CONFIDENTIALITY OF ARBITRATION PROCEEDINGS

by David Bailey
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INTRODUCTION

It is commonly stated that one of the advantages of arbitration is that the proceedings are held in private. From this it may be supposed that confidentiality may attach to the proceedings and to a variety of matters that are associated with the proceedings. A survey of the relevant cases and provisions suggests that assumptions about privacy and confidentiality should not be made. If confidentiality is a matter of concern to the parties then measures should be taken to ensure that it is appropriately protected. A number of general propositions may be stated about the arbitration process which bear upon the question of confidentiality.

(1) Arbitration by agreement of the parties is a consensual process and the terms upon which it will take place can largely be determined by the parties. eg they can choose the rules and procedure which will apply, the arbitrator who will determine the dispute, the arbitral institution [if any], the place of the arbitration and other matters such as whether the award will be published to other parties and presumably issues of confidentiality.

(2) Arbitration agreements stand in much the same position as other agreements as to their legal effect and enforcement. However, they possess some special characteristics. Statutes which apply to domestic and international arbitrations limit the extent to which the courts will intervene in the arbitral process.

(3) Arbitrators stand in a quasi judicial capacity during the arbitral process. But they are not immune from proceedings particularly if a party wishes to set the award aside. They may be called as witnesses in subsequent proceedings about the arbitration.

(4) If parties who have been involved in an arbitration resort to the courts for recourse in respect to the award or the conduct of the arbitration the courts may well apply overriding considerations of justice and equity if the case requires notwithstanding that one party may resist disclosure of information .

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(5) Apart from what appears to be a general acceptance on the part of the courts that arbitration proceedings may be held in private between the parties and their representatives to the exclusion of others there appear to be no other concepts of privacy or confidentiality which have found general acceptance.

(6) If confidentiality of information disclosed in or arising out of an arbitration is of importance to the parties they must advert to the matter and consider ways of protecting their interests. This paper attempts to examine possible areas of importance to the parties and determine whether there is cause for concern .It may be that the results of this brief survey will surprise some and lead to appropriate measures being taken to protect sensitive information. In any event there seems to be a need for fuller examination and consideration of the issue of confidentiality in arbitration proceedings.

THE CONFIDENTIALITY OF PRIVATE ARBITRATION PROCEEDINGS

Privacy of the Proceedings

Here we are concerned with what happens at an arbitration .Who may be present and who may be excluded. This issue has been the subject of recent litigation both in Victoria and in the United Kingdom. In Victoria it was raised for consideration in the case of *Esso Australia Resources Limited and Others v.Plowman Minister for Energy and Minerals*, [Supreme Court of Victoria, Appeal Division, Brooking, Tadgell and Smith JJ],[1994]VR 1, which I will hereafter refer to as the Esso case. The Court held that there was an implied term in arbitration proceedings that they should be heard in private. By this is meant that any person not taking part in the arbitration, a "stranger", would be excluded from the hearing unless he or she had the permission of all parties to be present at it. It was noted by the Court that there have been many judicial observations suggesting that arbitrations are private in that sense. It was further noted that it is the practice for arbitrations conducted in Victoria to be conducted in private. This also appeared to be the practice in the other Australian States and in England and in the United States of America.

Shortly before the *Esso* case Colman J held to similar effect in *Hassneh Insurance Co of Israel v. Steuart J Mew* [1993]2 Lloyds R 243 [Queens Bench Division] on the basis of universal practice over hundreds of years. The parties to an English arbitration are entitled to assume that the hearing will be conducted in private.

See also *Oxford Shipping Co v. Nippon Yusen Kaisha – The Eastern Saga* [1984] 3 All ER 835 a case in which the plaintiffs sought an order setting aside an order by an arbitrator that the arbitration should take place concurrently with another arbitration involving related issues. Leggats J. held that the arbitrators did not have jurisdiction to make such an order. In the course of his judgment he confirmed the private nature of the arbitration procedure. He said:

> "The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute."

The privacy of arbitration proceedings is an important and distinguishing feature of arbitration. Associated with the privacy attached to the hearing is the private nature of the steps prior to hearing. Pleadings, witness statements and other documents exchanged between the parties do not have to be filed at a public registry. This feature sets arbitration apart from litigation and administrative procedures.

Status of information disclosed during the arbitration proceedings

In the *Esso* case there was a dispute as to whether one of the parties to the arbitration was free to disclose to non parties to the arbitration information disclosed by the other party in the course of the arbitration. The information related to price increases for natural gas produced by Esso from the Victorian gas fields. Esso contended that there was an implied term in arbitration agreements that documents obtained in the course of an arbitration were subject to an obligation of confidence such that the information could not be disclosed by the other party to the arbitration to third parties. The Appeal Division held that there was no such implied term in arbitration agreements. The main judgment on this issue was that of Brooking J.

