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CONFIDENTIALITY IN ASIA-BASED INTERNATIONAL ARBITRATIONS

The rise of Asia as an economic powerhouse over the past decade has also led to the region becoming a hub for international arbitration. This development is not surprising given that arbitration has been the preferred method of dispute resolution in the commercial world for a number of years. While arbitration may not always live up to the expectation of being an efficient and cost-effective method to resolve commercial disputes, it still has its advantages over litigating in local courts. One of those perceived advantages is the imposition of confidentiality restrictions over the arbitration process, allowing parties to resolve their disputes outside of the public arena.

However, confidentiality in arbitration proceedings is not always a given. While in Hong Kong there is an express duty of confidentiality embodied in statute, in jurisdictions such as Singapore, an implied duty of confidentiality exists; in Japan, India, Indonesia, and the PRC, confidentiality is left for the parties to agree upon or the arbitration institution to regulate through its arbitration rules. Therefore, depending on whether you prefer an express, statutorily entrenched obligation of confidentiality (which also may apply during post-arbitration court proceedings), an implied duty of confidentiality (with exceptions reliant upon still-developing case law), or a duty of confidentiality established by arbitral institutions, the choice of jurisdiction and arbitral rules will have a significant impact on the level of confidentiality protection that is offered.

As England remains an important source of jurisprudence in the world of international arbitration, particularly in Asia, the potential implications of English law on Asia-based arbitrations should always be taken into account by parties and their legal advisors. The recent English decision of *Milsom and Ors v Ablyazov*[1] is such a case. In that case, Briggs J noted that an implied duty of confidentiality is not absolute and can be overridden in various circumstances. As such, parties should be very careful when selecting their arbitration seat to ensure that their information is sufficiently protected by the governing law and arbitration rules.

The following is an overview and comparison of the obligations of confidentiality in England and major seats of arbitration in Asia.

ENGLAND

The case of *Emmott v Michael Wilson & Partners*[2] affirmed that an implied obligation of confidentiality exists for parties in arbitration proceedings. Confidential information was divided into two classifications: first, protected information that is "inherently confidential" such as trade secrets; and secondly, documents disclosed or generated in arbitration that are protected by an implied duty of confidentiality (termed "an obligation of confidence"), meaning that they can be used only for the purposes of the arbitration.

The case also recognized various exceptions to the implied duty of confidentiality, such as where there is consent by the parties, where there is an order or leave of the court, where it is "reasonably necessary" for the protection of the legitimate interests of an arbitrating party, where the interests of justice require it, and possibly where the public interest requires disclosure. It was held that this list of exceptions is still in the process of development, and that the scope of the obligation would depend on the nature of the information and the documents in each case.

These principles were applied in *Milsom and Ors v Ablyazov*, where it was found that there existed an obligation of confidence, which meant that the fact that the documents were used in the arbitration was, in itself, confidential. However, it was also found that the duty of confidentiality did not apply to the defendant's own documents (even though they were adduced in the arbitration), because they were not inherently confidential. Indeed, the court found that it was in the interests of justice that the information be disclosed to a third party.

SINGAPORE

Like England, Singapore has an implied duty of confidentiality in arbitration proceedings. The recent decision of *International Coal Pte Ltd v Kristle Trading Ltd and Another and Another Suit*[3] held that the level of confidentiality applied in each case would need to be evaluated in the context of its circumstances. It was also recognized that different types of confidentiality could be applied to different documents, such as arbitration awards, which would be treated differently from the materials used in the course of arbitration proceedings. In this case, once an award was registered as a Singaporean judgment, it entered the realm of the public domain and was no longer protected by confidentiality.

One difference between Singapore and England is that the High Court of Singapore in *Myanma Yaung Chi Oo Co Limited v. Win Win Nu*[4] decided that leave of the court was not required to disclose information that was reasonably necessary for the protection of a party's legitimate interests. This position is unlike in England, where leave is required. Although later disputes over whether disclosure was reasonably necessary can be brought to the Singaporean courts, this is a significant and potentially dangerous departure from the English position, because by the time the dispute is brought to the courts, the confidential information would already have been revealed.

