

- 14 Ibid.
- 15 Section 2 of the Hong Kong Arbitration Ordinance (Cap 609).
- 16 *Sumikin Bussan International (Hong Kong) Ltd v King Shing Enterprises Ltd (In liquidation) and Manharlal Trikamdas Mody & Anr* 2008 (5) Bom CR 464.
- 17 *State of West Bengal v Jugal Kishore More* AIR 1969 SC 1171.
- 18 Section 2 of the Hong Kong Arbitration Ordinance (Cap 609)
- 19 [1999] 2 HKC 205, CFA '[...] the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v Alberto-Culver Co* (1974) 417 US 506; *Imperial Ethiopian Government v Barich-Foster Corp.* (1976) 535 F. 2d 334 at 335)'. See also *Apex Tech Investment Ltd v Chuang's Development (China) Ltd* [1996] 2 HKC 293, C. *Shenzhen Nan Da Industria and Trade United Co v FM International Ltd* [1992] 1 HKC 328, HC; *China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd* [1994] 3 HKC 375, HC.
- 20 'Foreign Award' has been defined in section 2 of the *Foreign Awards (Recognition and Enforcement) Act, 1961* (now repealed) and Section 44 of the 1996 Act. Both statutes were enacted to give effect to the Convention.
- 21 The 1937 Act was enacted to give effect to the 1923 Geneva Protocol and the 1927 Geneva Convention.
- 22 Under Indian law, a treaty entered into by India cannot become law and cannot be implemented unless Parliament passes a law as required under Article 253 of the Constitution of India, 1950 (see *State of West Bengal v Kesoram Industries Ltd.* (2004) 10 SCC 201).
- 23 Section 44 of the 1996 Act provides for notification by the Central Government in the Official Gazette declaring a Member State as reciprocal territory.
- 24 (1998) 2 SCC 281.
- 25 In *Pratabmull Rameshwar v KC Sethia Ltd*, AIR 1960 Cal 702, the High Court of Calcutta has held that the aggrieved party is entitled to file a suit in India challenging the foreign award. The Court observed that, 'Freedom or capacity to question the validity of such foreign award only as defence to proceedings brought for its enforcement cannot in my opinion be read as an implied ouster of his right to initiate and maintain an action to set aside such awards on the same grounds open to him in defence to proceedings brought against him'.
- 26 *Badat and Co v East India Trading Co*, AIR 1964 SC 538. The Indian Supreme Court held in paragraph 44 that an award can furnish a fresh cause of action. However, the award must be final.
- 27 AIR 1964 SC 538.
- 28 *The Conflict of Laws* (7th ed) (1958) at page 1056; see also paragraph 60(2) of the 13th ed (London: Sweet & Maxwell. 2000), page 625.
- 29 *M/s. Gopal Singh Hira Singh v Punjab National Bank*, AIR 1976 Delhi 115; *Northern Sales Co Ltd v RE Industries Pvt Ltd*, AIR 1985 Bombay 332).

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Towards a uniform approach to confidentiality in arbitration: a role for the new IBA Rules

Parties choosing arbitration over litigation do so in part due to its private nature, which for many users implies a certain level of confidentiality. However, although parties often assume that the arbitral proceedings and evidence submitted therein will remain confidential, there is often no assurance under the law of the seat of the arbitration or the applicable procedural rules that the confidentiality of the arbitral proceedings will be protected.

The statutory/legal environment: the Korean example

Like many jurisdictions around the world, Korea's Arbitration Act is based closely upon the UNCITRAL Model Law. As the Model Law has no provisions relating to confidentiality, the Arbitration Act is also silent on the confidentiality obligation of the various participants in the arbitral proceedings. In addition, the Korean courts do not recognise confidentiality as an implied term of an arbitration agreement. Korea is not unique in



this regard. French courts, for example, have also held that confidentiality is not implied by the private nature of arbitration.

In jurisdictions such as Korea, therefore, there is no inherent statutory or extra-contractual legal protection of the confidentiality of arbitral proceedings or evidence submitted in the arbitration (either in support of one's case or in response to document requests or orders for production of evidence during discovery). As such, where confidentiality is a concern of one or more parties to an arbitration agreement seated in Korea or similarly situated jurisdictions, special consideration must be given to the agreed applicable procedural rules and the arbitration agreement itself.