Brooking J conducted an extensive review of the authorities in England and the United States of America. He concluded that there was no rule that would prevent a party from disclosing information obtained during the course of the arbitration proceedings to a third party. He left to one side the issue as to whether a party could claim some protection under the equitable rules relating to protection of trade secrets and confidential information.

Brooking J held that there was no principle of law or an implied term in arbitrations to the effect that information disclosed in the course of an arbitration was subject to any principle of confidentiality. Nor could any such principle be found in custom or uniform course of conduct. Part of the difficulty in formulating any such principle was that it would be necessary to specify exceptions to cover matters such as disclosure under compulsion of law ,disclosure where the interests of a party require it and disclosure for the purposes of legal proceedings concerning the award or the arbitration. One of the great obstacles to the adoption of the principle of confidentiality contended for lay in identifying and stating the exceptions which would prove the rule particularly that permitting disclosure where the interest of the party required it.

In so holding His Honour referred to the English case of *Dolling-Baker v.*

Merrett [1990]1 WLR1250 a decision of the Court of Appeal in which that Court recognised a duty of confidentiality in relation to arbitration subject to two exceptions, disclosure with the consent of the other party and disclosure pursuant to an order or with leave of the Court. However, His Honour was not persuaded by the reasoning in the *Dolling-Baker* case. His Honour was also referred to the judgment of Colman J in the *Hassneh Insurance Co* case[then unreported] which he regarded as confined to its particular facts.

Implied undertaking in discovery in litigation

> "A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit". – Bray

In the *Esso* case it also argued that the principle of confidentiality in arbitration proceedings was also supported by an analogous principle to that which obtains in the course of discovery in civil litigation. Information obtained in discovery in litigation is not to be used by the party obtaining discovery for any collateral or ulterior purpose.[1] This obligation is called the implied undertaking. It is regarded as one of the fundamental rules of discovery and was so regarded over a century ago.[2] Breach of the undertaking is a contempt of court and can be restrained. If a party wishes to be relieved from the undertaking then application must be made to the Court to have the undertaking varied or released.[3] The courts do not treat such applications lightly and relief or variation is usually only granted to enable a party to enforce or pursue rights in another forum. General relief from the undertaking is not given and relief other than for use in other litigation to protect a party's rights would only be given in- the face of overwhelming evidence that relief should be given.

But in the *Esso* case the Court refused to accept the analogy of the implied undertaking in discovery and Brooking J said that the obligation in relation to discovery rested on a duty to the Court. Such a principle could not apply to non-curial proceedings. His Honour did not take account of a wider statement of the basis of the rule in the New South Wales case of *Ainsworth v. Hanrahan* [1991]25 NSWLR 155 in relation to answers to interrogatories where Kirby P. referred to a more general obligation of confidence as being a modern foundation of the principle

"*The ground for confining the use of information supplied for one purpose to that purpose, except with the consent of the provider or clear authority of law is not confined to the procedure of discovery. It is a general principle governing the use of the information provided by one person to another. It is reflected in a number of international instruments in which information privacy principles are expressed.*" He referred to the guidelines issued by the Organisation for Economic Co-Operation and Development (OECD) in that regard. He also referred to the Law Reform Commission reference on Privacy[4] as indicating basic rules governing the fair use of information supplied by one person to

another and the adoption of privacy principles in the Privacy Act 1988 (Cth).

The English Position

As observed above a recent English case was cited to the Supreme Court of Victoria in the *Esso* case namely the *Hassneh Insurance Co of Israel v. Steuart J Mew* case, supra. That case involved a dispute dealing with reinsurance contracts which had been referred to arbitration. In the course of the arbitration there had been substantial discovery of documents ,there was exchange of pleadings and witness statements and there was a transcript of the proceedings. An interim award ,including reasons, was made and the reassured party ,being substantially unsuccessful, wished to sue insurance brokers on the basis of negligence and breach of duty. The reassured wished to disclose to the brokers the interim award and the reasons and it was also envisaged that they might also wish to disclose transcripts of witness statements, pleadings or other documents from the arbitration.

The plaintiff [reinsurer]was prepared to allow the defendant reassured to disclose the award to the underwriter and the reasons as were referred to in the award but objected to disclosure of the whole of the reasons or the disclosure of any other documents such as pleadings or witness statements or transcripts. The plaintiff sought injunctions to restrain such disclosure on the basis that such disclosure would be a breach of confidence. They contended that the appropriate course would be that there be no disclosure of documents prior to discovery in the proceedings against the underwriter at which time the defendant reassured could produce the documents for inspection only if the court so ordered and not otherwise. The defendant reassured counterclaimed for leave to disclose contending that although there was some duty of confidence in respect of documents in the arbitration it was a qualified duty to the effect that the documents could be disclosed to a third party if to do so was required or was reasonable and proper or reasonably necessary for the protection of the party's own interests.

