Arbitration International

A journal published quarterly

Volume 15 Number 2 1999

ARTICLES

BOOK REVIEW

Published by
Kluwer Law International

The Occasionally Unwarranted Assumption of Confidentiality

by L. YVES FORTIER*

I. INTRODUCTION: A CLEARLY AMBIGUOUS STATE OF AFFAIRS

THE PRINCIPLE that arbitrations are private and confidential as between the parties would seem to be self-evident. Is this not one of the most important of the perceived advantages of arbitration and one of the main reasons why business people around the world have made arbitration the forum of choice for the resolution of international commercial disputes?

As noted in the recently published Third Edition of the *Handbook of Arbitration Practice,* it is indeed common wisdom that 'arbitration is a private tribunal for the settlement of disputes'. The authors add, significantly, that 'no authority is cited for this proposition but it seems implicit in an agreement to refer a dispute to arbitration'.[1]

In fact, the principle - at least, in the absolute form in which it is generally understood by most parties - is more truism than truth. As many authors have noted, and as many practitioners have learned - frequently to their dismay - basic questions ranging from the nature and scope of the principle, in law, to its utility, in practice, to its formulation as a rule of arbitral procedure, are highly contentious.

The issues of privacy and its corollary, confidentiality, are fundamental. They are also timely. They beg questions that lie at the heart of the arbitral process, answers to which may once have been taken for granted - but no more. These questions have, in fact been the subject of much heated debate recently, in various

---

* L. Yves Fortier CC, QC is Chairman and Senior Partner, Ogilvy Renault, Montreal, Canada, and President of the LCIA (World Wide Arbitration).

This article (originally entitled 'Confidentiality in International Commercial Arbitration: Let Me Tell You a Secret...') was initially presented by the author at a luncheon of Committee D, Arbitration and ADR, of the International Bar Association on 15 September 1998 in Vancouver BC, Canada. It was subsequently revised for publication in this journal.

The author wishes to acknowledge the contribution of his associate Stephen L. Drymer in the article's preparation.

[1] Ronald Bernstein *et al., Handbook of Arbitration Practice* (London: Sweet & Maxwell, 1998, 3rd ed.) at p. 193.

ARBITRATION INTERNATIONAL, Vol. 15, No. 2

jurisdictions and institutions. The conclusions reached in those instances demonstrate what might be called a *definite lack of consensus.*

Until very recently, the question of confidentiality in arbitration was seldom, if ever, debated. Specialized works devoted to arbitration, in both the domestic and international contexts, dealt with the issue, if at all, in only summary fashion. Indeed, the excerpts cited above are typical of the extent of the discussion found in most treatises.[2]

It has been accurately observed that 'this very silence and absence of discussion is relied upon by the proponents of the two main schools of thought to reach opposite conclusions'.[3] Those who seek to deny the existence or limit the application of a principle of confidentiality argue that if any general duty existed there would – *surely* – be an abundance of authorities proclaiming and describing such a duty; the fact that there are not demonstrates that no such duty exists.

On the other hand, those who support and extol confidentiality as one of the defining characteristics of arbitration rely upon 'this very silence and absence of discussion' as proof that the duty exists – *surely* – and is simply taken for granted. More specifically, they argue that the distinction between privacy and confidentiality is chimerical: the private nature of arbitral proceedings is well established and the concept of privacy would have no meaning if participants were required to *arbitrate privately by day* while being free to *pontificate publicly by night.* The duty is not absolute, argue its proponents, but the qualifications or exceptions that attach to it are just that: *exceptions* to a general rule.

