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"A SLIDING SCALE OF ARBITRAL CONFIDENTIALITY": IMPLICATIONS OF A CORPORATION V. (1) FIRM B (2) MR W [2025]

The recent judgment in [A Corporation v Firm B and Another](#) provides guidance on the general duty of arbitral confidentiality and highlights the nuanced nature of confidentiality in arbitration.

BACKGROUND

Two ship owning companies, A Corporation and D Corporation, who share the same ownership, were involved in separate disputes with B Corporation and C Corporation (who also had an ongoing cooperation agreement) relating to alleged breaches of vessel sale agreements and the conditions of the vessels on delivery:

1. Arbitration 1: A Corporation was engaged in arbitration with B Corporation over Vessel 1 (concluded).
2. Arbitration 2: D Corporation was engaged in arbitration with C Corporation over Vessel 2 (ongoing).

The First Defendant was a firm of solicitors with offices in London and Asia. A partner in the First

Defendant's London office represented B Corporation in Arbitration 1, while a partner in the First Defendant's Asia office acted for C Corporation in Arbitration 2.

A Corporation was concerned that the First Defendant's London Office had breached arbitral confidentiality by sharing information relating to Arbitration 1 with their Asia office to assist with the ongoing Arbitration 2. The alleged disclosures included information relating to a settlement offer, expert opinions, and issues and allegations related to the condition of the vessels and the claims involved. A Corporation considered these documents confidential as they were derived from the arbitration process and could potentially influence the proceedings in Arbitration 2. Consequently, A Corporation sought various orders for interim injunctive relief, including orders that the First Defendant:

1. cease acting for Corporation C; and
2. refrain from sharing confidential information with C Corporation or anyone assisting C Corporation in respect of Arbitration 2.

QUESTIONS CONSIDERED

In considering the injunction application based on the general duty of arbitral confidentiality, Mr Justice Foxton examined the following questions:

1. What material does the obligation of arbitral confidentiality extend to; and
2. To what extent is this obligation engaged here, and what are the relevant exceptions?

FINDINGS

The Judge elaborated on the scope of arbitral confidentiality by distinguishing between inherently confidential information and materials protected due to their use in arbitration. He noted that while documents generated or prepared for use in arbitration, such as pleadings, witness statements, and expert reports, are subject to confidentiality, a party's own documents that existed independently of the arbitration do not become confidential merely because they are used in the proceedings.

This is because the obligation of arbitral confidentiality arises from the private nature of the arbitration process itself, rather than the inherent nature of the information. The Judge stated, "[T]he implied obligation of arbitral confidentiality is not premised on the inherent confidentiality of the material to which it attaches, but arises from the private nature of the process – it is not the information itself which benefits from arbitral confidentiality in this particular context, but the fact and manner of its deployment in the arbitration."

Furthermore, he acknowledged that the obligation extends to derived information—material obtained with the use of confidential information—even if the disclosure in question does not directly disclose the original confidential information itself.

However, the mere fact that there is a commercial dispute subject to arbitral proceedings does not in itself make the existence of the dispute and the events that gave rise to it confidential. Therefore, documents that come into existence independent of the arbitral process are not automatically subject to the general duty of arbitral confidentiality simply because a party has relied on them during the arbitration.

In addressing the second question, the Judge identified several key exceptions to the obligation of arbitral confidentiality, including express or implied consent; an order or leave of the court; where such a disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and where the interests of justice/public interest call for such a disclosure. Additionally, the Judge noted that disclosure of certain material may be permissible to elicit similar fact evidence from a third party who is believed to have similar complaints against the opposing party.

The Judge essentially considered that a pragmatic approach should be taken and recognised a "sliding scale" of confidentiality, suggesting that the sensitivity of the information and the context in which it is used may influence the degree of protection and the ease of establishing an exception to the general rule, noting that *"the disclosing of a parties' own filings or reports is, all other things being equal, less intrusive than disclosure of material produced by another party or which draws on that material (with material produced by that other party under legal compulsion in the arbitration coming at or near the most sensitive end of the spectrum)."*

APPLICATION AND FACTS

In applying the above principles, the Judge rejected A Corporation's applications for interim injunctive relief. In doing so, he found that there was limited prejudice to A Corporation and D Corporation from any alleged breaches of confidentiality, as the information disclosed was either already known to C Corporation or did not confer any enduring advantage.

Additionally, many of the alleged breaches fell within permissible exceptions to arbitral confidentiality, such as the sharing of information for establishing similar events and complaints relating to both vessels. The Judge was satisfied with the measures taken by the solicitors (Firm B) to prevent further disclosure of confidential information, including the standing down of personnel involved in Arbitration 1 from Arbitration 2, the "cleansing" of the Vessel 2 file, and the implementation of an information barrier.

Moreover, he considered the significant prejudice that would be occasioned to C Corporation if Firm B's Asia office were enjoined from continuing to act, as C Corporation would be deprived of their choice of lawyer, who had been acting for them for a year. The Judge concluded that granting an injunction would occasion significant prejudice to Firm B and C Corporation, whereas not granting the injunction would not occasion any prejudice to A Corporation, and very limited prejudice to D Corporation.

COMMENT

This Judgment provides useful guidance on the scope of arbitral confidentiality, the circumstances in which it arises, and the exceptions to the general principles. It also underscores the delicate balance between maintaining confidentiality in arbitration and accommodating the practical needs of legal representation. By allowing a pragmatic approach and recognising a sliding scale of confidentiality and identifying specific exceptions, the Judgment offers a nuanced framework for navigating confidentiality issues, and ensures that the protection of sensitive information does not impede the pursuit of justice or the legitimate interests of the parties involved.

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