ADR Perspectives
Perspectives PRD

Perspectives on alternative dispute resolution for ADR parties and their lawyers.

Perspectives sur la résolution des différends pour les parties et leurs avocats.

December 2016 / *décembre 2016*

Confidentiality in Arbitration

Joe McArthur, FCIArb and Laura Cundari

The expectation of a confidential dispute resolution process is often what draws parties to choose arbitration over litigation. However, sometimes that expectation may not be realized. The domestic courts of the United Kingdom, Australia and Canada have each taken different approaches in interpreting the scope of confidentiality attributed to arbitral proceedings. Despite these differences, courts have consistently ordered disclosure of documents created for arbitration where the interests of justice demand production.

The expectation of a confidential dispute resolution process is often what draws parties to choose arbitration over litigation. Where appeal or judicial review rights exist, parties generally understand that confidentiality may be lost. However, the potential for a court to order production of documents created for arbitral proceedings in other circumstances is given less attention.

As the source of arbitral confidentiality is contractual (either explicitly or as an implied term), arbitration documents are generally subject to the same principles that apply when courts are dealing with other documents subject to contractual obligations of confidentiality. As discussed below, the courts of the United Kingdom, Australia and Canada have each taken different approaches in interpreting the scope of confidentiality attributed to arbitral proceedings. Regardless of the approach taken, parties to a proceeding may be required to produce documents that would otherwise be protected by a confidentiality agreement if the court deems it necessary in the interests of justice.

The United Kingdom

English courts have recognized an implied obligation of confidentiality in arbitration arising out of the nature of arbitration itself. The English Court of Appeal in *Emmott v Michael Wilson & Partners Ltd*. stated that disputes about the limits of the implied obligation of confidentiality should be resolved through interpretation of the arbitration agreement.[1]

Emmott involved an appeal of an order authorizing the disclosure of documents created for an English arbitration, for use in related proceedings in New South Wales and the British Virgin Islands. The Court of Appeal held that even though the parties had an obligation "not to disclose or use for any other purpose any documents prepared for and used in the arbitration", case law has established four exceptions where disclosure may be permissible:

- where there is express or implied consent between the parties to the arbitration;
- where there is an order or leave of the court (though this does not give the court a general discretion to lift the obligation of confidentiality);
- where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and
- where the interests of justice require disclosure.[2]

[1] Emmott v Michael Wilson & Partners Ltd., [2008] EWCA Civ 184, at paras 110 & 119 [Emmott].
[2] *Ibid* at para 107.

The court in *Emmott* relied on the fourth "interests of justice" exception in its reasons for ordering the disclosure. The Court held that disclosure was necessary to ensure that the findings of the arbitration could be relayed to the foreign court so that it was not misled.

Australia

The Australian courts diverge from the UK courts in their approach. In *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)*, the High Court of Australia held that there is no implied term of confidentiality in arbitration agreements, as confidentiality is not an essential attribute of a private arbitration.[3] The High Court refused to read in an implied term of confidentiality for fear of foreclosing disclosure where there is a legitimate public interest.[4] The Court was particularly reluctant to do so in the *Esso* case due to its public nature (relating to price increases for gas supplied to state entities). The Court held that the consumers and the public should not be denied knowledge of the arbitral proceedings and that the Minister was entitled to the calculations upon which the price increases were based.[5]

Canada

In *Adesa Corporation et al. v Bob Dickenson Auction Service Ltd*,[6] the Ontario Superior Court held that although there is an expectation of confidentiality in arbitration, and confidentiality should be fostered to maintain the integrity of the arbitration process, it should not be elevated to the status of privilege. In *Adesa,* the Court ordered the production of transcripts from an arbitration on issues related to the court proceeding. The Court was influenced by the fact that the court proceeding was commenced by the party resisting production, stating that when parties to arbitral proceedings commence an action, they place the confidentiality of those proceedings at risk.[7] Although Justice Cameron in *Adesa* did not "regard confidentiality as essential to the arbitration process", Justice Cumming of the same court in *GEA Group AG v. Ventra Group Co.*[8] interpreted *Adesa* as being potentially aligned with the English position that confidentiality is inherent to a private arbitration.

The British Columbia courts have also resisted determining the scope of confidentiality in arbitration. In *Hi-Seas Marine Ltd. v. Boelman,*[9] the British Columbia Supreme Court considered the divergent approaches in the UK and Australia regarding the question of whether confidentiality is an essential attribute of private arbitration but ultimately found it was not necessary to resolve the question of whether documents should be produced.

Conclusion

Although there are jurisdictional differences regarding the scope of confidentiality, courts act with consistency in ordering disclosure of documents created for arbitration where the interests of justice demand production. While much of the uncertainty surrounding confidentiality can be addressed with a properly drafted arbitration agreement, courts are willing to interpret the scope of confidentiality on a case by case basis, depending on the interests at play.

Joe McArthur, FCIArb acts as both arbitrator and arbitration counsel in commercial disputes from Blake, Cassels, Graydon's Vancouver office.

Laura Cundari is a partner in the Vancouver office of Blake, Cassels & Graydon. She acts as arbitration counsel on a variety of commercial and construction disputes.

[3] (1995)183 CLR 10 at pg 402 [*Esso*].
[4] *Ibid* at pg 402.
[5] *Ibid* at pg 403.
[6] (2004) 73 OR (3d) 787 at para 53 [*Adesa*].
[7] *Ibid* at para 57.
[8] (2008) 307 DLR (4th) 329.
[9] 2006 BCSC 488, 17 BLR (4th) 240 aff'd 2007 BCCA 137, 27 BLR (4th) 184.