SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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CONTENTS

VIEWPOINT

PRESIDENT'S MESSAGE

I am honoured to have served as President of the Institute for the Council year 2003/2004 & 2004/2005. The past two years as the President of the Institute have been exciting and I have enjoyed dealing with the challenges and opportunities presented in pursuing our vision to promote and enhance Singapore as a location of choice for arbitration and dispute resolution.

With the close cooperation of fellow Council Members and good support from the Secretariat, the Institute has emerged with renewed vigour and gained recognition as an arbitration institute of international standing.

The Institute embarked on various events and training programmes in the past year and will continue to do so. From these activities, we have been successful in recruiting and admitting many new, active members from both Singapore and overseas into our Institute. In addition, the Institute also reached out to many of its counterpart Institutes in the region to jointly promote exchanges among members and to combine resources to conduct more events and training programmes together. I believe that if we continue with our present efforts and capitalise on the momentum generated, we will be able to strengthen our position as the leading arbitration institute in the region.

Here is a brief update on some of the highlights in the past quarter.

Memorandum of Co-operation with the Badan Arbitrase Nasional Indonesia (BANI)

The Institute held a signing ceremony with BANI at the Singapore Hilton on 6 May 2005. The Guest-of-Honour was Associate Professor Ho Peng Kee, Senior Minister of State for Law & Home Affairs, Singapore. In his speech, Professor Ho gave his warm support for the promotion of ties between the arbitration communities of Indonesia and Singapore. We were also honoured by the presence of many distinguished guests from BANI, the President and various Council Members of the Malaysian Institute of Arbitrators and our own members from the region who took the time to attend the event. Following the signing ceremony, there was dinner and a speech by Michael Hwang SC on "A Singaporean Perspective of Indonesian Arbitration". The evening concluded with the presentation of membership certificates to welcome many of our new members.

Memorandum of Co-operation with the Institute of Arbitrators & Mediators Australia (IAMA)

It may be appropriate to set the theme for May 2005 as the international friendship month for the Institute. In addition to the MOU signed with BANI, the Institute also

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signed a Memorandum of Co-operation with the Institute of Arbitrators & Mediators Australia (IAMA) on 28 May 2005 at their 30th Annual Conference in Canberra, Australia. I attended the signing ceremony together with fellow Council members Dr Philip Chan, Mr Govind Asokan and Ms Meef Moh. (See the article on this visit in page 14)

The Councillors of IAMA were very hospitable during our visit and were keen to further our relationship with the conduct of joint training programmes in Singapore. One such programme envisaged is an Adjudicators training programme. With the IAMA's vast experience in adjudication based on the NSW Building and Construction Industry Security of Payment Act (which is similar to ours) there is much that we can learn from IAMA on their conduct of adjudication.

Memorandum of Understanding with the Construction Industry Development Council (CIDC) India and the Singapore International Arbitration Centre (SIAC) – Accreditation of Joint Fellowship Training Programme

Following the Memorandum of Understanding late last year with the Construction Industry Development Council (CIDC) India and Singapore International Arbitration Centre (SIAC) on the setting up of a new arbitration centre, the Institute also signed another a Memorandum of Understanding on 15 June 2005 with the Construction Industry Development Council (CIDC) India. Under the accreditation scheme as part of the Memorandum, the Institute will accept candidates who have successfully completed the training programme as having satisfied the requirements of Article 5.3.1.1, 5.3.1.2, 5.3.1.3 & 5.3.1.4 of the Constitution and will be considered for admission as Fellows of the Institute. This will be a further step in promoting our Institute internationally and in expanding our membership.

The Institute's Panel of Arbitrators

With the recent implementation of the Institute's Arbitration Rules and the Code of Conduct, the Institute is well placed to move forward in constituting the Institute's Panel of Arbitrators among its experienced practising members. The Institute is taking steps to form the Panel of Arbitrators soon.

24th Annual General Meeting on 15 July 2005

The 24th Annual General Meeting will be held on 15 July 2005 at the Singapore Hilton. I look forward to your presence at the AGM

Finally, I would like to thank all of you for your confidence and trust in me as your President for the past two years.

Thank you.

Yours sincerely

Raymond Chan
President, SIArb
2003/2004 & 2004/2005

Dubai International Arbitration Centre

Dubai International Arbitration Centre ("DIAC") is looking for arbitrators to be placed on their Panel. Arbitrators with all kinds of experience are welcome. Presently, DIAC is particularly interested in arbitrators with experience of construction disputes. Interested applicants may download application forms from the DIAC website: *www.DIAC.ae*

CONFIDENTIALITY IN ARBITRATION

– *The Criteria Adopted by Institutions*

By Michael Hwang S.C. & Lee May Ling***

INTRODUCTION

Whether or not arbitration is confidential in nature has long been the subject of debate and continues to be today. Indeed, the debate on the common law position is split mainly between the English and the Australian positions. The English position views confidentiality in arbitration as an essential corollary to the private nature of arbitration, and therefore, views arbitration as generally confidential subject to certain exceptions[1] . On the other hand, the Australian position regards arbitration as only a private process but not confidential[2] . I will not revisit the different poles of that debate in this paper, and will instead examine the question from the point of view of institutional arbitration. In practical terms, this question is likely to be more important than the common law debate as, in practice, institutional rules will determine the manner in which most arbitrations are run.

