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Confidentiality In International Arbitration: A recent decision of the Privy Council by J. Gaffney

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Commentary***Confidentiality In International Arbitration:
A recent decision of the Privy Council***

By
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[Editors Note: John P. Gaffney is a Partner with O'Flynn Exhams & Partners. He holds a Diploma in International Arbitration from the National University of Ireland and was recently appointed as WIPO Domain Name Panellist. Copyright 2003 by the author. Replies to this the commentary are welcome.]

1. Introduction

It is a central principle of English law that privacy and confidentiality are fundamental characteristics of arbitration. In a recent leading case in this area, *Ali Shipping Corporation v Shipyard Trogir*,¹ Potter L.J. held that the obligation of confidentiality in arbitration proceedings is an implied term of the arbitration agreement (arising as an essential corollary of the privacy of arbitration proceedings), which is subject to a number of exceptions and qualifications.² The approach of the English courts to date has contrasted with that of courts in other jurisdictions, such as Sweden and Australia, which have rejected English judicial authority that a general duty of confidentiality exists in arbitration.³

The recent decision of the UK Privy Council in *Associated Electric & Gas Insurance Services Limited v The European Reinsurance Company of Zurich* (the "Aegis case"),⁴ while commenting on the scope of an express confidentiality agreement between parties to two sets of international arbitration proceedings, contains some interesting and potentially important comments on the implied duty of confidentiality of arbitration proceedings under English law, as formulated in the *Ali Shipping* case. As such, it represents an important addition to the jurisprudence in this important area.

2. Background

This case involved an appeal to the Privy Council (hereinafter the "Privy Council" or "Board") from a decision of the Court of Appeal of Bermuda involving two insurance companies, Associated Electric & Gas Insurance Services Limited ("Aegis") and the European Reinsurance Company of Zurich ("European Re").

On 31 March 1980, Aegis and European Re entered into an automatic facultative reinsurance agreement. This agreement included an arbitration clause⁵ providing for a panel of three arbitrators with Bermuda as the *situs* of the arbitration. Two separate disputes regarding the obligation of European Re to indemnify Aegis under their agreement were referred to arbitration under this clause. The first of these was a panel chaired by Mr Stuart Boyd QC (the "First Arbitration"). The second was a differently constituted panel chaired by Miss Phillippa Rowe (the "Second Arbitration"). In the Second Arbitration, European Re wanted to rely upon the award (the "Award") in the First Arbitration. Aegis argued that they were not at liberty to do so. They submitted that European Re could not show any part of the Award to the arbitrators in the Second Arbitration, as it would breach the confidentiality of the First Arbitration.

Aegis succeeded in obtaining an *ex parte* injunction to restrain European Re from disclosing the Award to the arbitrators in the Second Arbitration. On appeal, the Bermudan Court of Appeal

allowed the appeal by European Re, who sought to discharge the injunction. Aegis appealed the judgment of the Court of Appeal to the Privy Council.

3. Arguments Of The Parties

European Re argued that the correct interpretation of the arbitration clause and the application of its provisions was an important and critical, and ultimately decisive of the dispute between the parties in the First Arbitration. It submitted the same dispute had again been raised between the parties in the Second Arbitration. Accordingly, European Re argued that the effect of the injunction obtained by Aegis was to prevent European Re from referring to the Award (in the First Arbitration), which had decided the issue and, therefore, preclude it from raising a plea of issue estoppel in the Second Arbitration.

Aegis advanced two arguments to the contrary. First, it argued that to disclose the Award or any part of it to the arbitrators in Second Arbitration would involve a breach of both the ordinary principles of the privacy of arbitration.⁶ More specifically, Aegis relied upon the stipulations of an express confidentiality agreement (“Confidentiality Agreement”) made between the parties during the First Arbitration. The Confidentiality Agreement was structured in a way that set out a general duty of confidentiality with a number of exceptions subsequently described in detail.⁷ In essence, the parties, their lawyers and the arbitration panel agreed in principle to maintain the privacy and confidentiality of the arbitration. In particular, they agreed that *“the arbitration result will not be disclosed at any time to an individual or entity, in whole or in part, which is not a party to the arbitration between Aegis and European Re.”*

Second, Aegis argued that to submit the plea of issue estoppel was so lacking in merit that it constituted an abuse of process.

4. Judgment

(a) Effect Of Confidentiality Agreement

The Privy Council accepted that the clear impression conveyed by the Confidentiality Agreement was that as a whole it was intended to be exhaustive. It also accepted, as argued by Aegis, that it granted no permission to communicate anything or to provide any documentation relating to the First Arbitration to the arbitrators in the Second Arbitration or to any other arbitration. However, while characterising these as “powerful arguments,” the Privy Council noted that they had:

“to be evaluated having regard to the surrounding circumstances in which this confidentiality agreement was made and the basic principles and purpose of arbitration.”

