

CONFIDENTIALITY IN THE ARBITRATION PROCESS

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A number of reasons are typically advanced in favour of arbitration, as opposed to the conventional litigation process, in the resolution of disputes. Amongst these are lower cost to disputants, earlier resolution of disputes, and the presumed confidentiality inherent in the arbitration process, which avoids the light of the public record that normally accompanies traditional litigation. Much discussion appears to revolve around the issue of confidentiality, perhaps because it is seen by parties to a dispute as a particularly attractive alternative to the publicity that might result from a piece of litigation. Whether to avoid embarrassment, protect trade secrets, or for other reasons, confidentiality seems to be a key element of arbitration.

By way of example, the ADR Institute of Canada, Inc.'s *National Arbitration Rules*¹ provide, at Rule 33, in relation to the conduct of arbitration under the Institute's Rules:

The parties, the witnesses and the Arbitrators shall treat all meetings and communications, the proceedings, documents disclosed in the proceeding, discovery and the awards of the Tribunal as confidential, except in connection with a judicial challenge to, or enforcement of, an award, and unless otherwise required by law. Nothing in this Rule shall preclude disclosure of such information to a party's insurer, auditor, lawyer or other person with a direct financial interest in the arbitration. The parties shall use such information solely for the purposes of the arbitration, and shall not use or allow it to be used for any other purpose unless the parties agree otherwise or unless otherwise required by law.

While the Rule provides that the arbitration process is to be treated as confidential by all involved, the parties, the witnesses and the arbitrator², it also seems to carve out a rather

¹ ADR Institute of Canada, Inc.: *National Arbitration Rules*, amended October, 2008.

² Legal counsel is not listed, presumably because they act as agents for their respective clients and are therefore bound by the same obligation to confidentiality that binds their clients.

broad set of exceptions where confidentiality may be sidestepped.³ Amongst other things, the Rule is qualified to provide that an obligation to maintain confidentiality may be set aside where it is “otherwise required by law”.⁴ Within this broad exception one may arguably include circumstances where it is deemed to be in the interests of justice to do so.

Is confidentiality then an absolute pre-condition to arbitration? Is it inviolable, in light of its attraction as a key and desirable feature of arbitration? Can it be set aside in circumstances where parties to a dispute have agreed to arbitration in the reasonable expectation that the arbitration proceedings would be maintained in confidence?

In respect of the legal position concerning confidentiality in Swedish arbitral proceedings, Clas Romander and Lennart Petterson write that:

... as confidentiality is a classic argument in favour of the utilisation of arbitration as opposed to court proceedings, there has been a general understanding that some form of duty of confidentiality exists, at least to some extent. However, if such duty exists in Sweden, it should be noted that this duty is not universal. With reference to the judgment of the High Court of Australia in 1995, there is no global consensus on the issue of confidentiality in arbitration proceedings.⁵

The judgment of the High Court of Australia to which Romander and Petterson refer is *Esso Australia Resources Ltd. v. Plowman*.⁶ That case may have eroded somewhat the concept of confidentiality as it applies to arbitration proceedings.

³ The Rule also provides that witnesses are to be bound by the same duty of confidentiality as the other participants in the process. Absent an order of the Arbitration Tribunal in question to that effect, I question whether witnesses can be effectively precluded from discussing their testimony publicly and otherwise commenting on their understanding of what has transpired in the arbitration.

⁴ Arguably, no such qualification is necessary since a Court with inherent jurisdiction is entitled to govern its process and do what is required to best serve the interests of justice.

⁵ *Confidentiality in Swedish Arbitration Proceedings* (Arbitration Institute of the Stockholm Chamber of Commerce; 2001-02-01). The authors refer to a judgment of the Swedish Supreme Court (Högsta domstolen), Case no. T 1881-99, in which it is said by the authors that the Court clarified the question of whether confidentiality is an inviolable and integral part of the law in Sweden. It provides that parties may disclose certain information without the risk of having such information without the risk that it may be used against them in subsequent proceedings. The question of what type of information may be freely disclosed, however, must be carefully considered, write the authors.

⁶ [1995] HCA 19 (hereinafter “*Esso*”).