Colman J of the Queens Bench Division noted that there was surprisingly little authority in English law dealing with the nature and scope of the duty of confidence which applies in relation to arbitrations and the documents in them. He referred to the *Dolling-Baker* case and concluded first that if parties to an English law contract refer their disputes to arbitration they are entitled to assume at the least that the hearing will be conducted in private .This is established on the basis of universal practice over hundreds of years. As to the question of the confidentiality of documents in an arbitration he determined that the requirement of privacy must in principle extend to documents which are created for the purpose of the hearing .The most obvious of these would be a note or transcript of the evidence. The disclosure to a third party of such documents would almost be equivalent to opening the door of the arbitration room to that third

party. Similarly witness statements being so closely related to the hearing must be within the obligation of confidentiality as must submissions tendered to the arbitrators, as well, so must pleadings.

(a) Documents disclosed during an arbitration

As to such documents Colman J held that the parties were bound by an obligation not to disclose them in a similar way to the implied undertaking which applies to documents disclosed in the course of litigation .He said that inasmuch as the parties to an English law arbitration impliedly agree to use English discovery procedure, or at least to submit to the possibility that such procedure will apply, that it must by implication be their mutual obligation to accord to documents disclosed for the purposes of the arbitration the same confidentiality which would attach to those documents if they were litigating their dispute as distinct from arbitrating it. The fact that the proceedings are in private lends weight to the necessity for that implication.

(b) The award

In relation to the award which contained reasons Colman J said that there was an important distinction between the reasoned award and the above documents .The award identifies the rights and duties of the parties in relation to which they have been in dispute .It gives rise to an independent contractual obligation to perform the award .The reasons explain how that obligation arises. Secondly the award is by reason of the arbitration legislation subject to the supervisory jurisdiction of the English courts. Thirdly awards can be enforced in the English courts under the summary procedure provided by the Arbitration Act or by an action on the award. On the basis of this analysis he concluded that the award and the reasons had characteristics not shared by the other documents.

He then considered whether a duty of confidence attached to the award on any other basis. First he considered the ordinary course of commerce and considered that there would be many circumstances where one party to an arbitration may require to establish against a third party that the arbitrating party is or has been under an obligation to satisfy an award. He also examined the relationship between banker and customer and the prescription of the duty of confidentiality which is dealt with in the leading case of *Tournier v. National Provincial & Union Bank of England* [1924]1 KB 461 He considered that the exception which applied in that case to the effect that the Bank should be able to disclose information if to withhold it would or might prejudice the Bank in the establishment or the protection of its own legal rights against the customer or third parties would apply with equal force to arbitration awards. That is to say if it is reasonably necessary for the protection of an arbitrating party s rights vis-vis a third party that the award should be disclosed to that third party so to disclose it, including its reasons, would not be a breach of the duty of confidence.

Colman J concluded that it was reasonably necessary for the establishment by the defendant of his cause of action against the underwriter that he should disclose or in his pleadings quote from the arbitration award including the reasons. But he went on to hold that the other documents had to be maintained in confidence and could not be disclosed to the underwriter. He considered that the approach to be adopted in relation to such documents should be the same as that applied by the House of Lords in *Scientific Research Council v. Nasse* [1980JAC 1028 In the absence of the consent of the other party the arbitrating party cannot disclose such documents. In a practical sense in the course of legal proceedings ,if the arbitrating party is required to make discovery the relevant documents should be listed and then inspection should be declined except by order of the court. It is ordinarily not appropriate that the court should be invited at any earlier stage to perform the task of resolving the conflicting interests of protection of confidence and disclosure.

The *Esso* case has been appealed to the High Court of Australia and judgment is not expected to be delivered until later this year. It the meantime parties about to embark upon arbitration in matters involving sensitive information should consider ways of protecting information .This is an issue which will be pursued further below.

