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Confidentiality in International Commercial Arbitration: Does Australia Meet International Expectations?

Michael Pryles, Imogen Kenny · Saturday, August 25th, 2018

Australia has been known for taking a somewhat controversial approach to the confidentiality of arbitral proceedings. However, the legislature, to the international arbitration community's sigh of relief, has intervened to change the law and bring opt-out confidentiality to international commercial arbitrations seated in Australia (see Michael Pryles, 'National Report – Australia' in The ICCA International Handbook on Commercial Arbitration). Issues, however, remain in relation to how Australian courts will treat confidentiality of foreign international arbitral proceedings.

Judicial approach to confidentiality

Notoriously, in *Esso Australia Resources v Plowman* (1995) 183 CLR 10 (***Esso***), the High Court of Australia held that confidentiality was not "an essential attribute" of arbitration and therefore, in the absence of express party agreement, there is no right to confidentiality (see Michael Pryles, 'Confidentiality' in Leading Arbitrators' Guide to International Arbitration, edited by Newman & Hill (2nd ed, Juris Publishing, 2008)). In so doing, the High Court distinguished between the two concepts of 'privacy' and 'confidentiality' (see for example, Mayank Samuel's post on the distinction).

The High Court acknowledged that while arbitral proceedings and hearings are 'private' because strangers have no right to admission, it does not follow that they are 'confidential'. Mason CJ rejected submissions that an implied obligation of confidentiality exists because the efficacy of the parties' arbitration agreement would be damaged, even defeated, if arbitral proceedings were made public by the disclosure of documents relating to the arbitration.

Rather, the High Court held there was no obligation, in Australia, to keep confidential the arbitral proceedings or documents and information provided in and for the purposes of arbitration. However, the High Court did find one instance where confidentiality attached, namely where documents were produced compulsorily, such as, pursuant to a direction by the tribunal for disclosure.

The High Court of Australia is the highest court in the Australian judicial system, and its decision binds all lower courts. In the absence of express abrogation by the Australian legislature, this is the binding law of Australia.

Legislative intervention on confidentiality

First reform

In 2010, the Australian legislature recognised that confidentiality was one of the significant attractions of arbitration. Citing *Esso*, Parliament considered that, while the Australian common law provided an appropriate level of confidentiality in most circumstances, parties to an international arbitration seated in Australia may have a legitimate interest in ensuring a greater level of confidentiality with respect to sensitive commercial information put before an arbitral tribunal (see the Revised Explanatory Memorandum to the International Arbitration Amendment Bill 2010 (**2010 Bill**) at [149]-[153]).

Consequently, Part III (including sects. 23C to 23G, which deal with confidentiality) was inserted into the *International Arbitration Act 1974* (Cth) (**IAA**) to encourage international arbitration taking place in Australia (see Malcolm Holmes and Chester Brown, The International Arbitration Act 1974: A Commentary (2nd ed, Lexis Nexis, 2015) at p. 5).

Section 23C of the IAA provides that parties to arbitral proceedings commenced in reliance on an arbitration agreement must not disclose confidential information, unless:

- the disclosure falls within one of the circumstances outlined in sect. 23D of the IAA, including that all parties to the proceedings consent to the disclosure; the disclosure is to a professional or other adviser to any of the parties; or if the disclosure is necessary for the purpose of enforcing an arbitral award, and the disclosure is no more than reasonable for that purpose (sect. 23D);
- the arbitral tribunal makes an order allowing the disclosure in certain circumstances (sect. 23E) and no court has made an order prohibiting a party from disclosing confidential information (sect. 23F); or
- a court makes an order allowing disclosure in certain circumstances (sect. 23G).

'Confidential information' is defined broadly in sect. 15(1) of the IAA and includes, *inter alia*, pleadings, submissions, information supplied to the tribunal by a party, documentary and other evidence, transcripts of hearings and rulings and awards of the arbitral tribunal.

These provisions applied on an 'opt-in' basis on or after 6 July 2010 (see sect. 2 of the *International Arbitration Amendment Act 2010* (Cth)). In other words, parties had to expressly agree that the confidentiality provisions of the IAA applied to their arbitration. The legislature did not consider that confidentiality should be available as a matter of course, but rather, that it was one of the "matters to which the parties should expressly turn their minds before they apply" (see the Supplementary Explanatory Memorandum to the 2010 Bill at [20]-[25]).

