

## **CONFIDENTIALITY AND STATE PARTY ARBITRATIONS**

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The Law Commission has recently released a discussion paper on possible improvements to the Arbitration Act 1996 (*Law Commission Preliminary Paper N° 46 ‘Improving the Arbitration Act 1996’, September 2001*). The first issue identified in the discussion paper is the adequacy of section 14 of the Arbitration Act which deals with the question of the confidentiality of arbitration proceedings. Section 14 provides as follows:

***“14. Disclosure of information relating to arbitral proceedings and awards prohibited***

- (1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.*
- (2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection –*
  - (a) If the publication, disclosure, or communication is contemplated by this Act; or*
  - (b) To a professional or other adviser of any of the parties.”*

Section 14 was introduced into the Arbitration Act 1996 at the Select Committee stage as a response to the decision of the High Court of Australia in *Esso Australia Resources Ltd v Plowman* ((1995) 11 *Arbitration International* 235; [1995] 128 ALR 391) which decided that arbitration was private but not confidential to the parties. Confidentiality, the majority of the court agreed, was not “*an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration*”. This decision contradicted the English Court of Appeal decision in *Dolling-Baker v Merrett* ([1991] 2 All ER 890) which had held (at 898) that there was “*an implied obligation arising out of the nature of the arbitration itself*” that bound the parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of arbitration, or transcripts or notes of the

evidence in the arbitration, or even the award, save with the consent of the other party or pursuant to an order of the Court. *Eso Australia v Plowman* also ran counter to the general understanding of the arbitration community, at least in Europe, that arbitration proceedings were confidential. The High Court of Australia decision, and a subsequent decision of the Court of Appeal of New South Wales of similar effect (*Commonwealth of Australia v Cockatoo Dockyards Pty Ltd* (1995) 36 NSWLR 662) caused an uproar in the arbitration world and a flurry of articles. The general opinion seemed to be that, outside of Australia, arbitration was and should be confidential, but this confidentiality was subject to certain qualifications (*See in particular Jan Paulsson and Nigel Rawding 'The Trouble with Confidentiality' (1995) 11 Arbitration International 303-320; Patrick Neill Q.C. 'Confidentiality in Arbitration' (1996) 12 Arbitration International 287-317; Andrew Rogers Q.C. and Duncan Miller 'Non-Confidential Arbitration Proceedings' (1996) 12 Arbitration International 319-345; L. Yves Fortier Q.C. 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 15 Arbitration International 131-139*).

Shortly after the decision in *Eso Australia v Plowman* the United Kingdom amended its arbitration legislation by passing the Arbitration Act 1996 (U.K.). As the Law Commission's discussion paper explains (*paragraph 10*) legislators in the United Kingdom considered whether legislative provision was needed to protect the privacy and confidentiality of arbitration and decided that, as the exceptions and qualifications to the English principle of confidentiality of arbitration had not yet been fully worked out, then it was preferable not to legislate on the subject. The possible common law exceptions to the confidentiality of arbitration identified at this time were disclosure by a party of details of the arbitration to its insurers, to its investors of information needed to give a true view of the party's financial position, and disclosure by a government party subject to public disclosure obligations.

The New Zealand Legislature, in enacting section 14 of the Arbitration Act 1996, therefore rushed in where the United Kingdom Parliament feared to tread. In an effort to preserve the previously understood common law position from the *Eso Australia* view, the New Zealand Legislature imposed confidentiality on New Zealand arbitrations, unless the parties expressly agreed otherwise, subject only to a potential derogation from section 14 by section 9 of the Arbitration Act 1996.

Section 14 is therefore immediately objectionable on two grounds. Firstly, it ignores the exceptions or qualifications to the principle of confidentiality which exist or might exist, at common law. Secondly, it derogates from the principle of party autonomy that underpins the Arbitration Act 1996. The question of confidentiality, like other matters of arbitral procedure, should be left to freedom of contract and the agreement of the parties, and failing such

agreement, to the decision of the arbitrators appointed pursuant to the parties' agreement, and this result is best achieved if statute does not in effect create a presumption of total confidentiality. The parties can, of course, 'opt out' of the mandatory confidentiality rule in section 14, but this possibility is not entirely satisfactory. Firstly, the negotiating dynamic has been changed so that the 'default' position if agreement cannot be reached is total confidentiality, rather than the qualified common law confidentiality or a matter for argument before and decision by the arbitral tribunal on an *ad hoc* basis. Secondly, in the negotiation of most contracts the primary obligations and the commercial aspects of the arrangement normally attract the time and attention of the parties and their advisers, and the details of the arbitration clause are comparatively neglected. The parties agree in principle to arbitration, the applicable law and rules, and the number and appointment procedures for arbitrators, and often little more; a standard form arbitration clause may be used that was drafted without the idiosyncrasies of New Zealand law in mind. The result is that the confidentiality of the subsequent arbitration is in reality imposed by section 14 rather than agreed between the parties. It seems clear that had more consideration been given to the nuances of the reasoning of the English and Australian authorities on confidentiality in arbitration, the underlying principles of New Zealand's reform of its arbitration legislation, and international trends and practices generally, section 14 would not have been passed in its present form.