The Protection of Confidential Information

It was expressly confirmed in the *Esso* case that where information was confidential in nature and would qualify for protection by Equity against misuse a party to an arbitration entitled to that protection would, of course, be able to invoke such protection. It has to be recognised that in order to obtain such protection a party has to establish a basis for such protection .Mere disclosure under compulsion of law is not enough. The courts of equity developed the concept of breach of confidence. This concept is not dependent on there being a contractual relationship between the parties. The principle is an obligation based on confidence which binds the conscience of the party subject to it. The cases appear to require the following elements before they will treat information as confidential and able to be protected by the courts. First it must be demonstrated that the information has the necessary quality of confidence or secrecy about it. Secondly the information must be imparted in circumstances where an obligation of confidence is attached, for example, where a person learns of trade secrets in the course of that person's employment *Merryweather v. Moore [1892]2 Ch 218, Ansell Rubber Co Pty Ltd v. Allied Rubber Industries Pty Ltd [1967]VR 37* or where a contractor is supplied with confidential material to enable a task to be performed on behalf of another *Saltman Engineering Co Ltd. v. Campbell Engineering Co. Ltd [1963] 3 All ER 413 (1948) 65 RPC203.* Thirdly it should also appear that there has been or may be an unauthorised use of the information to the

detriment or prejudice of the owner.[5]

The Information must be Confidential

The range of information that qualifies as confidential is very broad. In recent years the courts have adopted broader views as to what sort of information can be confidential. In modern society as industrial and commercial activity becomes more and more complex the courts have recognised that any technical, trade, commercial or other information utilised in a business or other activity may be the subject of an action for breach of confidence. Information about processes of manufacture, lists of customers and leads, information obtained from research and investigation, technical drawings and information such as manuscripts, lectures, plots of plays and computer programs and similar information can all qualify. But if the information is not confidential the courts will not grant protection. Much information that could be disclosed in arbitrations in commercial and industrial matters would be capable of being confidential for these purposes. On the other hand there may be a great deal of information which would not have the necessary quality of confidence.

Do the Parties stand in a Relationship of Confidence?

The disclosure must be made in circumstances that impart an obligation of confidence. This can arise in a number of ways. It could arise from the terms of the contract itself either expressly or by necessary implication although it does not require a contract for its existence. It could also arise where the nature of the relationship contains elements of good faith or trust. It might also arise where due to personal contact or dealings the parties are in a position or relationship such that a court would impose a duty of confidence. For example, where the information has been disclosed without a contract or relationship but the recipient ought to know that the information is confidential, e.g. disclosure of information about a business to a prospective purchaser, disclosure about a design for a house to an architect.

I have not been able to locate any case about arbitration which involves these principles. Presumably if the parties to an arbitration have a contractual relationship it might deal expressly with confidentiality or the relationship between the parties might otherwise impose an obligation of confidence on the basis of the foregoing principles.

In an article in The Arbitrator, Andrew Kincaid,[6] having reviewed the principles upon which the courts will protect a confidence states that he doubts whether these principles provide a ' blanket' confidentiality for documents made available in the arbitration process. He argues that much of the information imparted in an arbitration will not have the necessary quality of confidence to satisfy the requirement that the information be 'confidential. Compare for example the cases of *Ansell Rubber v. Allied*

Rubber Industries Pty Ltd [1967] VR 37 (in which it was held that a former employee was under an obligation of confidence with respect to the use of trade processes acquired in the course of his previous employment with the plaintiff) with the case of *Independent Management Resources v. Brown [1987] VR 605* where it was held in relation to a former employee that the information in question did not possess the necessary quality of confidence.

On the other hand Mr T M Johnstone in an earlier article in The Arbitrator[7] submits that the information disclosed during the presentation of evidence and hearing of an arbitration and disclosed in private would be presumed to be disclosed in confidence. But in the absence of express agreement the extent of that presumption could vary in individual cases. Mr Johnstone's article was published prior to the *Esso* case. In the light of the *Esso* case one might doubt whether the proposition that there is a presumption of confidentiality attaching to information disclosed during an arbitration is tenable Either the information itself must have the necessary quality of confidence or the parties must expressly agree that the information cannot be disclosed.

Moreover in the *Dolling-Baker* case Parker L.J.[8] observed that the basis of the claim to protection against disclosure of the documents was not based on a claim to the "confidentiality" of the documents themselves but as a result of the private nature of the arbitration procedure.

THE ARBITRATOR

The Position of the Arbitrator

Although the arbitrator is not a party to the arbitration agreement once the arbitrator enters on the reference the arbitrator becomes a part of the private arbitration procedure. In Bernstein, Handbook of Arbitration Practice,[9] it is stated that the duty not to disclose information obtained in the course of and for the purposes of an arbitration applies to the arbitrator as much as anyone else. From this it is said to follow that it would be improper for the arbitrator without the consent of the parties to disclose information made available in the course of the arbitration to third parties and that the arbitrator could be restrained from doing so.