AN ANALYSIS OF INSTITUTIONAL RULES

Institutional rules, to a greater or lesser extent, provide for the confidentiality of arbitration. Indeed, apart from a general protection of confidentiality, many institutional rules are more detailed than the English common law, providing specifically for confidentiality of various aspects of an arbitration, such as to the documents used and generated in the arbitration as well as the players in the arbitration. A survey of some institutional rules is presented in the table in page 4. The survey identifies six different aspects of an arbitration:

(i) general confidentiality;
(ii) existence of the arbitration;
(iii) documents used or generated in the arbitration;
(iv) duty of confidentiality imposed on the arbitrator;
(v) duty of confidentiality imposed on the witnesses; and
(vi) confidentiality of the award.

The institutional rules surveyed are merely a selection of those rules more commonly adopted by international arbitrating parties as well as those of the more prominent Asian institutions. Amongst these rules so surveyed, the Swiss rules are the latest, and should reflect the most up-to-date thinking on the extent of protection that should be afforded to the confidentiality of arbitration.

SCORECARD ON PROTECTION OF CONFIDENTIALITY[3]

The results show that, despite the Australian view that arbitration is not confidential, almost all of the institutional rules surveyed have taken the English position, viz. that arbitration is generally confidential. An analysis of these institutional rules reveals a number of characteristics which are similar across the institutional rules. At the very least, confidentiality is, under most institutional rules, protected in a general manner. Except for the ICC, UNCITRAL and ICSID Rules, most institutional rules have a provision providing for the general confidentiality of an arbitration. Further, the survey shows that some institutional rules are more sophisticated than others, affording specific protection to confidentiality of the various aspects of arbitration. The most sophisticated of the institutional rules surveyed are the WIPO Rules, which provide expressly for confidentiality of the following aspects of arbitration:

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[1] These exceptions have been discussed in various English cases such as Dolling-Baker v Merrett (1991) 2 All ER 890, Hassneh Insurance Co of Israel and others v Steuart J Mew (1993) 2 Lloyd's Rep 243, Ali Shipping Corporation v Shipyard "Trogir" (1998) 2 All ER 136, Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich (2003) UKPC 11 and Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co (2004) EWCA Civ 314. The following exceptions have been held to apply: (i) documents used in a previous arbitration may be disclosed in a latter court action pursuant to an application for specific discovery of such documents; (ii) documents used in a previous arbitration may be disclosed by a party wishing to assert a claim on a third party and to justify such a claim and also to explore the prospects of settlement; (iii) an award in a previous arbitration may be disclosed by a party wishing to raise a plea of issue estoppel in a subsequent arbitration between the same two parties; (iv) a judgment relating to an arbitration, where the hearing was held in private, may be disclosed.

[2] See Esso Australian Resources Ltd v Plowman (1995) 183 CLR 10.

[3] A "✓" indicates that the particular aspect of confidentiality of arbitration is protected. A "?" indicates that whether or not the particular aspect of confidentiality of arbitration is protected is unclear.

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Institution***	(i) General Confidentiality	(ii) Existence of Arbitration	(iii) Documents used or generated	(iv) Arbitrator	(v) Witnesses	(vi) Award
LCIA	✓		✓	✓		✓
ICC						
UNCITRAL [4]						✓
ICSID				✓		✓
SWISS	✓		✓	✓		✓
AAA	✓	? ("all matters relating to the arbitration or the award")		✓		✓
SIAC	✓	✓		✓		✓
KLRCA	✓	? ("all matters relating to the arbitration proceedings")		✓		✓
BANI	✓		✓	✓		✓
CIETAC	✓		✓	✓	✓	
JCAA			✓	✓		
WIPO		✓	✓	✓	✓	✓

***Table Legend

LCIA – London Court of International Arbitration
ICC – International Chamber of Commerce
UNCITRAL – United Nations Commission on International Trade Law
ICSID – International Centre for Settlement of Investment Disputes
SWISS – Swiss Rules of International Arbitration
AAA – American Arbitration Association
KLRCA – Kuala Lumpur Regional Centre for Arbitration
BANI – Badan Arbitrase Nasional Indonesia
CIETAC – China International Economic and Trade Arbitration Commission
JCAA – Japan Commercial Arbitration Association
WIPO – World Intellectual Property Organization

(i) the very existence of the arbitration[5]
(ii) the documents used and generated in the arbitration[6]
(iii) the duty of the arbitrators to observe confidentiality[7]
(iv) the duty of the witnesses to observe confidentiality[8]
(v) the award[9]

Although there is no general confidentiality provision in the WIPO Rules, given the extensive protection accorded to confidentiality of the arbitration, a general confidentiality provision can probably be implied.

More commonly, most of the institutional rules surveyed provide for the protection of confidentiality in a less extensive manner than that set out in the WIPO Rules. Apart from a general statement about the confidentiality of arbitration, most of the institutional rules surveyed impose a duty of confidentiality on the arbitrator and impose restrictions on the publication of the arbitral award. However, what few institutional

[4] *An UNCITRAL arbitration is ad hoc, not institutional. Nevertheless, this analysis is made for general interest.*

[5] *Article 73 of the WIPO arbitration rules provides that: "(a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only:*
(i) by disclosing no more than what is legally required; and
(ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it."
(b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.

[6] *Article 74 of the WIPO arbitration rules provides that: "(a) In addition to any specific measures that may be available under Article 52, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction."*

[7] *Article 76 of the WIPO arbitration rules provides that: "(a) Unless the parties agree otherwise, the Center and the arbitrator shall maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed during the arbitration, except to the extent necessary in connection with a court action relating to the award, or as otherwise required by law.*
(b) Notwithstanding paragraph (a), the Center may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the parties or the particular circumstances of the dispute to be identified."

