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Preliminary Discovery in International Arbitration: An Australian Perspective

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The availability and scope of 'discovery' or document production significantly differs across jurisdictions, most notably when comparing litigation in common law and civil law courts. In the field of international arbitration, the compromise position adopted by the International Bar Association's Rules on the Taking of Evidence in International Arbitration is to permit disclosure of documents where it is "*relevant to the case and material to its outcome*".[1)] This approach has been reasonably effective in practice as a compromise between the extensive discovery generally afforded in common law courts, and the very limited document production orders granted by civil law courts.

But what is the position where, before an arbitral tribunal is constituted, a party needs to obtain documents from a prospective respondent, to determine whether to even initiate a case at all?

Preliminary discovery may fill this gap. It may enable a prospective claimant to compel a prospective respondent to produce documents for the purpose of determining whether to commence legal proceedings. However, while an arbitral tribunal clearly has power to order document production once proceedings have commenced (subject, of course, to any limitations under the arbitration agreement and the applicable law), it is not clear that the tribunal's powers extend to preliminary discovery.

This blog post will examine whether preliminary discovery is available in arbitrations seated in Australia, and offer some practical insights for litigants considering this.

The Australian position

The general position is that before initiating arbitration proceedings, a prospective claimant may seek preliminary discovery under domestic court procedures: *see* the New South Wales Supreme Court's ("**NSWSC**") judgment in *nearmap Ltd v Spookfish Pty Ltd* [2014] NSWSC 1790.

In this case, the plaintiff, nearmap Ltd ("**nearmap**"), operated a business supplying aerial and geospatial photomosaic images. It relied on innovative and confidential design processes and information. Several employees, including a former Chief Technology Officer and a Chief

Operating Officer, left to operate a rival firm in the same industry, Spookfish Pty Ltd ("**Spookfish**").

Nearmap was worried that its former employees retained confidential information from their employment, and that Spookfish was unlawfully using that information in its business. It sought preliminary discovery from Spookfish and its directors under the NSWSC's procedural rules, the Uniform Civil Procedure Rules 2005 (NSW) (the "**UCPR**"), to determine whether to pursue proceedings against the defendants for breach of confidence (among other claims).

Spookfish resisted the application, arguing that it should be permanently stayed pursuant to an arbitration agreement between the parties, and determined by the arbitral tribunal instead. Spookfish cited s 8 of the Commercial Arbitration Act 2012 (WA) and s 8 of the Commercial Arbitration Act 2010 (NSW) (each, an "**Act**"), which both provide that:

> *"A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless if finds that the agreement is null and void, inoperative or incapable of being performed."*

Chief Judge in Equity Bergin ("**Bergin CJ in Eq**") refused to stay the court proceedings in favour of arbitration, finding that the motion for preliminary discovery was not a "*matter*" for the purposes of the cited provisions. A claim that Spookfish's employees breached their obligations of confidentiality would constitute a "*matter*". However, an application for preliminary discovery was of a different kind, being "*not a dispute as to the rights or obligations of the parties"* but instead *"a right independent of the Agreements…arising under the Uniform Civil Procedure Rules and any obligation to produce the documents arises from a judicial determination, having regard to whether the prerequisites in the Rule have been satisfied." (*At [72])

Her Honour also found that a tribunal's power to order "*discovery of documents*" under s 17(3)(b) of each Act relates to discovery relevant to the issues between the parties in respect of any application for the quasi-injunctive relief set out in s 17(2) of the Act, and does not extend to ordering preliminary discovery. (At [76])

Further, the interim measure referred to in s 17(2)(d) of the preservation of "*evidence that may be relevant and material to the resolution of the dispute*" is also not a vehicle for preliminary discovery but *"to secure evidence in respect of which a party to an already existing dispute of which the arbitrator is seized, may entertain fears of destruction or dissipation in the absence of such an interim measure."* (At [76])

Although *nearmap* concerned a domestic arbitration, its principles are likely also applicable to international arbitrations seated in Australia. Section 7(2) of the International Arbitration Act 1974 (Cth) requires a court to refer a "*matter*" to arbitration where a party has initiated court proceedings which are arbitrable and are subject to a valid arbitration agreement. In light of *nearmap*, Australian courts are unlikely to find that a preliminary discovery application is a "*matter*" which engages s 7(2).