However, it does not appear as if such a decision was necessary to provide courts with ample discretion to set aside confidentiality, whether contractual (as in situations where there is a written agreement providing for it), implied or ordered by arbitrators.

Esso arose in the context of arbitration in Australia between Esso Australia Resources Ltd. and two public utilities concerning the pricing of natural gas supplies. The subject agreements as between Esso and the utilities provided that the price for the gas sold to the utilities was to be adjusted on account of changes to royalties and taxes payable.⁷ The sales agreements also provided for the arbitration of any disputes. They did not provide explicitly that any resulting arbitrations were to be confidential.

In 1991, Esso sought an increase in the price to be paid by the utilities. The utilities refused to comply. The resulting disputes were accordingly referred to arbitration by Esso. While the sales agreements provided for the production by Esso of certain information, prior to arbitration, to substantiate or justify the proposed increased pricing, it did not produce such information.

A third party, The Minister for Energy and Minerals⁸, commenced an action against Esso and the utilities seeking a declaration providing that there was no implied term in the sales agreements providing that the arbitrations were to be private (so as to exclude from the hearings parties that were not parties to the arbitrations) and no implied term imposing upon the utilities an obligation of confidentiality.⁹ The Minister, not a party to the arbitrations, but under whose authority the utilities operated, sought disclosure from the utilities of information produced by Esso in the context of the arbitrations. Esso considered such information to include sensitive trade secrets, having

⁷ *Esso*, supra, paragraphs 1 and 2.

⁸ Hence the name of the case, The Honourable Sidney James Plowman being the Minister.

⁹ *Esso*, supra, paragraphs 6 to 8.

to do with gas production and other matters in respect of which Esso preferred its competitors to remain in the dark. Esso therefore resisted the Minister's claim.¹⁰ It did agree to provide such information if the utilities agreed to enter into agreements providing that they would not, in turn, disclose the information to anyone else. For its part, the government took the position that the utilities would be statutorily bound to pass it on and, accordingly, such arrangement was not accepted.¹¹

The issue in *Esso*, in essence, became whether, in the absence of an explicit provision, there was any implied obligation of confidentiality. The Court agreed that:

... the efficacy of a private arbitration as an expeditious and commercially attractive form of dispute resolution depends, at least in part, upon its private nature. Hence the efficacy of a private arbitration will be damaged, even defeated, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration.¹²

Notwithstanding, the Court concluded that, if an obligation of confidentiality "had formed part of the law", it would "have been recognized and enforced by judicial decision long before *Dolling-Baker*."¹³ In other words, if such an obligation was historically recognized at law, it would have been enshrined in the case law sooner. If

¹⁰ In *Esso*, Chief Justice Mason writes:

[9] ... the Minister's counsel submitted that, in the case of the GFC [one of the utilities concerned] arbitration, the declaration should take the following form:

"1. GFC is not restricted from disclosing to the Minister and third persons information provided to it by Esso/BHP pursuant to their obligation under clause 12.8 of the 1975 Sales Agreement to provide to GFC details of the increase or decrease and the method and distribution of such royalties, taxes, rates, duties or levies.

2. There is no express or implied term of the 1975 Sales Agreement that restricts disclosure to the Minister and third persons of information obtained by GFC in the course of or by reason of arbitration pursuant to the 1975 Sales Agreement.

3. GFC is not restricted from disclosing information to the Minister and third persons by reason only that

(a) the information was obtained by it from Esso/BHP in the course of or by reason of arbitration pursuant to the 1975 Sales Agreement; and

(b) the information has not otherwise been published."

Likewise, the Minister's counsel sought similar declarations in relation to the SEC [being the other utility concerned] arbitration.

¹¹ *Esso*, supra, paragraph 10.

¹² *Esso*, supra, paragraph 28.

¹³ *Esso*, supra, paragraph 30. *Dolling-Baker*, a 1990 decision of the English Court of Appeal, is discussed below.

confidentiality is not then an “essential characteristic” of arbitration, it follows that it cannot be found to be an implied term either.¹⁴ That is, if it does not exist to begin with, it cannot be deemed to exist at all.