[8] *Article 74 (b) of the WIPO arbitration rules provides that: "For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness's testimony, the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party."*

[9] *Article 75 of the WIPO arbitration rules provides that: "The award shall be treated as confidential by the parties and may only be disclosed to a third party if and to the extent that:*
(i) the parties consent; or
(ii) it falls into the public domain as a result of an action before a national court or other competent authority; or
(iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party."

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rules address is the question of whether the very existence of the arbitration is confidential. Indeed, only the WIPO and the SIAC[10] Rules provide explicitly for this. Nevertheless, the phrase "all matters relating to the arbitration or the award" in the AAA Rules[11] and the phrase "all matters relating to the arbitration proceedings" in the KLRCA Rules[12] may be interpreted to encompass the very existence of the arbitration itself, so as to make this the subject of confidentiality under those rules. Similarly, few institutional rules impose a duty of confidentiality on witnesses. Of the institutional rules surveyed, only the WIPO and CIETAC[13] Rules impose a duty of confidentiality on witnesses.

UNCITRAL ARBITRATION RULES

The UNCITRAL Rules contain nothing on the confidentiality of arbitrations. Article 25(4) of the UNCITRAL Rules provides only for the privacy of hearings:

"Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined."

Although the UNCITRAL Rules do not provide for protection of confidentiality of arbitrations, the UNCITRAL Notes on Organising Arbitral Proceedings recognise that arbitrations may be subject to the duty of confidentiality by express agreement[14].

ICSID RULES

As mentioned above, the ICSID Rules do not have a general provision on the confidentiality of arbitrations conducted under its auspices. The only respect for confidentiality that the ICSID Rules afford are to the award[15] and the duty of confidentiality of the arbitrators[16]. Accordingly, parties to ICSID arbitrations are not subject to any restrictions on the disclosure of arbitration proceedings or the arbitral award. Two recent ICSID decisions further confirm that, in the absence of an explicit provision imposing the duty of confidentiality on parties, parties are not prohibited from making disclosures of the arbitration to third parties. Indeed, in practice, many ICSID awards are published through one of the parties making copies of the award available to third parties, even without the consent of the other party[17]. Further, although the first sentence of Rule 48(4) of the ICSID Rules prohibit the publication of the award without the consent of the parties, the second sentence of that rule allows ICSID to publish the legal rules applied by the Tribunal.(but see the latest developments described in the next section). However, since ICSID arbitrations invariably involve a state party there is an element of public interest which makes it difficult to keep the arbitration completely confidential in the same way as arbitrations between purely commercial parties. There is an in-built measure of publicity for all ICSID arbitrations because of Regulation 23 of the Administrative and Financial Regulations, which provides that a public register must be kept of all ICSID arbitrations as well as significant data relating to the institution, conduct and disposition of each proceeding, including requests for supplementation, rectification, interpretation, revision or annulment of the award, and any stay of execution. This register is open for public inspection. In practice, most (if not all) ICSID awards are disclosed to the public by one of the parties and its text is often available on the internet within days of its issue.

ICC RULES OF ARBITRATION

Despite being one of the most important sets of rules for institutional arbitration, the ICC Rules of Arbitration, like the UNCITRAL Rules, do not provide expressly for the protection of confidentiality, not even a general statement according protection of confidentiality. The only provision relating to the privacy of an arbitration conducted under the auspices of the ICC is Article 21(3) of the ICC Rules, which states that:

[10] *Article 34.6 of the SIAC Rules states that: "The parties and the Tribunal shall at all times treat all matters relating to the proceedings (including the existence of the proceedings) and the award as confidential..."*

[11] *Article 34 of the AAA Rules provides that: "Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential* ***all matters relating to the arbitration or the award."***

[12] *Rule 9 of the KLRCA Rules states that: "Unless the parties agree otherwise, the arbitrator and the parties must keep confidential* ***all matters relating to the arbitration proceedings*** *Confidentiality extends also to the award, except where its disclosure is necessary for purposes of implementation and enforcement."*

[13] *Article 37 of the CIETAC Rules states that: "For cases heard in closed session, the parties, their arbitration agents, witnesses, arbitrators, experts consulted by the arbitration tribunal and appraisers appointed by the arbitration tribunal and the relevant staff-members of the Arbitration Commission shall not disclose to outsiders the substantive or procedural matters of the case."*

[14] *Paragraphs 31 and 32 of the UNCITRAL Notes on Organising Arbitral Proceedings*

[15] *Rule 48(4) of the ICSID Arbitration Rules*

[16] *Rule 6 of the ICSID Arbitration Rules*

[17] *As confirmed through an enquiry with the ICSID secretariat.*

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"All meetings and hearings shall be held in private unless the parties otherwise agree."

This would mean the exclusion of strangers to the arbitration from all hearings, including witnesses (except when giving evidence). However, Article 21(3) protects the privacy of the arbitration, not its confidentiality. The rules of the ICC International Court of Arbitration do prohibit public disclosure of the deliberations of the Court discussing the Award and other matters relating to arbitrations held under the auspices of the Court[18]. Further, Article 20(7) of the ICC Rules provides that the arbitral tribunal may take measures to protect trade secrets and confidential information. Thus a tribunal can order discovery but forbid the use of the documents outside the arbitration. Article 20(7) is drafted sufficiently widely that "confidential information" could be interpreted to cover documents produced for the purpose of the arbitration, e.g. pleadings, witness statements and even the Award. In practice, however, the ICC does recognise the confidentiality of arbitration when it comes to the publication of the arbitral award (see below). ICC arbitrators are informed of their duty of confidentiality in general terms when they accept appointment by the ICC, although the obligation of confidentiality on the parties, counsel and witnesses is less clear. The solution is for parties to address this issue themselves, either in the arbitration agreement or at preliminary meetings before the tribunal.

