JUDGMENT : MR JUSTICE COOKE : 5th June 2003

Introduction

1. This is a hearing which arises out of the judgment I gave on 19 March 2003, in which I rejected applications made under section 68 of the Arbitration Act 1996. In this judgment I shall use the same abbreviations as I used in my earlier judgment.

2. IIB and Bankers Trust sought to challenge the arbitration award on the ground of serious irregularity affecting the tribunal, the proceedings or the award. IIB, in essence, complained under section 68(2)(a), (d) and (h) that the arbitrator had failed to act fairly and impartially in accordance with section 33 of the 1996 Act in the manner in which he came to his decision, failed to comply with the requirements as to the form of the award, and failed to deal with all the issues that were put to him, thus frustrating the object of the arbitration, namely the fair resolution of the disputes between the parties.

3. Bankers Trust's approach to the award was not dissimilar, save that it was based upon section 68(2)(d) alone and was more restricted in its ambit, being limited to the arbitrator's alleged failure to deal with two issues. Bankers Trust contended that the parties were entitled to a decision from the arbitrator on issues where the arbitrator could not safely resolve the disputes without doing so, where the parties attributed importance to them, and where the arbitrator himself attributed importance to them.

4. The hearing of these applications took place in private by reason of the terms of CPR rule 62.10(3) since no application was made for it to be heard in public. Moscow did not apply for a public hearing, being content with a private hearing and indeed stressing the sensitivity of the issues involved. It thus waived any right to a public hearing, whatever that means or involves. It was not until the judgment was handed down in draft to the parties' lawyers for typographical and manifest errors to be pointed out, and the result was known, that a difference emerged between the parties. Moscow then stated that it wished to make the judgment public, whilst the other parties stated that it was private and should remain unpublished. No prior notice of any such difference between the parties had emerged and the judgment had not been framed with an eye to any such dispute.

5. Both IIB and Bankers Trust appear to accept that Moscow can refer to and publicise both the result of the award and the result of the judgment, but maintain that because the underlying policy of arbitration involves privacy, or confidentiality, not only was the challenge to the award rightly heard in private in this court but the judgment, like the award, should not be available for publication. Moscow, to the contrary, maintains that, regardless of the fact that the hearing was in private, an order of the court is not a private document and, subject to particular categories of exception which it says are inapplicable to the present case, there is no basis for the court directing that the judgment should remain secret permanently.

The CPR regime

6. The procedure in all civil courts is now regulated by the Civil Procedure Act 1997 which by section 2 gave authority to the Civil Procedure Rule Committee to make rules to be approved by the Lord Chancellor. The current rules include CPR rule 39.2 and CPR 62.10, the latter of which provides that rule 39.2 should not apply to arbitration claims. The regime for such "arbitration claims", as defined in CPR 62.2, which includes the applications to which my earlier judgment related, is therefore to be found exclusively in CPR rule 62.

7. CPR Rule 62.10 reads as follows:

"(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)(a) does not apply to-

(a) the preliminary question of whether the court is satisfied that the matters set out in section 45(2)(b) or -

(b) an application for permission to appeal under section 9(2)(b)."

8. CPR Rule 39.2 sets out the general rule that a hearing is to be in public and in sub-rule (3) provides that a hearing may be in private for a number of different reasons: for example, (a) if publicity would defeat the objects of the hearing; (c) if it involves confidential information, including information relating to personal financial matters, and publicity would damage that confidentiality; and (g) the court considers this to be necessary in the interests of justice. In addition, in the practice direction to the rule at 39PD1.5, a list of different types of hearings is set out, which in the first instance are to be listed by the court as hearings in private, under rule 39.2(3)(c), as hearings which involve confidential information.

9. There are a limited number of rules which refer to hearings in private, such as CPR 34.9(3), CCR 27.17(5) and CCR 49.12(5), as well as the remnants of old rules of the Supreme Court, namely Rules SC 46.5(4) and SC 52.6, but the old rules are of limited assistance in the present case.

10. As is plain from the terms of CPR 62.10, for arbitration claims, there is no general rule that a hearing is to be in public, nor any list of criteria to be applied if an exception is to be made to that general rule, as is the case for

matters governed by CPR 39.2(1) and (3). Whereas CPR 39PD1.5 sets out ten types of proceedings which should, under CPR 39, be listed by the court as hearings in private in the first instance, unless and until a judge decides otherwise with the benefit of any representations made to him and after having regard to article 6(1) of the European Convention on Human Rights, there is no equivalent list of criteria in CPR 62.10.

