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PRIVACY AND CONFIDENTIALITY IN ARBITRATION

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Arbitration is distinguished from litigation by two essential features: privacy of the proceedings and confidentiality of the process. Privacy is concerned with the rights of persons other than arbitrators, parties and witnesses to attend meetings and hearings and to know about the arbitration. Confidentiality is the obligation on the arbitrators and the parties not to divulge or give out information relating to the contents of the proceedings, documents or the award. [1]

Privacy

One of the fundamental principles of arbitration is that arbitration proceedings are private.[2] The parties to an arbitration agreement agree to submit to arbitration disputes arising between themselves and only between themselves. In this regard, Redfern and Hunter have this to say:

> International commercial arbitration is not a public proceeding. It is essentially a private process and this is seen as a considerable advantage by those who do not want discussion in open court, with the possibility of further publication elsewhere, of the kind of allegations which can and do arise in commercial disputes – allegations of bad faith, of misrepresentation, of technical or managerial incompetence, of lack of adequate financial resources, or whatever the case may be. [3]

The privacy of the hearing itself has never been in dispute. In this connection, Coleman J in Hassneh Insurance Co of Israel v Mew [4] said:

> If parties to an English law contract refer their disputes to arbitration, they are entitled to assume at the least that the hearing will be conducted in private. That assumption arises from a practice which has been universal in London for hundreds of years and is, I believe, undisputed. It is a practice which represents an important advantage of arbitration over the Courts as a means of dispute resolution. The informality attaching to a hearing held in private, and the candor to which it may give rise, is an essential ingredient of arbitration.

Parker LJ Dolling-Baker v Merret [5] stated the law in the following words:

> As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, 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 disclosed or produced in the course of 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 has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or with leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.

Leggatt J in Oxford Shipping Co Ltd v Nippon Yusen Kaisha, The Eastern Saga[6] explained:

> The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated the disputes in question may be. The only powers which an arbitrator enjoys relate to the reference in which he has been appointed. They cannot be extended merely because a similar dispute exists which is capable of being and is referred separately to arbitration under a different agreement.

Given that arbitration is a private procedure which is confidential between the parties, only the parties to the arbitration agreement and their representatives can attend any arbitration meeting or hearing. The public are excluded and have no right to attend a hearing before an arbitral tribunal. The witness' testimony is only heard by those persons allowed to be present. Mason CJ in Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals)[7] would 'prefer to describe the private character of the hearing something that inherent in the subject matter of the agreement to submit disputes to arbitration rather than attribute the character to an implied term'. He added, [8]

> 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 defeating, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration... If the hearing itself is private and confidential, then it would seem logical to regard documents created for the purpose of that hearing – such as witness statements, experts' reports and so on – as equally private and confidential. It would also seem logical to extend the same description to a note or transcript o what took place at the hearing. To do otherwise, would be almost equivalent to opening the door of the arbitration room to a third party.

Toohey J in Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals) [9] opined:

> Privacy should be implied as a term of agreement to arbitrate; the implied term is attached as a matter of law rather than give business efficacy to the agreement. A term is implied as a matter of law 'as the nature of the contract itself implicitly requires, [10] the very nature of arbitration agreements, the established practice for arbitrations to be conducted in private and the importance

attached to privacy in arbitration hearings indicate that a term requiring privacy should be implied as a matter of law.

Privacy is now simply taken for granted as one of the ordinary and necessary incidents of arbitration, arising from the fact that (save in cases of statutory references) an arbitration is the outcome of a private agreement between parties to withdraw their dispute from the courts, and submit it to the decision of a private tribunal. If the principle of privacy is breached, the arbitration may be compromised. [11]

Confidentiality

Confidentiality is widely sold as one of the major benefits of arbitration. Confidentiality is secure only if it extends to and is respected by the parties, the arbitral tribunal and arbitral institution as well as by third parties having access to information and evidence.

To this end, some arbitration rules specifically provide that all that takes place at arbitration is confidential in that neither party nor the arbitral tribunal shall, without the consent of the other, disclose to third persons, except for the purpose of the proper conduct of the arbitration, what has happened in the course of the arbitration. [12]

Whilst it is commonly accepted that arbitration hearings are private, there is little in the way of analysis or support for a blanket obligation of confidentiality. Until recently, the issue of confidentiality has mostly been addressed in a cursory fashion with the attendant paucity of statutory and case law authorities.