Moreover, Chief Justice Mason writes:

... it has to be acknowledged that, for various reasons, complete confidentiality of the proceedings in an arbitration cannot be achieved. First, it is common ground between the parties that no obligation of confidence attaches to witnesses who are therefore at liberty to disclose to third parties what they know of the proceedings. Secondly, there are various circumstances in which an award made in an arbitration, or the proceedings in an arbitration, may come before a court involving disclosure to the court by a party to the arbitration and publication of the court proceedings. Thus, by leave of the Supreme Court, an award made under an arbitration agreement may be enforced in the same manner as a judgment or order of that Court to the same effect. An award may become subject to judicial review. The Supreme Court may determine a preliminary point of law arising in the arbitration, and may remove an arbitrator or umpire. And the Court has the same power to make interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court. Thirdly, there are other circumstances in which an arbitrating party must be entitled to disclose to a third party the existence and details of the proceedings and the award. An arbitrating party may be bound under a policy of insurance to disclose to the insurer matters involved in the arbitration proceedings which are material to the risk insured against. Likewise, an arbitrating party may be obliged to disclose the existence and nature of arbitration proceedings as well as the award made in the proceedings because the disclosure is necessary in order to state accurately what are the assets and liabilities of the party or to give an indication of its future prospects. Such a disclosure may be necessary in order to comply with the statutory requirements regulating the provision of financial information by corporations or with stock exchange requirements or simply because a company considers that it is desirable that its shareholders and the market should have up-to-date information concerning the company's affairs.¹⁵

There being no obligation of confidentiality, the Court concluded, with reasoning that is difficult to follow, that it need not deal with whether the difficulty in carving out exceptions to such an obligation render the implication of such term impossible:

In the light of the conclusion which I have reached, I do not need to consider whether the difficulties in defining the exceptions to any implied term forbidding disclosure are such as to preclude the implication of such a term. That the difficulties are considerable was acknowledged both by the Court of Appeal in *Dolling-Baker* and by Colman J in *Hassneh Insurance*. Colman J thought that a qualification could be formulated along the lines of the exceptions to a bank's duty of confidentiality, which had been discussed by the members of the English Court of Appeal in *Tournier v. National Provincial and Union Bank of England*. In that case, the formulations of these exceptions differed to some extent. Colman J expressed the qualification applicable to arbitration agreements in these terms:

"If it is reasonably necessary for the establishment or protection of an arbitrating party's legal rights *vis-a-vis* a third party, in the sense which I have described, that the award

¹⁴ *Esso*, supra, paragraph 37.

¹⁵ *Esso*, supra, paragraph 31. References omitted.

should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it would not be a breach of the duty of confidence."

For my part, if an obligation of confidence existed by virtue of the fact that the information was provided in and for the purposes of arbitration, this statement of the qualification seems unduly narrow. It does not recognize that there may be circumstances, in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a "public interest" exception. The precise scope of this exception remains unclear.¹⁶

That is, if an obligation did exist, it would be subject to a "public policy" exception, the extent of which remains to be defined.

The Court in *Esso* further rejected the notion (as Canadian courts appear to have done, as discussed below) that evidence given in an arbitration is subject to an implied undertaking rule. It went on to conclude that:

... consistent with the principle as it applies in court proceedings, the obligation of confidentiality attaches only in relation to documents which are produced by a party compulsorily pursuant to a direction by the arbitrator. And the obligation is necessarily subject to the public's legitimate interest in obtaining information about the affairs of public authorities. The existence of this obligation does not provide a basis for the wide-ranging obligation of confidentiality which the appellants seek to apply to all documents and information provided in and for the purposes of an arbitration.¹⁷

In *Adesa Corp. v. Bob Dickenson Auction Service Ltd.*¹⁸, a decision of the Ontario Superior Court of Justice (Commercial List) a defendant sought production of transcripts of discoveries and oral hearings from an arbitration proceeding to which the plaintiff had been a party, but not the defendants. In concluding the award made at the arbitration, the arbitrator imposed a confidentiality order providing as follows:

I order that no portion of the transcripts of the hearing or the examination for discovery in this matter or the evidence contained therein shall be provided or communicated to any person apart from counsel on the record to the parties in the arbitration.¹⁹

The defendant also sought an order vacating or rescinding the arbitrator's order as to confidentiality.²⁰

¹⁶ *Esso*, supra, paragraph 38. Emphasis added. *Hassneh Insurance* a 1993 decision of the English Queens Bench, is discussed below.

