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IN VIA JURIS • ATTORNEYS AT LAW

CONFIDENTIALITY AND ITS LIMITS

Kyiv Arbitration Days 2011

17 – 18 November 2011

Sweden – The occasionally unwarranted assumption of confidentiality

- *Bulgarian Foreign Trade Bank v. A.I.T. Trade Finance*
[Swedish Supreme Court, 27 October 2000]
 - In the absence of an express agreement between the parties regarding confidentiality, there is no justification for imposing such an agreement by way of an implied term

Australia (1)

- ***Esso Australia Resources Ltd v. Plowman***
(XXI Y.B. Comm. Arb. 137 [Australian High Court 1995])

- Chief Justice Mason, after discussing a string of English cases:
 - *„I do not consider that, in Australia, [...] we are justified in concluding that confidentiality is an essential attribute of a private arbitration [...]“*

 - *„The case for an implied term must be rejected.“*

Australia (2)

- **Australian International Arbitration Act 1974** (amended 2010)
- *„Confidential information“*:
 - all pleadings, submissions, statements, or other information
 - any evidence supplied
 - any transcript of oral evidence or submissions
 - any rulings of the Tribunal
 - any award

Australia (2) – *cont'd*

- Exceptions from confidentiality:
 - consent of all parties
 - vis-à-vis professional or other advisors of a party
 - if necessary for a full presentation of a party's case
 - if necessary for a party to establish or protect legal rights vis-à-vis a third party
 - if necessary for the purpose of enforcing an arbitral award
 - order made or subpoena issued by a court
 - if disclosure is authorized or required by another relevant law or required by a competent regulatory body
 - order of court in other cases

Confidentiality – Opting In

- **Norwegian Arbitration Act 2004**

- § 5: Arbitration proceedings and decisions reached by Tribunal not subject to confidentiality, unless otherwise agreed

- **French Decree no. 2011 - 48 (January 2011)**

- Domestic arbitration: Arbitration is confidential, save for “legal obligations” and unless parties have agreed otherwise
- International arbitration: No corresponding provision
i.e. international arbitration is NOT confidential

- **Austrian law**

- no confidentiality in the absence of express wording or clearly established intent

Switzerland – yes, no, don't know?

- Chapter 12 Swiss Federal Act on Private International Law 1987 (PILA): silent on confidentiality
- Some: In the absence of the parties' express agreement, no duty of confidentiality
- The majority: Implied confidentiality obligation
- Swiss Rules of International Arbitration (2006): Unless expressly agreed otherwise in writing, all awards, materials submitted (unless in the public domain) are confidential unless disclosure required by legal duty, to protect or pursue a legal right or to enforce or challenge an award (Article 43)

England (1) – the implied duty of confidentiality

- *Ali Shipping Corporations v. Shipyard Trogir*

[(1997) APP. L.R. 12/19]

- duty of confidentiality implied as a matter of law arising as an essential corollary of the privacy of arbitration proceedings
- arbitration clause is a good example of a definable category of contractual relationships where the law will necessarily imply a term [i.e. duty of confidentiality]

England (2)- Exceptions to confidentiality

- (i) consent, express or implied
- (ii) order of the court
- (iii) leave of the court
- (iv) disclosure, if reasonably necessary for the protection of an arbitrating party's legitimate interests
- (v) in the „public interest“

England (3) – the Boundaries of Confidentiality?

- ***Emmott v. Wilson***

([2008] EWCA Civ 184)

- *“The content of the [confidentiality] obligation may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case-by-case basis.”*

- *“Indeed, the breath of the exceptions referred to in Emmott ... almost all of which required the application of subjective judgement – make it impossible to identify the boundaries of the confidentiality obligation with any degree of certainty.”*

² Young/Chapman, Confidentiality in International Arbitration: Does the Exception prove the Rule? Where Now for the Implied Duty of Confidentiality under English Law? (Kluwer 2009)

Confidentiality – What's its nature?

- A substantive term?
- A procedural term?
- A mixed term – procedural part complemented by substantive law part?
- *Emmot v. Wilson*: „A rule of substantive law masquerading as an implied term.“

Confidentiality – Which law?

- Lex arbitri?
- Law governing the substantive contract?
- Law governing the arbitration agreement?
 - *Sonatrach Petroleum v. Ferrell International*: Proper law of the arbitration agreement is the law chosen for the substantive contract or, in the absence of an express choice, by the law of the place of arbitration
 - Ad-hoc arbitration in England, governing law of arbitration clause Norwegian, French, Austrian – what about the implied term?