11. It should be noted, however, that the terms of CPR 39.2(3), in setting out the criteria necessary for a hearing to take place in private, refer to all those matters which previously would have been considered those relevant to a hearing taking place "in camera," ie one which was not open to the public and where reporting would be restricted.

12. CPR 62.10, which displaces CPR 39.2 so far as arbitration claims are concerned, uses the terms "public hearings" and "private hearings" in the same way as CPR 39.2. Where either rule addresses the question of a private hearing, it plainly does so, not simply as a matter of administrative convenience, but as a matter of policy decided upon by the Rules Committee. Whereas it is possible that in some circumstances a hearing in private in civil proceedings may simply be a matter of administrative convenience, particularly under the old rules of court, the list in CPR 39PD1.5 makes it plain that all those matters fall within one of the specific criteria in CPR 39.2(3), namely that the hearing involves confidential information.

13. In ***Clibbery v Allen*** [2002] FAM 261 the President of the Family Division referred to three categories of case, namely those to be heard in open court, those heard in private and those heard in secret. In the third category, the information disclosed to the court in the proceedings remains confidential. Both in that case and in ***Hodgson v Imperial Tobacco Ltd*** [1998] 1 WLR 1056 a distinction was drawn between situations where the court sits in private merely as a matter of administrative convenience and those where the court sits in private (previously referred to as "in camera") in the exceptional circumstances where the nature of the application is so sensitive that there should be restrictions not only on attendance by members of the public but on publication of what has taken place. This occurs in special circumstances, for example where there are issues involving children or national security or secret processes, where publication would defeat the purpose of the hearing. Lord Woolf, then Master of the Rolls, in ***Hodgson's*** case set out the principles applicable prior to the Civil Procedure Act 1997 and the new CPR of 1998 in relation to work transacted "*in chambers*" which, he equated to the words "in private" which are now used in CPR 39.2. He stated that what occurred during proceedings in chambers in those circumstances was not confidential or secret just because it took place in chambers, and information about what occurred there and the judgment or order pronounced could, and in the case of any judgment or order should, be made available to the public when requested.

14. Section 12 of the Administration of Justice Act 1960 provides that the publication of information relating to proceedings before any court sitting in private is not of itself to be a contempt of court except in the particular cases thereafter set out, involving children, mental health applications, national security, secret processes, and where the court, having power to do so, expressly prohibits the publication of all information relating to the proceedings or information of the description which is published: see section 12(1)(e) and section 12(2). There is no express power in the Arbitration Acts to prohibit the publication of a judgment on an arbitration claim, but the question arises as to the effect of CPR 62.10 in this connection.

15. In ***Forbes v Smith*** [1998] 1 All ER 973, Jacob J pointed out that the status of a judgment in chambers should not depend upon questions of administration, which determined whether or not the judgment was given in chambers or in open court, but on something more fundamental. He regarded the concept of a secret judgment as "abhorrent" and only justifiable where there was cause for secrecy, such as a trade secret case. He concluded that it might only be a part of a judgment which needed to be kept secret in such circumstances. He decided that no judgment could be a secret document save where the judge specifically so directed. Similarly, Lord Woolf in ***Hodgson***, in addition to the passage I have already referred to, stated that any judgment, including a judgment in chambers, is normally a public document. As the President also said in ***Clibbery,*** the exclusion of the public from a hearing in private does not of itself have the consequence of a ban on later publication of what occurred at the hearing. A hearing in private does not make confidential what would otherwise not be confidential, and the fact of a hearing in private does not require of itself a ban on reporting of what occurred. Indeed, the general position, so far as any judgment is concerned, is directly to the contrary effect, namely that it is open to the world unless the court should decide otherwise.

16. The underlying policy for this is clear and self-evident. The proper administration of justice requires that not only is justice done but that it is seen to be done and that therefore judgments should be open to public scrutiny. As it is put by the Master of the Rolls in ***Hodgson*** at page 1071: *"It remains a principle of the greatest importance that unless there are compelling reasons for doing otherwise which will not exist in the generality of cases, there should be public access to hearings in chambers and information available as to what occurred at such hearings."*

He went on to say that if there were any practical difficulties involved in providing access to the public where it was sought, then a judgment could be given in open court announcing not only the order made, but giving an account of the proceedings in chambers.