¹⁷ *Esso*, supra, paragraph 43. Emphasis added.

¹⁸ 2004 CarswellOnt 5087 (hereinafter "*Adesa*"). I recall some years ago being in Court, waiting for my turn to argue my case, and having the opportunity to witness the argument in *Adesa*. I recall counsel commenting on the dearth of conclusive authority on the subject.

¹⁹ *Adesa*, supra, paragraph 22.

It was common ground in *Adesa* that the issues in the action were the same as some of those considered in the arbitration.²¹ The plaintiff also conceded that some unfairness would result from the fact that it would have access to the arbitration transcripts, but the defendants would not.²² Perhaps most importantly, the Court found that “there was an expectation of confidentiality in the Arbitration.”²³

In *Adesa*, Justice Cameron considered the decision in *Hassnah Insurance Co. of Israel v. Mew*²⁴ in which it was held that implicit in arbitration is the expectation of privacy and that “arbitration documents should not be ordered disclosed unless they are relevant and necessary for dispensing fairly with the cause or for saving costs.”²⁵ In assessing what is “necessary”, His Honour concluded that:

Necessity means that the party seeking discovery of the arbitration could not possibly succeed in the proceeding without such discovery, or would have only a very slim chance of success without inspection but would have a strong chance of success with inspection or the discovery must be essential to the interests of justice.²⁶

The Court further re-iterated that, on an application for production, it is not bound by an agreement pursuant to which parties may have purported to agree to maintain documents confidential. Such agreement could not restrict the inherent authority of the Court to order documentary production. “If the document is relevant to the issues pleaded it must be produced.”²⁷ In considering the implied undertaking rule contained in the Ontario *Rules of Civil Procedure*²⁸ and the discretionary exception provided for

²⁰ *Adesa*, supra, paragraph 1.

²¹ *Adesa*, supra, paragraph 23.

²² *Adesa*, supra, paragraph 37.

²³ *Adesa*, supra, paragraph 56.

²⁴ [1993] 2 Lloyd’s Rep. 243 (Eng. Q.B.).

²⁵ *Adesa*, supra, paragraph 44. Emphasis added.

²⁶ *Adesa*, supra, paragraph 45.

²⁷ *Adesa*, supra, paragraph 46.

²⁸ R.R.O. 1990, Reg. 194, as amended.

therein, Justice Cameron concluded such exception does “not contemplate an arbitrator’s order of confidentiality of the arbitration evidence.”²⁹

Finally, in rejecting the proposition that the obligations of confidentiality in the arbitration process rise to the status of a privilege that ought to be recognized in law, the Court concludes:

I am satisfied that there was an expectation of confidentiality in the Arbitration. The arbitration relationship generally benefits greatly from the element of confidentiality. The confidentiality of arbitration proceedings should be fostered to maintain the integrity of the arbitration process. I do not regard confidentiality as essential to the arbitration process. In my view “sedulously” is perhaps a somewhat strong adverb for these circumstances. In balancing the interests served by confidentiality against the interests served in determining the truth and disposing correctly of the litigation, I do not think the confidentiality of arbitration proceedings should be elevated to the status of a privilege such as solicitor-client or spousal privilege or, on occasion, doctor-patient or spiritual adviser-penitent. I am not persuaded that the confidentiality of the arbitration process, including the need to encourage the truth of the evidence therein, is so important as to outweigh the need in this court for justice if that requires the disclosure. The principle to be protected by such privilege does not go to the heart of our adversarial system of justice or to *Charter* or other societal values. The recognized privileges are based on the need to preserve a socially important relationship. Even these privileges are limited in scope and subject to exception where the party entitled to the privilege puts the advice or the contents of the disclosure in issue or where other paramount considerations based on justice prevail.³⁰

In the result, Justice Cameron writes:

The plaintiffs, who were party to the Arbitration, placed the confidentiality at risk by commencing this action against the defendants. The plaintiffs raised the issues before the court and made the transcripts relevant. If the confidentiality was so necessary to the Arbitration they could have chosen not to commence this action and are free to withdraw those claims if the confidentiality issue is paramount.³¹

And, further:

I am satisfied that the defendants will be at a material disadvantage in this litigation if they cannot prepare for trial with the Arbitration transcripts of the evidence of all witnesses at the Arbitration relevant to the issues in this action. Justice will not be done to the defendants if this court invokes for the plaintiffs a confidentiality provision created by the plaintiffs without participation by the defendants.³²

²⁹ *Adesa*, supra, paragraph 48.

