Confidentiality and Arbitration

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Introduction

1. When listing the advantages and disadvantages of arbitration as compared to other forms of dispute resolution (and in particular litigation), it is usual to include “confidentiality” on the plus side for arbitration. A former Secretary General of the ICC has said that confidentiality was regularly cited by parties as the most attractive feature of arbitration as compared with litigation and in its Report on the Arbitration Bill dated February 1996\(^1\), the Departmental Advisory Committee (“DAC”) (chaired by Lord Saville) recorded that “there is ... no doubt whatever that users of commercial arbitration in England place much importance” on privacy and confidentiality “as essential features”.

2. Unsurprisingly, the importance of confidentiality is usually recognised by national courts\(^2\), at least in part, in order to present the local jurisdiction as reliable and attractive for arbitrations which could be taken elsewhere.

3. The Arbitration Act 1996 makes no reference to the obligation of confidentiality. However, as indicated by the quotation from the DAC Report above, this omission was no indication that confidentiality was not regarded as being important. It was the difficulty of reaching a statutory formulation, in the light of “the myriad exceptions” and the qualifications that would have to follow, that led the DAC to conclude that

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\(^1\) Paragraphs 10 – 17.
\(^2\) However, even within the common law world the protection offered is uneven. See, for example, the decision of the High Court of Australia in Esso Australia Resources Limited v Plowman (1995) 128 ALR 391.
the courts should be left to continue to work out the implications “on a pragmatic case-by-case basis”.

4. This paper will examine the way in which English law protects the confidentiality of the arbitral process at different stages:
   (1) The hearing;
   (2) The award;
   (3) The documents prepared for the arbitration;
   (4) Any subsequent applications pursuant to CPR Part 62.

The hearing

5. The position is, perhaps, least controversial in relation to the privacy of the hearing. Subject to the parties agreeing otherwise, the arbitration held pursuant to an agreement to submit to arbitration is private in the sense that it is not open to the public. The arbitrator will exclude strangers from the hearing unless the parties consent to attendance by a stranger.

6. Perhaps because the principle is uncontroversial, there is little authority on the point. In *The Eastern Saga*, Leggatt J said:

   “The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the

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3  [1984] 2 Lloyd’s Rep 373 at 379.
hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the parties seeking it and however closely associated with each other the disputes in question may be.”

7. Persons whose presence is necessary for the proper conduct of the arbitration are not strangers in the relevant sense. It appears that, in practice, this rule has caused few, if any, practical problems.

8. It is, however, worth noting that the Arbitration Act 1996 is silent on the issue of who may attend an arbitration hearing, and it may be thought that arbitrators have a discretion subject only to their overriding duty in section 33(1)(a) of the 1996 Act to secure a fair hearing.

The award

9. The circumstances in which an award can be disclosed in subsequent proceedings are primarily set out in:

   (1) *Hassneh Insurance v Mew*; and

   (2) *Ali Shipping v Shipyard Trogir*.

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4 Merkin cites two 19th century cases: *Tillam v Copp* (1847) and *Re Haigh* (1861) 3 De G F & J 157.
10. In *Hassneh Insurance v Mew*\(^5\), the defendant was reinsured by the claimants under various reinsurance contracts entered into in the course of the period 1979 to 1984. The placing brokers were CE Heath and Co (Heath).

11. Disputes arose between the claimants and the defendant. The defendant commenced arbitration claiming to recover under the policies. The reinsurers (claimants) raised various defences including non-disclosure and misrepresentation, coverage points going to the construction of the contracts and to the making of cessions not permitted by the contract.

12. The reassured (the defendant) sought to claim against their brokers in the event that they failed against the reinsurers. There was no arbitration agreement between Heath and the reassured so Heath would have to be sued in separate proceedings in Court. In the event pending determination of the arbitration the reassured and Heath entered into a standstill agreement under which all further steps in the claim against Heath were postponed.