However, when arbitration-related proceedings are brought before the courts, the Singapore International Arbitration Act (the "SIAA") provides that proceedings under the SIAA, on the application of any party to the proceedings, shall not be heard in open court.[5] Further, where they are heard in closed court, the court may give directions as to whether information relating to the proceedings may be published, if all parties agree on publication or the court is satisfied that the information would not reveal any matter a party reasonably wishes to remain confidential.[6] Further, where a court considers its arbitration-related decision to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications, and if any party to the proceedings reasonably wishes to conceal any matter, the court can give directions doing so. One example of this was in *AAY and others v AAZ*,[7] where the Singapore High Court found that the confidentiality of the arbitration was sufficiently preserved even though a redacted version of the Court of Appeal's judgment was made available, because it did conceal the identities of the parties and other matters that the plaintiffs wished to remain confidential.

HONG KONG

The Hong Kong Arbitration Ordinance (Cap. 609) (the "Ordinance") that came into effect on June 1, 2011 introduced an express imposition of confidentiality in arbitration

proceedings, making it one of the few jurisdictions to do so. The Ordinance states that no party to the arbitration may communicate any information relating to the arbitral proceedings or an award made in the proceedings. Therefore, even the existence of the arbitration proceedings, and the contents of the award (not just the outcome), should not be disclosed, and this statutory restriction applies even if the parties have not agreed to keep such information confidential.

There are exceptions, such as disclosure to a party's adviser, where a legal obligation requires disclosure, where a party's legal right or interest must be protected, or where an arbitration award is being enforced or challenged before a court.[8] For example, an exception may be invoked where a party wishes to disclose an award obtained in a previous arbitration so as to raise the res judicata ("a matter already judged") argument in subsequent judicial proceedings.[9] Another example would be where a company applies for a listing of securities on the Hong Kong stock exchange and is required to disclose information that is necessary to enable an investor to make an informed assessment of the activities, assets, and liabilities of the company;[10] depending on the circumstances, this may include an obligation to disclose the existence of arbitration proceedings.

If the parties subsequently end up going to court in relation to the arbitration, the court proceedings are not to be held in open court, unless a party applies for open court proceedings or the court decides otherwise.[11] If closed court proceedings are held, then a party can apply for a direction as to what information (if any) relating to the proceedings may be published. Similar to Singapore, a court must not make a direction permitting information to be published unless all parties agree that the information may be published or the court is satisfied that the information would not reveal any matter (including the identity of any party) that is reasonably desired to remain confidential. If the court decides that a judgment involving closed court proceedings is of major legal interest, it must direct that the judgment may be published in law reports and professional publications, but a party may apply to have matters concealed or to have the report published after a certain period.[12]

The above express statutory provisions mean that parties should be cautious about disclosing more information about arbitration proceedings or an arbitral award than is reasonably necessary. While the Ordinance does not address the consequences of a breach of the duty of confidentiality in relation to arbitration proceedings or awards, in practice, Hong Kong courts have recognized that injunctions can be used to prevent the disclosure of confidential information with respect to arbitral proceedings.[13]

PRC

Article 40 of the Arbitration Law of the People's Republic of China states that the arbitration tribunal may not hear a case in open session unless otherwise agreed. However, the details of the duty of confidentiality are left to the arbitration institutions, such as Chinese International Economic and Trade Arbitration Commission ("CIETAC"), Beijing Arbitration Commission ("BAC"), and China Maritime Arbitration Commission ("CMAC"). For example, the Arbitration Rules of CIETAC, BAC, and CMAC state that hearings shall be heard in private, unless both parties request an open hearing and the tribunal agrees. For cases heard in private, the parties, their representatives, witnesses, interpreters, arbitrators, tribunal-appointed experts, and institution staff members shall not disclose to third parties any substantive or procedural matters of the case.[14] In reality, it is difficult for a party to bring a claim against another for failure to obey an obligation of confidentiality, as it is usually hard to collect evidence and prove alleged resulting losses, and it is not possible to get a preliminary injunction.

