Kingsbridge Capital Advisors v. AlixPartners: What Confidentiality in Arbitration?

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Just a few weeks ago, an arbitral award made headlines in the German press: "Advisors in Märklin deal to pay multi-million euro fine", "Märklin: advisors to pay damages", "Märklin fallout: Former owner awarded $18.7 million in judgment against consultant", to name but a few examples. According to the newspapers, the US-based consulting firm AlixPartners was declared liable for damages for giving wrongful advice to the financial investor Kingsbridge Capital Advisors with regard to the takeover of the German model railroad manufacturer Märklin in 2006. It is said that an arbitral tribunal awarded €14m in damages to Kingsbridge because of irregularities in the due diligence for which AlixPartners was responsible at the time.

The decision comes as a surprise in the market – not least because consulting firms ordinarily limit liability to cases of gross negligence or wilful misconduct. However, the case will not only have implications for the consulting industry. The unusual publicity it has gained raises questions concerning the conduct of arbitral proceedings generally, namely, what confidentiality obligations there are for the parties to an arbitration. The topic has repeatedly been debated in this blog (see, for example, Ileana Smeureanu's post on the situation in the Philippines) and in the arbitration community generally. Confidentiality is, in fact, said to be one of the most important advantages of arbitration as a dispute resolution mechanism.

Practical experience such as the Märklin case shows, however, that confidentiality in arbitration is not guaranteed. Notwithstanding the long debate, numerous court decisions and legislative activity, there is still no generally accepted answer to the controversial question of whether an agreement to arbitrate implies an obligation to treat the proceedings and the attendant information as confidential. In England, there is a long line of case law according to which the confidentiality of arbitral proceedings is an implied obligation of the parties to an arbitration agreement (for a recent decision see *Emmott v. Michael Wilson & Partners Ltd.* [2008] EWCA Civ. 184 at [81] per Collins LJ). A similar position has been adopted by legislators elsewhere (see, for example, section 18(1) of the recent Hong Kong Arbitration Ordinance 2011 which expressly forbids the parties to disclose information relating to the arbitral proceedings).

However, senior English judges have expressed doubts as to the merits of this "confidentiality by default" rule (*Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Co of Zurich,* [2003] UKPC 11 at [20] per Lord Hobhouse), and the English approach has, in fact, met with little sympathy elsewhere. In other jurisdictions such as Australia, Sweden and the U.S., the courts have refused to recognise an "implied confidentiality obligation". In France, some court decisions have held that there was such an obligation (*Aïta v. Ojjeh,* [1986] Revue de l'Arbitrage 583; *Bleustein*

v. Société True North et Société FCB International, [2003] Revue de l'Arbitrage 189). However, the new arbitration law of 2011 now provides specifically that in international arbitration, a duty to treat information confidentially cannot be implied from an arbitration agreement (there is an implied confidentiality for domestic arbitration under art. 1464(4) of the *Nouveau Code de Procédure Civile,* but under art. 1506, this does not apply in international arbitration). When the ICC prepared the edition of its new 2012 Arbitration Rules, it was decided not to include a general duty of confidentiality. Under the new rules, an arbitral tribunal may make orders to enforce confidentiality obligations (art. 22(3) ICC Rules 2012), but the legal basis for such obligations must be found elsewhere, for example, in an express agreement between the parties.

Several arguments have been put forward in favour of an implied duty of confidentiality: Allegedly, confidentiality is part of the legitimate expectations of the parties to an arbitration agreement. Moreover, it is said that the private conduct of arbitral proceedings would become meaningless if the parties were at liberty to communicate freely about the arbitration. It is also feared that, without a duty of confidentiality, parties may face what is described as "trial by press release" instead of the neutral and objective dispute resolution mechanism that arbitration is expected to provide.

The latest legislative reform in France shows, however, that these arguments are far from compelling. There is little evidence that parties to an arbitration agreement actually expect that this agreement implies a confidentiality obligation. At any rate, against the background of widely diverging approaches of statutory law and case law, it is doubtful whether such expectations are legitimate. In fact, recent research from Queen Mary University suggests that for many users, confidentiality may not be that important after all (2010 International Arbitration Survey: Choices in International Arbitration, p.30). To imply a duty of confidentiality may also conflict with the principle of party autonomy, because it leads to confidentiality by default even where the parties never considered the issue at the time when the arbitration agreement was concluded. Where parties actually wish to secure confidential treatment of the proceedings, they are free to make an express agreement to that effect, and it is universally accepted that courts and arbitral tribunals will enforce such an agreement (subject to few exceptions such as legal provisions requiring the parties to make information public or requiring the public conduct of court proceedings in support of arbitration). In such circumstances, there is no need to imply an obligation of confidentiality.

A specific feature of the Märklin case suggests that there may be another argument against an implied confidentiality obligation: in fact, AlixPartners announced that it will apply to have the partial award set aside. Most recent figures suggest that about 20% of arbitral awards are not being complied with voluntarily and have to be executed. This figure is unsatisfactorily high and shows that in many instances, arbitration fails to provide a resolution of the dispute that is accepted by all parties. One way to improve this situation is to increase the degree of transparency in arbitration. Such transparency may have positive effects on the quality of arbitral awards: it would, in fact, create an additional incentive for arbitrators to conduct the proceedings in a way that stands the test of public debate, and to make persuasive and diligent decisions. In that respect, the recent legislative reform in France has much to commend itself.

At any rate, the debate on confidentiality is far from being settled. The latest trend in case law and legislation is, however, not to imply a duty of confidentiality in an agreement to arbitrate. Against that background, potential litigants will have to determine well in advance what needs they have with regard to confidentiality, and to include appropriate and express agreements in the arbitration clause, or at least in the terms of reference set up at the beginning of the arbitral proceedings. Without express agreements of that sort, confidentiality is certainly not a feature which parties should rely on when choosing arbitration as a dispute resolution mechanism.