13. In the course of the arbitration pleadings were exchanged, there was substantial discovery of documents, there was exchange of witness statements and transcripts of the hearings.

14. An interim award including reasons was made in which the reassured (the defendant) was substantially unsuccessful and consequentially wished to proceed against Heath.

claiming on the basis of negligence and breach of duty as placing brokers. The defendant reassured wished to contend that Heath negligently prepared and allowed the reassured to enter into reinsurance treaties worded in such a way as to make them unsuitable for many of the risks intended to be reinsured, negligently failed to place proper run off reinsurance and made misrepresentations to re-insurers in respect of a cancellation addendum in 1987 which insurers were for that reason entitled to avoid.

15. The defendant reassured wished to disclose to Heath the interim award and the reasons and it was envisaged that at some future stage in the pursuit of the proceedings against Heath the defendant, might wish to disclose transcripts, witness statements, pleadings or other documents from the arbitration.

16. The claimants were content that the defendant should at once disclose the award to Heath and so much of the reasons as were referred in the award. They objected to the disclosure of the whole of the reasons or the disclosure of any other documents such as pleadings or witness statements or transcripts. They claimed injunctions to restrain such disclosure on the basis that such disclosure would be a breach of confidence by the defendants. They argued that the appropriate course was for there to be no disclosure of such documents prior to discovery in the proceedings against Heath at which time the defendants should produce the documents for inspection only if the Court so ordered and not otherwise.
17. The defendant counterclaimed for leave to disclose contending that although there was some duty of confidence in respect of documents in the arbitration, it was a qualified duty to the effect that the documents could be disclosed to a third party if to do so was required or was reasonable and proper or reasonably necessary for the protection of the defendant's own interest.

18. Colman J held as follows:

(1) if it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-a-vis a third party that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it including its reasons would not be a breach of the duty of confidence;

(2) if it was reasonably necessary for the establishment by the defendant of his causes of actions against Heath that he should disclose or in his pleadings quote from the arbitration award including the reasons of he should be entitled to do so without editing either the award or the reasons and without having to apply to the Court for leave to do;

(3) it was to be implied as a matter of business efficacy in the agreement to arbitrate that, if it was reasonably necessary in order to run off the contracts to have access to the award including the reasons the defendant would be entitled to disclose that document to Heath;

(4) the documents such as pleadings, witness statements, disclosed documents in the arbitration and transcripts were subject to a duty of confidence; they were merely
the materials which were used to give rise to the award which defined the rights and obligations of the parties to the arbitration; accordingly the qualification to the duty of confidentiality based on the reasonable necessity for the protection of an arbitrating party's rights against a third party could not be expected to apply to them; it was the final determination of rights expressed in the award which was pertinent as against third parties not the raw materials for that determination;

(5) the documents created by or in the course of an arbitration to which an objection of confidence attached could not in principle have any different status from any other documents which were the subject of a duty of confidence; there was nothing to justify the voluntary disclosure to a third party of such arbitration documents, other than the award, in anticipation of the commencement of proceedings by or against that third party; and to disclose such documents without the consent of the other arbitrating party would be a breach of the obligation of confidence; in so far as the injunction currently applied to the whole of the reasons as well as the award the order should to that extent be discharged.

19. In *Ali Shipping v Shipyard Trogir*⁶, the Court of Appeal identified the following further circumstances in which disclosure of an award would be allowed:

(1) “consent”, i.e. where disclosure is made with the express or implied consent of the party who originally produced the material”. Consent may in exceptional circumstances arise from the custom and practice of the relevant trade.