17. In relation to such hearings, he summarised the position at pages 1072A-D in the following manner:

"In relation to hearings in chambers the position may be summarised as follows:

1) *The public has no right to attend hearings in chambers because of the nature of the work transacted in chambers and because of the physical restrictions on the room available, but if requested permission should be granted to attend when and to the extent that this is practicable.*
2) *What happens during the proceedings in chambers is not confidential or secret and information about what occurs in chambers and the judgment or order pronounced can, and in the case of any judgment or order should, be made available to the public when requested.*
3) *If members of the public who seek to attend cannot be accommodated, the judge should consider adjourning the proceedings in whole or in part into open court to the extent that this is practical or allowing one or more representatives of the press to attend the hearing in chambers.*
4) *To disclose what occurs in chambers does not constitute a breach of confidence or amount to contempt, as long as any comment which is made does not substantially prejudice the administration of justice.*
5) *The position summarised above does not apply to the exceptional situations identified in section 12(1) of the Act of 1960 or where the court with the power to do so orders otherwise."*

18. In ***Scott v Scott*** [1913] AC 417, Viscount Haldane, then the Lord Chancellor, said this: *"Whilst the broad principle is that the courts of this country must as between parties administer justice in public, this principle is subject to apparent exceptions .... But the exceptions are themselves the outcome of a yet more fundamental principle, that the chief objects of courts of justice must be to secure that justice is done. In the two cases of wards of court and of lunatics, the court is really sitting primarily to guard the interests of the ward or the lunatic. This jurisdiction is in this respect collateral and administrative and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the court should exclude the public. The broad principle which ordinarily governs it, therefore, yields to the paramount duty which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity -- after all, only the means to an end -- must accordingly yield. But the burden lies on those seeking to displace this application in the particular case to make out that the ordinary rule must of necessity be superseded by this paramount consideration. The question is by no means one which consistently with the spirit of our jurisprudence can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning not on convenience but on necessity .... Unless it be strictly necessary for the attainment of justice there can be no power in the court to hear in camera either a matrimonial cause or any other where there is contest between the parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure but he must make out his case strictly and bring it up to the standards which the underlying principle requires. He may be able to show that the evidence can be effectively brought before the court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time, or altogether. But this further conclusion he will find more difficult in a matrimonial case than in a case of the secret process where the objection to publication is not confined to the mere difficulty of giving testimony in open court. In either case he must satisfy the court that by nothing short of the exclusion of the public can justice be done."*

19. As was pointed out by counsel for Moscow, the basic policy is bolstered by Article 6 of the European Convention on Human Rights, which states that: *"Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society; where the interests of juveniles or the protection of the private life of the parties so requires; or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

20. Since the common law is essentially co-extensive with the terms of Article 6 of the Convention, courts in countries which are parties to that Convention will be faced with much the same issues when arbitration claims come before them, although Article 6 is always applied broadly by reference to the particular system of justice in the jurisdiction concerned.

The meaning and effect of CPR 62.10 on private hearings

21. It is in this context that the terms of CPR 62.10 fall to be considered. The wording of the rule is clear as to the normal position. Not only does CPR 39.2 not apply, but CPR 62.10 sets out its own specific regime in relation to arbitration claims. Subject to any specific order made by the court as to whether a hearing should be in public or private, determination of preliminary points of law, under section 45 of the 1996 Arbitration Act, or appeals on a point of law under section 69 of that Act, are to be heard in public, whilst all other arbitration claims are to be heard in private. This covers a large gamut of claims relating to many different issues arising in or out of arbitrations. A claim of the kind brought in the present case by Bankers Trust and IIB under section 68 of that Act would fall to be heard in private unless the court ordered otherwise. No application was made by any party for the matter to be heard in public and although it appears that two, or possibly as many as four, members of the public did come into the courtroom during the hearing of these applications and stay for part of a session, this was a matter of inadvertence and not design on the part of the parties or the court staff, and cannot affect the issue before me.