Second reform

In 2015, the Australian legislature again acknowledged the need to amend the IAA to ensure that international arbitrations in Australia received confidentiality in line with community expectations and international best practice, namely that proceedings are confidential unless the parties agree to conduct their arbitration in another manner (see the Explanatory Memorandum to the Civil Law and Justice (Omnibus Amendments) Bill 2015 (**2015 Bill**) at [42], [213]-[214] and Luke Nottage's post discussing the 2015 Bill).

Consequently, sect. 22 of the IAA was amended to provide that the confidentiality provisions

(sections 23C to 23G) applied on an 'opt-out' basis, which means that they will apply unless the parties choose to exclude them. These provisions govern arbitral proceedings arising from arbitration agreements made on or after 14 October 2015 (see sect. 2(1) and Sch. 1 sect. 61 of the *Civil Law and Justice (Omnibus Amendments) Act 2015* (Cth)).

This amendment provides better protection for parties, and their representatives, who might not be familiar with Australian law and who agreed to arbitrate in Australia on the presumption that the Australian approach to confidentiality would be similar to that in many other countries.

Remaining confidentiality issues

Recent judicial authority has indicated that Australian courts may decline to make orders protecting the confidentiality of foreign-seated international arbitrations on the basis that Part III, Division 3 of the IAA (which includes the confidentiality provisions) only applies to Australian-seated international arbitrations.

This concern stems from the Federal Court of Australia's decision in *Samsung C&T Corporation, in the matter of Samsung C&T Corporation* [2017] FCA 1169. Gilmour J declined an application, by a party to an international arbitration seated in Singapore, to order subpoenas to third parties in Australia under Part III, Division 3 of the IAA. This decision was made on the grounds that the Court only had jurisdiction to make such orders in relation to international arbitrations seated in Australia (see the Resolution Institute's post). Gilmour J went on to find that, after interpreting the legislation, the provisions in Part III, Division 3 of the IAA only applied to parties who have commenced their arbitral proceedings in Australia, and not foreign-seated international arbitrations. While this case only deals with orders for document production, the interpretation of the application of Part III, Division 3 of the IAA could likewise apply when seeking an order from an Australian court to restrain disclosure of confidential information.

Consequently, parties to foreign-seated international arbitrations may not be able to avail themselves of Australian court orders under sects. 23C or 23F of the IAA prohibiting the disclosure of 'confidential information' within the meaning of sect. 15(1). Rather, they may only receive the protection of confidentiality granted in *Esso*, that is, only documents produced compulsorily in the arbitration have a claim to confidentiality.

Parties will obviously be able to circumvent this unsatisfactory result by expressly providing for confidentiality in their arbitration agreement or adopting arbitration rules that deal with confidentiality. Further, the parties could potentially bypass this issue by selecting a national law that provides for confidentiality to govern their arbitral proceedings (*lex arbitri*) and asking an Australian court to test confidentiality in accordance with the *lex arbitri*. However, there is an unresolved choice of law issue governing confidentiality (see Filip De Ly, Mark Friedman, Luca Radicati Di Brozolo, 'International Law Association: International Commercial Arbitration Committee's Report and Recommendations on "Confidentiality in International Commercial Arbitration"', 28(3) *Arbitration International* 355). The most obvious choice is between the *lex arbitri* and the law of the place where the issue of confidentiality arises (*lex fori*) (see Michael Pryles, 'Confidentiality' in Leading Arbitrators' Guide to International Arbitration, edited by Newman & Hill (2nd ed, Juris Publishing, 2008) pp. 450-451). In these authors' opinion, the *lex arbitri* should prevail over the *lex fori*, in this case Australian law, to determine confidentiality.

Concluding remarks

Australia has made most welcome reforms to bring the law regulating confidentiality of international commercial arbitrations seated domestically more closely in line with international best practice. However, further reform would be helpful to ensure that foreign-seated arbitrations will consistently receive the same protection.

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