The omission of an express provision for confidentiality is not an oversight. It was considered by the Working Party which reviewed the 1988 Rules but it was unable to formulate a rule on confidentiality by consensus owing to the many legitimate exceptions that might arise. Another consideration for not enacting a specific provision for confidentiality was that, unlike other institutional rules, which normally operate under a single curial law, the ICC Rules are meant for use in all countries, and the variety of arbitration laws to which an ICC arbitration might be subject made it difficult to formulate a universal rule of confidentiality that would not conflict with any national arbitration law. Another consideration was the perceived lack of sanctions which could be imposed for any breach of confidentiality.

Nevertheless, there is a culture of confidentiality which pervades the ICC Court, which in practice respects the confidentiality of the parties in relation to an ICC arbitration (including its very existence).

PUBLICATION OF AWARDS

As stated above, most institutional rules provide for the confidentiality of arbitral awards. Even in the case of the UNCITRAL and ICSID Rules, despite the lack of an express provision for confidentiality of arbitration, the arbitral award cannot be published without the parties' consent[19]. Indeed, only the ICC Rules and the CIETAC Rules do not contain express provisions for the confidentiality of arbitral awards.

Although the ICC Rules do not provide for even a general protection of confidentiality, the ICC does, in practice, recognise the confidentiality of arbitration. Like ICSID, it allows the publication of arbitral awards only to the extent that these are in sanitized form, and the ICC always reviews summaries or excerpts of arbitral awards before allowing these to be published. Further, the ICC also has publishing agreements with some law journals, which sometimes indicate to the Secretariat what topics they would like to discuss and ask the Secretariat to select appropriate ICC awards for the purpose of such discussion. If parties expressly request that there be no publication of the award, ICC will usually respect that request[20]. Furthermore, Article 28(2) of the ICC Rules prohibit delivery of the Award by the Secretariat to anyone other than the pairtes.

In contrast, the LCIA Rules state that the publication of arbitral awards is not allowed without the prior consent of the parties and the tribunal[21]. The LCIA does not even publish sanitized versions of its awards. This difference from ICC practice in respect of the protection of confidentiality reflects the view taken by the LCIA that confidentiality is one of the fundamental tenets of arbitration, and should be codified in its rules since it is one of the factors which contracting parties consider when deciding on which rules to apply[22].

In October 2004 the ICSID Secretariat released a paper entitled "Possible Improvements of the Framework for ICSID Arbitration" which awaits feedback from various interested groups. Among the proposals is one that will not merely authorize, but require, ICSID to publish

[18] *ICC Rules of Arbitration, Appendix I Article 6 and Appendix II Article 1. An argument could be made that a broad view of this provision would impose the duty of confidentiality, not only on the proceedings of the Court, but also on all arbitrations held under the aegis of the Court.*

[19] *See UNCITRAL Arbitration Rules, Article 32(5) and ICSID Arbitration Rules, Rule 48(4). In most of the recent ICSID awards, parties have given ICSID their consent for the publication of the awards.*

[20] *Although this is not promulgated as a rule, an enquiry with the ICC Secretariat confirmed this practice.*

[21] *LCIA Rules, Article 30.3*

[22] *This was confirmed by the LCIA Secretariat in response to an enquiry*

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excepts from all rendered awards. This proposal has now been adopted, and ICSID Arbitration Rule 48(4) described above will shortly be amended to require the Secretariat to publish excerpts of the legal conclusions of the Tribunal.

WHICH INSTITUTION GIVES THE GREATEST RESPECT TO CONFIDENTIALITY?

The above survey of institutional rules shows that the institution which gives the greatest respect to confidentiality is WIPO. Indeed, given that WIPO is an international organization which protects intellectual property, and given the legitimate concerns of parties for the protection of proprietary and confidential information, WIPO Rules are, in comparison with most other rules, much more rigorous in its protection of confidentiality. Accordingly, the WIPO Rules protect the confidentiality of five out of six of the different aspects of arbitration, including the very existence of the arbitration itself[23].

Most other institutional rules accord less extensive protection of confidentiality than the WIPO rules. These institutional rules are the LCIA Rules, the Swiss Rules, the SIAC Rules, the BANI Rules and the CIETAC Rules. These institutions, unlike WIPO, are not concerned specifically with a particular type of commercial dispute or with the protection of a particular type of trade secret. This is probably the reason why these institutional rules are less extensive in their protection of the confidentiality of arbitrations than the WIPO Rules. Nevertheless, these institutional rules do accord protection to those aspects of arbitration which parties are usually most concerned about, namely general confidentiality, confidentiality of documents used or generated in the arbitration, duty of confidentiality of the arbitrators and confidentiality of the award.

There are also those institutional rules which provide minimal protection to the confidentiality of arbitration. These are the ICSID Rules, JCAA Rules and the UNCITRAL Rules. These rules do not provide for general confidentiality, but they all take the view that the arbitral award is generally confidential. One rationale for the less rigorous regime of the ICSID Rules is that ICSID arbitrations typically involve a State party where perhaps different considerations are involved. The public interest in good governance, for example, which demands transparency and accountability would require that a State party to an arbitration should disclose at least limited information relating to the arbitration to the public of that State.