22. The 1996 Arbitration Act came into force in January 1997, as did a new Order 73 RSC, which, apart from using the words *"in chambers"* as opposed to "*in private*" was to the same effect as the later CPR 62.10, albeit with a different structure. In a practice note at [1997] 1 WLR 391 appeared a statement by Colman J in open court

made on 13 January 1997. He said this: *"In giving effect to the 1996 Act and the new Order 73 the Judges of the Commercial Court will endeavour as far as possible to achieve consistency in matters of construction both of the Act and of the new Order 73. In order to facilitate consistency of approach, arrangements have been made for decisions on matters of construction and application to be circulated between the judges immediately they are given. Investigations are in progress as to the feasibility of the wider circulation of these decisions to the rest of the profession without the delay ordinarily entailed in awaiting published reports. Since most of the judgements on arbitration applications are likely to be given in chambers, it is hoped that all parties will cooperate in facilitating publication of those judgements which are concerned with matters of construction or application of the 1996 Act and the new Order 73."*

23. The judge appears to have taken the view that judgements on applications heard in chambers would not be generally available to the public at large without the parties' consent.

24. It is worth noting that Lord Woolf, to whose judgment in ***Hodgson*** I have referred, was responsible for supervising the drafting of the CPR. Since the reference to hearings *"in private"* are so limited in the CPR, it is hard to see that, in the context of CPR 39.2(3) and the cross reference to it in CPR 62.10, the reference to hearings in private in CPR 62.10 does not connote a hearing where access and publication are restricted. A comparison of the terms of CPR 39.2 and 62.10 indicates that where an arbitration claim is heard in private, whether by virtue of the terms of 62.10(3) or by virtue of a specific court order under 62.10(1) the clear intention is that both the hearing and the judgment will partake of the nature of that which had previously been referred to as "in camera" proceedings. On the same basis that all the matters listed in CPR 39PD1.5 fall under CPR 39.2(3)(c), arbitration claims, which raise no questions of law or matters of wider public interest, all fall to be dealt with in the same way, subject always to the power of the court to order otherwise.

25. Although the starting point in common law as expounded by Jacob J, Lord Woolf and the President of the Family Division in the authorities I have referred to, both by reference to ***Scott*** and as supplemented by section 1 of the Human Rights Act, which brought into effect Article 6 of the European Convention on Human Rights, is that judgements in private are public documents, the starting-point in the case of arbitration claims must be the terms of the relevant rule, namely order 62.10.

26. CPR 62.10(1) provides that the court may order that an arbitration claim be heard either in public or in private. As I have already mentioned, no criteria are set out for consideration in the making of any such decision but there are a number of obvious factors which a court will take into account which have nothing to do with administrative convenience. The first set of criteria are plainly those referred to in CPR 39.2(3). Secondly, the court will consider the matters raised in ***Scott*** and in section 12 of the Administration of Justice Act 1960 in so far as these involve any additional elements. Thirdly, it seems to me that other matters will fall to be taken into account, namely the nature of the application being made, the issues which are raised, namely whether there are any points of law or of wider interest; the attitude of the parties towards publication (there are many reported cases of arbitration claims, mostly of course prior to CPR). Fourthly, the court will have considerable regard to the essential nature of arbitration, which in the absence of contrary agreement involves privacy and confidentiality. Confidentiality is a factor which appears in CPR 39.2(c) as a matter for the court to take into account in determining whether a hearing should be public or private when considering the terms of that rule. At its most fundamental, it seems to me that what must be considered is that which is necessary in the interests of justice, having regard to the nature of the material to be aired before the court and its sensitivity so far as the parties are concerned, both in relation to the hearing itself and in relation to any judgment to be given at the end of that hearing.

27. It is also plain from the distinction drawn in CPR 62.10(3) itself that applications involving points of law are to be treated differently from other forms of application. In the present case the application was based on alleged serious irregularity in the decision making process and not upon any alleged point of law, the issue in the arbitration itself being governed by the substantive law of Russia. The very nature of the application, which raised suggestions of unfairness in the way the arbitrator had come to his decision in the arbitration, was one which was sensitive in itself. The arbitration had been completed at the time of the application and the challenge made was rejected by the court, so that for the purpose of considering publication of the judgment, other issues referred to in the judgment were also the centre of focus. It was repeatedly emphasised to me during the course of the hearing that the arbitration itself raised highly sensitive political issues so far as Moscow itself was concerned, and highly sensitive commercial issues so far as both the other parties were concerned, which were inevitably, in the circumstances which obtained, referred to in the judgment.