No authority for the propositions is given in Bernstein. It could be argued on the basis of the English cases such as *The Eastern City* [1984] 3 All ER 835, *Dolling-Baker v. Merritt*, [1990] 1 WLR 1205 and *Hassneh Insurance Co of Israel v. Steuert J. Mew* [1993] 2 Lloyds R 243 that this principle follows as a necessary extension of the principles stated in those cases.

The Arbitrator as a witness

Some of the rules of arbitral bodies expressly endeavour to protect the arbitrator from having to give evidence in subsequent proceedings relating to the subject matter of the arbitration. See for example the rules of the

London Court of International Arbitration article 19.2 In a Victorian case an arbitrators notes were required to be produced in an application subsequent to the award to set aside the award. The arbitrators who were not parties to the proceedings to set aside the award were ordered by the Court to make notes of the proceedings made by the arbitrators available for inspection. A claim by the arbitrators that the notes were protected by privilege was rejected by the Court, see *Nathan v. M.J.F.Constructions* [1986] VR 75. Nicholson J rejected an argument on the basis of public policy that an arbitrators notes should be protected. He so held on the basis of various authorities which held that arbitrators can be compelled to give evidence about what occurred at arbitration proceedings before them although there are some restrictions as to what questions can be put e.g. not as to the reasons for making a particular decision, *Duke of Buccleuch v. Metropolitan Board of Works* [1872] LR S HL 418, *Zanatta v. McLeary* [1976] 1 NSWLR 230

THE AWARD

General position

An Award is not a public document and need not be published to anyone except the parties. Even publication to the parties is not necessary to the validity of the award. The arbitrator usually informs the parties that the award is available. These principles yield to the provisions of the arbitration agreement or of the submission to arbitration. A party may use the award to establish the party's rights and in order to do so the award may need to be produced or proved. See the statement of Colman J. in the *Hassneh Insurance Co.* case as to a party's rights to prove the award.

Reasons

If the award is a reasoned award the reasons may be included in the award or stated separately. The reasons will be available to the parties. The parties may be under a duty to each other not to disclose the reasons to others without the consent of the other party or pursuant to an order of the court.

Confidential Reasons

There is a practice referred to in some of the cases of providing reasons separately and stipulating that the reasons are confidential eg in maritime arbitrations.[10] This is done with a view to preventing the reasons from forming the basis of an appeal. See *Mutual Shipping Corporation v. Bayshore Shipping Co. The Montan [1985] Lloyds R 189.* It has been held that such stipulation is not effective and that the court is not prevented from looking at the award on an application to set aside or remit the award.

Such a stipulation cannot oust the jurisdiction of the court to review the reasons if justice requires it.

ARBITRATION AGREEMENT

> "It is fundamental to the understanding of commercial arbitration that the parties, providing they do not go outside the law or the public interest, may make any agreement for the conduct of the proceedings they require before and after a dispute arises and during an arbitration."- Institute of Arbitrators, Australia

The agreement to submit a dispute to arbitration is the central feature of arbitration.[11] Without an agreement there can be no private arbitration. The arbitration agreement may form part of the original agreement between the parties as, for example, an arbitration clause in a partnership deed, a building agreement or some other commercial or business transaction. Such provisions are generally very short and follow standard precedents. Such clauses in addition to stipulating that the parties will submit disputes arising under the agreement to arbitration specify how the arbitrator is to be appointed where the arbitration will be conducted and the rules which will apply to the conduct of the arbitration. It is unusual for a standard arbitration clause to condescend to details about procedure. Perhaps the assumption is made by the drafter that if the rules of a particular institution have been chosen that they will cover all relevant aspects. As we have seen above it may be necessary for the parties to advert to questions of privacy and confidentiality rather than leave those matters to implication and possible uncertainty. If this is not done in the principal agreement then it could be done at a later stage in the submission to arbitration or if there is to be a preliminary conference may be an item which is dealt with at that stage. It is the thrust of this paper that the parties need to advert to issues of privacy and confidentiality and to provide for them in the agreement or arrangements relating to the arbitration.

Effect of the agreement to arbitrate

Arbitration agreements are enforceable under our legal system. The courts have developed rules which support the intention of the parties to conduct an arbitration. The support of the courts is also necessary to ensure that the agreement to arbitrate is observed by the parties and that any award resulting from the arbitration can be enforced if necessary.