Confidentiality – Taking stock

„Few legal concepts are more indefinite in nature, dubious in scope and uncertain in existence than confidentiality.“¹

¹ Iliana M. Smeureanu, „Confidentiality in International Commercial Arbitration 2011“

Confidentiality v. Paradigm case

- consent of all parties
- vis-à-vis professional or other advisors of a party
- if necessary for a full presentation of a party's case
- if necessary for a party to establish or protect legal rights vis-à-vis a third party
- if necessary for the purpose of enforcing an arbitral award
- if disclosure is authorized or required by another relevant law or required by a competent regulatory body
- order of the court
- leave of the court
- “public interest“ or “interests of justice”

A paradigm case (1)

- Confidential LCIA arbitration in London
- Dispute between A and B concerning A's investment in Ukraine
- A, claimant, individual, residing outside of Ukraine
- B, respondent, company incorporated outside of Ukraine, beneficially owned and controlled by Z, a high official in Ukraine, and represented by a “magic circle” UK law firm
- Applicable law – English Law

A paradigm case (2) – Sabotaging the arbitration

- B formally participates in arbitration and appoints arbitrator
- Y (fully controlled Ukrainian subsidiary of B) initiates parallel proceedings in Ukraine and seeks a declaration of the invalidity of the arbitration clause in Ukrainian state court
- Y requests an anti-arbitration injunction, restraining A and its counsel from continuing the arbitration (classic anti-suit injunction)

A paradigm case (3) – The anti-arbitration injunction

Judge grants Y's application and issues anti-arbitration injunction:

“As an interim measure [A] is prohibited, personally and through its representatives, from taking any action for the consideration of any dispute under the [Contract] before LCIA, including, inter alia, submitting the claims, requests, demands and other procedural documents, assigning the rights that are the subject matter in the dispute under the [Contract] as well as from taking any other action connected to the consideration of the dispute under the [Contract] before LCIA.”

A paradigm case (4) – The anti-arbitration injunction

The ruling of the Ukrainian court:

- infringes attorney's right to practice law
- precludes the law firm representing A from fulfillment of its obligations under the legal services agreement
- precludes the law firm from pursuing commercial activity

A paradigm case (5) – The anti-arbitration injunction

WOULD YOU CHALLENGE THE DECISION?

A paradigm case (6) – Cassation proceedings

- Law firm files a statement of cassation
- The statement of cassation is taken into consideration
- The injunction is “clarified”:
 - “injunction is aimed at individual attorneys, not a law firm”
 - “the rights of the law firm are not infringed”
- Cassation proceedings are terminated

Ukrainian Criminal Code

(as amended in July 2010)

„Article 382. Failure to comply with a judgement

(1) Wilful failure to comply with a sentence, judgement, ruling or order of a court which has come into effect, or the frustration of their execution,

*shall be punishable by a fine of 500 to 1000 tax-free minimum incomes, **or** imprisonment for a term of up to three years.“*

A paradigm case (6) – Difficult choices

- Withdraw the claim in the arbitration and face the risk of criminal accountability?

or

- Ignore the anti-arbitration injunction and continue?

A paradigm case (7) – Difficult choices

AN UNLIKELY SCENARIO?

Telenor Mobile Communications AS v. Storm LLC (1)

- UNCITRAL arbitration in New York
- *Storm* is represented by a “magic circle” law firm
- *Alpren Limited* (Ukrainian subsidiary of Storm) seeks invalidation of arbitration clause in Ukrainian court
- *Alpren Limited* requests an anti-arbitration injunction against *Telenor* (Norway) from Ukrainian court

Telenor Mobile Communications AS v. Storm LLC

(2)

Ukrainian court grants an injunction:

“Telenor and any authorized representative thereof are prohibited, until the case is considered by court on merits, to take any action in accordance with Shareholders Agreement, in particular are prohibited to submit any clarification, make any statement, submit any statement of claim, any motion, take part in the arbitration proceedings, hearings, meetings of the Arbitration Tribunal (Gregory B. Craig, William R. Jentes - Arbitrators, Kenneth R. Feinberg - President), taking place under the claim of Telenor Mobile Communication AS under the UNCITRAL Rules in New York City.”

Next step

As attorneys committed to our client's interests we choose to
continue ...

Confidentiality v. Paradigm case – Issues to consider

- The limits of confidentiality
- Should we go to the court for a leave?
- Whether “exceptions” are applicable
- Mass media & the public?

THANK YOU!

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