The Privy Council recognised that the documentation exchanged and generated during the course of an arbitration would inevitably include materials which might be of value to persons with interests adverse to either Aegis or their members and European Re. Thus, the Privy Council recognised the need to preserve confidentiality, as well as lawyer/client privilege. Nonetheless it observed:

“the otherwise legitimate use of an earlier award in a later, also private, arbitration, of the same two parties would not raise the mischief against which the confidentiality agreement is directed.”

Hence, while recognising the circumstances in which the confidentiality agreement was made, the Privy Council attached more importance to the essential purpose of arbitration. Their Lordships recognised that the purpose of arbitration is to determine disputes between the parties; to

declare what the rights and liabilities of the parties are and to bind the parties by that declaration. Enforcement of such a declaration lay with the courts and their Lordships noted it was possible to sue on the arbitral award for damages and to honour the award.⁸

In this regard the Privy Council referred to the various statutes and international conventions which have facilitated the direct enforcement of arbitral awards. In particular, it referred to Section 58 of the English Arbitration Act 1996 and English common law to find that an arbitral award is final and binding on the parties.⁹ It also noted that the arbitration agreement was governed by the law of Bermuda, and thus, the Bermuda International Conciliation and Arbitration Act, 1993, which incorporated the UNCITRAL Model Law on International Arbitration. Their Lordships observed that both the 1993 Act and the Model Law confirmed the parties' duty to perform the award, i.e., to recognise and respect the rights which it declares.

On that basis, the Privy Council concluded:

"Taking these factors into account in construing this confidentiality agreement, that is to say, the mischief at which the clause is directed and the fundamental purpose of an arbitration agreement, it becomes clear that it should not be construed so as to prevent one party from relying upon an award as having given him rights against the other. But that is what the application of injunction sought to achieve."

(b) Issue Estoppel

Aegis had attempted to argue that on the basis of the Model Law, there could be no such thing as issue estoppel in arbitration in Bermudan Law since this was no more than an evidentiary principle and procedural and evidentiary matters were wholly within the control of the arbitrators and created no substantive rights.

The Privy Council rejected these arguments and referred to the recognition under English common law that issue estoppel applies to arbitration as it does to litigation.¹⁰ The parties, having chosen the tribunal to determine disputes between them as to their legal rights and duties, were bound by the determination of that tribunal which was relevant to the decision of any dispute referred to that tribunal.

The Privy Council accepted arguments made on behalf of European Re that the decision in the First Arbitration gave rise to issue estoppel which it could rely upon in the Second Arbitration. In other words, for Aegis to raise again the same dispute in the Second Arbitration amounted to a failure by it to recognise and perform the earlier award and, therefore, did not infringe the stipulations of the Confidentiality Agreement, properly construed. The Privy Council accepted that where arbitrators have, pursuant to the submission of a dispute to them, decided an issue that decision binds the parties, neither party can thereafter dispute the decision.

Their Lordships thus dismissed the second argument advanced by Aegis that European Re were acting in bad faith in raising the issue of plea. Their Lordships left it to the Second Arbitration to consider the merits of this argument and rule upon it, as they took the view that it was not for the courts to pre-empt such an argument, nor was it for the courts to decide it in substitution for the Second Arbitration.

(c) Implied Duty Of Confidentiality

The *Aegis* case is also interesting for comments made *obiter dicta* by their Lordships on the leading English decision in *Ali Shipping*,¹¹ to which their Lordships did not refer in the main part of their Judgment, as discussed above.

The Privy Council sought to distinguish *Ali Shipping* from the present case on the basis that the latter involved the construction of an express confidentiality agreement, as a result of which the more general statements in *Ali Shipping* concerning the privacy of arbitration proceedings and the duty of one party to respect the confidentiality of the other were of less assistance and relevance. Furthermore, the Privy Council noted that although the *Ali Shipping* case involved a plea of issue estoppel, it involved different parties in a situation where the plea was “clearly unsustainable.”

What is interesting, however, is that having distinguished *Ali Shipping* from the present case, their Lordships proceeded to comment on the leading judgment of Potter L.J. in that case. Referring to the characterisation by Potter L.J. of the duty of confidentiality as an implied term of the arbitration agreement and his formulation of the exceptions to which it could be subject, their Lordships expressed:

“[Their] reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of documents or to documents which had been obtained in different ways and elides privacy and confidentiality.”