Arbitration legislation

Domestic arbitrations are subject to the commercial arbitration legislation of the various Australian jurisdictions. The legislation was substantially reformed in 1984 to bring it into line with overseas developments particularly in the United Kingdom which favoured more party autonomy and less court intervention.[12] For the purposes of this paper it is sufficient to note that the legislation supports the agreement of the parties to arbitrate. It provides procedures to support an arbitration, for example, if the parties have not dealt with the appointment of the arbitrator in

sufficient detail as, for example, where the arbitrator may need to be replaced in the event of death or otherwise ceasing to hold office (section 9). Many of the sections are expressed to operate only if the parties have not otherwise agreed in writing or made provision in the arbitration agreement. For example section 14 of the Victorian Act provides that:

> Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit "

The commercial arbitration legislation therefore supports the concept of private arbitration by agreement between the parties and keeps legislative and judicial interference to a minimum. However the legislation does not advert to matters of privacy or confidentiality leaving it to the parties to deal with these matters if they so desire.

The preliminary or preparatory conference

The opportunity for the parties to deal with procedural matters relating to the arbitration in the nature of a timetable or agenda is presented if a preliminary or preparatory conference is convened. Much has been written about the conduct of preliminary conferences. Recently UNCITRAL. the United Nations Commission on International Trade Law, has circulated guidelines for preparatory conferences in arbitral proceedings for consideration and approval at its annual session commencing at the end of this month.[13] Copies of these guidelines have been circulated to interested bodies for comment and discussion. The Commonwealth Attorney-General's Department which will prepare Australia's submission to UNCITRAL has circulated guidelines within Australia seeking comments from interested bodies. The draft guidelines deal with numerous matters including general considerations, convening and conducting a preparatory conference and an annotated check list of possible topics to be dealt with at the preparatory conference The guidelines do not appear to refer to whether privacy of the proceedings or confidentiality in relation to disclosure of information should be considered at the preparatory conference. However paragraph 8 in the introductory part states that the confidential nature of arbitration makes it difficult to assess the extent of the practice of holding preparatory conferences. Again one notes the general assumption carried with that statement that arbitration has a confidential nature.

It would seem that matters that might usefully be dealt with at a preparatory conference or at any other meeting or agreement about the arrangements for the conduct of the arbitration could include attention to the following:

(a) The privacy of the proceeding – by this is meant, who is entitled to be present, the parties, their representatives, the arbitrators, stenographer, administrative facilities and so forth? What control will be the parties exercise over personnel entering and leaving the

arbitration? Do confidentiality undertakings need to be taken from personnel such as clerical workers involved with the arbitration? In a large commercial arbitration or international commercial arbitration substantial numbers of people may be involved in the conduct of the proceedings.

(b) Arrangements about evidence, discovery of documents, witness statements, exhibits and transcripts. Here the parties will need to decide whether it is necessary spell out the extent to which information exchanged between the parties on discovery or other methods is to be treated subject to an undertaking that it will not be disclosed to third parties or used for any collateral purpose, at least without the approval of the party making the information available or by order of a court. Does this need to form part of the agreement or is it sufficient if it appears as a note in the minutes of the preparatory conference?

(c) Storage of documents and exhibits. For the sake of convenience documents and exhibits are often stored under security at the arbitration venue. Any such evidence should be secure and should only be accessible by the arbitrator and the parties.

(d) Transcript and the award – should it be assumed that the award will not be published beyond the parties, nor will the transcript or the reasons of the arbitrator whether forming part of the award or otherwise be available other than to the parties? In other words, these documents are not to be published beyond the parties unless the parties expressly agree or it is necessary to do so in order to comply with a court order.

Drafting considerations

The drafting of suitable privacy and confidentiality provisions may not be an easy task. One of the reasons given by Brooking J. in the *Esso* case for being unable to accept an implied term as to confidentiality of documents disclosed in the course of the arbitration was the difficulty in specifying the exceptions to any broad rule of confidentiality. In the *Hassneh Insurance Co* case Colman J. was prepared to indicate the limits that might apply to any obligation of confidentiality and so to did Parker LJ. in the *Dolling-Baker* case.

In drafting any provisions dealing with privacy and confidentiality the parties should be realistic in their expectations. Clearly it is not too difficult to deal with the question of who may be present at the arbitration, the obligation of confidence between the participants in the arbitration, the parties, their representatives and the arbitrator with respect to the confidentiality of matters such as the fact of the arbitration being conducted, the place where it is being conducted, the confidentiality attaching to material disclosed pursuant to the arbitration proceeding and the confidentiality of documents created for the purposes of the

arbitration including pleadings, written submissions, transcripts, the award and reasons. The drafter should also bear in mind should further proceedings be necessary in respect of the arbitration in the form of judicial intervention to support the arbitration or where there is a challenge to the jurisdiction of the arbitrator or challenge to the award then it is inevitable that disclosure of information will be necessary in the course of those proceedings. The parties may nevertheless agree on rules as to particularly sensitive documents which require some cloak of protection. Here the law relating to confidential documents should be considered. Also the courts discretion to extend protection as is commonly done in cases dealing with sensitive information will be available.

