

Litigation Update

January 2008

ARBITRATION NEWS

Recent amendments to the Arbitration Act 1996 improve arbitration as a means of resolving commercial disputes

Important changes to the Arbitration Act 1996 ("Act") came into force in late 2007¹, dealing with a number of practical issues that had arisen in the workings of the Act. The amendments:

- (a) clarify the confidentiality of arbitration proceedings and the exceptions to that confidentiality;
- (b) enhance the powers of the arbitrator to grant interim measures and provide a mechanism for the enforcement of such measures;
- (c) confirm that the whether or not there was sufficient (or any) evidence to support a finding of fact made by an arbitrator is not a question of law for the purpose of an appeal from an arbitral award; and
- (d) improve the provisions concerning consumer arbitration agreements.

Of the changes, those in relation to confidentiality and interim measures are particularly significant.

Confidentiality

Confidentiality of arbitration proceedings is almost taken as given, and is often a key reason why commercial parties choose arbitration as a method of resolving their disputes.

The Act's provisions in relation to confidentiality were, however, somewhat lacking and unclear, particularly in relation to what precisely was to be kept confidential and the exceptions to confidentiality. For example, the earlier provisions did not provide an exception to confidentiality where disclosure was required as a matter of law. The sole exceptions were if disclosure was contemplated by the Act itself, or disclosure was to a professional or other adviser of any of the parties.² Those exceptions were clearly too limited.

The new provisions set out with much greater clarity the actual material that is deemed to be confidential. Like the earlier provisions, the "catch all" is that "*information that relates to the arbitral proceedings or to an award made in those proceedings*" is deemed confidential.³ However, the amendments go on to clarify that this includes:

- (a) statements of claim and defence, and any other pleading type documents;
- (b) evidence (documentary or otherwise) supplied to the arbitral tribunal (this would include documents given by way of discovery, and witness statements, expert reports etc);
- (c) arbitrator's notes of the proceedings;
- (d) transcripts of the proceedings; and
- (e) rulings of the arbitrator.

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1. See the Arbitration Amendment Act 2007.

2. Sections 14(2)(a) and (b) of the Act.

3. New section 2(1), definition of "confidential information".

Importantly, the exceptions to confidentiality are widened. There is now an express exception where disclosure is required as a matter of law, or required by a regulatory body (for example, New Zealand Exchange Limited).⁴ Disclosure is also permitted when in accordance with an order made by a court.⁵ Further exceptions include where disclosure is necessary to:

- (a) establish or protect a party's legal rights against a third party; and
- (b) to make and prosecute an application to a court under the Act.⁶

These two exceptions are, however, limited to the extent reasonably required to serve the relevant purpose. The provisions also permit the arbitrator or High Court to allow or prohibit the disclosure of confidential information, further enhancing the discretion that may be applied on a case by case basis.⁷

Despite lobbying from a number of interest groups, the new provisions do not provide for arbitration related court proceedings (for example, an application to remove an arbitrator, an appeal on a question of law, or an application to set aside an award) to be held on a confidential basis. As many parties will know, the confidentiality offered by arbitration is immediately undone the moment such an application is made to the High Court. The new provisions in the Act do provide for arbitration related court proceedings to be held in private if the Court is satisfied that "*the public interest in having the proceedings conducted in private is outweighed by the interests of the [arbitrating parties] to have the whole or any part of the proceedings conducted in private*". However, the default, and it would seem, preferred position is that such proceedings are to be held in public.

As a practical point, one of the matters the Court must consider when determining an application to hold arbitration related court proceedings in private is the terms of any arbitration agreement between the parties. Accordingly, if parties are negotiating a particularly confidential agreement, it would be wise to include in the arbitration clause a provision that the parties intend for any court related proceedings to also be conducted on a private basis and that they will take all steps necessary to achieve this. This might at least avoid an application to the Court for confidentiality being actively opposed.

Interim measures

The policy behind the Act was that, as far as is possible, all applications should be made to the arbitrator, including applications for interim measures. That said, however, the Act expressly states that it is not inconsistent with an arbitration agreement for a party to seek interim relief from the Court, albeit that the substance of the dispute is resolved by the arbitrator.⁸

As a result of the amendments, the scope of interim measures able to be ordered by an arbitrator is clarified and expanded, and a new regime is introduced for their enforcement through the courts. It remains possible for parties to seek urgent relief from the Court, but the new provisions again reinforce that wherever possible, the first port of call should be the arbitrator.

New section 17 of the Act expressly sets out the type of interim measures that the arbitrator can award. This includes any order which maintains the status quo pending resolution of the dispute, taking steps to preserve assets out of which a subsequent award may be satisfied, preserving evidence and the giving of security of costs. The Act also sets out the standard to be applied by the arbitrator when determining whether or not to grant an interim measure, which is very similar to the test to be applied by the courts when considering the granting of an injunction.

Two further developments are of particular note:

- (a) first, the new regime permits the arbitrator to make "preliminary orders", which are ex parte orders pending a full hearing on an application for an interim measure; and

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4. New section 14C(d).

5. New section 14C(c).

6. New section 14C(b).

7. New sections 14D and 14E.

8. Article 9 of the First Schedule to the Act.

(b) second, a regime for the enforcement by the courts of an interim measure granted by an arbitrator, irrespective of whether or not it is granted in the form of an arbitral award.

Conclusion

Given the fact that the amendments were only introduced in late 2007, it is too early to tell how they will work in practice and how any interpretational issues will be dealt with by the Courts. In the main, however, and aside from some relatively minor drafting points that may give rise to some argument or issues, the amendments are a welcome step forward for commercial arbitration in New Zealand.

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