from an open justice perspective. This blog post provides an overview of some of the lecture's main themes.

The origins of privacy and confidentiality in commercial arbitrations

The lecture began by highlighting that privacy and confidentiality have long been touted as self-evident and key advantages of commercial arbitrations.

In 2018, the Queen Mary University of London/White & Case *International Arbitration Survey* reported 36% of respondents rated 'confidentiality and privacy' as one of the three most 'valuable characteristics' of international arbitration – a finding on par with the previous 2015 report. An overwhelming 87% of respondents also attached some degree of importance to confidentiality (ranging from 'somewhat' to 'very' important).

The broad acceptance of privacy and confidentiality as a valuable or important characteristic of commercial arbitration is usually justified by the conceptually distinct foundation of arbitration to litigation. Arbitration is founded on a private bargain between autonomous and consenting parties, rather than on the compulsion of a State. That conceptual distinction is seen to justify parties to arbitration agreements being freely able to conduct and resolve their disputes in 'secret', despite those arbitrations being seated in jurisdictions founded on long-standing principles of open justice.

Mr Walker's lecture revisited the supposed rationale for this different approach to litigation and, in doing so, queried whether privacy and confidentiality should still be viewed as essential ingredients in all commercial arbitrations.

Approaches to privacy and confidentiality in Australia and elsewhere

Unsurprisingly, the approaches to privacy and confidentiality in commercial arbitrations around the world lack uniformity.

Mr Walker provided an analysis of several Australian High Court decisions over the past 40 years that discussed the concepts of privacy and confidentiality in arbitration. The survey of cases included the seminal decision of *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10, which distinguished privacy from confidentiality, and held that absolute confidentiality of documents produced and information disclosed in an arbitration was not an essential characteristic of private arbitrations in Australia. Of course, since then, Australia's approach has moved towards greater confidentiality in international commercial arbitrations through a series of legislative amendments to the *International Commercial Arbitration Act 1974* (Cth) to provide a default 'opt-out' confidentiality regime.

Given the absence of privacy or confidentiality provisions in the UNCITRAL Model Law, other jurisdictions have also sought to regulate these issues through national legislation, such as in Malaysia, Brazil, the Philippines and New Zealand. Many arbitral institutions have also sought to include explicit provisions around privacy and confidentiality in their rules (e.g. Article 26 ACICA Rules; Article 30 LCIA Rules).

In contrast, for some years, the ICC International Court of Arbitration has taken bold steps in favour of transparency through the publication of certain information about arbitral tribunals, industry sectors and law firms involved in arbitrations administered by it (unless the parties otherwise agree). Importantly, since 2019, the ICC has published various awards, procedural orders, and opinions as a means of 'facilitating the development of trade worldwide'. Moves, such as these, towards greater transparency in commercial arbitrations, reinforce a key point made in the lecture about the educative force of declared and enforced legal rights and obligations. They are an essential element of the rule of law and of open justice principles, which should be 'seen and heard'.

Practical issues relating to the application of open justice principles in commercial arbitrations

The lecture (and following Q&A) touched on a range of issues relating to the practical application of open justice principles to commercial arbitrations. Some of the issues are highlighted below:

Identifying the 'right' kind of commercial arbitration disputes

One issue is the potential complexities in defining the features of commercial arbitrations that warrant greater transparency.

The lecture did not advocate for open justice principles to be applied to 'all' commercial arbitrations. In fact, Mr Walker saw no difficulty with most arbitrations retaining the parties' intended position on privacy and confidentiality. However, Mr Walker acknowledged the expanding realm of disputes that have been found by national courts to be capable of arbitration, that leave fewer categories of disputes within the exclusive jurisdiction of those national courts to resolve.

Possible examples of commercial arbitrations included those involving public or government

procurement contracts or related disputes, and other endeavours funded by public monies (e.g. large-scale infrastructure projects). The exact line in the sand however would likely be up for considerable debate, both as to the general rule of which proceedings should be caught, and as to the application of any necessary exceptions to that general rule. For now, as to the latter, Mr Walker identified at least one possibility, being cases concerning a genuine public interest immunity claim (e.g. where national security issues were involved).

Impact on the attractiveness of commercial arbitration

As we saw in the 2018 *International Arbitration Survey* results above, privacy and confidentiality remain to be seen as valuable or important factors in the use of commercial arbitration. Perhaps unsurprisingly, in-house counsel were singled out as placing more importance on confidentiality than other categories of respondents.

However, while these findings may seem dramatic, they tell us little about what specific aspects of privacy and confidentiality parties find important. They also provide little insight on how any departure from those aspects in commercial arbitrations might impact on the attractiveness of arbitration over litigation. In fact, both the 2015 and 2018 surveys found that the enforceability of awards, avoiding specific legal systems/national courts, flexibility, and the ability of parties to select arbitrators, are more frequently cited by respondents as within the three most valuable characteristics of arbitration, compared to privacy and confidentiality.

Mr Walker recognised a cultural change would be necessary among parties to commercial arbitrations. He also stressed that he did not underestimate the difficulty of such a change. One could argue that commercial parties may be more persuaded by factors such as greater efficiency and reduced legal costs, in addition to those characteristics listed in the survey, and rated more valuable than privacy and confidentiality. Public parties, on the other hand, may be less inclined to invite closer scrutiny, particularly where disputes could involve the examination of public maladministration. However, even then, Mr Walker noted that public officials could still benefit from greater transparency (e.g. in gaining greater access to details of previous disputes involving a business that seeks to contract with a public body).

Conclusion

Mr Walker's insightful analysis in the 2021 CIArb Australian Annual Lecture brought home the concerns associated with well-established concepts of privacy and confidentiality in commercial arbitrations from an open justice perspective. Although these issues have long been the subject of debate, the lecture reiterated a useful perspective of viewing arbitration as part of an integrated justice system with litigation, and not separate from what many courts do on a daily basis.

More coverage from Australian Arbitration Week is available here.

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