THE ARBITRAL INSTITUTION

Confidentiality of Arbitration Proceedings

Rules of Arbitration Institutions

Having regard to the uncertainty of some of the issues of confidentiality surrounding arbitration proceedings I decided to review the rules for arbitration of some of the leading arbitral bodies. The results appear to be as follows.

The Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitrations.

These rules deal with matters such as Notice of Dispute, rule 2, nomination, rule 4, powers of arbitration, rule 8, costs, rule 13, conditions for view, rule 15, and the award, rule 16. They do not refer to aspects of privacy or confidentiality.

UNCITRAL Model Law

Article 19[1] provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings

Article 24 deals with hearings and written proceedings. It does not specify whether any evidence or material property or documents produced by a party are subject to any duty of confidence on the part of the other party.

Article 31 deals with the form and contents of the award. The article makes no reference as to whether or not the award or the reasons for the award are to be treated as confidential or not.

Article 23 deals with the statements of claim and defence. There is no statement as to whether or not these pleadings are to be treated as confidential or not.

INTERNATIONAL CHAMBER OF COMMERCE RULES OF CONCILIATION AND ARBITRATION

Conciliation

Article 6 states that the confidential nature of the conciliation process shall be respected by every person who is involved in it in whatever capacity.

Article 10 states [1]that the conciliator shall not act in any judicial or arbitration proceeding relating to the dispute which has been subject to the conciliation process and also [2] the parties mutually undertake not to call the conciliator as a witness in any such proceedings, unless otherwise agreed between them.

Arbitration

Article 6 Pleadings and written statements, notifications or communications – this article deals with these documents but does not state whether or not any confidentiality is attached to them

Award

A number of articles deal with the award, article 17 award by consent, article 18 time-limit for award, article 19 award by three arbitrators, article 20 decision as to costs of arbitration, article 21 scrutiny of award by the Court, Article 22 making of award, article 23 notification of award to parties, article 24 finality and enforcibility of the award and article 25 deposit of the award. None of these articles refer to any aspect of confidentiality.

Appendix II -Internal Rules of the Court of Arbitration

The heading to paragraphs 2,3 and 4 is Confidential character of the work of the Court of Arbitration. Paragraph 2 states that the work of the Court is of a confidential character which must be respected by everyone who participates in that work in whatever capacity. Paragraph 3 states that the sessions of the Court are open only to its members and to the Secretariat. Paragraph 4 states that the documents submitted to the Court or drawn up by it in the course of the proceedings it conducts are communicated only to the members of the Court and to the Secretariat. There is power in the Court to authorise researchers to acquaint themselves with certain documents of general interest but not documents remitted by the parties within the framework of the arbitration proceedings. But any such authorisation is subject to the beneficiary undertaking to respect the confidential character of the documents made available and not publishing without having previously submitted the text for approval to the Secretary – General of the Court.

UNCITRAL Arbitration Rules

General Provisions Article 15 paragraph 1 provides that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate ,provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case., paragraph 2 requires the tribunal at the request of either party at any stage of the proceedings to hold hearings for the presentation of evidence or oral argument, paragraph 3 requires all documents or information supplied to the arbitral tribunal by one party to

be communicated to the other party. There is no statement as to whether or not the parties are to respect the confidentiality of the information so supplied.

Pleadings
Article 18 dealing with the statement of claim, article 19 dealing with the statement of defence, article dealing with amendments to the statement of claim and defence and article 22 further written statements, do not provide any guidance as to whether any confidentiality applies. The same applies with regard to the articles dealing with evidence and hearings, articles 24 and 25.

The award
Article 32 paragraph provides that the award shall be made public only with the consent of both parties.

Rules of the London Court of International Arbitration
Article 6 submission of written statements and documents deals with the statement of case, statement of defence, reply, counterclaims and defence to counterclaim but does not advert to whether or not such documents are confidential or not.
Article 10 Hearings
Article 10.4 provides that all meetings and hearings shall be in private unless the parties agree otherwise.

Article 11 deals with witnesses but makes no reference to confidentiality or otherwise of testimony.

The Award, articles 16 and 17 deal with awards but do not refer to privacy or confidentiality in connection with awards.

Article 19 headed Exclusion of Liability provides that after the award has been made and the possibilities of correction and additional awards have lapsed or been exhausted ,neither the Court nor any arbitrator shall be under any obligation to make any statement to any person about any matter concerning the arbitration, nor shall any party seek to make any arbitrator or officer of the Court a witness in any legal proceedings arising out of the arbitration.