28. At the outset of the arbitration Moscow had sought a specific order from the arbitrator confirming the confidentiality of the arbitration, and Moscow had never suggested in the arbitration either that the confidentiality of the proceedings had been lost, or that it should be lifted. Moscow appears to have been concerned to preserve the confidentiality of matters relating to the arbitration during the court proceedings, and it was only after receiving the judgment of the court that its attitude changed.

29. There is in my mind no doubt at all that a compelling reason for the parties' choice of arbitration was the desire for privacy or confidentiality for the resolution of their dispute.

30. The policy which underlies CPR 62.10 is in my judgment that which underlies this aspect of arbitration agreements. Where there are matters of law which arise out of an arbitration award, where it is beneficial for a court to make decisions in order to clarify the law both for these parties and others -- see ***Hassneh Insurance v Mew***

[1993] 2 Lloyd's Rep 243 -- the proceedings will normally be in public unless the court otherwise decides. Where the issues raised are not of this kind, the parties' own desire for privacy, as enshrined in their agreement to arbitrate, should generally be continued in the context of the proceedings arising out of the award. Section 1 of the 1996 Arbitration Act provides that the provisions of Part I of the Act are founded on the principles set out in subsections (a)-(c), and should be construed accordingly. Subsection (b) provides that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. Here, the parties agreed to arbitrate under UNCITRAL rules which provide *that "Hearings shall be in camera unless the parties agree otherwise"* (article 25.4) and that "The award may be made public only with the consent of both parties" (article 32.5).

31. It is, however, clear that the privacy agreed for the conduct of the arbitration and the award itself does not automatically transfer to any hearing of an application to challenge that award. Nonetheless, CPR 62 envisages that regard should be had to such a matter. The hearing in private of an arbitration claim which does not involve questions of law, is not a matter simply of administrative convenience but of policy, reflecting the privacy which is to be accorded to arbitrations. The effect of a public hearing, or of automatic publication of proceedings challenging an award, would be to militate against the legitimate pursuit of any challenge to an award where a fundamental basis for agreeing to arbitrate was the requirement for privacy, and would cut across the parties' agreement for the private resolution of their dispute. That would, on its face, appear to be contrary to justice and the public interest in allowing the parties the freedom to resolve their disputes as they would wish, subject to the constraints of section 1 of the 1996 Arbitration Act.

Private Judgments

32. The parties were agreed that Article 6 of the Convention and the ambit of Scott were essentially co-extensive. Whilst it was initially argued that Article 6 required a judgment to be pronounced publicly and that the qualifications for exclusion from all or part of the trial of the press and the public did not apply to the giving of judgment, this does not make sense, and in my judgment cannot be the case. The pronouncement of judgment must be subject to the same qualifications as the exclusion of the public from the hearing where it is necessary in the interests of justice to do this. Indeed, the decision of the European Court of Human Rights in ***B v United Kingdom*** 34 EHRR 19 establishes this.

33. Article 6 provides: *"…. for secrecy to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."* Whilst the speeches of the House of Lords in ***Scott*** stress that the chief object of the courts must be to secure that justice is done, and although exclusion of the public or a restriction on publication of what has occurred in court is only to be allowed where strictly necessary for the attainment of justice, the terms of CPR 39.2(c) and the reference to trade secrets cases, which are referred to as a prime example where such restrictions are necessary, demonstrate that confidentiality is a matter to which the court will have considerable regard. The case of ***Pelling*** [2001] UK HRR165 establishes that CPR 39.2 does not itself violate Article 6 and the same must be true by parity of reasoning for CPR 62.10.

34. The authorities establish that it is necessary to distinguish between private hearings and publication of a judgment given following such a hearing, certainly where the privacy of the hearing is a matter of administrative convenience rather than a decision that the hearing should be of an "in camera" nature. Even where "in camera" hearings take place, the judgment need not necessarily be in camera, depending upon its content. It is clear that a specific decision must be taken by the court in relation to the publication or non-publication of its judgment in this context and specifically in the context of the rule with which the court is concerned today. It is clear in my judgment that the principles applicable to "*in camera"* hearings must be those which are applicable to judgements given in private hearings. Under the terms of CPR 62.10, in the light of the authorities to which I have referred, arbitration claims heard in private are to be considered the equivalent of claims heard in camera but whether or not this is the case, the question still arises as to whether any particular judgment given following such a hearing should be treated as an "*in camera*" judgment.