The state of affairs that prevails today has been aptly, graphically and succinctly described as follows: 'The silent world which I have been describing is silent no longer, indeed, it is currently in uproar.'[4]

In a recent arbitration conducted in Paris under the ICC Rules, the Tribunal was called upon to dispose of a dispute concerning the purported breach of the confidentiality of the proceedings. The impugned conduct, according to the claimant, consisted of statements describing the arbitration made during the course of the annual shareholders' meeting of the respondent's parent corporation. For its part, the respondent retorted that the claimant itself had caused the problem by disclosing the existence and nature of the arbitration to the financial press. The Tribunal dealt with the dispute as follows:

> While the confidentiality of ICC proceedings is not mentioned in the ICC Rules [...] it has been the experience of the members of this Tribunal and their colleagues whom they have consulted who often act as ICC arbitrators that, as a matter of principle, arbitration proceedings have a confidential character which must be respected by everyone who participates in such

---

[2] The editors of the Handbook, *supra*, n. 1, *do* provide, however, a fuller analysis of the issue, including a discussion of case law and of the controversy that has recently erupted, in particular since the decision of the High Court of Australia in *Esso/BHP* v. *Plowman* (1995) 128 ALR 391. The *Esso* case is discussed later in this text.

[3] F.P. Neill, 'Confidentiality in Arbitration' in (1996) 12 *Arbitration International* 3 at p. 287.

[4] *Ibid.* at p. 289.

> proceedings ... We invite both parties, in the future, to respect the confidential character of the proceedings.

The decision of the Tribunal in that case describes a general duty and standard of conduct to which, I believe, all participants in the arbitral process - including arbitrators - should be held accountable.

The irony of citing an arbitral award as support for the proposition that arbitrations are inherently confidential is obvious. However, as I hope to demonstrate, not only are the opinion expressed and the fact of its expression perfectly compatible, together they reflect both the legal nature and the practical application of a rule of confidentiality in arbitrations.

II. FORMULATING A RULE OF CONFIDENTIALITY: THE TIP OF THE ICEBERG

Eric Schwartz, former Secretary General of the International Chamber of Commerce (ICC) International Court of Arbitration, recently wrote, in relation to the new 1998 ICC Rules of Arbitration:

> ... as international arbitration increasingly becomes the normal forum for the final resolution of international commercial disputes, there are increasing numbers of participants in the process who question the conventional notion that, *simply because it is private, arbitration must be confidential.* Arbitration assuredly gives the parties an opportunity to provide for con-fidentiality. However, that this ought to be the rule in all circumstances is not universally accepted.[5]

This fact - the lack of consensus regarding whether 'simply because it is private, arbitration must be confidential' - combined with what are generally understood to be the legitimate exceptions to the principle of confidentiality that arise in the normal course of events, is reflected in the 1998 ICC Rules by the *absence* of any mention of a general rule of confidentiality.[6]

In reviewing and revising its rules, the ICC devoted much time to consideration of this matter. Ultimately, the working party charged with proposing updated rules was unable to arrive at a consensus regarding an appropriate formulation of a general duty of confidentiality, bearing out the above-noted comments by Mr Schwartz. As a result, no such duty was proposed. Implicitly, at least, the ICC Rules defer to the will of the parties, as may be expressed by them in a given case, and, if necessary, to domestic law, insofar as confidentiality is concerned.

While the difficulty of elaborating a general duty of confidentiality is acknowledged, one might reasonably question the usefulness of the new - and only -

---

[5] E.A. Schwartz, 'Comments' in 'The New 1998 ICC Rules of Arbitration: Proceedings of the ICC Conference Presenting the Rules' in (1997) *ICC International Court of Arbitration Bulletin*, Special Supplement, November at p. 70.

[6] The only change in this regard from the older version of the ICC Rules is a provision authorizing the arbitral tribunal to take measures for protecting 'trade secrets and confidential information' (Article 20(7)). As Mr Schwartz notes in his article, this falls far short of a general duty to respect the confidentiality of the proceedings.

provision of the 1998 ICC Rules relating to confidentiality: the power of the Tribunal to 'take measures for protecting trade secrets or confidential information' (Article 20.7). In terms that are apposite to the dispute concerning confidentiality that arose in the arbitration referred to above, one commentator has written:

> I am not quite sure whether this [Article 20.7 of the new ICC Rules] is an entirely adequate provision in those cases where a party will wish to use the press to gain commercial advantage from an arbitration or to improve its position in the arbitration itself. I would have preferred a provision where confidentiality was the rule and the party had to obtain the specific permission of the Arbitral Tribunal to publish any information on the arbitration other than its existence and the mere outline of the facts.[7]

In grappling with this thorny issue, an entirely different approach was adopted by the drafters of the new LCIA Rules. In spite of the legal and practical complexities associated with the formulation of a general rule of confidentiality, the LCIA decided to clarify and, in its view, strengthen the inherent confidentiality of arbitration by incorporating into its new Rules an explicit statement of the parties' obligations.