Noting that commercial arbitrations are essentially private proceedings, their Lordships observed that “implied restrictions” on the use of material obtained in such proceedings could have a greater impact, in their view, than those applying in litigation. However, in the case of an arbitration award, they argued that the same logic could not be applied:

“An award may have to be referred to for accounting purposes or for the purpose of legal proceedings [. . .] or for the purpose of enforcing the rights which the award confers [. . .]”

Their Lordships thus observed:

“Generalisations and the formulation of detailed implied terms are not appropriate.”

Their Lordships concluded that the court in *Ali Shipping* was not considering what rights an award gave rise to nor any question of what is involved in the enforcement of an award.

Although not expressly stated, the Privy Council appear to reject the reasoning of Potter L.J. — which appeared to be based on the earlier case of *Scally v Southern Health Board*¹² — that the implied duty of confidentiality in English law arose as “a necessary incident of a definable category of contractual relationship,” rather than as “an implied term necessary to give business ethicacy to a particular contract.”¹³ Potter L.J. had elaborated on this by arguing that the boundaries of this duty of confidentiality would be best achieved:

“[B]y 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 the light of the particular circumstances of presumed intentions of the parties at the time of their original agreement.”

The Privy Council’s approach to determining the scope and effect of the Confidentiality Agreement is more in line with the approach rejected by Potter L.J.

5. Comments

The *Aegis* case is instructive in a number of respects. First, it is generally recognised within the world of international arbitration that arbitration proceedings, while they may be private, are not automatically confidential. Thus, practitioners are advised to expressly address the issue of confidentiality in drafting arbitration clauses.¹⁴ The *Aegis* case provides a clear demonstration of the

limits to the scope of such express confidentiality provisions in light of the basic principles and purpose of arbitration. The Privy Council makes it clear that such confidentiality agreements are not all-encompassing, but are subject to interpretation in light of the circumstances in which the confidentiality agreement was made and the principles and purpose of arbitration.

Second, as far the particular issue of the confidentiality of arbitration awards is concerned, practitioners need to recognise the multi-faceted nature of the confidentiality issues surrounding such awards when drafting express confidentiality agreements or clauses.¹⁵

Third, while it is still too early to draw any definitive conclusions from this case, their Lordship's remarks on the *Ali Shipping* case raise the question of whether the English courts will move in the direction of courts in other jurisdictions, such as Australia and Sweden, which have rejected the notion that a general duty of confidentiality exists in arbitration. In a departure from the usual tradition of English judicial economy, their Lordship has clearly demonstrated their disapproval of generalisations in the formulation of detailed implied terms with regard to the issue of confidentiality in arbitration proceedings.

In criticising the approach advocated by Potter L.J., the Privy Council may be signalling that future English case law in this area may be characterised by a more critical, case-by-case approach to determining the confidentiality of different types of documents or of documents that have been obtained in different ways. In other words, the inherent privacy of arbitration proceedings may not necessarily give rise to an implied duty of confidentiality; this will depend on the document or documents for which confidentiality is claimed and the general purpose and principles of arbitration. Their Lordship's approach is similar to the view taken by the Departmental Advisory Committee (DAC), when advising the drafting of what was to become the Arbitration Act 1996, that:

"[T]he formulation of any statutory principles would be likely to create new impediments to the practice of English arbitration and, in particular, to add to English litigation on the issue."

In its view, formulating a set of principles would create new difficulties and, accordingly, the development and limitation of general principles of privacy and confidentiality should be left to pragmatic development in the courts.¹⁶

6. Conclusion

All this, of course, is not to say that the UK Privy Council no longer regards privacy and the confidentiality of arbitration proceedings as a fundamental characteristic of the agreement to arbitrate.¹⁷ However, it will be interesting to see how English case law in this area will develop in the future.

ENDNOTES

1. [1999] 1 WLR 314.
2. These include: (a) consent; (b) order of the Court; (c) leave of the Court; (d) the protection of legitimate interests of an arbitrating party; and (e) where the "public interest" requires disclosure.

3. *Bulgarian Foreign Trade Bank Limited v A.I. Trade Finance Inc.*, Case T/1881-99 (Swedish Supreme Court, 2000); see Partasides, and Bagner, in Mealey's International Arbitration Report (December 2000) at pages 44 and 52A, respectively; and *Esso Australia Resources Limited v Ploughman* [1995] 183 CLR 10.
4. [2003] UK PC 11 (29 January 2003).
5. This read as follows: "Any disputes arising out of this agreement or concerning its interpretation or validity shall be resolved on a friendly basis and in accordance with current reinsurance practice rather than strictly according to the letter of the law.