(2) order of the court;

(3) leave of the court. The practical scope of this exception i.e. the grounds on which such leave would be granted would give rise to some difficulty. However, on the analogy of the implied obligation of secrecy between banker and customer, leave would be given in respect of:

(4) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. Potter LJ followed went on to note that the concept of reasonable necessity ought not to require the party seeking disclosure “to prove necessity regardless of difficulty or expense”. Instead the court was to take a rounded view, “taking account of the nature and purposes of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is being directed and the practicality and expense of obtaining such evidence or information elsewhere” however, he held that “it is not enough that an award or reasons might have a commercially persuasive impact”

(5) where the interests of justice require. This principle was derived from the judgment of Mance J in London and Leeds Estates Ltd v Paribas Ltd (No 2)7. Potter LJ held that this was not a wide ranging exception but rather a limited one based upon the importance of a judicial decision being reached upon the basis of truthful or accurate evidence of the witnesses concerned.

7 [1995] 2 EG 134.
20. There will be no disclosure if there is no direct link between the earlier arbitration and the later proceedings. In *Insurance Company v Lloyd’s Syndicate*\(^8\), the claimant was the leading insurer in a group of six reinsurers under a reinsurance policy issued to the defendant, reinsuring the defendant’s liability under the whole account insurances. The claimant denied liability, claiming both that the defendant had failed to disclose material facts and that the losses were not covered by the reinsurance wording. The defendant succeeded in the arbitration, and wished to use the award to establish the liability of the five following reinsurers. The claimant sought injunctive relief against the use of the award.

21. Colman J, in granting the injunction, held that disclosure was not necessary to protect the defendant’s interests. Each reinsurer had a separate contract with, and therefore potentially different defences against, the reinsured: it followed that the award was at best persuasive evidence of the liability of the remaining reinsurers, and might otherwise have a commercially persuasive influence upon them, but it could not be said that disclosure was necessary to the successful prosecution of the defendant’s claims against the reinsurers.

22. Colman J recognised that the position would be different had the reinsurance agreement contained a “leading underwriter” clause obliging the following reinsurers to accept settlements reached by the leading reinsurer, for in such a case there would have been a direct link between the favourable arbitration award and the liability of the following market.

\(^8\) [1995] 1 Lloyd’s Rep 272
Documents relating to the arbitration

23. The position in relation to documents relating to the arbitration is somewhat more controversial.

24. Clearly, the efficacy of a private arbitration will be damaged, even defeated, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration.

25. It was on this basis that the Court of Appeal, in Dolling-Baker v Merrett\(^9\) restrained a party to an arbitration from disclosing on discovery in a subsequent action documents relating to the arbitration. The documents consisted of documents prepared for or used in the arbitration transcripts and notes of evidence given and the award. Parker LJ (with whom Ralph Gibson and Fox LJJ agreed), after referring to “the essentially private nature of an arbitration”, said:

“As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must ... be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court.”

\(^9\) [1991] 2 All ER 891.
26. Parker LJ went on to emphasize that the obligation arose out of the “nature of arbitration itself”. The fact that a document is used in an arbitration does not confer on it any confidentiality or privilege which can be relied upon in subsequent proceedings but, in considering a question as to production of documents or discovery by list or affidavit, the court must nevertheless have regard to the obligation. However, Parker LJ concluded that, if the court is satisfied that, despite the implied obligation, discovery and inspection are necessary for the fair disposal of the action, discovery and inspection must take place, though other means of achieving a similar result should be taken into account.

27. Although not directly at issue in Hassneh Insurance, Colman J did address the scope of confidentiality attaching to documents, other than the reasoned award, relating to an arbitration. He stated that the following three factors applied to an award but not to other documents generated for the purposes of the arbitration:

1. the reasoned award identified the rights and duties of the parties;
2. the award is subject to the supervisory jurisdiction of the English courts. For this reason, the award may have to brought into open court;
3. the award could be enforced by summary judgment, the application for which would take place in open court.

28. Colman J held that the confidentiality which attached to the other documents in the arbitration proceedings was not subject to the same limitations as the confidentiality attaching to the award, so that voluntary disclosure was not possible. He concluded
that it would be open to a court, in an appropriate case, to order disclosure of pleadings, witness statements and transcripts of evidence produced for the purposes of an earlier arbitration. However, he also held that the voluntary disclosure of arbitration documents, other than the award, in anticipation of the commencement of proceedings by or against that third party could not be justified. Instead the documents should be listed, if relevant, but no inspection should be permitted except on an order of the court.