### ***Public and Private Disputes***

Comparisons between arbitration and litigation invariably refer to privacy or confidentiality as an advantage of arbitration. The existence of the dispute, and the terms of its resolution, might be forever kept from the public eye by the discrete institution of arbitration. This point was well made by Sir George Jessel M.R. in *Russell v Russell* ((1880) 14 Ch.D 471 at 474):

*"As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful."*

This facility to avoid 'painful' disclosure is perfectly acceptable between private individuals without public reporting responsibilities. It is, however, at odds with the principles of open government expected of public authorities. Section 14 therefore creates a dilemma for any Department or organisation subject to the Official Information Act 1982 that engages in arbitration of reconciling its statutory obligation of disclosure with a possible statutory obligation of confidentiality under section 14. If the Department or organisation is properly advised then a mutually satisfactory position might be negotiated with the other party and included in the arbitration agreement.

If this is not done, the Department or organisation might rely on section 9(2)(b) or (ba) of the Official Information Act to refuse a subsequent request for the disclosure of official information on the grounds of confidentiality, or alternatively might choose to utilise section 9 of the Arbitration Act to give precedence to its Official Information Act obligations. However, this latter course might override the legitimate expectations of the other party to at least some qualified confidentiality. The clumsiness of section 14, and its incompatibility with the principle of party autonomy, are again fully apparent. (*Section 9 of the Arbitration Act 1996 provides that “Where a provision of this Act is inconsistent with a provision of any other enactment, that other enactment shall, to the extent of the inconsistency, prevail”*).

We must also recognise the risk that a Department or organisation subject to the Official Information Act might see in section 14 a temptation to be tardy in its disclosure of official information, or as an excuse to plead powerless and so circumvent its obligations altogether. Indeed it is not difficult to imagine a Department or organisation in some circumstances finding section 14 very attractive as a possible means to bury official mismanagement or a dispute that might be politically painful in a long and conveniently confidential arbitration.

The Law Commission’s present review of the Arbitration Act 1996 provides the opportunity to consider not only whether section 14 requires a general repeal or amendment, but also whether it is time to recognise that different rules relating to the confidentiality of arbitrations might be necessary where one of the parties is the State or some state entity. In arbitrations between private parties an obligation of confidence, perhaps qualified in certain circumstances (for example, statutory reporting requirements for public companies) might remain appropriate. However, this article proposes that a separate standard is required for arbitrations involving the State or public authorities.

### ***New Zealand and the Growth of Investor-State Arbitrations***

The imperative to recognise a different approach to confidentiality in arbitrations involving the State or a state entity arises from the potential public importance of the issues involved in State party arbitrations generally, and particularly State party arbitrations involving foreign investment in New Zealand. It must be stressed that this is a matter of principle relating to government accountability and the public access to official information, unaffected by the actual level of state arbitration in New Zealand. Indeed it is fair to say, as the Law Commission recognised in its report prior to the enactment of the Arbitration Act 1996 (*see New Zealand Law Commission Report No. 20 ‘Arbitration’ (1991) paragraphs 18-20*), that arbitration, and particularly international arbitration, is relatively under-utilised in New Zealand, although this is likely to change. Foreign investors in New Zealand

appear to date to have been prepared to accept the jurisdiction of the New Zealand courts more readily (and therefore resort less to arbitration) than in other regions of the world. This reflects admirably on the international reputation of the New Zealand judiciary (including the Privy Council), and might also indicate that inbound foreign investment has historically come from within the common law world.