Article 30 of the new LCIA Rules reads, in part, as follows:

> *Confidentiality*
> 30.1 Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.
> 30.2 The deliberations of the Arbitral Tribunal are likewise confidential to its members ... [...]

The examples of the LCIA and the ICC – in particular, their illustration of two completely different, though equally viable and practical means of dealing with questions related to confidentiality – highlight the complexity of the underlying questions: Is there a duty of confidentiality? What is its scope? How is it best formulated?

III. DISCERNING A RULE: THE REAL PROBLEM

The most proximate cause of the so-called 'uproar' in the world of international commercial arbitration referred to above is the April 1995 decision of the High Court of Australia in the case of *Esso/BHP* v. *Plowman*.[8] The decision in that case certainly caused ripples in the state of Victoria, where it originated and was highly publicized, but it crashed like a giant wave – a veritable Australian tsunami – on

---

[7] René van Rooij, 'Comments' in 'The New 1998 ICC Rules of Arbitration', *supra*, n.5, at p. 68. One could also ask whether this new rule adds anything at all to the powers of the arbitrator that he did not already possess under the 1988 Rules.

[8] (1995) 128 ALR 391.

the shores of jurisdictions around the world. The decision has been referred to as 'dramatic' and of 'significance far beyond the shores of Australia'. It has also been described as flying in the face of *'widespread understanding elsewhere...'*.[9]

The *Esso* proceedings arose out of two parallel arbitrations in the state of Victoria between Esso/BHP and two public utilities with each of which it had an agreement relating to the supply of natural gas from the Bass Strait gas fields. Each of those agreements contained a price review clause, providing for adjustments in the price of the gas supplied, as well as an arbitration clause applicable in the event that the supplier (Esso/BHP) and the public utility could not agree on price increases.

During the course of the arbitrations, the Minister for Energy and Minerals of the state of Victoria declared his intention to release *all information disclosed by Esso/BHP in the arbitrations* - including what was acknowledged to be commercially sensitive material concerning profit margins, production costs and estimated gas reserves. Shortly thereafter, he initiated court proceedings seeking a declaration that he was entitled to do so. The Minister's application was largely accepted by the trial judge, as well as on appeal, first, to the Appeal Division of the Supreme Court of Victoria and, subsequently, to the Australian High Court. It is the decision of Chief Justice Mason, in the last instance, that has become the subject of controversy.

Briefly, the High Court held that, under Australian law, a general duty of confidentiality *is not to be implied in an agreement to arbitrate*, since confidentiality is neither 'an essential attribute' of a private arbitration, nor part of the inherent nature of the contract and of the relationship thereby established.[10] Later in its analysis the court found that, even if a duty of confidentiality exists, it is not absolute. The court then went on to make what many commentators consider to be its most troubling finding: the existence of a general 'public interest' exception. The policy consideration underlying this aspect of the court's reasoning was summed up by Mason CJ:

> Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the Public Utilities?[11]

Whether or not one considers the decision in *Esso* to constitute a correct statement of the law, either in Australia or elsewhere, its impact cannot be denied. Much ink has been spilled by scholars, practitioners and judges on both sides of the issue trying to come to grips with the fundamental questions that are raised in the *Esso* decision regarding the existence, nature and scope of the duty of

---

[9] *See* editorial introducing the 'Special Issue on the Confidentiality of International Commercial Arbitration' in (1995) 11 *Arbitration International* 3. The editors also note: '... not for the first time in recent legal history, the Australian High Court has shown that foreign legal emperors wear transparent clothes (but English judges none).'

[10] *Supra*, n. 8, at 401-402.