JAPAN

The Arbitration Law in Japan does not impose any duty of confidentiality on parties to an arbitration. Similar to the PRC, it is up to the parties to agree upon such a duty and/or the arbitration institutions such as the Japan Commercial Arbitration Association (the "JCAA") to include confidentiality obligations into procedural rules. For example, the JCAA Commercial Arbitration Rules state that arbitral proceedings and records shall be closed to the public. The arbitrators, JCAA staff, parties, and their representatives shall not disclose facts related to arbitration cases or facts learned through arbitration cases, except where disclosure is required by law or in court proceedings.[15]

INDONESIA

On par with Japan and the PRC, the Indonesian Arbitration Law leaves the regulation of confidentiality to the arbitration institutions. Article 13(2) of the Rules of Arbitral Procedure of the Indonesia National Board of Arbitration states that all arbitration proceedings shall be closed to the public, and all matters related to the "arbitral reference" (including documents, testimonies of witnesses, and awards) shall be kept in strict confidence, except to the extent required by law or as otherwise agreed. However, Article 33 clarifies that this protection shall not prevent registration of the award with the appropriate district court or submission to any other court for the purposes of seeking enforcement.

INDIA

India enacted its Arbitration and Conciliation Act in 1996, which provides for confidentiality in conciliation proceedings, but it is silent as to confidentiality in arbitration proceedings. Despite this statutory gap, it is arguable that a duty of confidentiality in arbitration would be implied, as one Indian judgment found that such a duty was implied into mediation proceedings, which were also not expressly covered by statute.[16]

Further, like most arbitral institutions, the London Court of International Arbitration India stipulates in its Arbitration Rules that parties undertake to keep confidential all arbitral awards, materials in the proceedings created for the purpose of the arbitration, and all other documents produced by another party not otherwise in the public domain, except where they have agreed otherwise in writing, or where disclosure is required by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in bona fide legal proceedings before a court or other judicial authority. The tribunal deliberations and arbitral awards are likewise confidential.[17]

CONCLUSION

Although arbitration proceedings are generally perceived as being confidential, parties should be aware that there are differences in the level of protection offered by the various jurisdictions in Asia. Hong Kong has established strong confidentiality protection through its legislation by introducing express obligations on parties involved in an arbitration, and (like Singapore) it has even provided for circumstances where proceedings relating to arbitrations subsequently end up in the courts. On the other hand, the English and Singaporean positions rely upon the implied duty of confidentiality, with a body of (still developing) case law carving out exceptions to this. As the courts in these jurisdictions have recognized that the existence and scope of the duty depends on the circumstances of each case, there is an inherent risk that a party will not be protected by this implied duty. At the furthest end of the spectrum, jurisdictions such as Japan, India, Indonesia, and China rely largely upon the arbitral institutions' rules to impose confidentiality restrictions on parties. While these are often sufficient, they lack the detail and strength of statute-imposed duties. As such, when drafting arbitration agreements, parties must make strategic decisions regarding under which seat and which rules their arbitration proceedings are brought, or they risk losing confidentiality protection, arguably one of the most important facets of arbitration, and having their proceedings exposed to the public.

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ENDNOTES

1 [2011] EWHC 995 (Ch).

2 [2008] 1 Lloyd's Law Reports 616.

3 [2008] SGHC 182.

4 [2003] SGHC 124.

5 Section 22 of the Singapore International Arbitration Act.

6 Section 23 of the Singapore International Arbitration Act.

7 [2010] SGHC 350.

8 Section 18 of the Hong Kong Arbitration Ordinance.

9 *Parakou Shipping Ptd Ltd v Jinhui Shipping and Transportation Ltd* [2010] HKCFI 817.

10 Section 3 of the Securities and Futures (Stock Market Listing) Rules.

11 Section 16 of the Hong Kong Arbitration Ordinance.

12 Section 17 of the Hong Kong Arbitration Ordinance.

13 *Housing Authority v Sui Chong Construction & Engineering Co Ltd* [2008] 1 HKLRD 84.

14 Article 33 of the CIETAC Arbitration Rules; Article 24 of the BAC Arbitration Rules; and Article 42 and Article 43 of the CMAC Rules.

15 Rule 40 of the JCAA Commercial Arbitration Rules.

16 *Moti Ram (D) Tr. LRs and Anr. Vs. Ashok Kumar and Anr*, December 07, 2010, in Civil Appeal No. 1095 of 2008.

17 Article 30 of the LCIA India Arbitration Rules.