Procedural rules: a mixed bag

The procedural rules chosen by the parties may or may not contain provisions regarding confidentiality. As the various ad hoc and institutional rules vary widely in this regard, care must be exercised in the selection of the appropriate procedural rules and in the supplementing of existing rules to provide for confidentiality, where desired. For example, the UNCITRAL Arbitration Rules as revised in 2010 ('UNCITRAL Rules') provide at Article 34(5) that an award may be made public only with the consent of the parties 'or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority'. However, the UNCITRAL Rules contain no provisions regarding obligations of the parties, counsel or arbitrators with respect to the confidentiality of the proceedings or evidence produced during the course of the arbitration.

Institutional rules are inconsistent in their treatment of confidentiality. The World Intellectual Property Association Arbitration Rules ('WIPO Rules') provide the greatest level of protection of confidentiality. This is perhaps not surprising, given that the WIPO Rules were drafted so as to be particularly well-suited to intellectual property disputes, an area in which trade secrets and other highly confidential information must be examined as evidence. The WIPO Rules contain an entire chapter on confidentiality (Articles 73-76), and explicitly require the parties to refrain from disclosing even the existence of the arbitration except in certain limited circumstances (such as where required by law, and then only to the extent

required by law). The chapter also provides that any documentary or other evidence given by a party or witness, as well as the arbitral award, shall be treated as confidential. Finally, Article 76 imposes an obligation upon WIPO and the arbitrators to maintain the confidentiality of the arbitration, the award, and any documentary or other evidence disclosed during the proceedings. The arbitration rules of the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) also include provisions protecting the confidentiality of most aspects of the arbitral proceedings.

Until very recently, the ICC Rules of Arbitration ('ICC Rules') represented the other end of the spectrum with respect to protection of confidentiality – they were totally silent in this regard. The newly revised ICC Rules, in force as of 1 January 2012, incorporate a very helpful clause regarding confidentiality. Article 22(3) of the new ICC Rules provides that, upon the request of any party, the tribunal may make orders concerning the confidentiality of the proceeding or of any other matters in connection to the arbitration, and may take measures for the protection of trade secrets and confidential information. This provision, while not as specific or comprehensive as the WIPO Rule provisions, will allow the tribunal the flexibility to make orders tailored to the particular circumstances of each arbitration, and to address the concerns of a party submitting confidential or sensitive information or evidence.

The KCAB: two arbitration rules, two standards of confidentiality

The Korean Commercial Arbitration Board (KCAB) has two sets of arbitration rules, both of which were recently revised effective 1 September 2011. The KCAB Domestic Rules, which apply to KCAB arbitrations between Korean parties, provide simply that 'the arbitration proceedings shall be kept confidential' (Article 9). No further guidance is provided with respect to the scope of this confidentiality obligation, either as to the type of information required to be kept confidential or as to the persons to whom the obligation applies.

The KCAB International Rules, which apply to KCAB arbitrations in which one party's place of business or the place of arbitration

is outside of Korea, are more specific. Article 52 (entitled 'Confidentiality') of the International Rules provides:

1. The arbitration proceedings, and records thereof, shall be closed to the public.
2. The members of the Arbitral Tribunal and the Secretariat, the parties and their representatives and assistants shall not disclose facts related to arbitration cases or facts learned through arbitration cases except where disclosure is consented to by the parties, required by law or required in court proceedings.

Obviously the International Rules do a better job of protecting the confidentiality of evidence or information disclosed during the arbitral proceedings, as the scope of the obligation is much more clearly defined. However, as with the international ad hoc and institutional rules, there is a lack of consistency in approach to confidentiality even as between the two sets of KCAB arbitration rules.

The IBA Rules: a consistent approach

The various ad hoc and institutional arbitration rules provide varying levels of protection of confidentiality, but there is no consistent approach. Some rules provide specific and comprehensive protection of confidentiality, while others leave the matter to the discretion of the tribunal and/or the parties. National arbitration laws are often of little assistance. Where confidentiality is important, therefore, the parties may be well advised to consider incorporating a confidentiality obligation in their agreement to arbitrate. In addition, we believe that the *IBA Rules on the Taking of Evidence in International Arbitrations* ('IBA Rules') could also play an important role in providing reasonable and consistent protection for the confidentiality of the arbitral proceedings in Korea and other jurisdictions, especially if they are incorporated by reference into the agreement to arbitrate.