[11] *Ibid.* at 403.

confidentiality and, more recently, regarding the sanctions associated with a breach of the duty.

Particular insight was recently shown by Lord Justice Potter in December 1997 when he analysed the issues in the English Court of Appeal case of *Ali Shipping Corporation* v. *Shipyard 'Trogir'*.[12] With respect to the origin and purpose of a rule of confidentiality, he stated:

> I observe by way of preliminary that, to date, the confidentiality rule has been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of arbitration outside the four walls of the arbitration, even when required for use in other proceedings (subject to exceptions ...).[13]

As to the specific nature of 'the implied term of confidentiality', Potter LJ rejected the notion that confidentiality is in any way dependent on the inherently private nature of the material in question or on such concepts as custom, usage or business efficacy in arbitrations. Rather, referring to substantial case law, he concludes that confidentiality attaches to arbitration agreements *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' ...[14]

Again citing (approvingly) previous decisions of the English courts, Potter LJ goes on to observe:

> A clear distinction is to be drawn 'between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will necessarily imply as a necessary incident of a definable category of contractual relationship.[15]

In other words, the circumstances surrounding the execution of an arbitration agreement - be they general considerations such as 'business efficacy' or circumstances specific to the agreement in question - are beside the point. Confidentiality is a term implied simply by virtue of the fact that the parties have entered into a contract to which *the law* attributes particular characteristics.[16] As to the limit of the obligation so implied, Potter LJ said:

> While acknowledging that the boundaries of the obligations of confidence which thereby arise have yet to be delineated [...], the manner in which that may best be achieved is by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in light of the particular circumstances and presumed intentions of the parties at the time of their original agreement.[17]

---

[12] [1998] 2 All ER 136.
[13] *Ibid.* at 149.
[14] *Ibid.* at 146.
[15] *Ibid.* at 147.
[16] The concept of a 'definable category of contractual relationship' to which necessary incidents attach by law is not unknown to lawyers in civil law jurisdictions, where such contracts are known as 'nominate contracts' ('*contrats nommés*' in French).
[17] *Supra*, n. 12, at 147.

The reasoning of the Court of Appeal in the *Ali Shipping* case regarding the nature, scope and application of those exceptions to the general rule of confidentiality - *consent; order of the court; protection of the legitimate interests of an arbitrating party; interests of justice* (sometimes called public interest) - constitutes an excellent analysis of English common law relating to arbitrations.

One other recent case deserves mention. On 10 September 1998, the Stockholm City Court rendered its decision in the matter of *Bulgarian Foreign Trade Bank Ltd* v. *AI Trade Finance Inc.*[18] The significance of that decision lies not so much in its analysis of the existence and nature of a duty of confidentiality in arbitrations, but in its findings concerning the legal sanction resulting from a *breach* of the duty. The decision has been called extreme.[19] At the very least, it should stand as a warning to all those involved in international ventures where disputes are to be resolved by arbitration.

The parties in the *Bulbank* case were involved in an arbitration, in Stockholm, conducted according to the Arbitration Rules of the UN Economic Commission for Europe (the 'ECE Rules'). Early in the proceedings, the jurisdiction of the arbitral panel was challenged and the panel subsequently issued an award affirming its competence. The award was communicated by the defendant to the periodical *Mealey's International Arbitration Report* and was subsequently published. The claimant applied to the panel for an order declaring the arbitration agreement null and void and seeking the cancellation of the final hearing scheduled for the following week, by reason of the defendant's alleged breach of its obligation of confidentiality. The panel rejected the claimant's application. The hearing was held and a final award issued on 22 December 1997. The claimant then applied to the court requesting that the award be declared invalid.

