CA on appeal from QBD (Cooke J) before the Vice-Chancellor, Mance LJ; Carnwath LJ. 25th March 2004.

JUDGMENT : Lord Justice Mance:

Introduction

1. Party autonomy is fundamental in modern arbitration law. S. 1 of the Arbitration Act 1996 provides that the provisions of Part I (sections 1-84) *"are founded on the following principles, and shall be construed accordingly-*

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the court should not intervene except as provided by this Part".

2. Among features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality. The Act?s silence does not detract from this. In its Report on the Arbitration Bill dated February 1996 (paragraphs 10-17), 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"*. The DAC cited a survey conducted among "Fortune 500" US corporations for the London Court of International Arbitration by the London Business School in 1992. It observed that it was open to arbitration institutions to express corresponding principles in their rules (as the UNCITRAL rules relevant in this appeal do). 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 the courts should be left to continue to work out the implications *"**on a pragmatic case-by-case basis".***

3. S. 68 is one of the safeguards *"necessary in the public interest"*, mentioned in section 1. It enables a party to arbitral proceedings to *"apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award".*

Pursuant to The Civil Procedure (Amendment No. 5) Rules 2001 S.I. No. 4015 (L32), the relevant rules governing such applications have since 25th March 2002 been CPR 62.2 to 62.10 ("Section I" of Part 62). For the purposes of claims under the 1996 Act, CPR 62.2 contains a wide definition of *"**arbitration claim**",* which includes any application under s.68:

"62.2(1) In this Section of this Part "arbitration claim" means-

(a) any application to the Court under the 1996 Act;

(b) a claim to determine-

(i) whether there is a valid arbitration agreement;

(ii) whether an arbitration tribunal is properly constituted; or

what matters have been submitted to arbitration in accordance with an arbitration agreement;

(c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and

(d) any other application affecting-

(i) arbitration proceedings (whether started or not); or

(ii) an arbitration agreement.

(2) This Section of this Part does not apply to an arbitration claim to which Section II or III of this Part apply."

CPR 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)(a) 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).”

CPR 62.11 to 62.16 ("Section II") regulate pre-1996 Act arbitration claims and include no equivalent of CPR 62.10.

4. The issue on this appeal is whether a judgment dismissing an application made under s.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"), submit that it should be. The respondents, Bankers Trust Company ("Bankers Trust") and International Industrial Bank ("IIB"), resist this. The judgment was given by Cooke J on 21st March 2003, dismissing applications under s.68 by Bankers Trust and IIB, seeking respectively the remission and the setting aside of a single arbitrator?s award dated 30th May 2002 for serious irregularity. The following circumstances are already in the public domain: that the arbitration involved three sets of parties, Bankers Trust, Moscow and IIB; that the arbitration was under UNICTRAL rules in London; that Bankers Trust was claiming to recover funds allegedly advanced under a Credit Agreement No. 750 dated 24th October 1997 made originally between Moscow and IIB; and that under the award Bankers Trust succeeded against IIB, but not against Moscow. UNCITRAL Rules provide:

”25.4 Hearings 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”.

The arbitration took place in private, and the award was published only to the parties. Bankers Trust’s and IIB’s application under s.68 were themselves heard "in private" under CPR 62.10(3)(b). No contrary application or order was made under CPR 62.10 (1).

5. 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 23rd 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 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. Further, the judgment which Cooke J handed down in writing on 21st March 2003 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 is 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, and may still remain, on computers belonging to all those subscribers who received the email summary.

6. Both before Cooke J and before us, Moscow?s primary case has been that the judgment or failing that the Lawtel summary should be available for general publication. Only alternatively has Moscow applied for limited permission to send the judgment, or the Lawtel summary, to the sub-participants in Credit Agreement No. 750. There are two potential problems about this alternative. First, I find it difficult to see how, if such publication were permitted, publication could or would be restricted to sub-participants. But I do not think that could be critical if publication to them was otherwise justified, and it does not arise if more general publication is justified. Second, Bankers Trust has in its skeleton,

although it did not stress this orally, objected that use of the sub-participants? identities for the proposed distribution would conflict with Moscow?s implied obligation to keep confidential information obtained by way of disclosure in the course of the arbitration. That problem is not before us, and we are not in a position to adjudicate on it. Moscow?s expressed reason for wishing for publication is 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. It is common ground that it was and is open to Moscow "freely [to] state the end result of the arbitration and the end result of the litigation" under s. 68. Having heard submissions, the judge determined, by separate judgment dated 5th June 2003, supplemented by short reasons relating to the Lawtel summary, that the earlier judgment dated 21st March 2003 should remain private and that neither it nor the Lawtel summary should be available for any publication. Against that judgment dated 5th June 2003, Moscow now appeals, with permission given by the judge because of the novel point of public interest involved.

The judgment under appeal

7. Cooke J's judgment on 5th June 2003 was given in public. As Cooke J said, it raised matters of law and matters of wider interest and contained no confidential information save for the existence of the dispute, the existence of the award and the existence of his earlier judgment, all of which had been freely mentioned by the parties and also mentioned in the press. There was therefore, he said, good reason for its publication and no reason for secrecy in respect of it. The present judgment is also public.