However, there are good reasons to conclude that arbitrations between the New Zealand Government and foreign investors are likely to be substantially more common and important in future. The protection of investment in accordance with international standards is a condition of participation in global investment flows, and the international standard is increasingly being equated with rights of investors against host States enforceable by international arbitration. Such rights have recently formed an integral part of some prominent multinational trade agreements, notably the North Atlantic Free Trade Agreement (“NAFTA”) and the Energy Charter Treaty, and also nearly two thousand Bilateral Investment Treaties worldwide. A distinctive feature of these instruments is the various guarantees provided by State parties to foreign investors, particularly standards of national, most-favoured-nation and fair and equitable treatment, and most importantly, protection from expropriation without compensation. These guarantees are enforceable *directly* by the foreign investor against the State party through arbitration, usually under the auspices of the International Centre for the Settlement of Disputes (“ICSID”) established pursuant to the 1965 *Washington Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States*. To date, New Zealand has not participated significantly in the development of investor-State arbitration practice, notwithstanding the involvement of the New Zealand Government in one important ICSID arbitration (*Mobil Oil Corporation and others v. New Zealand*, ICSID Case No. ARB/87/2; [1989]2NZLR 649; 4 ICSID Rep. 140 (1997)). The recent Agreement between New Zealand and Singapore on a Closer Economic Partnership does provide for investor-State arbitration, but the Closer Economic Relations Agreement with Australia contains no arbitration provisions.

However, the extension of free trade areas and bilateral arrangements around the Pacific rim, and New Zealand’s participation in this process, are inevitable, and this will raise the profile and frequency of investor-State arbitrations in the region. Australia is vigorously pursuing a free trade agreement with the United States, which will probably provide for investor-State arbitration in accordance with normal United States practice. Investor-State arbitrations are now well established in Latin America, and their role will be further enhanced if negotiation of the proposed Free Trade Agreement of the Americas (which involves all thirty-four active members of the Organisation of American States) is completed. If New Zealand wishes to pursue free trade agreements with this region, as the Prime-Minister’s recent

visit to Brazil, Uruguay, Chile and Argentina suggests, then it must be prepared to engage the established dispute settlement mechanism of this region.

Finally, the possibility must be acknowledged that the abolition of the Privy Council will change the perception of foreign investors of the sovereign risk relating to the neutrality or competence of domestic courts in New Zealand. If such a change occurs, an increased resort to international arbitration is likely to result.

A glance at the type of issues raised by investor-State arbitrations puts in sharp relief the need for protection of the public right of access to official information in this type of arbitration. They often involve issues of significant public concern that ought not to be subject to a presumption of blanket confidentiality. For example, New Zealand's involvement in the ICSID arbitration with Mobil Oil referred to above arose from an agreement to give effect to a 'Think Big' policy of the Muldoon government relating to natural gas conversion to petrol. When the subsequent Labour Government passed the Commerce Act in 1986 Mobil was advised by the Ministry of Energy that it would not give effect to certain provisions of the agreement which contravened the Commerce Act. The arbitration therefore involved politically important issues of energy and competition policy. Similarly, *Esso Australia v Plowman* related to agreements for the sale of natural gas to two public utilities in Victoria. As Brennan J. observed "*The award to be made in the respective arbitrations will affect the price of energy...to the public. The public generally has a real interest in the outcome, and perhaps the progress, of each arbitration which the relevant public authority has a duty to satisfy.*" (at 253). The importance of the public right to know in State party arbitrations has recently become a highly charged issue in North America as a result of the clash between environmental and trade policies in some leading NAFTA arbitrations. *Ethyl Corporation v Government of Canada* involved a Canadian enactment that prohibited a gasoline additive (MMT) in Canada on the grounds of "*the maintenance of health, for the conservation of clean air and for the protection of the environment*". Ethyl owned a processing facility for MMT in Canada, and challenged the legislation under Chapter 11 of NAFTA (which relates to investment and settlement of disputes) on grounds including that it amounted to expropriation without compensation of its investment in Canada. Canada unsuccessfully challenged the jurisdiction of the NAFTA Arbitral Tribunal, and then settled the claim by withdrawing the legislation, paying \$US13,000,000 in damages, and providing an admission that there was no scientific evidence to support claims that MMT posed a health threat (*Ethyl Corporation v. Government of Canada, Preliminary Award on Jurisdiction dated June 24, 1998*; see <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp> and Henri C. Alvarez 'Arbitration Under the North American Free Trade Agreement' (2000) 16 *Arbitration International* 393-430, at 421-427). Similarly, *Metalclad*

*Corporation v United Mexican States* involved the politics of the construction of a hazardous waste landfill in Mexico, which had been authorised by the Federal government. After major public protests and demonstrations, the State Governor intervened and declared the area an ecological preserve. Metalclad commenced arbitration against the Mexican government pursuant to NAFTA and was awarded \$US16,685,000 on the basis that the declaration of the ecological preserve had expropriated its investment (*ICSID Case No. ARB(AF)/97/1; The final award of August 30 2000 is at <http://www.worldbank.org/iscid/cases/awards.htm>* ).