Redfern and Hunter consider the principle of confidentiality in arbitration as one and the same as privacy. [13] If indeed, a distinction is to be drawn, there is little guidance in case law regarding the distinction between privacy and confidentiality. The question is whether privacy automatically results in confidentiality or does it automatically demand confidentiality?

Confidentiality of arbitration can be undermined, even where all participants concerned are originally determined to maintain it. For example, the court, whose proceedings are a matter of public record, may vitiate or undermine confidentiality before or during arbitral proceedings when the parties attempt to set aside or enforce the arbitral award. The parties or non-party may see fit to use one or another element of prior arbitral proceedings in subsequent arbitral or court proceedings. It would be difficult, if not impossible, to prevent a winning party from crowing his success form the rooftops. Witnesses may not be meaningfully restricted in revealing knowledge of arbitration proceedings where they had given evidence. The parties may not be able to ensure maintenance of confidentiality by such witnesses.

There are two main areas of confidentiality: first, confidentiality prior to award and secondly, confidentiality after award. In the former situation, the parties may want to reveal unilaterally mere existence of dispute for commercial purpose or for tendentious purposes. The parties may be under a statutory or other duty to provide information to insurers, auditors, shareholders, public regulators, etc. A spouse or a partner may well need to know the outcome of the reference. These ‘outsiders’ can include, for example, a

subcontractor who may be entitled to a proportion of the claim made by the main contractor. He may, thus, have a legitimate interest in knowing some aspect of the evidence, or of the outcome by way of award in order to pursue his own legal interest. In the latter situation, parties in facing issues of commercial prejudice may pursue further litigation and to the varying extend use the award, pleadings and evidence which is part of the public record in challenge or enforcement proceedings.

The court in Dolling-Baker v Merrett [14] held that in the absence of an express term in an arbitration clause providing for confidentiality, the presumption of confidentiality applies as an implied term arising out of the very nature of the arbitral process. The obligation of confidentiality attached to the award, the pleadings, written submission, notes and transcripts of evidence given in the arbitration. Neither party will disclose to the third party, without the agreement of the other, the award, the reasons for the award, documents disclosed in the arbitration and documents prepared for the purposes of the arbitration. As a matter of law, the court in Ali Shipping Corporation v Shipyard Trogir [15] held confidentiality as attaching to arbitration agreements as 'necessary incident of a definable category of contractual relationship' apart from issues of custom, usage or business efficacy, with limitations. The arbitral tribunal and the parties owe a general duty of confidentiality to each other.

However, this has been denied in Australia. The Australian High Court in Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals) [16] held that a general duty of confidentiality cannot be implied in an agreement to arbitrate. It held that confidentiality is not an essential attribute of private arbitration, and also not part of the inherent nature of contract and relationship established by such contract. Even if such a duty exists, it is not absolute as there is a general public interest exception to confidentiality where outcome of the arbitration affects public interest (ie, public utility natural gas prices charged to consumers).

This decision has generally regarded in the international arbitration circles as unwelcome and inapposite, as a break with axiomatic general principle of confidentiality. The comment of Redfern and Hunter is noteworthy as a sample of such criticism:

> This could be a dangerous road to tread, leading to increased intervention by the courts in the arbitral process. On balance, it is hoped that the case is confined to its particular facts – namely, one in which the relevant Minister sought information to enable him to carry out his duty of supervising public utilities… Even if the parties had expressly agreed that everything that occurred in the arbitration would be confidential, the Minister would have been entitled to the information he sought. For clearly, the parties could not by private agreement displace a duty imposed by statute. [17]

It is unlikely that the Malaysian courts would strike down the contractual route to confidentiality in the light of established English precedents as there is no doubt that privacy and confidentiality are regarded as essential features by users of arbitration in Malaysia. As it stands, if the arbitrator or the parties divulge such information, for example, issuing detailed status reports to third parties, it will be in breach of the confidentiality requirements. An arbitrator in breach of the confidentiality requirements would be exposed to misconduct proceedings.

It is interesting to note that the Revised PAM Arbitration Rules, [18] Arts 4.5 and 29.5 now allow PAM arbitrators to report on the details of the arbitration to the PAM Arbitration and Mediation Services Committee on PAM's request. It is trite law that the appointing authority is functus officio after it has carried out its duty in appointing the arbitrator. Its residual role as stakeholder is subject to the direction of the parties and arbitrator. A third party committee overseeing the arbitration does not normally feature in the scheme of arbitration.