³⁰ *Adesa*, supra, paragraph 56. The term “sedulously” referred to by Justice Cameron comes from John Henry Wigmore’s four conditions necessary for the establishment of a privilege, one of which is that the relationship in question is one that should be “sedulously fostered”: *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), sec. 2285.

³¹ *Adesa*, supra, paragraph 57.

³² *Adesa*, supra, paragraph 59.

With certain qualifications as to the permissible extent of their use, the Court concluded that relevant portions of the arbitration transcripts should be produced and, to that extent, set aside the arbitrator's order concerning confidentiality.³³

Both *Esso* and *Adesa* were considered in *High-Seas Marine Ltd. v. Boelman*³⁴, a decision of the British Columbia Supreme Court. In *High-Seas*, the Court considered what, if any, use could be made of transcripts of an arbitration in which the defendant had participated. The plaintiff sought to use the transcripts as evidence of the defendant's personal liability to the plaintiff. The decision in *High-Seas* was rendered in the context of competing applications: the plaintiff's application for summary judgment and the defendant's application for summary dismissal of the action against him. The arbitration transcript was found to be inadmissible, seemingly on evidentiary grounds applicable in a summary judgment proceeding. Commenting that, while the applicable rules of court made specific provision for the use of transcripts of other proceedings and that none of the pre-conditions provided for in the rules permitted the use of such a transcript, Justice Davies held:

I am accordingly satisfied that while Boelmen's testimony before the Arbitration panel would likely be admissible during cross-examination of him at trial, the use of excerpts from the transcripts of his testimony at the Arbitration may not be used in the manner they were intended for use by Hi-Seas in these summary trial proceedings under Rule 18A.³⁵

As I have previously noted, however, my conclusions concerning Hi-Seas' inability to use the Arbitration transcripts in these summary trial proceedings in the ways sought does not rely on Mr. Cowper's submissions that the use of the transcripts is precluded by the private nature of the Arbitration.³⁶

³³ *Adesa*, supra, paragraphs 66 to 70. Notably, at paragraph 69, the Court did not order production of the Arbitrator's reasons or the Award, for fear that it "could result in the embarrassment of inconsistent findings."

³⁴ 2006 CarswellBC 721 (hereinafter "*Hi-Seas*").

³⁵ *High-Seas*, supra, paragraph 59.

³⁶ *High-Seas*, supra, paragraph 60. Emphasis added.

Notably, the Court concluded that, in any event, it was not bound by any private agreement concerning confidentiality in the context of arbitration.

Perhaps of greater interest is the Court's discussion concerning the conflicting case law that has developed on the subject. While the plaintiff, seeking production, relied on *Esso* and its apparent permissive approach, the Court went on to note that, following that decision, the English Court of Appeal "again visited the question of whether there was an implied obligation of confidentiality incident to private arbitration contracts."³⁷ The British Columbia court cited *Ali Shipping Corp. v. Shipyard Trogir*³⁸, a decision of the English courts, which, in turn, reaffirmed the latter's earlier decision in *Dolling-Baker v. Merrett*³⁹. *Dolling-Baker* provides for a more restrictive approach to the use of evidence given on arbitration, with limited exceptions. In refusing to follow *Esso*, Lord Justice Potter in *Ali* held:

In *Dolling-Baker v. Merrett* [citation at footnote 32 herein] ... Parker LJ referred to "the essentially private nature of an arbitration" which he coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained, in order to arrive at his decision in that case. Thus, the principle which he propounded did not depend upon any inherent confidentiality in the material protected (which he expressly rejected), although the implied obligation arising was broadly similar in effect. So far as the judicial nature of that implied term is concerned, while I note that in *Hassneh Insurance Co. v. Mew* [citation at footnote 31 herein] Colman J. remarked that the "implication of the term must be based on custom or business efficacy" I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the court is propounding a term which arises "as the nature of the contract itself implicitly requires".⁴⁰

Lord Justice Potter went on to note four specific exceptions to the "broad rule of implied confidentiality"⁴¹: where disclosure is made on consent of the parties; by order of the court; by leave of the court (it is, he concluded, "the practical scope of this exception, ie

³⁷ *High-Seas*, supra, paragraph 64.