Finally, there are the ICC Rules, which have no express provision for the protection of confidentiality but which (as discussed above), in practice, recognise the confidentiality of arbitration.

CONCLUSION

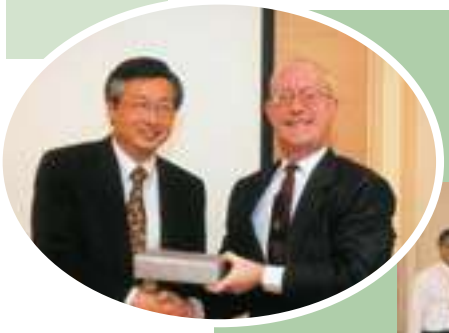
Whatever the common law position in respect of the confidentiality of arbitration, it is the scope of the obligation of confidentiality in institutional rules which matter more in practice. This is because, in the majority of arbitrations, parties and tribunals do not simply rely on the common law but rather on the rules which the parties have chosen as applying to the arbitration. The above survey of some institutional rules shows that, while some institutional rules provide extensively for confidentiality of arbitration (such as the WIPO Rules), and others provide for it to a lesser extent, arbitration is generally recognised under institutional rules as confidential, but subject to certain exceptions. The survey of the institutional rules also demonstrates that confidentiality of arbitration can be identified in respect of different aspects of arbitration, and can even encompass the very existence of the arbitration and the imposition of the duty of confidentiality on witnesses. It may therefore be that too much attention has been paid by learned writers to the theoretical basis of confidentiality in arbitration when practitioners and institutions have, to a greater or lesser extent, achieved effective confidentiality in practice. Nevertheless, there will always be difficult situations not anticipated by institutional rules, but these are probably exceptional situations which do not derogate from the general culture of confidentiality in international arbitration[24].

[23] Although there is no provision in the WIPO Rules for "general confidentiality", given that five out of six of the different aspects of arbitration are explicitly provided, it can probably be implied that "general confidentiality" is also protected.

[24] An example of an exceptional situation would be the English case of Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co (2004) EWCA Civ 314, where there was a dispute over whether a judgment setting aside an arbitral award could be published on the Internet. The judgment which referred to the arbitral award was not marked private although the hearing itself was held in private. The Court of Appeal held that the judgment could not be confidential mainly because there was a public interest in making judgments available to the public. 24 An example of an exceptional situation would be the English case of Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co (2004) EWCA Civ 314, where there was a dispute over whether a judgment setting aside an arbitral award could be published on the Internet. The judgment which referred to the arbitral award was not marked private although the hearing itself was held in private. The Court of Appeal held that the judgment could not be confidential mainly because there was a public interest in making judgments available to the public. 24 An example of an exceptional situation would be the English case of Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co (2004) EWCA Civ 314, where there was a dispute over whether a judgment setting aside an arbitral award could be published on the Internet. The judgment which referred to the arbitral award was not marked private although the hearing itself was held in private. The Court of Appeal held that the judgment could not be confidential mainly because there was a public interest in making judgments available to the public.

Arbitration Today - Samoe Fundamen
By Humphrey Lloyd QC
6 Jun 2005

Perspective on Dispute Resolution:
Int'l Oil & Gas Industry
12 April 2005



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CONFIDENTIALITY IN ARBITRATION BY QUENTIN LOH SC 12 MAY 2005

SIGNING CEREMONY - MOC WITH BANI 6 MAY 2005

Legal Developments Affecting Arbitration

by Dr Philip Chan Chuen Fye

Permasteelisa Pacific Holdings Ltd v Hyundai Engineering and Construction Co Ltd [2005] 2 SLR 270 [Judith Prakash J]

PART 1 - INTRODUCTION

In this issue, only one case is featured. Although this is a construction arbitration case, this case is important because it lays down general principles on misconduct, leave to appeal, remission, order to state reasons for an ward, and evidence which will serve as a useful guide to arbitrators and lawyers.

In this case, the applicants are Permasteelisa Pacific Holdings Limited ("PISA"), the nominated sub-contractor for the design, supply, delivery and installation of aluminium curtain-walling and glazing. They are the claimants in the arbitration. The respondents in this case and the arbitration are the main contractor, Hyundai Engineering & Construction Co Ltd ("Hyundai"). It was noted by the learned judge that as the arbitration proceedings commenced prior to the enactment of the Arbitration Act 2001, this application is governed by the provisions of the Arbitration Act (Cap 10, 1985 Rev Ed).

PART 2 – MISCONDUCT – SECTION 17(2)

Misconduct on the part of the arbitrator may take two forms. First, the arbitrator may have misconducted himself. Second, he may have misconducted the proceeding. However, the learned judge added that misconduct on the part of the arbitrator does not mean that he is immoral but does mean that he has acted in a way that is viewed as irregular for the purpose of the arbitration proceeding.

- "A finding that the arbitration has been misconducted does not imply any moral turpitude on the part of the arbitrator. As *Halsbury's Laws of Singapore* vol 2 (Butterworths Asia, 1998) ("*Halsbury's*") para 20.127 indicates, in arbitration, "misconduct" denotes irregularity, such as failing to observe the rules of natural justice or taking steps that amount to a procedural mishap, like examining one party in the absence of the other or questioning a party and basing part of the award on the answers given, even though the agreement of the parties had been to make an award based on documents only."
- "*Halsbury's* also points out that "[n]ot all procedural irregularity warrants a finding of misconduct – the failure must have caused a miscarriage of justice".