29. In *Ali Shipping Corporation v Shipyard Trogir*\(^{10}\) the Court of Appeal applied the reasoning of the Court of Appeal in *Dolling-Baker*. The facts of *Ali Shipping* were as follows. Following a dispute between the claimants and the defendants arising out of a shipbuilding contract, an arbitration award was made in favour of the claimants. Subsequently a further dispute arose between the defendants and three other companies in the same corporate group as the claimant. That dispute also went to arbitration. The defendants wished to rely in the second arbitration on certain materials generated in the course of the first arbitration in support of the plea of issue estoppel. The claimant applied and obtained an ex parte injunction restraining the defendants from doing so on the basis that use of the material would amount to a breach of the defendant’s implied obligation of confidentiality in respect of the first arbitration.

\(^{10}\) [1998] 2 All ER 136.
30. The Court of Appeal held that the implied term upon which confidentiality rested was implied as a matter of law\textsuperscript{11} and not as a matter of fact, and accordingly arose in the same way in every arbitration and not by reason of the presumed intentions of the parties.

31. The Court of Appeal also stated that the exceptions set out at paragraph 19 above applied to the general rule of non-disclosure of pleadings, witness statements and notes of evidence in an arbitration.

32. The key distinction between the award and other documents relating to arbitration is that in the circumstances identified by Colman J a party can give voluntary disclosure of a reasoned award without breaching the duty of confidentiality. Unless it has the consent of the other party to the arbitration, a party can only disclose other documents relating to an arbitration either with the leave or order of the court.

33. In \textit{Associated Electric & Gas Insurance Services Limited v European Reinsurance Company of Zurich}\textsuperscript{12}, the Privy Council cast some doubt on the decision of the Court of Appeal in \textit{Ali Shipping}.

34. The case before the Privy Council involved the construction of an express confidentiality agreement and whether the later use of the award to support an issue estoppel fell within the scope of enforcement. Their Lordships expressed reservations

\textsuperscript{11} See per Lord Wilberforce in \textit{Liverpool City Council v Irwin} [1977] AC 239 at 254.

\textsuperscript{12} [2003] UKPC 11.
about the desirability or merit of adopting the approach of Potter LJ in *Ali Shipping* where he characterised the duty of confidentiality as an implied term and set out the exceptions to which it would be subject.

35. Their Lordships considered that this approach ran 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 elided privacy and confidentiality.

36. Commercial arbitrations were essentially private proceedings and unlike litigation in public courts did not place anything in the public domain. This may mean that the implied restrictions on the use of material may have a greater impact than those applying in litigation.

37. However, the same logic could not be applied to the award. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings or for the purposes of enforcing the rights which the award confers. Generalisations and the formulation of detailed implied terms were not appropriate.

Applications to the court

38. In *Department of Economic Policy and Development of the City of Moscow and The Government of Moscow v Bankers Trust Company and International Industrial*
Bank\textsuperscript{13}, the issue arose as to whether a judgment dismissing an application made under section 68 or failing that a Lawtel summary should be available either for general publication or for limited publication to specified financial institutions. The appellants, the Department of Economic Policy and Development of the City of Moscow and The Government of Moscow (together “Moscow”), contended that there should be publication and this was resisted by the respondents, Bankers Trust Company (“Bankers Trust”) and International Industrial Bank (“IIB”).

39. The following circumstances surrounding the arbitration were in the public domain:

(1) The arbitration was under UNCITRAL rules in London;

(2) The parties to the arbitration were Bankers Trust, IIB and Moscow;

(3) Bankers Trust was claiming to recover funds allegedly advanced under a Credit Agreement No 750 dated 24\textsuperscript{th} October 1997 made originally between Moscow and IIB;

(4) Under the award Bankers Trust succeeded against IIB but not against Moscow.

