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International Arbitration – Privacy and Confidentiality

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Introduction

One of the classic features of arbitration is always taken to be that the proceedings are private and the substance is confidential, offering the advantage of protection against unwelcome scrutiny and publicity for the disputants.

The English Court of Appeal's decision in *Department of Economic Policy and Development of the City of Moscow* v *Bankers Trust Company*[1] provides an opportunity to consider the extent to which international arbitration actually does offer these perceived benefits.

The City of Moscow case

Moscow had been party to a financing agreement and, following a dispute with Bankers Trust and International Industrial Bank, an arbitration was held under the UNCITRAL Arbitration Rules.

During the arbitration, a number of allegations of corrupt practices were made against Moscow and its employees. When a challenge was made to the award in the High Court, Moscow's first argument was that the judgment should be confidential, because the subject matter of the arbitration was highly sensitive. However, when it became clear that the award completely exonerated it, Moscow wanted the High Court judgment published with full details.

The banks resisted, wishing to preserve confidentiality. Inadvertently, the parties had not asked for the judgment to be delivered in confidence and a headnote and link to the complete judgment were made available by Lawtel, the online legal database.

The Court of Appeal noted that the UK Arbitration Act 1996 was silent on the question of confidentiality but regarded it as a crucial issue. The court noted that the Government's Departmental Advisory Committee (DAC) on Arbitration Law in its 1996 *Report on the Arbitration Bill* had recorded that "there is… no doubt whatever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features." The DAC cited a London Business School study of Fortune 500 US Corporations as supporting this view. It was, however, decided that the Arbitration Act should not contain any express provision, because of the 'myriad of exceptions', leaving the courts to work out the extent of the principles "on a pragmatic case-by-case basis."

The *City of Moscow* case derived from an UNCITRAL arbitration that took place in private. The award was only published to the parties in accordance with the UNCITRAL Rules. The banks' challenge to the award took place in private under the English Civil Procedure Rules, but the court's judgment was not marked 'private' and a summary was disseminated by Lawtel. On immediate protest by the banks, the judge

declared that the judgment should be private and that Lawtel's report should be withdrawn.

The Court of Appeal decided that:

1. The judge's conclusion that the judgment should remain private was justified and Moscow's appeal on that point was dismissed.

2. However, the Lawtel report offered a brief and factually neutral summary of the court's decision and there was no basis for an order precluding its publication. Moscow's appeal succeeded on that point.

Provisions for confidentiality and privacy in international arbitration

Arbitration clauses in some international commercial contracts make provision for confidentiality. The following examples[2] are indicative:

> "Except as may be required by law, neither party nor its representatives nor a witness nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties".

> "No information concerning an arbitration, beyond the names of the parties and the relief requested, may be unilaterally disclosed to a third party by any party unless required by law."

> "Any documentary or other evidence given by a party or witness in the arbitration shall be treated as confidential by any party whose access to such evidence arises exclusively as a result of its participation in the arbitration, and shall not be disclosed to any third party (other than a witness or expert), except as may be required by law."

In the absence of detailed agreement between the parties, the principal international institutional regimes make varying degrees of provision for confidentiality and privacy.

Not surprisingly, given the sensitivity of intellectual property disputes, the WIPO Arbitration Rules give the fullest degree of protection. By contrast, the most 'open' regime is ICSID, in that it contemplates the possibility of attendance by 'other parties' and publication of excerpts from decisions by the Centre. Between these two extremes are several variants. The UNCITRAL Arbitration Rules provide for privacy of hearings unless the parties agree otherwise and for the award only to be made public by consent. It is notable that "[t]he ICC Rules are silent on the subject of party confidentiality obligations, as are the AAA International Arbitration Rules"[3], although both provide for private hearings unless the parties agree otherwise. The LCIA Rules provide for both privacy and confidentiality unless the parties agree otherwise.

Legal principles relating to privacy and confidentiality: English law

English law distinguishes between the position of arbitration itself and that governing litigation arising from arbitration proceedings.

So far as arbitration itself is concerned, the English position is that privacy and confidentiality should apply, subject to some exceptions. A number of statements supporting this view have been made by senior judges in the last 20 years. As Leggatt LJ said in *Oxford Shipping Co Ltd* v *Nippon Yusen Kaisha, The Eastern Saga*[4]:

> "The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration."

Also in the Court of Appeal, Park LJ in *Dolling-Baker* v *Merrett*[5] was clear that there must be "some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed

not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court", this being an implied obligation arising "out of the nature of the arbitration itself".