35. In my judgment the ***Scott*** presumption of open justice and publication of judgements is not directly applicable to arbitration claims which fall within the privacy provisions of CPR 62.10 because that rule provides its own code, which is equivalent to CPR 39.2 for other cases. Where matters fall *prima facie* within the privacy provisions of CPR 62.10, which applies in default of a court order, the issue, if raised, is nonetheless to be determined on equivalent criteria to those of CPR 389.2 ***Scott;*** and Article 6 of the European Convention on Human Rights and the other matters to which I have referred, but without the presumption of ***Scott,*** and with perhaps, if anything, a presumption in favour of privacy given in the rule itself.

36. The reason for this is the strength of the requirement of confidentiality or privacy in arbitration, as exemplified by the Departmental Advisory Committee report at paragraphs 11 and 12, and the comments of Lord Neill which are cited in this publication prior to the 1996 Arbitration Act: *"Privacy and confidentiality have long been assumed as general principles in English commercial arbitration, subject to important exceptions. It is only recently that the English courts have been required to examine both the legal basis for these principles and the breadth of certain of these exceptions without seriously questioning the existence of the general principles themselves. …. In practice there is also no doubt whatever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features of English arbitration, eg see survey of users amongst the Fortune 500 US corporations, conducted for the LCIA by the London Business School in 1992. Indeed, as Sir Patrick Neill QC said in*

his 1995 Bernstein lecture, it would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principles of confidentiality and privacy."

37. CPR Rule 62.10 is to be interpreted in the light of the Act, which in section 1 stresses the freedom of the parties to resolve disputes in the agreed manner, where privacy is almost inevitably involved and in this instance is expressly set out in the UNCITRAL rules. The CPR rule plainly seeks to support the privacy of arbitration to some extent -- to an extent which is compatible with the interests of justice -- by giving the court power to decide whether hearings and judgments should take place in public or in private.

38. Thus, whilst it is the case that even where a hearing is in private, the judgment of the court is normally open, arbitration claims fall into a special category and are capable of being treated in a manner equivalent to CPR 39.2. The need to examine the nature of the proceedings is clear from such authorities as ***Clibbery*** and the policy which gives rise to private hearings may also be one which the court would wish to carry over into any judgment given.

39. As matters stand, CPR 62.10 provides that hearings may take place in public or private, with the concomitant result that the judgment, when delivered, would, if immediately following the hearing itself, usually accord with the form of the hearing. Because of the general position expressed elsewhere, however, that judgments in private hearings are available for publication, it may require an order of the court to prevent that taking place. The same policy reasons which would lead to a court deciding that a hearing should take place in private may be equally relevant to the question of publication of the judgment but until the judgment is known, neither the court nor the parties may appreciate the extent to which there are issues of public importance, and the extent to which there may be sensitive matters raised within the judgment which will create problems for the parties if published. Self-evidently, it does not automatically follow that, because the hearing of an arbitration claim has taken place in private, the judgment in relation to it should not be available for publication.

40. As Bankers Trust recognise, the mere fact that the proceedings are held in private neither creates nor destroys the confidentiality of matters aired in the course of the proceedings, and the mere fact that the proceedings are held in private does not provide a basis upon which to object to publication of what took place. The hearing of the proceedings in private affords the court the jurisdiction to decide whether to permit publication, having regard to the nature of the proceedings and the facts of the particular case.

41. In the context of an arbitration claim, where no real issues of law arise and where the material is of a highly sensitive nature both politically and commercially, as is the case for the matter before me, the fact that all of the hearing involved confidential information is a dominant factor. The whole subject with which the court was concerned was an arbitration which in itself was confidential. Everything raised in relation to it was confidential. If publicity would damage that confidentiality, then the court may rightly consider privacy both for the hearing and for the judgment to be necessary in the interests of justice. Such matters can constitute special circumstances where publication of the judgment would prejudice the interests of justice, not only because of the impact on the parties concerned, but also on the future administration of justice in relation to arbitration claims, because of the potential deterrent effect for those who have a legitimate grievance to pursue in respect of the conduct of an arbitration, the conduct of a tribunal or in relation to a serious irregularity in the award. Persons entitled to justice at the hands of the court could reasonably be deterred from seeking it, if the court was uniformly to adopt an approach that the confidential nature of the information with which it was concerned did not justify privacy both for the hearing and for the judgment. Indeed, such persons might be dissuaded from arbitration under the supervision of the English court. Each application, hearing and judgment, will be require to be examined by the court to ascertain whether or not a private or public hearing or a private or public judgment is appropriate in the light of the criteria to which I have already referred.

