

Legal Business

Memoranda on legal and business issues and concerns for multiple industry and business communities

RAJAH & TANN
advocates & solicitors



Case Note: The Confidentiality Of Arbitration Proceedings

November 2004
Rajah & Tann
4 Battery Road
#26-01 Bank of China Building
Singapore 049908
Tel: 65 6535 3600
Fax: 65 6538 8598
E-mail: eOASIS@rajahtann.com
Website: www.rajahtann.com



Case Note: The Confidentiality Of Arbitration Proceedings

As opposed to litigation, arbitration proceedings have always been considered to be private in nature. Indeed, this has always been touted as being one of its advantages. However, does this translate into an obligation of confidentiality that binds the parties to the arbitration and the arbitrator? The answer to this question has a significant impact, not only on whether documents used in one arbitration can later be disclosed in subsequent proceedings whether arbitral or litigious in nature, but also on the attractiveness of arbitration to potential disputants.

Until lately, there has been no Singapore decision on this issue and English and Australian cases conflict, with the English courts upholding the confidentiality of arbitral proceedings and documents (as was done in *Dolling-Baker v Merrett* [1991]), and Australian courts coming to the opposite conclusion (see, for example, *Esso Australia Resources Ltd v Plowman* [1995]). Recently, the Singapore High Court settled the position for Singapore in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] where it chose to follow the English rather than the Australian approach. At the same time, however, the English Privy Council made statements in a recent case, *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003], that have called into question the English approach to the issue of confidentiality. This article will examine two main English cases on this point, as well as the Singapore decision. It will then suggest practical approaches to dealing with the confidentiality issue.

The English and Singapore Cases

In *Dolling-Baker v Merrett*, the English High Court declined to allow disclosure of the arbitral award, the opening submissions at the arbitration, and the transcripts of evidence. It held that the law implied a duty of confidence obliging parties to an arbitration to keep confidential all arbitral documents. Further, it held that no disclosure could be made without leave of court. The court would grant leave to disclose if it were reasonably necessary to do so. While the Court disallowed disclosure, it also indicated that, in respect of the transcripts of evidence, if these were later required to impugn the credibility of the witnesses at the subsequent hearing, that would be sufficient to meet the requirement of reasonable necessity at that point in time.

It should be noted that as regards the question of leave, the Court went substantially further than prior English cases deciding on this point. While these earlier cases had accepted that there was a duty of confidentiality, such a duty was limited by the exception of reasonable necessity, which, if it applied, meant that a party was at liberty to disclose the document without leave of court. Leave of court was only required if the document was confidential. Whether the court would allow disclosure depended, not on the 'reasonable necessity' exception, but on whether the document met the tests relevant for the application under which disclosure was resisted (such as an application for injunction) or sought (such as an application for discovery).

Dolling-Baker v Merrett was followed by the Singapore High Court in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu*. However, the High Court did not adopt the approach in that case totally. While it accepted that the law would imply a duty on parties to an arbitration to keep arbitral documents confidential, it also held that leave of court would not be required if disclosure of the documents was reasonably necessary. As regards the process of disclosure, the Court noted that if one party decided that disclosure was reasonably necessary and made disclosure, if the other party disputed this, it



could apply to expunge the disclosure and the court would then determine if it was reasonably necessary, and make an order to expunge if not.

In this case, the Singapore High Court held that disclosure was not necessary. This was because the defendants had sought disclosure of the arbitral documents in support of their application to strike out the plaintiff's claim in Singapore on the basis that this claim was already the subject of an arbitration in Myanmar. However, by the time the application was heard by the High Court, the arbitration in Myanmar had terminated as the arbitral tribunal had declared that it did not have jurisdiction to hear the matter. Accordingly, there could be no reasonable necessity to rely on the arbitral documents in the proceedings before the Court at that point in time. However, the Court noted that this would not have been the case earlier when the application to disclose was first heard before the registrar of the court. In other words, as was recognised in *Dolling-Baker v Merrett*, whether disclosure is reasonably necessary is a matter that changes over time.

As noted, in 2003, the question of confidentiality of arbitral documents was also considered by the Privy Council in *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich*. In that case, the Privy Council had to construe a clause imposing an obligation of confidentiality on parties to the arbitration. It held that such a clause should not be construed so as to prevent a party from legitimately relying on the legal rights conferred on it by the arbitral award and that, accordingly, the award could be disclosed if such disclosure was required to enforce a party's rights as embodied in the award.

As the Privy Council was construing an express contractual clause, it was not necessary for it to consider the correctness of *Dolling-Baker v Merrett*. However, it did do so, and significantly stated, 'Their Lordships have reservations about the desirability or merit of adopting [the approach in *Dolling-Baker v Merrett*. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of documents or to documents which have been obtained in different ways and elides privacy and confidentiality.' Unfortunately, however, this decision was not considered by the Singapore High Court in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu*, and so it is not known how the Court would have considered the Privy Council's view.

Practical Principles To Consider

Singapore's reputation as a top jurisdiction in the region for dispute resolution received well-deserved recognition when its legal system was rated as number one among 12 Asian countries for the sixth year running by Hong Kong-based Political and Economic Risk Consultancy. The Singapore decision upholding the confidentiality of arbitral documents ensures that arbitration in Singapore remains an attractive proposition, which helps to cement our good reputation in the arena of dispute resolution. For persons considering arbitration in Singapore, the following practical principles on confidentiality can be extracted from the cases discussed:

- Notwithstanding that the law will imply an obligation of confidentiality into an arbitration agreement, for clarity and prudence, a specific confidentiality clause should be expressly included. Various standard arbitral rules, such as the Rules of the Singapore International Arbitration Centre, do provide for this, and it would be sufficient if they were incorporated by reference into the arbitration agreement.
- Such a clause should ideally expressly set out situations where the award can and cannot be disclosed without consent. This is to ensure that the court will be less likely to read terms into the



confidentiality clause as was done in *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich*.

- Finally, although *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* endorsed an approach that permitted disclosure without obtaining leave of court, the possible subsidiary risk of a claim for equitable damages for breach of confidentiality should be addressed by providing that such damages are expressly excluded.

Rajah & Tann is one of the largest law firms in Singapore, with a representative office in Shanghai. It is a full service firm and given its alliances, is able to tap into resources in a number of countries.

Rajah & Tann is firmly committed to the provision of high quality legal services. It places strong emphasis on promptness, accessibility and reliability in dealings with clients. At the same time, the firm strives towards a practical yet creative approach in dealing with business and commercial problems.

The information contained in this newsletter is correct to the best of our knowledge and belief at the time of writing. The contents of the above intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as the information above may not necessarily suit your specific business and operational requirements. It is also to your advantage to seek specific legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann or e-mail the Knowledge & Risk Management Group at eOASIS@rajahtann.com.

© Rajah & Tann Knowledge & Risk Management. All rights reserved.