DOMESTIC/INTERNATIONAL
I have not made any particular differentiation between domestic arbitration and international arbitration in dealing with issues of privacy and confidentiality. The main difference between the two is that with an international arbitration it may well be subject to rules specifically designed for international commercial arbitration such as the UNCITRAL Model law and if an arbitration is involved be under the supervision of a recognised international arbitration institution such as the International Chamber of Commerce. the London Court of Arbitration or the

Australian Centre for International Commercial Arbitration- The law which might be applied to the arbitration could be the law of the country adopted by the contract expressly as the proper law of the contract which may of course be different to the law of the country in which the arbitration is actually held.

As with the law relating to domestic arbitration the rules applying to international commercial arbitration do not appear to deal with questions of privacy or confidentiality except on a very limited basis. Leading text books dealing with international commercial arbitration refer to the privacy of the proceedings and confidentiality but these concepts are not dealt with in any detail in relevant rules such as the UNCITRAL rules or in the rules of international commercial arbitration institutions.

Accordingly it is a matter for the parties to ensure that if they are involved in an international arbitration that their agreement or the reference should deal with the extent to which the proceedings are to be private and confidentiality of information dealt with in the arbitration and created for the purposes of the arbitration. They also need to be aware of any rules of law that apply in the jurisdiction in which the arbitration is conducted that could infringe on questions of privacy and confidentiality.

The need for the parties to work out for themselves the procedures to be followed in an international commercial arbitration is referred to in Redfern & Hunter, Law & Practice of international commercial Arbitration. They refer to the fact that there is evidence of growing internationalism in the practice of international commercial arbitration and a desire on the part of lawyers involved in the process to develop appropriate procedures. Nevertheless it will always be useful for the parties to deal with the rules which will govern their international commercial arbitration and not to assume that if they adopt the UNCITRAL rules or any other rules that issues such as privacy and confidentiality will be appropriately addressed.

FOOTNOTES

1. Riddick v. Thames Board Mills Ltd [1977] 3 All ER 67, Crest Homes Pty Ltd v. Marks (1987) 2 All ER 1074 and Ainsworth v. Hanrahan (1991) 25 NSWLR 155. Bailey, Simpson & Evans – Discovery and Interrogatories, 2nd Edition at pp.79-80.
2. Bray, Law of Discovery, 1885, p.238.
3. Crest Homes Plc v. Marks [1987] 2 All ER 1074, Holpitt Pty Ltd v. Varimu Pty Ltd (1991) 103 ALR 684, Carrington v. Sea World Australia Ltd [1992] 2 Qd R 470 and Sofilas v. Cable Sands (WA) Pty Ltd (1993) 9 WAR 196 Distillers Co (Biochemicals) Limited v. Times Newspaper Ltd [1975] I QB 613.
4. ALRC (1983) Canberra AGPS Vol.l at p.270 see also Privacy Act (Cth) 1988 sl4.
5. McComas, Davison & Gonski. The Protection of Trade Secrets, Butterworths, 1981. Strahan, Digest of Equity, 6th Edition, 1939 Article 184 Coco v A N. Clark (Engineers) Ltd [1969] RPC 41.
6. Kincaid, Confidentiality of Documents Made Available in the Arbitration Process

(1993) 12 The Arbitrator III.

7. Johnstone, Private and Confidential, (1992) II The Arbitrator 153.
8. [1990] I WLR 1205atp.1213.
9. Bernstein, Handbook of Arbitration Practice, Sweet & Maxwell, 1987 at p.101.
10. See Bernstein at p.130 also Mustill and Boyd, Commercial Arbitration; Butterworths, 1989 at pp.562-563.
11. Redfern & Hunter, Law and Practice of International – Commercial Arbitration; Sweet & Maxwell, 1986, 3-4 see also the Notes to Rules for the Conduct of Commercial Arbitrations published by the Institute of Arbitrators, Australia.
12. For the background to this reform see Report of the Working Group on the Operation of Uniform Commercial Arbitration Legislation in Australia, Attorney-General's Department.
13. UNCITRAL., 27th Session. New York, 31 May-17 June 1994, International Commercial Arbitration; – Draft Guidelines for Preparatory Conferences in Arbitral Proceedings.

MARITIME ARBITRATION

The Institute has been advised by The Maritime Law Association of Australia and New Zealand that the Association is to establish its own panel of maritime arbitrators. The panel list will be used by the President of the Association when requested to nominate an arbitrator and will be made available to those wishing to choose their own arbitrator.

Admission to the Association's panel of Arbitrators is at the discretion of its President.

In addition to experience requirements the Association's guidelines for admission to its panel provided that the applicant has been graded or accredited as an arbitrator by The Institute of Arbitrators Australia or a similar body elsewhere.