All such disputes shall be referred to a Court of Arbitration which shall consist of two arbitrators, one to be appointed by each party, and an umpire who shall be appointed by the arbitrators before they have studied the case material. The arbitrators and the umpire shall be active or retired officials of companies or underwriters carrying on a similar type of insurance or reinsurance business to that covered hereunder.

If either party fails to appoint an arbitrator within three weeks after being requested in writing by the other party to do so, or in the event of the arbitrators failing to agree as to the appointment of the umpire within an identical period after their own appointment, such arbitrator or umpire shall be appointed by the Secretary General at the time of the Court of Arbitration of the International Chamber of Commerce at the written request of either party.

The procedure shall be at the discretion of the Court of Arbitration appointed for a particular dispute, whereby it shall dispense as far as possible with all legal formalities. It shall pronounce on the distribution between the parties of costs and charges. The ruling of the Court of Arbitration shall be in writing, stating the reasons for its decision and be signed. If one of the arbitrators refuses to sign the decision, this shall have no bearing on its validity. The decision shall be reached within three months after the constitution of the Court of Arbitration."

6. See *Dolling - Baker v. Merrett* (1991) 2 All ER 890.
7. This read as follows: "Confidentiality

30. The parties, their lawyers, and the Court of Arbitration agree as a general principle to maintain the privacy and confidentiality of the arbitration. In particular they agree that the contents of the briefs or other documents prepared and filed in the course of this proceeding, as well as the contents of the underlying claim documents, testimony, affidavits, any transcripts, and the arbitration result will not be disclosed at any time to any individual or entity, in whole or in part, which is not a party to the arbitration between AEGIS and European Re.

31. The parties acknowledge that certain AEGIS' claims documents and information, such as coverage opinions and communications with defence counsel, may be subject to attorney-client, work product, and or other privileges and immunities. Any disclosure by AEGIS to European Re of such documents and information will be made with the expectation of privacy and for the sole purpose of this arbitration. By disclosure of underlying claims information to European Re for this purpose, AEGIS does not intend to waive, nor should be construed to waive, any privilege that may apply to such documents and information as to third-parties to this dispute.

32. It is understood that, despite this confidentiality agreement, parties to this arbitration may consult with their experts and share necessary information with those experts and that parties to this arbitration may contact, interview, and request documents from non-parties. It is understood that any documents obtained from third parties must be produced to the other party in order to be submitted to the Court of Arbitration.

33. In the event members of the Arbitration Tribunal retire and new members are appointed, information described in paragraphs 30 and 31 above can be shared with the new Court of Arbitration without violating the confidentiality provision.

34. If either party receives a subpoena from anyone seeking information concerning this arbitration, notice of that subpoena shall be provided immediately to lawyers for the other party so as to afford the opposing party the opportunity to oppose or seek protection from such subpoena.

35. Nothing in this Order shall be construed to preclude European Re from reporting to its retrocessionaires, compliance with rights of inspection (if any), or otherwise enforcing its rights against retrocessionaires, subject to European Re taking reasonable steps to ensure that retrocessionaires respect the confidentiality of that information.

36. Nothing in this Order shall be construed to preclude either party from sharing information with its auditors or regulatory authorities, subject to the party taking reasonable steps to ensure that the recipients of this information respect the confidentiality of that information.

37. Within thirty (30) days of the final disposition of the last gradual pollution claim subject to arbitration, each party will destroy all material obtained from the other party in discovery, and will provide assurances at that time to each other that these materials have been destroyed."

8. *Sybray v White* 1 M & W 435.
9. *Bremer Oeltransport GmbH. v. Drewry* [1933] 1 KB 753, 760.
10. *Fidelitas Shipping Co Limited v. V/O Exportchleb* [1966] 1 QB 630, 643 (per Diplock L.J.).
11. *Op.cit.*, at note 1.
12. [1992] 1 AC 294.
13. *Ibid.*, at 307.
14. See e.g., Reed, "Confidence and Confidences: Confidentiality Considerations, in Particular for Parties and Counsel," International Centre for Dispute Resolution, Forum – Dublin, May 29, 2002.
15. Reed, *op.cit.*, suggests the following wording concerning the confidentiality of arbitral awards: "Awards should be treated as confidential and not be communicated to third parties unless all parties [and the arbitrator] in consent; or they fall into the public domain as a result of enforcement actions before national courts [or other authorities]; or they must be disclosed in order to comply with the legal requirement imposed by an arbitration party or to establish or protect such a party's legal rights against a third party."
16. DAC Report (paragraphs 11 to 17); see Neill, "Confidentiality in Arbitration" [1996] 12(3) Arbitration Int'l 287.
17. *Op.cit.* at 316 to 317. ■