42. In the absence of any express order, the terms of CPR 62.10(3) would automatically apply, but at any point the court can direct its attention both to the form of the hearing and the form of the judgment. Because the parties when agreeing to an arbitration subject to the supervision of the English court must be taken to agree to the provisions of the CPR governing any arbitration claim, they must also be taken to recognise that they are criteria which the court will apply in determining whether or not the confidentiality which was a feature of the arbitration process should continue to apply to the arbitration claim in the court.

43. In the present case the factors which led to the parties' agreement to arbitrate, their desire for privacy in arbitration, and the absence of any application for the hearing to take place in public all militate against any publication of the judgment, in so far as it concerns the substance of the award and the arbitration process, which were themselves subject to the effect of authorities such as ***Dolling and Baker v Merrett*** [1991] WLR 1205, the ***Hassneh*** case to which I have already made reference, and ***Ali Shipping Corporation v Shipyard Trogir*** [1999] 1 WLR 314.

44. There is no doubt as to the sensitivity of the material contained in the award itself and to some extent, therefore, inevitably reiterated in my earlier judgment. Any revelation of the processes of that arbitration runs counter to the principle of confidentiality. Without descending into any detail, there is no doubt as to the seriousness with which the parties viewed the confidentiality of the arbitration itself with everything which took place within it. The appropriateness of a private hearing was not called into question by the parties, and where, as here, confidentiality is of great importance and there are no issues of law or of wider interest, in my view my earlier

judgment should remain private also. In the context of such an arbitration claim, privacy is required in the interests of justice and publicity would prejudice such interest.

45. Whilst IIB and Bankers Trust could provide little evidence of actual detriment should the judgment be published, Moscow has provided equally no good reason for requiring publication either, since it can freely state the end result of the arbitration and the end result of the litigation. In these circumstances, the confidentiality of the arbitration, by which the parties set so much store, is the dominant factor in determining that the hearing and the judgment itself should be private. In many arbitrations the position may be different, but the terms of CPR 62.10, for the reasons given, provide a strong pointer to the way in which the courts should approach such matters. It is the very terms of the rule when the word "private" is seen as meaning "in camera" which has weighed most heavily with me in coming to this conclusion.

Forfeiture of the right to privacy

46. Moscow alleges that Bankers Trust and possibly IIB have forfeited any right to privacy or confidentiality in relation to the arbitration by making disclosure to third parties. This argument is in my judgment unsustainable. Moscow relies on letters written prior to the commencement of the arbitration by Bankers Trust to 13 or 14 investors in the loan (by purchase of loan notes for a Bankers Trust company dependent on the Bankers Trust loan) in which Bankers Trust informed such parties that Moscow had failed to pay instalments due, despite paying some interest, was in default and had made no sensible repayment proposals. Those letters, written prior to the commencement of arbitration, cannot affect this issue.

47. Letters of 15 September 1999, 11 November 1999 and 14 December 1999 informed up to 15 such participants of Moscow's continued failure to make repayment and that arbitration proceedings had been instituted. No details of the substance of the arbitration proceedings were ever disclosed by Bankers Trust once the arbitration had been commenced, however. The fact that credit rating agencies and the press became aware of the dispute is not surprising. Indeed, it might be thought inevitable. Moscow made it known at some point, whether before or after arbitration was commenced, that it disputed ever receiving the monies, and indeed suggested that a Russian bank had misappropriated them. This too was reported.

48. The offering circular relating to Moscow's Euro market borrowing of a considerable sum in October 2001 referred to the existence of the dispute, as it had to, but this information no doubt originally emanated from Moscow. It had nothing to do with Bankers Trust or IIB.

49. Nothing done by Bankers Trust or IIB constituted a breach of any implied term of privacy or confidentiality in the arbitration agreement, nor any breach of any such duty arising out of the fact of the arbitration, if the implication of such a term is not the best analysis of that duty of confidentiality.