As these examples show, investor-State arbitration might raise questions of significant public importance and political accountability. They might raise issues relating to public health, protection of the environment, control of natural resources, privatisation of state assets, utilities regulation and competition policy. When the New Zealand Government arbitrates such matters the presumption should be of a public right to know, unless there are good reasons to the contrary. Section 14, which prohibits the parties from disclosing “*any information relating to arbitral proceedings*”, is unacceptable insofar as it applies to the New Zealand Government, and therefore should be repealed at least in respect of State party arbitrations. *(There is an interesting question, that might be acknowledged but not pursued here, as to whether an arbitral tribunal bound to apply substantive New Zealand law but without a New Zealand seat would consider itself bound by the confidentiality provision in section 14; the possibility that an international arbitral tribunal might ignore section 14 provides no justification not to repeal or amend it)*

In addition to the question of principle, there are two further reasons why section 14 should be repealed in respect of State party arbitrations. Firstly, it is unnecessary. The parties and the arbitral tribunal can adequately protect genuinely confidential information without a blanket confidentiality provision. The Parties have the opportunity to address and provide for genuine confidentiality concerns at the time of negotiating the contract, at the time of providing the information, and during the arbitration; and if agreement cannot be reached then the parties can resort to the arbitral tribunal for an appropriate order.

Secondly, as a result of the extensive public concern in North America over the secrecy and far-reaching effects of the orders of NAFTA arbitral tribunals there is now a definite trend in this region in favour of public access to information in State party arbitrations. In *Metalclad Corp v United Mexican States*, for example, where the Claimant had an obligation under United States securities law to provide information to its shareholders about its involvement in an arbitration that might significantly affect its share value, the Arbitral Tribunal recognised that there was no general principle of confidentiality, under either NAFTA or the ICSID Additional Facility Rules

applicable in that case, that would operate to prohibit public discussion of the arbitration proceedings by either party. Most recently, the NAFTA Free Trade Commission has issued a practice note dated July 31, 2001 relating to confidentiality in NAFTA arbitrations which states:

*“Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven [Chapter 11 relates to the investment and the settlement of disputes] in order to clarify and reaffirm the meaning of certain of its provisions:*

**A. Access to documents**

*1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration...[nor] precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.*

*2. In the application of the foregoing:*

*.....*

*b. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:*

- (i) confidential business information;*
- (ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and*
- (iii) information which the Party must withhold pursuant to the relevant arbitral rules”*

*(see <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp>)*

Finally, a recent NAFTA Arbitral Tribunal in *Methanex Corporation v United States of America* was prepared to go a step beyond public access to information in State party arbitrations to actual public participation through *amici curiae* briefs. This case again involved a challenge to the regulation of gasoline additives, this time in the State of California. Four environmental NGOs (International Institute for Sustainable Development, Committee for a Better Environment, the Earth Institute and the Centre for International Environmental Law) applied to appear as *amici curiae* on the basis, *inter alia*, that the arbitration raised issues of sustainable development not sufficiently recognised by the submissions of the parties, and that the case raised issues of constitutional importance concerning the balance between



governmental authority to implement environmental regulations and property rights. The Tribunal decided that it was able to accept *amici* briefs, noting that there was an undoubted “*public interest in this arbitration... There is also a broader argument... the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.*” (*Decision of the Tribunal on Petitions From Third Persons to Intervene as Amici Curiae* dated 15<sup>th</sup> January, 2001, paragraph 49, available at the IISD website at [http://iisd.ca/pdf/trade\\_methanex\\_background.pdf](http://iisd.ca/pdf/trade_methanex_background.pdf)). These NAFTA developments demonstrate the direction of international arbitral practice in State party arbitrations, with which section 14 of the Arbitration Act is entirely out-of-step.

### **Conclusions:**

The enactment of a blanket confidentiality provision for arbitration in section 14 of the Arbitration Act 1996 was a hasty overreaction to a controversial decision of the High Court of Australia. The Law Commission’s present examination of whether section 14 deals appropriately with issues of confidentiality is timely.

Where the New Zealand Government is a part to an arbitration in some capacity, then section 14 is inappropriate and creates a danger to public access to information and to political accountability. It reverses the proper presumption, and is capable of abuse. Genuinely confidential information can and should be protected by party agreement or tribunal order, but there should be no legislative presumption or ‘default’ position of total confidentiality for State party arbitrations.

As a final point, the State and public interests involved in and recognised by the Australian courts in the *Esso Australia* and *Cockatoo Dockyards* cases have been under-estimated by critics of these decisions. The Australian approach is progressive and constructive when viewed from a public law perspective. In any event, in the respectful view of this writer *Esso Australia v Plowman* was, on its facts, a correct decision and section 14 was an ill-considered response.