(5) The UNCITRAL rules applied and provided:

“25.4 Hearing shall be held in camera unless the parties agree otherwise

... 

32.2 The awards shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

... 

32.5 The award may be made public only with the consent of both parties.”

\textsuperscript{13} [2004] EWCA Civ 314.
(6) The arbitration took place in private and the award was published only to the parties.

40. Bankers Trust’s and IIB’s application under section 68 were themselves heard “in private” under CPR 62.10(3)(b). No contrary application or order was made under CPR 62.10(1)\textsuperscript{14}.

41. Prior to and during the arbitration Bankers Trust gave notice to various financial institutions who had at IIB’s or its instance acquired an interest as sub-participants in Credit Agreement No. 750; and, after receiving the award it wrote to those investors implying that its failure to establish any default by Moscow was due to a “surprising” application of Russian law by the arbitrator. While the London arbitration was in progress, on 23\textsuperscript{rd} October 2001 the City of Moscow issued an Offering Circular, through ING Barings and UBS Warburg as lead managers in London with Chase Manhattan (London) as trustee, to raise Euro 300,000,000 by way of loan participation notes due 2004. The Circular referred to claims against it in an ongoing arbitration by “an international bank” in respect of a loan allegedly made to it by a

\textsuperscript{14} CPR Part 62.10 provides:

“(1) The court may order that an arbitration claim be heard either in public or in private.
(2) Rule 39.2 does not apply.
(3) Subject to any order made under paragraph (1)-
(a) the determination of
   (i) a preliminary point of law under section 45 of the 1996 Act; or
   (ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award,
will be heard in public; and
(b) all other arbitration claims will be heard in private.
(4) Paragraph 3(b) does not apply to-
   (a) the preliminary question of whether the court is satisfied of the matters set out in section 45(2)(b); or
   (b) an application for permission to appeal under section 69(2)(b).”
Russian bank, and recorded that Moscow contested these claims on the basis that it had never received the funds and said that it believed that the funds had been “improperly misappropriated” by the Russian bank.

42. The section 68 application was heard by Cooke J. His judgment was not marked private, and, although the point about privacy was immediately raised with him and stood over for further argument, Lawtel received a copy of the judgment, which in good faith it summarised on its website and by email to its 15,000 or so subscribers, in each case with a link to the full text on its website. Objection was at once raised by Bankers Trust and the material on Lawtel’s website was deleted. There was no evidence that any subscriber in fact downloaded all or any part of the full transcript during the limited time that this was on the web. But the relevant email summaries remained on computers belonging to all those subscribers who received the email summary.

43. Moscow’s expressed reason for wishing for publication was that it should be able to demonstrate “to the international financial markets” or “investment community” generally that the arbitration award holding that it had not committed any sort of financial default “had been the subject of detailed and careful scrutiny by the Commercial Court which rejected all … attacks” upon it.

44. It was common ground that it was open to Moscow “freely [to] state the end result of the arbitration and the end result of the litigation” under section 68. Having heard
submissions, Cooke J determined, by separate judgment, supplemented by short reasons relating to the Lawtel summary, that the earlier substantive judgment dated should remain private and that neither it nor the Lawtel summary should be available for any publication.

45. Moscow appealed against that judgment to the Court of Appeal.

46. The Court of Appeal held that the full judgment on the section 68 application should not be published, but that the Lawtel summary should be published (as it did not include any factually sensitive material).

47. The following features of the Court of Appeal’s judgment should be noted.

48. First, the Court of Appeal held that ECtHR jurisprudence under Article 6 permitted both private hearings\(^\text{15}\), and, where appropriate, private judgments\(^\text{16}\).

49. Second, it was necessary to consider the developments in the procedure applicable to arbitration applications or claims which took place in 1997 and 2002. These showed that there was a trend towards greater privacy in hearing of arbitration applications.