It is respectfully submitted that this provision has eroded the requirement of confidentiality for arbitrations conducted under the PAM Arbitration Rules. PAM arbitrations are considered as ad hoc rather than administered arbitrations. As such, arbitration under the PAM rules will be a far less attractive dispute resolution mechanism where confidentiality as one of its fundamental principles can no longer be said to apply in full. Parties who need to avail themselves of the confidentiality blanket of the law may carefully consider their choice of the arbitral rules or alternatively, opt out of it if already committed.

As regards the exceptions to the confidentiality rule, Mustill and Boyd [19] recognize three strands based on case law: first, disclosure is permissible with the express or implied consent of the party who originally produced the material. Second, disclosure is permissible by order of the court, or by leave of the court, which may be given when and to the extent that it is reasonably necessary for the establishment or protection of a party's legal right vis-à-vis a third party or to defend a claim brought by the third party, or otherwise in the interest of justice. A third exception exists in the case of admissible material deployed before the court in proceedings concerning the arbitration.

Therefore, the duty of confidentiality is not absolute but subject to limited qualifications or exceptions, such as consent, compulsion of law, disclosure by leave of the court or disclosure necessary for the purpose necessary for the purpose of protecting the legitimate interests of an arbitrating party. [20] However, the fact that the same issues have to be arbitrated in linked proceedings involving one of the parties and a third party does not justify the reuse of material generated in the course of the arbitration.

By way of differentiation, the award and reasons may be used for the purpose of establishing a cause of action against or defending a claim brought by a third party with a need to apply to court, whereas the use of raw materials used in the arbitration for purposes unconnected with the arbitration is normally prohibited unless and until the court determines on application that the ends of justice require overriding of confidentiality. It is open to either party to waive the term either by an anterior provision in the arbitration agreement or by a subsequent ad hoc agreement.

The principal of confidentiality is recognized as an essential corollary to privacy and will be implied as a term in the arbitration agreement. Except where parties have otherwise agreed, it is now generally accepted that arbitrations are private and confidential. [21] Arbitrations are to be held in private, and all information concerning them and what transpires at the hearing is to be treated as strictly confidential. It is a collateral

expectation of parties to an arbitration that their business and personal confidences will be kept. This is compared with the public nature of the court procedure. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. It is a reason for resorting to arbitration, as distinct from litigation.

The primary directive to parties concluding arbitration agreements, as stated by the Australian High Court in Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals) [22] is that they provide expressly in their arbitration agreement for the nature and extent of confidentiality. In this regard, a specific provision about confidentiality may be worth including in an arbitration agreement. Parties can draft an appropriate arbitration clause setting out the extent and nature of confidentiality obligations to apply in any future arbitration. [23]

They should consider whether it is the proceedings, the documents, the award and/or possibly the very existence of the arbitration which should be confidential and whether such information may nevertheless be made public in specified circumstances, such as enforcement proceedings, court challenges, compulsion of law, in compliance with Security Commission or Kuala Lumpur Stock Exchange regulations, or to satisfy insurers, auditors and other parties for the purpose of protecting the legitimate interests of an arbitrating party. The clause may also address of what sanctions shall follow in the event of breach.

With such a clause in place, parties may request the arbitrator to rule on an issue of confidentiality in the course of the arbitration, such as in respect of a particular document or trade practice adduced in evidence. Parties may also raise issues of confidentiality following the arbitration and initiate further arbitration or litigation.

It would be opportune to legislate about this issue in any reform to the Malaysian arbitral regime similar to the New Zealand Arbitration Act 1996, s 14 which has an express provision on confidentiality: parties to an arbitration agreement shall be deemed to have agreed that they 'shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made for those proceedings'.

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1 See 'Expert Report of Dr Julian DM Lew (in Esso/BHP v Plowman)' (1995) 11 Arbitration International 283 at p 285.

2 Tillam v Copp (1847) 5 CB 211; 136 ER 357; Haig v Haig (1861) 3 De G F & J 157; 45 ER 838; Russell v Russell (1884) 14 Ch D 471 per Jessel MR at p 474; Bibby Bulk Carriers Ltd v Cansulex Ltd [1989] QB 155 at pp 166–167 per Hirst J held, 'I accept that the arbitration proceedings is a private one, but arises simply and solely as a result of the contract between the participants.'

3 Redfern, A and Hunter, M, Law and Practice of International Commercial Arbitration, 3rd Edn, 1999, Sweet & Maxwell, p 27.

4 [1993] 2 Lloyd's Rep 243 at p 247.

5 [1991] 2 All ER 890, [1990] 1 WLR 1205 at p 1213, CA (Eng).

6 [1984] 3 All ER 835 at p 842.