PART 3 – LEAVE TO APPEAL – SECTION 28

Parties to an arbitration governed by the Arbitration Act are given the right to appeal if they obtain the leave of court to do so. In deciding whether leave should be granted certain guidelines have been used by the courts:

- "It is only when there is a question of law that arises from the award that leave to appeal is permissible." [see para 9] and
- where it concerns the construction of a contract, the arbitrator must be obviously wrong if a "one-off" contract has been interpreted and in the case of the interpretation of a standard, the resolution of the question of construction would add significantly to the clarity, certainty and comprehensiveness of Singapore commercial law, and second, that a strong *prima facie* case has been made out that the arbitrator has been wrong in his construction However, even in this latter situation, when the events to which the standard clause falls to be applied are themselves "one-off" events, stricter criteria must be applied along the same line as those appropriate to "one-off" clauses: see Lord Diplock in *The Nema* at 742–743; [see para 10] or
- where the arbitrator is required to determine whether the facts proved in evidence before him lead to a particular legal conclusion, it must appear upon perusal of the award either that the arbitrator misdirected himself in law or that his decision was such that no reasonable arbitrator could reach; [see para 11] and
- the questions of law must have a substantial impact on the rights of at least one of the parties in order for leave to be given. [see para 13]

3.1 A question of law defined

Accordingly, the definitions given in the case of *The Nema* have been adopted by the Singapore courts. In essence, parties may frame their questions of law in two ways:

- "The first is a question relating to the proper construction of a contract, because English law (and thus Singapore law too) regards the interpretation of a written document as being a question of law rather than a question of fact." [see para 10];
- "The other type of question of law that may arise is the kind that requires the arbitrator to determine whether the facts proved in evidence before him lead to a particular legal conclusion. It can be a pure

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question of law or a mixed question of fact and law. An example of this type of question of law arose in *The Nema* itself, where the arbitrator had to decide whether the charterparty between the parties had been frustrated. As Lord Diplock stated (at 738), the question of frustration is never a pure question of fact, but involves a conclusion of law as to whether the frustrating event or series of events has made the performance of the contract a thing that is radically different from that which was undertaken by the contract.." [see para 11].

3.2 A question of law is not an error of law

It is also important to note that the courts do not consider the wrong application of a legal principle by an arbitrator to be question of law which forms the basis for granting leave to appeal. This misapplication of the law by the arbitrator has been termed as an error of law. Thus, the learned judge held at paragraph 9,

- "The first point to be made is that, as stated in s 28(1) of the Act, the court cannot set aside an award because there has been an error of law on the face of the award. Nor does an error of law give rise to a right of appeal."
- "It is only when there is a question of law that arises from the award that leave to appeal is permissible."

She continued to explain what exactly qualifies as a question of law for the purpose of the grant of leave to appeal,

- "In the *Northern Elevator* case, the Court of Appeal (*per* Choo Han Teck J at [19]) held:

  [A] "question of law" must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

- This holding was an endorsement of the statement of the law by G P Selvam JC in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [2000] 1 SLR 749 at [7]:

  A question of law means a *point of law in controversy* which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. ... If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. [emphasis added]"

The learned judge observed that the above position put Singapore case law in a different position from the English case law and said that,

- "By reason of the foregoing authorities, it would seem that, in Singapore, the view of Robert Goff J in *Italmare Shipping Co v Ocean Tanker Co Inc (The Rio Sun)* [1981] 2 Lloyd's Rep 489 that it does not follow that "simply because there is no dispute as to the general law, the application of the law to the facts cannot itself raise a question of law" (at 492) has been rejected."

3.3 A question of law is not a question of fact

The learned judge acknowledged at paragraph 12, the difficulty in distinguishing between a question of law and a question of fact.

- "Distinguishing between questions of law and questions of fact may not always be straightforward. As pointed out in D Rhidian Thomas, *The Law and Practice Relating to Appeals from Arbitration Awards* (Lloyd's of London Press Ltd, 1994) at para 3.2.6:

  A question may, however, remain one of fact notwithstanding that it arises in the context of legal criteria and therefore cannot in strictness be described as one of the pure fact. Such questions arise when what is in issue is the application of evaluated facts to an abstract legal proposition. What is a partnership is a question of law with the legal concept defined by the Partnership Act 1890, section 1. But whether a particular relationship amounts to a partnership is characterised as a question of fact."

3.4 Substantially affect the parties' rights

Before any leave to appeal can be granted, the learned judge held at paragraph 13 that,

- "...even if the questions of law raised by PISA meet the tests set out above, the court cannot give leave to appeal unless it considers that the determination of the question of law concerned could substantially affect the rights of one or more to the arbitration agreement (s 28(4) of the Act). Thus, the questions of law must have a substantial impact on the rights of at least one of the parties in order for leave to be given."

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PART 4 – REMISSION – SECTION 16(1)

It would appear that the power of the court to remit the matter back to the arbitrator usually supplements the power to setting aside the award in part or in whole.

- "The court may, however, under s 16(1) of the Act remit matters arising in the arbitration to the arbitrator for reconsideration." [see para 8]

PART 5 – ORDER TO STATE REASONS – SECTION 28(5)

Sometimes the direction that accompanies the order to remit the matter back to the arbitrator essentially requires the arbitrator to state the reasons for his award. At Paragraph 39, the learned judge held that,

- "[The arbitrator] did not, however, set out the reasoning that supported his conclusion. In omitting to do this, the arbitrator erred because, as stated above, it is established law that a sub-contractor whose works are delayed can only be made to pay damages for such delay if it is shown that his delay caused the loss claimed by the main contractor. The arbitrator, before going on to decide on the apportionment of loss, should have made a finding as to the extent to which Hyundai's delay arose from PISA's delay and given his reasons for this finding. I therefore remit the matter to the arbitrator for him to set out his reasons and finding in relation to this matter."

