Kluwer Arbitration Blog

Sealing of Court Documents Relating to an Arbitration

Darius Chan (Norton Rose Fulbright) · Wednesday, June 27th, 2012 · YSIAC

Confidentiality is often a distinguishing reason why users choose arbitration over court litigation. In a 2010 International Arbitration Survey on Choices in International Arbitration, 62% of respondents said confidentiality was very important to them. Last month, a contributor to this blog observed anecdotally that in-house counsel want confidentiality especially in industries in which a dispute may arise in one part of the world between businesses while in another part of the world amiable and profitable projects are still ongoing.

The confidentiality of arbitration refers to the extent to which parties are prohibited from disclosing the existence, nature and content of the arbitration proceedings (including documents and other evidence produced during them) to third parties. The extent to which any arbitration is confidential will depend on, *inter alia*, the *lex arbitri*, the arbitral rules and the parties' agreement.

Under Singapore law, the principle of confidentiality in arbitration was, after detailed analysis, affirmed by the Singapore High Court in *AAY v AAZ* [2011] 1 SLR 1093 as a "general principle or doctrine of arbitration law developed through the common law". In the recent decision of *AZT v AZV* [2012] SGHC 116, the Singapore High Court took a further step towards the enhancement of confidentiality in arbitration when it ordered certain court documents relating to an arbitration to be sealed.

In that case, both parties were co-respondents in a Singapore arbitration. The arbitral award found AZT and AZV jointly and severally liable for damages and costs towards the claimant in the arbitration. The award, however, did not apportion liability between AZT and AZV because it was not part of the tribunal's mandate. AZT agreed to pay the claimant $65 million in full satisfaction of the award. Subsequently, AZT commenced an action before the Singapore courts seeking contribution from AZV ("the court action").

AZT filed an application to seal the court documents in the court action in order to preserve the confidentiality of the arbitration proceedings. The Singapore High Court granted the application, and observed that there was a need to balance two competing interests, that of the public administration of justice and the principle of confidentiality in arbitration.

Sections 22 and 23 of Singapore's International Arbitration Act (IAA) reflect the public policy of keeping arbitrations, and all proceedings related to arbitration, confidential. Consequently, the balancing exercise was described by the Court in these terms: "the principle of open justice must be weighed against the need to preserve confidentiality in arbitration, with the latter being an *important factor* in the court's exercise of discretion".

However, as with most principles, the principle of confidentiality is subject to exceptions. In the earlier case of *AAY v AAZ*, the Singapore High Court endorsed Collins LJ's formulation in the leading English decision of *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] 2 All ER (Comm) 193 in the following way:

> In sum, an examination of exceptions to confidentiality would probably still begin with a reference to the established categories, taking into account the context and circumstances of the case, including the nature of the document(s) sought to be disclosed, to whom disclosure is sought to be made, and for what purpose. Lawrence Collins LJ [in *Emmott*] accepted at [107]:
>
> "On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitration party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure."

The Singapore High Court's reasoning in the instant case can be understood against this framework. In summary, the learned Judge held that the following factors militated in favour of allowing the application of sealing of the court files:

> (a) Both parties to the application were party to the arbitration;
>
> (b) The dispute was contractual in nature and the documents revealed nothing that could be of legitimate public interest;
>
> (c) AZV was neither opposing nor consenting to the application at hand;
>
> (d) The court action is a proceeding that would be heard in chambers (as opposed to an open court hearing), and thus the sealing of court documents would be a less significant intrusion into the principle of open justice.

This is to be contrasted with the earlier holding in *AAY v AAZ* where the Singapore High Court had found that there was legitimate public interest in making the judgment in *AAY v AAZ* public, albeit with redaction, because the judgment discussed the latest jurisprudence on the issue of confidentiality in arbitration.

This latest decision of the Singapore High Court confirms the court's continued commitment to supporting the arbitral process and robust respect for one of the hallmarks of arbitration. This is to be contrasted with the position in other jurisdictions, such as Australia, where the notion of confidentiality of arbitral proceedings has yet to be fully endorsed by the courts.

It is noteworthy that, following the footsteps of New Zealand, Hong Kong has in fact recently enacted specific legislation concerning confidentiality in its revised Arbitration Ordinance (which

came into force on 1 June 2011). The Ordinance permits the disclosure of information relating to arbitration proceedings in certain circumstances. Under section 18 of the Ordinance, a party may disclose information relating to the arbitration where the disclosure (1) is agreed by the parties; (2) is to protect the party's legal right or interest; (3) is to enforce or challenge an arbitral award before a court or other judicial authority in or outside Hong Kong; (4) is obliged by law to be made to any government body, regulatory body, court or tribunal; or (5) is made to a professional or any other advisors of the party.

Consequently, users of arbitration who are concerned about confidentiality would do well to consider the *lex arbitri*, the arbitral rules, the arbitration agreement, and whether there is any need for a specific order by the tribunal, at early stages of the arbitral proceedings, relating to confidentiality. In this connection, a Model Procedural Order on Confidentiality had been suggested by Michael Hwang S.C. during the 2010 Goff Lecture and this may be a useful starting point for both practitioners and in-house counsel alike.

This entry was posted on Wednesday, June 27th, 2012 at 11:45 pm and is filed under Asia-Pacific, Confidentiality, Public Policy
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.