7 [1995] 128 ALR 391 at p 398.

8 Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals) [1995] 128 ALR 391 at p 399, as per Mason CJ. Cf Aerospatiale Holdings Australia Pty Ltd v Espan International Ltd (1992) 28 NSWLR 321, as per Cole J who held that there is no

reason in principle why an arbitration and a reference dealing with closely associated matters and being principally between the same parties should not be held together. This decision has been criticized as going against the established principle of privacy that is deeply ingrained in arbitration law in all major jurisdictions.

9 [1995] 128 ALR 391 at p 411, as per Toohey J.

10 Liverpool CC v Irwin [1977] AC 239 at p 254.

11 Baker v Cotterill (1849) 18 LJQB 345; Giacomo Costa fu Andrea v British Italian Trading Co Ltd [1961] 2 Lloyd's Rep 394 at p 402.

12 See the Arbitration Rules of the Kuala Lumpur Regional Centre for Arbitration, Rule 9; the International Chamber of Commerce (ICC) Rules, Art 20(7), Appendix 1, Art 6; the American Arbitration Association International Arbitration Rules, Art 34; the London Court of Arbitration Rules, Art 30; the China International Economic and Trade Arbitration Commission Arbitration Rules 1995, Art 37; the World Intellectual Property Organization (WIPO) Rules, Art 52, 73, 74, 75; the Malaysian Institute of Arbitrators Rules (2000 Edn), Rule 35; the Pertubuhan Akitek Malaysia (PAM) Arbitration Handbook (1994 Edn), Rule 14.

13 Redfern, A and Hunter, M, Law and Practice of International Commercial Arbitration, 3rd Edn, 1999, Sweet & Maxwell, p 27.

14 Dolling-Baker v Merrett [1991] 2 All ER 890, [1990] 1 WLR 1205 at 1213, CA (Eng).

15 [1998] 2 All ER 136; [1999] 1 WLR 136; [1998] 1 Lloyd's Rep 643, CA. See also Hassneh Insurance Co of Israel v Mew [1993] 2 Lloyd's Rep 243; London & Leed Estates Ltd v Paribas Ltd (No 2) [1995] 1 EGLR 102; Insurance Co v Lloyd's Syndicate [1995] 1 Lloyd's Rep 272; London and Leeds Estates Ltd v Paribas Ltd (No 2) [1995] 2 EG 134; Sacor Maritima SA v Repsol Petroleo SA [1998] 1 Lloyd's Rep 518; Aquator Shipping Ltd v Kleimar, The Capricorn [1998] 2 Lloyd's Rep 379.

16 [1995] 128 ALR 391. See also United States v Panhandle Eastern Gen 118 FRD 346 (D Del 1988).

17 Redfern, A and Hunter, M, Law and Practice of International Commercial Arbitration, 3rd Edn, 1999, Sweet & Maxwell, at p 29.

18 2003 Ed.

19 See Mustill and Boyd, Commercial Arbitration, Companion Volume to 2nd Edn, 2001, p 113. These exceptions was approved by Potter LJ in Ali Shipping Corp v Shipyard Trogir [1998] 2 All ER 136; [1999] 1 WLR 136; [1998] 1 Lloyd's Rep 643, CA. See also The Hamtun and The St John [1999] 1 Lloyd's Rep 883; Hassneh Insurance Co of Israel v Mew [1993] 2 Lloyd's Rep 243; London & Leed Estates Ltd v Paribas Ltd (No 2) [1995] 1 EGLR 102; Insurance Co v Lloyd's Syndicate [1995] 1 Lloyd's Rep 272.

20 P Neill, 'Confidentiality in Arbitration', (1996) 12 Arbitration International 287 at p 290.

21 Liverpool City Council v Irwin [1977] AC 239, [1976] 2 All ER 39, HL; Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555, [1957] 1 All ER 125, HL; Ali Shipping Corp v Shipyard Trogir [1988] 2 All ER 136, [1999] 1 WLR 314, CA (Eng); Hassneh Insurance Co of Israel v Mew [1993] 2 Lloyd's Rep 243. Cf Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals) [1995] 128 ALR 391.

22 [1995] 128 ALR 391.

23 Leon E Trakman, 'Confidentiality in International Commercial Arbitration' (2002) Vol 18 No 1 LCIA Arbitration International 1 at p 12; Hans Bagner, 'The Confidentiality Conundrum in International Commercial Arbitration', ICC International Court of Arbitration Bulletin Vol 12/No 1 – Spring 2001.