\(^{15}\) _Suovaniemi v Finland_ (Decision as to the Admissibility of Application No.31737/96):
“… it is clear that the right to a public hearing can be validly waived even in court proceedings … The same applies, a fortiori, to arbitration proceedings, one of the very purposes of which is often to avoid publicity.”

\(^{16}\) _B v United Kingdom_ (2002) 34 EHRR 19 at p 529, paragraph 45:
“the form of publicity given under the domestic law to a judgment must be assessed in the light of the special features of the proceedings in question and by reference to the object and purposes of Article 6(1).”
(1) prior to 31st January 1997, RSC O.73 r.2 provided that applications to remit an award, remove an arbitrator or umpire or set aside an award or to determine or set aside an award or to determine any question of law arising in the course of a reference, appeals under s.1(2) of the Arbitration Act 1979 and applications for a declaration that an award is not binding because made without jurisdiction should be made by originating motion to a single judge in court. The law reports contain many judgments dealing with such applications. Other applications, including applications for leave to appeal under s.1(2) of the 1979 Act were made to a judge in chambers;

(2) under Part II of the new O.73 (which came into effect on 31st January 1997), the position remained unchanged with respect to pre-1996 Act arbitrations. But Part I introduced with respect to post-1996 Act arbitrations a concept of “arbitration application”, very similar to the modern concept of “arbitration claim” (cf paragraph 3 of this judgment); and O.73 r.15 in this Part was along the lines of the present CPR 62.10, but with the important differences that, instead of differentiating between hearings in public and in private, the distinction drawn was between hearings “in open court and in chambers”, and there was no equivalent of paragraph (2).

(3) the trend towards greater privacy continued when (in 2002), under the CPR, the old RSC O.73 was eventually replaced by the new CPR 62.10. The Rules Committee must have accepted, as the starting point for the hearing of arbitration applications, a more limited approach to publicity. The Court of Appeal considered the phrase “in private” in both CPR 39.2 and in CPR 62.10 as
referring to situations in which a hearing would formerly have been described as being in camera or in secret (not simply in chambers).

50. The Court of Appeal held that the rule changes in 1997 and 2002 were justified and rested clearly on the philosophy of party autonomy in modern arbitration law, combined with the assumption that parties value English arbitration for its privacy and confidentiality. Party autonomy requires the court so far as possible to respect the parties’ choice of arbitration. Their choice of private arbitration constitutes an election for an alternative system of dispute resolution to that provided by the public courts.

51. The same philosophy limits court intervention to the minimum necessary in the public interest, which must include the public interest in ensuring not that arbitrators necessarily decide cases in a way which a court would regard as correct, but that they at least decide them in a fundamentally fair way: see s.1 of the 1996 Act. The object of modern arbitration legislation, starting from at least the 1979 Act, had been to offer the international community an attractive framework within which to arbitrate in England. Previous legislation and practice were regarded as offering too much scope for court intervention.

52. The rule makers clearly deduced from the principles of the Arbitration Act 1996 that any court hearing should take place, so far as possible, without undermining the
reasons of, *inter alia*, privacy and confidentiality for which parties choose to arbitrate in England.

53. However, the consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court under CPR 62.10. CPR 62.10 therefore only represents a starting point. Such proceedings are no longer consensual. The possibility of pursuing them exists in the public interest. The courts, when called upon to exercise the supervisory role assigned to them under the Arbitration Act 1996, are acting as a branch of the state, not as a mere extension of the consensual arbitral process. Nevertheless, they are acting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution, and both the Rule Committee and the courts can still take into account the parties’ expectations regarding privacy and confidentiality when agreeing to arbitrate.

54. Under CPR 62.10, in cases where permission to appeal is appropriate (e.g. because an award raises some point of general legal importance or is clearly wrong), the starting point was to treat the public interest in a public hearing as outweighing any wish on the parties’ part for continuing privacy and confidentiality. In the case of other arbitration claims, the starting point is reversed.