PART 6 - EVIDENCE

6.1 The Evidence Act

The relevance of the Evidence Act to an arbitration was discussed by the learned judge. She declared at paragraph 32 that,

- "The Evidence Act (Cap 97, 1997 Rev Ed), which contains the rules governing the admission of evidence during court proceedings, provides specifically (in ss 2 and 170) that none of its provisions apply to arbitration proceedings with the sole exception of the sections relating to bankers' books. Thus, in arbitration proceedings, generally, the law of hearsay and the manner of proving the truth of written statements as set down in the Evidence Act, are not applicable. In the present case, in relation to documents to be used as evidence, the procedure for the arbitration as contained in the arbitrator's directions was simply that the parties were to file an agreed bundle of documents. The arbitrator did not direct that the rules of hearsay would apply to the evidence sought to be admitted in the proceedings.

6.2 The Meaning of Agreed Bundle

First, the learned judge noted at paragraph 32 that,

- "The parties agreed that the documents in the agreed bundle were agreed as to authenticity but not as to contents."

She then explained that there are two parts to the agreement, the first part being,

- "That agreement meant that the makers of the documents did not need to be called but it did not mean that the contents of the documents were totally unreliable and not to be regarded by the arbitrator as evidence at all in the absence of testimony from the maker."

In the second part, she said that,

- "Since the parties did not agree to the truth of the contents of the documents, they were permitted, both in evidence and in submissions, to challenge the truth of any statement that appeared in any document. That was all. The arbitrator was not bound to disregard any document which any party criticised as being untrue. He still had the ability to deal judicially with such a document by weighing the evidence and considering the parties' arguments in making his decision as to whether the contents of the same should be accepted as true or not. That was his function as the finder of fact."

6.3 Reliance on Inadmissible Evidence

The learned judge was also asked to decide on the point as regards the reliance on inadmissible evidence by the arbitrator, to which she held at paragraph 31 that,

- "Whilst PISA's argument is dressed up as a contention of misconduct of the arbitration, its basis is that the arbitrator relied on inadmissible evidence. PISA is therefore saying that the arbitrator came to a finding on insufficient evidence. PISA is not entitled to make such an argument. Even if a finding of fact has been made on insufficient evidence, coming to such a finding is not misconduct on the part of the arbitrator himself or a way of misconducting the arbitration."

Book Review: Law, Practice and Procedure of Arbitration

by Sundra Rajoo
(Published by Lexis Nexis Butterworths)

Written from the perspective of Malaysian Law, this textbook on arbitration by Mr. Sundra Rajoo is a welcome addition to the growing number of local arbitration textbooks. The author is a well-known Malaysian arbitrator with expertise in the fields of construction and architecture. He holds professional degrees in Architecture, Town Planning and Law with postgraduate qualifications in Construction Law and Arbitration.

In the structure of his book, the author sets out the issues commonly faced in arbitration proceedings and considers their practical implications. The layout of the topics using "Divisions" divided into Chapters and further subdivided into Subtopics makes reference by the busy practitioner to subjects of interest an easy task.

The chronological development of the arbitral process in the layout of the book assists the beginner with the creation of a comprehensive map of arbitration law in general and Malaysian law in particular. The inclusion in the book of many checklists showing the more important points of concern in effect guides the novice in avoiding the common pitfalls in the practice and procedure of arbitration.

The author discusses arbitration case law and statutes from many common law jurisdictions including Singapore and Australia. The author also discusses and clarifies the scope and procedure of the domestic arbitration regime in Malaysia. The author explores the international arbitration regime and refers to a wide range of arbitral rules from different jurisdictions. The author has managed in his book to convey arbitration as a dispute resolution regime with practical implications beyond geographical boundaries

In essence, the book is a comprehensive and detailed work that lays the fundamental groundwork for entrants in the law and practice of arbitration. At the same time, it is substantial enough to be a source of reference for the busy arbitration practitioner. Mr. Rajoo has provided arbitration practitioners with a meticulous and comprehensive guide to the law, practice and procedure of arbitration.

Reviewed by Raymond Chan

Announcements

• NEW MEMBERS •

The Institute extends a warm welcome to the following new members:

Fellows

1 Mr Glyn David Moore
2 Mr Anthony Kenneth Houghton
3 Mr Giam Chin Toon, SC
4 Mr Dhingra Jag Mohan
5 Mr Dinesh Dhillon
6 Rt. Hon. Lord Hacking Douglas David

Members

1 Mr Samuel Chacko
2 Mr Guy David Anthony Spooner
3 Mr Lee Peng Khoon Edwin
4 Mr Eric Ignatius Pereira
5 Mr John Peter Pyall

Associates Member

1 Mr Francis Charles Moti
2 Mr Anthony Anand Jude
3 Mr Basyaruddin Halim
4 Mr Md.Malik s/o Abdul Kader

• UPCOMING EVENTS •

- 24th Annual General Meeting on Friday **15 July 2005** at the Hilton Hotel
- "Introduction to Arbitration" (in collaboration with ST Education & Training) on Friday **22 July 2005**
- Pupillage Training: Documents Arbitration by Mr Philip Yang on Friday **19 Aug 2005**
- International Entry Course (IEC) (in collaboration with CIArb) on **20, 21 & 27 Aug 2005** at the Hilton Hotel
- "Dispute Resolution in India" by Mohan Pillay (in collaboration with the Law Society Singapore & Singapore Indian Chamber of Commerce & Industry) on Wednesday **24 August 2005**
- "Arbitration in China" on Monday **12 September 2005**
- Workshop on Arbitration of Intellectual Property Disputes and on WIPO Domain Name Dispute Resolution on **10** & **11 November 2005**

Memorandum of Co-operation between the Institute of Arbitrators and Mediators, Australia (IAMA) 27-29 May 2005 – Canberra, Australia

The first day of the 30th anniversary national conference in Canberra saw the signing of the Memorandum of Co-operation between the Institute of Arbitrators and Mediators, Australia (IAMA) and the Singapore Institute of Arbitrators, (SIArb).