50. Following the arbitration, BT wrote letters to the investors in the loan, disclosing the result of the arbitration and expressing some surprise at the result vis-a-vis Moscow, but not disclosing the substance of what had taken place. From the moment that the arbitration had been commenced, Bankers Trust had told the participant investors that it was constrained by the fact of the arbitration as to what it could and could not say.

51. In my judgment disclosure of the result of the award was necessary to the investors who had a legitimate interest in the arbitration itself, just as disclosure to shareholders might be necessary if an arbitration dispute had a material impact upon a company's accounts. It is clear from the authorities that not all disclosure to third parties is debarred, particularly where there is a commercial necessity or legitimate commercial interest. Indeed, an application to the court made in respect of an arbitration, is a form of disclosure and this in itself cannot be a breach of any duty of confidentiality. There can in my judgment be no breach of duty in disclosing the fact of commencement of arbitration, the existence of an arbitration or the result of that arbitration where there is any legitimate reason to do so. Equally, the existence of any challenge to an award, the existence of litigation relating to it and the result of that litigation would for similar reasons not amount to a breach if disclosed.

52. Furthermore, some limited breach by one party could not be used to justify a breach by another. The arbitration agreement here could not be said to be repudiated by any disclosure, nor was there any purported acceptance of such repudiation, so that the only impact upon a court would be if the disclosure by one party amounted to a waiver of the duty of another party or if the information in issue was already in the public domain, so that any question of continuing confidentiality or privacy was rendered otiose. Neither point applies here on the evidence before me.

53. A further issue arises, however. Because of the debate about publication of my judgment which arose at the point when I was about to hand it down formally, I directed that there should be no publication of it until the parties had a full opportunity to make submissions to me on the issue. Regrettably, on 9 April, Lawtel, an electronic on-line library and database of judgment, sent out an electronic summary of the judgment to its subscribers in the form of a daily up-date e-mail. The daily up-date included an electronic link to the text of the judgment. The daily up-date was sent to some 15,473 subscribers. Lawtel has apologised in writing to the court for this publication. There is no evidence of third parties downloading the judgment, which was available only for a brief period before the link to the summary was removed once Lawtel were made aware of the restriction on reporting which had previously been overlooked. The judgment cannot by this means be said to have entered the public domain, even though the summary remains available on subscribers' computers for reading and downloading. There is, in my judgment, plainly still a sufficient degree of confidentiality to require protection.

54. The issue which has been debated over the last day and a half is therefore to be resolved as one of principle in relation to this arbitration application, which was heard in private, taking account of the particular political and commercial sensitivities of the arbitration, the contents of my judgment and the uses to which any judgment might be put and its impact if so used.

Conclusion

55. For the reasons I have given, I consider that my earlier judgment should remain private and should not be available for publication generally. The result of these applications, as enshrined in any order, like the result of the arbitration, can of course be published without reference to the content of the judgment. Had I been made aware prior to giving judgment of the dispute over the issues I have had to decide today, I could perhaps have framed the judgment differently so as to avoid or minimise reference to the most sensitive matters considered to be of greatest confidentiality, but the judgment was delivered in the form it took, and does cover such matters. A judgment in a different form might have given rise to different considerations, but I consider that the end result would almost certainly have been no different had the judgment taken a different form, since it is the confidentiality of the arbitration as a whole which is the dominant feature in the present case.

56. On the evidence, I also see no reason why the judgment should be made available to any limited class of persons and no application has been made for any such limited circulation so far. I would not, however, wish to pre-empt any such application should one be considered in the future.

57. Finally, I should say that, as to the judgment I am giving today, it seems to me that it raises matters of law and matters of wider interest, and contains no confidential information save for the existence of the dispute, the existence of the award and the existence of my earlier judgment, all of which have been freely mentioned by the parties and to which reference has been made in the press. There is therefore good reason for publication of this judgment, and no reason for secrecy in respect of it, subject to any further submissions that the parties wish to make in relation to that point.

MR G DUNNING AND MR P KEY (instructed by Hogan & Harston) appeared on behalf of the Claimant
MR M BLOCH (instructed by Clifford Chance) appeared on behalf of the 1st Defendant
MR M SULLIVAN (instructed by Watson, Farley & Williams) appeared on behalf of the 2nd Defendant