³⁸ [1998] 2 All E.R. 136 (hereinafter "*Ali*").

³⁹ [1990] 1 W.L.R. 1205 (hereinafter "*Dolling-Baker*").

⁴⁰ *Ali*, cited in *High-Seas*, supra, paragraph 64.

⁴¹ *High-Seas*, supra, paragraph 65,

the grounds on which such leave will be granted, which gives rise to difficulty.”⁴²); or, where it is “reasonably necessary for the protection of the legitimate interests of an arbitrating party”.⁴³

While citing with approval the principles set out in *Dolling-Baker* and *Ali*, and thereby rejecting those set out in *Esso*, the British Columbia court in *High-Seas* nonetheless found admissible the arbitration award and portions of the arbitration transcript (notwithstanding the earlier finding of inadmissibility insofar as the plaintiff’s summary judgment motion was concerned), premised on one of the last of the exceptions, for the purpose of dismissing the plaintiff’s claim. Amongst other things, Justice Davies concluded that not to do so would result in unnecessary additional expense in having to adduce the impugned evidence and that the efficiency of the summary proceeding before the court would be “severely compromised”. Most importantly, His Honour concluded, the arbitration transcript evidence, in the circumstances of a summary proceeding, constituted the best evidence.⁴⁴

At the end of the day, the Court did not consider it necessary to address conclusively the divergent positions taken by the English courts in *Ali* and that of the Australian courts in *Esso* although it concluded that “it may eventually be necessary” to do so.⁴⁵

In light of the discussion above (which, admittedly, is limited in scope) I would suggest that there is not as much inconsistency in the manner in which confidentiality in the arbitration process is treated by the Courts. There appears to be consensus in that

⁴² *Ali*, cited in *High-Seas*, supra, paragraph 65.

⁴³ *Ali*, cited in *High-Seas*, supra, paragraph 65.

⁴⁴ *High-Seas*, supra, paragraph 67.

⁴⁵ *High-Seas*, supra, paragraph 66.

there is no absolute entitlement to confidentiality and that such a condition, while desirable in the interests of promoting alternative mechanisms for the resolution of disputes, such as arbitration, is not an essential element of the arbitration process. Insofar as common law jurisdictions are concerned, there appears also to be no legal recognition of such entitlement as might be gleaned from statute or the case law that has developed. Confidentiality is also not absolute even in circumstances where it is recognized by the Courts that the arbitrating parties had a reasonable expectation of privacy or confidentiality, or where they have entered into a written agreement providing for it. As has also been seen, even an arbitrator's order as to confidentiality can be rescinded. Lastly, the concept of the implied undertaking, be it at common law or codified as in the Ontario Rules of Court, does not serve to protect evidence adduced during arbitration.

While specific exceptions have been listed in some of the cases cited, it would seem that the underlying bases upon which a Court will interfere with the confidentiality inherent in arbitration (other than where the parties simply agree to waive it) is where the "interests of justice" dictate or where the Courts deem it necessary to do so in order to govern their own process. In my view, these bases provide as wide a discretion to interfere as may be taken from the decision in *Esso*. Consequently, I am not of the view that the decision in *Esso* and those of the English and Canadian Courts discussed above are, in their results, as divergent as Justice Davies suggests in his reasons in *High-Seas*. As Justice Cameron concludes in *Adesa*, where evidence is relevant and it is "necessary for dispensing fairly with the cause or for saving costs", one's expectation of privacy may be dispensed with.⁴⁶

⁴⁶ *Adesa*, supra, paragraph 44.

While confidentiality may well serve as one of the attractions to arbitration, participants would be well advised that, particularly in complex or other circumstances that may give rise to subsequent litigation, a Court is not obliged to abide by any such condition.