In its decision, the court traversed ground similar to that mapped by Potter LJ in the *Ali Shipping* case and found that confidentiality is indeed an implied term of an agreement to arbitrate. Briefly, it extrapolated from the starting-point that arbitral proceedings are closed to the public, noted that an arbitration agreement falls within what Swedish law would consider 'the private sphere of community life' and held that *'confidentiality comprises a basic and fundamental rule in arbitration proceedings'*.[20] Against this background, the court found that the mere fact '... that something became known [about the arbitration proceedings] and that this occurred through the cooperation of a party ...' - irrespective of precisely what or how - constituted a *fundamental breach* of the arbitration agreement. In the words of the court:

> The breach of contract, which was thereby fundamental, constituted valid grounds for Bulbank to avoid the contract. [...] The City Court can therefore conclude that there was no valid arbitration agreement [on] the date when the arbitration was issued.[21]

---

[18] Case No. T 6-111-98.

[19] *See*, for example C. Partasides, *Bad News from Stockholm: Bulbank and confidentiality ad absurdum*, Mealy's International Arbitration Report, Vol. 18, December 1998, at 21.

[20] *Ibid.* at 17-18; emphasis added.

[21] *Ibid.* at 18-19.

Given that there was no valid arbitration agreement as of the date when the arbitration award was issued, the award itself was declared void.

IV. 'PLUS ÇA CHANGE, PLUS C'EST LA MEME CHOSE...': PUT IT IN WRITING

Judicial pronouncements such as those in the *Esso*, *Ali Shipping* and *Bulbank* cases and the multitude of criticism, commentary and case law that they have spawned, have analyzed many of the questions surrounding the issue of confidentiality in arbitration. Mindful of the maxim that *great light produces great shadow*, I firmly believe that the results of this process of self-examination by members of the 'international arbitration Bar' are illuminating - and sobering. Questions for which we thought - *surely* - we had all the answers, have turned out to be unsettled. Even more unsettling, it seems that the real questions might never have been considered.

Much has been written about parties' expectations regarding confidentiality in arbitrations, about the origin and nature of the concept, about the desirability of a rule or the practical problems associated with its application. There has been much speculation about the legal or geographical ambit of the *Esso* decision. What is evident today is that, with respect to confidentiality in international commercial arbitrations, *nothing should be taken for granted.*

In certain cases - *e.g.* proceedings conducted according to the new LCIA Rules - a clear duty is stipulated in the institutional rules governing the conduct of proceedings. In others - *e.g.* arbitrations conducted according to the Rules of the ICC - this is not the case. If the decision of the Stockholm City Court stands the scrutiny of Swedish Appellate Courts, a precedent will have been set that not only finds an implied duty of confidentiality to be an integral part of the ECE Rules, but establishes a very severe penalty for any breach of that duty.[22]

Parties who choose to submit disputes to arbitration should be counselled to pay particular attention to, among other factors, the question of confidentiality. The problems posed by the uncertainty and confusion that seem to prevail in contemporary efforts to delineate a general duty of confidentiality can, I believe, be broken down - as Jan Paulsson and Nigel Rawding have done[23] - into a number of practical issues, and equally practical solutions, concerning three general issues: information generated in the course of proceedings; confidentiality of awards; and the duties of participants in the arbitral process. These matters can

---

[22] The AAA International Arbitration Rules provide that hearings are private (Art. 20(4)) and that awards shall be made public only with the parties' consent or as required by law (Art. 27(4)). As regards a general duty of confidentiality, this is imposed exclusively on the arbitrators and the administrator (Art. 34), leaving open the question of the parties' rights to disclose information emanating from the proceedings.

[23] J. Paulsson and N. Rawding, 'The Trouble with Confidentiality' in (1994) *ICC International Court of Arbitration Bulletin* 48. The authors also include in their excellent article a useful list of what they refer to as '*pointers to the elements to be considered by drafters*'.

be addressed in the drafting of an arbitration clause or in the elaboration of rules for the conduct of the proceedings, both of which might supplement any provisions regarding confidentiality found in applicable institutional rules.

It is now inevitable that all practitioners will, at some point, be called upon not only to advise their clients concerning the confidentiality of arbitral proceedings, but to develop precise stipulations for inclusion in rules of procedure and/or contractual clauses. In a sense, however, recent developments have done no more than put the lie to unwarranted beliefs. The challenge itself has not changed: to delineate both a rule of confidentiality and its limits, in such a manner that they can be understood and applied effectively in specific cases.