The implication is that a prospective claimant to a dispute covered by an arbitration agreement

should seek preliminary discovery under domestic court procedures instead of from the arbitral tribunal.

The prospective claimant may rely on rule 7.23 of the Federal Court Rules 2011 (Cth) or rule 5.3(1) of the UCPR. Under those provisions, a court may order preliminary discovery from a prospective defendant in possession of a document which may assist in determining if the applicant has a claim, provided the applicant has already undertaken reasonable inquiries which have not yielded sufficient information for it to decide whether to commence proceedings. The usual limitations arising from privilege and the implied undertaking as to the use of documents also apply.[2)]

One interesting open question is whether parties can confer an arbitral tribunal with powers to order preliminary discovery, by expressly stating so in the arbitration agreement. Bergin CJ in Eq ruled that applications for preliminary discovery did not attract the protection of s 8(1) of the Act, not that such applications are not arbitrable. Considering parties' flexibility to select the arbitral procedure under article 19(1) of the Model Law, it is theoretically conceivable that the parties could expressly confer the power to order preliminary discovery on the tribunal. In practice, however, recourse to domestic courts is likely to be more practical since it would allow prospective claimants to obtain preliminary discovery *before* an arbitral tribunal has been constituted.

As a quick comparison, English courts adopt a different position with respect to preliminary discovery (there known as "pre-action disclosure"). In *Travelers Insurance Company v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC), the High Court held that it could not order pre-action disclosure under the Court's procedures where the dispute is subject to a valid arbitration agreement between the parties.

Under s 33(2) of the Senior Courts Act 1981 (the "**SCA**"), the High Court may only grant an application for pre-action disclosure to "*a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court*." Justice Coulson held that the existence of the arbitration agreement meant that the applicant was not a likely party to subsequent proceedings in *the High Court*.[3)] Therefore, the Court did not have the requisite power and the application needed to be made to the arbitral tribunal. (At [30])

The difference between the positions in Australia and England is in part attributable to the differences in the procedural rules governing preliminary discovery/pre-action disclosure. Rule 5.3 of the UCPR allows preliminary discovery if "*the applicant may be entitled to make a claim for relief from the court against a person*", whereas s 33(2) of the SCA is more restrictive in requiring that the applicant is *"likely to be a party to subsequent proceedings in that court*".

Practical considerations

Prospective claimants should also consider the following when determining whether to pursue an application for preliminary discovery in respect of arbitration.

First, a party who is seeking preliminary discovery is generally responsible for the costs of the discovery. For example, in the Australian Federal Court (see *Sites N Stores Pty Ltd v Whirlpool.Net.Au Pty Ltd* [2015] FCA 1474), the default position is that an applicant for

preliminary discovery should pay the costs of the producing party unless the producing party has acted unreasonably. The costs of the discovery process can be significant and the potential strategic benefits of obtaining helpful documents should be weighed against costs and procedural economy considerations.

Second, it can often be difficult to determine whether a prospective respondent possesses documents which may assist so there is an element of risk involved. This, again, should be weighed against the potential benefit of locating documents which may found a viable claim.

Third, the scope of preliminary discovery is limited. In Australia, preliminary discovery cannot be used by a party to merely strengthen its position where it has already decided to commence legal proceedings, or 'fish' for information without believing that a genuine claim exists (*see Airservices Australia v Transfield Pty Ltd [1999] FCA 886* at [5]).

References

?1 Article 3(3)(b).

?2 *See* Ben Kremer and Rebecca Davies, *Preliminary discovery in the Federal Court: Order 15A of the Federal Court Rules*, (2004) 24 Aust Bar Rev 235, 255-258.

?3 At [17]-[21].

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