These implied obligations in English law have, however, been made subject to limitations by the courts. For example, as Phillips J put it in *Hyundai Engineering and Construction Co Ltd* v *Active Building and Civil Construction Pte Ltd*[6]:

> "What, in my judgment, is clear is that the duty of confidentiality must be subject to some limits or restrictions. If one adopts the 'implied term' approach and applies the 'of course' test… I suspect that one will not go far wrong. The answer 'of course' would in my judgment be given to the question: can information be disclosed to anyone to whom the liquidators properly delegate the conduct of an arbitration on behalf of a company in liquidation?"

In summary, there are four main areas of exception to the basic English rule protecting confidentiality. These are disclosure made (i) by a party with consent of another party, (ii) by order of the court, (iii) by leave of the court where reasonably necessary to protect the legitimate interests of an arbitrating party, and (iv) generally, "in the interests of justice".

The position changes where the arbitration proceedings are subject to litigation, such as a challenge to an award on a point of law. In litigation, "the general rule is that a hearing is to be in public".[7] There is, however, a major exception in that "the court may order that an arbitration claim be heard either in public or in private"[8].

The tension between the basic principle and exceptions was at the heart of the Court of Appeal's decision in the *City of Moscow* case:

> "The factors militating in favour of publicity have to be weighed together with the desirability of preserving the confidentiality of the original arbitration and its subject matter. There is a spectrum. At one end is the arbitration itself and at the other an order following a reasoned judgment under s 68 Arbitration Act 1996… [W]hen weighing the factors, a judge has to consider primarily the interests of the parties in the litigation before him or in other pending or imminent proceedings". (Per Mance LJ).

Legal principles relating to privacy and confidentiality: other jurisdictions

It should not be assumed, however, that all jurisdictions adopt similar views on these issues. A small number of examples will illustrate the differences in approach.

On 27 October 2000, the Swedish Supreme Court delivered judgment in *Bulgarian Foreign Trade Bank* v *Al Trade Finance Inc*[9], known as the *Bulbank* case, declaring that there was no inherent confidentiality obligation in arbitration in Swedish law. This appears to be somewhat similar to the position in Australia. In *Esso Australia Resources Ltd* v *Plowman*,[10] the High Court of Australia rejected arguments based on English law in favour of implied terms in the arbitration agreement. Mason CJ, while accepting that strangers should not attend the hearing, maintained that complete confidentiality cannot be achieved. No obligation of confidentiality will attach automatically to witnesses and arbitration proceedings will sometimes be disclosed during litigation. In addition, an arbitrating party must be entitled to disclose information to its insurers, its shareholders and even the market, all of whom have a legitimate interest in a company's affairs. If parties wish to secure confidentiality of the substance of the arbitration, they would need to do so expressly, either in the arbitration agreement or through the institutional rules, where applicable. These agreements would bind parties and arbitrators, but not witnesses, who could only be bound by separate agreements. In *Commonwealth of Australia* v *Cockatoo Dockyard Pty Ltd*[11] the New South Wales Court of Appeal stated that in certain circumstances the public interest need for transparency would operate to create an exception to confidentiality.

In the City of Moscow case, the court was referred to the position in New Zealand, where it was noted that absent contrary agreement, "strict confidentiality" would be implied in the arbitration itself, although not, either "automatically" or "necessarily" in any

subsequent High Court proceedings[12]. In the Privy Council case of *Associated Electric & Gas Insurance Services Ltd* v *European Reinsurance Co of Zurich*[13], it was mentioned that ss 45 and 46 of Bermuda's International Conciliation and Arbitration Act 1993 empowers the court expressly to hear such matters in private and to restrict reporting to enable "the rights of the parties to be protected, notwithstanding the court proceedings".

Conclusion

Although the points actually decided by the *City of Moscow* case are limited (albeit significant), the wider issues of confidentiality and privacy go to the very heart of commercial arbitration. While some limits on the absolute rights of the parties seem to be accepted in all jurisdictions, there is a range between those legal systems which place great emphasis on protection and imply it as a matter of course and those which regard it as the responsibility of the parties to agree expressly, which agreement will give way to the public interest. In international commercial contracts these different attitudes may affect decisions on choice of law and seat of arbitration and are factors of potentially great significance.

This article discusses, from a comparative perspective, the nature and extent of the obligation of confidentiality in arbitration, with particular reference to its application in international commercial arbitration.

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1 [2004] 2 All ER (Comm) 193
2 Paul Friedland, Arbitration Clauses for International Contracts (2000, Juris Publishing) p 60
3 Friedland, op cit
4 [1984] 3 All ER 835
5 [1990] 1 WLR 1205
6 1994, unreported
7 Civil Procedure Rule 39.2(1)
8 Civil Procedure Rule 62.10
9 Digested at YB Comm Arb XXV1 (2001) 291
10 [1995] 128 ALR 391
11 [1995] 36 NSWLR 662
12 Editorial notes: see Television New Zealand Ltd v Langley Productions Ltd [2000] 2 NZLR 250
13 [2003] 1 WLR 1041