The signing ceremony was preceded by a meeting the day before, between SIArb and IAMA, where SIArb was given a warm welcome and introduced to the Committee Members of IAMA.

Its President, Raymond Chan and three of its Council Members, Govind Asokan, Philip Chan and Meef Moh represented SIArb. During the meeting, the Presidents from both Institutes spoke on the background and objectives of the respective Institutes, and expressed enthusiasm for close co-operation.

The signing of the co-operation kicked off with speeches made by the respective President of IAMA and SIArb. The President of SIArb, Raymond Chan, emphasised the importance of such co-operation in the advancement of arbitration and ADR methods in Singapore. In response, the President of IAMA, Tim Sullivan, noted that the co-operation is a means of opening the door to Asia for IAMA. After the signing ceremony, both sides exchanged gifts to commemorate the event.

This co-operation marks a significant milestone for SIArb, in its continuous effort to share expertise in training, education and promotion of arbitration in the region. SIArb has previously signed similar memorandum of co-operation with the Malaysian Institute of Arbitrators, (MIArb) and Badan Arbitrasi National Indonesia, (BANI).

This co-operation also enlarges the scope of potential prospects of training with regard to arbitration and ADR, including in particular, adjudication of payment disputes in the building and construction industry. Singapore's Building and Construction Industry Security of Payment Act 2004 is based on the NSW Building and Construction Industry Security of Payment Act, known commonly as BCISPA.

The conference covered various aspects of ADR, including developments of BCISPA and practical lessons to be learnt from court cases.

Hearing Room for Hire

Please DO consider the Institute if you are looking for a hearing venue. The Institute offers competitive members' rates of S$200 per day/S$100 per half-day inclusive of two breakout rooms and free flow of refreshments. We welcome all enquiries. Please give us a call at 6323-1276 or email us at siarb@siarb.org.sg. You may also log-on to our website at www.siarb.org.sg for more details.

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Memorandum Of Co-Operation With Badan Arbitrase Nasional Indonesia (BANI) 6 May 2005

6pm on Friday, 6 May 2005 was an auspicious time for SIArb and BANI, and for Singapore-Indonesia relations as well. SIArb and BANI signed a Memorandum of Co-operation, whereby both parties formally put on paper their aspiration and vision to work together to provide mutual support to each other for the development and promotion of arbitration training and practice in the region.

The event was graced by the Guest-of-Honour, Associate Professor Ho Peng Kee, Senior Minister of State for Law and Home Affairs and His Excellency Mochamad Slamet Hidayat, Ambassador Extraordinary of Indonesia to Singapore was represented by Mr Irmawan Emir Wisnandar, Counsellor (Economic). Other distinguished guests included Professor Priyatna Abdurrasyid and Mr Husseyn Umar, Chairman and Vice-Chairman of BANI respectively. We were also happy to have with us Mr Khoo Choong Keow, the President of the Malaysian Institute of Arbitrators and some of his council members.

Associate Professor Ho congratulated both organisations on their initiative and wished them well.

The highlights of the evening were the speeches by Mr Michael Hwang SC and BANI President, Professor Abdurrasyid.

Mr Hwang SC, in his usual clear, crisp and eloquent style, informed the audience how pleased he was to hear the keynote address by President Susilo Bambang Yudhoyono at the Inter-Pacific Bar Association (IPBA) Conference in Bali, from where he had just returned that afternoon.

President Bambang had in no uncertain terms expressed his vision and determination to do his utmost to eliminate any corruption in the dispute resolution systems. This was certainly the right direction for encouraging more international arbitrations in Indonesia and the region, said Mr Hwang. He added that things were going well for arbitrations in Indonesia – namely, the current determination to promote Indonesia as a venue for arbitrations.

However, he was also candid about the problems and issues. For example, he said there was still no official translation, into English, of the Indonesian Civil Code; and there were any number of translations available at bookshops, some with errors and with differing translations of the same civil code sections, according to the authors' own interpretations.

BANI President, Professor Abdurrasyid, thanked Mr Hwang for his candid comments and acknowledged the points made by Mr Hwang. He welcomed the participation of SIArb and Singapore arbitrators in working together with BANI and Indonesian arbitrators in having more cross-border and international arbitrations involving Indonesians and Singaporeans.

Following this event and the Memorandum of Co-operation, there is no doubt about the potential for substantial co-operation between Indonesian and Singapore arbitrators, and between BANI and SIArb, in terms of training, education and in encouraging international arbitrations in these two neighbouring venues.

The event was altogether an enjoyable get-together, with the hospitality of dinner and drinks, attended by a arbitrators, arbitration counsel, and graduates of arbitration courses from the region. It was also a proud moment for new Members and Fellows of SIArb, who received their certificates personally from SIArb President, Raymond Chan.

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