Since coming into effect in 1999, the IBA Rules have found widespread acceptance in the arbitration community. The IBA Rules were revised as of 29 May 2010, and include provisions clarifying and expanding the scope of documents and evidence to which a confidentiality obligation applies, as well as a requirement that the arbitral tribunal consult with the parties as early as possible in the proceedings regarding, among other

things, the level of confidentiality protection to be afforded to evidence in the arbitration. Taken together, these provisions afford both a high level of protection for evidence in the arbitral proceedings and a sensible degree of flexibility and collaboration with the parties to tailor the level of protection as appropriate for a particular arbitration.

Confidentiality obligation applies to expanded scope of documents and evidence

Article 3.13 of the IBA Rules provides:

'Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.'

Prior to the 2010 revisions of the IBA Rules, former Article 3.13 provided protection only to those documents submitted pursuant to a request for production by a counterparty or an order for production by the tribunal. The revised provision extends this protection to all documents produced in the arbitration and not in the public domain. This is a more sensible approach, and should encourage more cooperation (and result in fewer disputes) regarding document production in arbitrations adopting the IBA Rules.

Consultation of tribunal with parties regarding level of confidentiality

More importantly, however, Article 2 of the revised IBA Rules provides that '[t]he Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence'. Among the matters to be discussed is 'the level of confidentiality protection to be afforded to evidence in the arbitration'. This provides an excellent opportunity for the tribunal and the parties to pause to consider



and agree upon the level of confidentiality protection required in the arbitration, well before the parties have commenced their requests for (and production of) documentary evidence or preparing their witness statements and other evidence. As consent of the parties is critical to a fair and efficient arbitration, this process ensures not only that the issue of confidentiality (and other issues relating to the taking of evidence) is resolved in advance, it also enhances the integrity and enforceability of any award rendered on the basis of evidence produced in the arbitration.

Incorporation of IBA Rules into arbitration agreements unlikely to face resistance

Given the widespread acceptance of the IBA Rules in the arbitration community, and their proven effectiveness in countless international commercial arbitrations around the world, we would expect little resistance to the notion of incorporating the IBA Rules into the arbitration agreements of parties in both civil law and common law jurisdictions. It is often said that the IBA Rules strike a reasonable balance between the civil law and common law attitudes toward discovery in arbitration, and we have found this to be the case in multiple arbitrations involving Korean and US parties, for example.

The IBA Rules also appropriately balance the need for protection of confidential information with the need to examine evidence in the arbitration to arrive at a fair and balanced award. As a default presumption, confidentiality protection is afforded to all evidence submitted by all parties in the arbitration under Article 3.13. But Article 2 provides the flexibility to increase the specificity and/or the level of protection on a case-by-case basis, in consultation with the parties, and in advance of any discovery disputes.

Given the inconsistency in the many ad hoc and institutional arbitration rules pursuant to which international commercial arbitrations are conducted, we believe the routine incorporation of the IBA Rules into commercial arbitration agreements would go a long way to moving towards a more uniform approach to discovery, including the protection of confidential information such as trade secrets and other commercially sensitive information. This is especially true in the numerous jurisdictions, like Korea, in which the Arbitration Act is silent with respect to the confidentiality of information and evidence disclosed in arbitral proceedings. While no set of rules or guidelines can be a panacea, the IBA Rules provide a convenient, consistent, efficient and fair framework for addressing confidentiality and other discovery issues in arbitration.

Setting aside of an Arbitral Award: judicial interpretation of the 1999 FIDIC Red Book

This article examines the recent decision of the Singapore Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33, dismissing the appeal brought from the decision of the Singapore High Court.

The decision has generated a fair bit of interest, primarily because the Singapore Court of Appeal was tasked with interpreting the dispute resolution mechanism set out in the *FIDIC Conditions of Contract for Construction* (1st ed, 1999 – the ‘1999 FIDIC Red Book’) in

order to ascertain whether an arbitral tribunal had acted in excess of its powers.

The background facts

CRW Joint Operation (CRW), a tripartite joint operation established under the laws of Indonesia, and PT Perusahaan Gas Negara (Persero) TBK (PGN), a publicly listed state-owned company incorporated in Indonesia, entered into a contract on 24 February 2006 pursuant to which CRW undertook to design,

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