55. Third, it was necessary to distinguish between the question whether a hearing ought to be in private and the question whether the judgment ought to be private. CPR 62.10
dealt in terms with a hearing. Whatever the starting point or actual position during a hearing, it was, although clearly relevant, not determinative of the correct approach to publication of the resulting judgment. The authorities, both domestic (cf Scott v. Scott and Clibbery v. Allan) and European (cf e.g. B v. United Kingdom), underlined the distinction between the considerations governing a hearing and the resulting judgment and order.

56. The range of arbitration claims within the definition in CPR 62.10 is very wide. There could not properly be a blanket protection of non-publication in all cases which fall initially to be heard in private under CPR 62.10. It may be possible to some extent to group cases arising out of the same type of circumstances. The Court of Appeal found it difficult to see why a judgment determining that there was no valid or applicable arbitration agreement or (probably) that arbitrators issued an award without jurisdiction, or dismissing an application for a stay of current proceedings in favour of arbitration should be private. There are arbitrations about factual circumstances and issues which appear unlikely to involve any significant confidential information at all. The main motive to arbitrate may be different considerations, such as the expertise or informality of the arbitrators – many shipping and commodity arbitrations must fall into this category. In arbitration claims relating to such arbitrations, the starting point may easily give way to a public hearing.

57. Further, even though the hearing may have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in
public, where this can be done without disclosing significant confidential information. The public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militates in favour of a public judgment in respect of judgments given on applications under section 68. The desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity under the principles of *Scott v. Scott* and article 6. Arbitration is an important feature of international, commercial and financial life, and there is legitimate interest in its operation and practice. The desirability of a public judgment is particularly present in any case where a judgment involves points of law or practice which may offer future guidance to lawyers or practitioners. It was no surprise that there had been since the introduction of CPR 62.10 a number of reported judgments on arbitration claims where the starting point of the hearing was privacy.17

58. The factors militating in favour of publicity have to be weighed together with the desirability of preserving the confidentiality of the original arbitration and its subject-matter. There was a spectrum. At one end is the arbitration itself, and at the other an order following a reasoned judgment under section 68. In between is the hearing under section 68. An order will normally give very limited information. Even a section 68 hearing is likely to cover only limited aspects of the subject-matter of the

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original arbitration. A reasoned judgment under section 68 will in likelihood disclose very much less about the subject-matter of the arbitration than will have been covered during the section 68 hearing itself. Moreover, judges framing judgments are accustomed to concentrate on essentials, to avoid where possible unnecessary disclosure of sensitive material and in some cases to anonymise.

59. When weighing the factors, a judge has to consider primarily the interests of the parties in the litigation before him or in other pending or imminent proceedings. The concerns or fears of other parties should not be a dominant consideration. Nor could there be any serious risk of their being deterred from arbitrating in England, if the court weighs the relevant factors appropriately. If (in the absence of other good reason for publication) the court withholds publication where a party before it would suffer some real prejudice from publication or where the publication would disclose matters by the confidentiality of which one or both parties have set significant store, but publishes its judgments in other cases, businessmen can be confident that their privacy and confidentiality in arbitration will, where appropriate, be preserved. The limited but necessary interface between arbitration and the public court system means that more cannot be expected. There can be no question of withholding publication of reasoned judgments on a blanket basis out of a generalised that their publication would upset the confidence of the business community in English arbitration.

60. The Court of Appeal did not consider that a party inviting the court to protect evidently confidential material about a dispute must necessarily prove detriment,
beyond the undermining of its expectation that the subject-matter would be confidential. This had to be balanced against Moscow’s failure to provide any “good reason for requiring publication either, since it can freely state the end result of the arbitration and the end result of the litigation”. The Court of Appeal did not consider that it was the fact that it was Bankers Trust which had made the section 68 application to be significant factors.

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