8. In his judgment of 5th June 2003 Cooke J started by setting out the provisions of CPR 62.10 in the context of other rules of the CPR (particularly 39.2) and against the background of the common law stated in ***Scott v. Scott*** [1913] AC 417, ***Forbes v. Smith*** [1998] 1 AER 973, ***Hodgson v. Imperial Tobacco Ltd.*** [1998] 1 WLR 1056 and ***Clibbery v. Allen*** [2002] EWCA Civ 45; [2002] FAM 261, as well as s.12 of the Administration of Justice Act 1960 and article 6 of the European Convention on Human Rights. He concluded that CPR 62.10 represented a policy decision reflecting the privacy to be accorded to arbitration, and that this was the starting point rather than any principle *"that judgments in private are public documents"* (paragraphs 25 and 31). He considered that

"31. 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 of privacy, and would cut across the parties? agreement for the private resolution of their dispute."

However:

*"35. 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 39.2, **Scott** and Article 6 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".*

Further, he said:

"38. 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. 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."

9. Cooke J described the hearing before him under s.68 as raising "***no real issues of law***", but as concerning *"**material of a highly sensitive nature both politically and commercially***", and continued:

"41. 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 required 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."

10. Cooke J concluded this part of his judgment as follows:

"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."

He went on to dismiss Moscow?s submission that any privacy had been forfeited by Bankers Trust or IIB by the previous publication of information about the arbitration, or by such publication as Lawtel had effected.

The common law and statutory background

11. I agree with the judge that it is necessary to understand and apply the new CPR 62.10 in the light of the common law as well as article 6 of the European Convention on Human Rights. Some consideration is also necessary of the concepts deployed under previous procedural regimes such as "in chambers" and "in camera". Even the use of modern equivalents such as "private" and "secret" has given rise to some apparent inconsistencies.

12. I start with ***Scott v. Scott***. The case concerned a finding that a petitioner, who had been granted a decree of nullity in a case heard in camera, had committed contempt by sending copies of the transcript to certain persons, in (she said) defence of her reputation. Two of the main questions addressed by the House of Lords were (a) whether the Divorce Court had power to sit in camera to hear a nullity suit and (b) assuming that it had, whether it had power to enjoin a party from publishing, after judgment, copies of the transcript of proceedings. The House of Lords answered the first question in an emphatic negative, and in terms covering courts of justice generally. Strong negative views were also expressed on the second question.

13. Visc. Haldane LC said that "***the broad principle of justice***" was that (unless the judge "demits ***his character as a judge and sits as an arbitrator***" by agreement - see p.436, and also pp. 423 and 442), ***"courts must, as between parties, administer justice in public".*** The only exceptions reflected the ***"yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice is done***" (p.437). In this respect he identified the court's ***"parental and administrative***" *jurisdiction* ***"to guard the interests of the ward or the lunatic***" and cases concerning a secret process, ***"where the effect of publicity would be to destroy the subject-matter***" (p.437). The Earl of Halsbury said that there was ***"not a judgment of authority to justify***" an injunction of perpetual secrecy. Earl Loreburn followed the Lord Chancellor on the first question, speaking of the ***"inveterate rule that justice shall be administered in public".*** But he accepted the possibility of exceptions, of which the underlying principle was: *" that the administration of justice would be rendered impracticable by [the public's] presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court."*

On the second question, he considered that the court could treat as contempt *"**any wilful and malicious publication**"* (p.448).

14. Lord Atkinson considered that a permanent injunction could be granted in cases of secret processes, where publication would cause the entire destruction of the whole matter in dispute. He distinguished a nullity suit where publication could have no such effect after determination of the issue, observing that the law of defamation offered protection. The judge's order to hear the nullity suit in camera meant no more than *"that the place where the case is to be heard shall be a private chamber, not a public court. The order was, I think, spent when the case terminated, and had no further operation beyond that date."* (p.453)

Lord Shaw shared the Lord Chancellor?s approach to the first question. He concluded that it was beyond the judge?s power to hear the case in camera, and that, even if such an order had been within his power: *" it was beyond his power to impose a suppression of all reports of what had passed at the trial after the trial had come to an end"* (p.476).

At p.477 he quoted extensively from Bentham, including the famous lines: *"Publicity is the very soul of justice. It keeps the judge himself while trying under trial*." (Benthamia, or Select Extracts from the Works of Jeremy Bentham (1843) p.115)

He added: *"There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of the judges themselves."* (pp.477-8)

15. The second question in *Scott v. Scott* was addressed in a number of subsequent statutes (e.g regulating the *reporting* of evidence in certain matrimonial cases, and the hearing of evidence of sexual capacity in nullity proceedings in camera; see also the discussion by Thorpe LJ in ***Clibbery v. Allan*** at paragraph 92 et seq.) It was further regulated in 1960 by s.12 of the Administration of Justice Act 1960 as amended. S.12, as amended by the Children Act 1989, s.108(5). S.12(1) provides generally that publication of information relating to proceedings in private will not of itself be contempt of court, but is subject to exceptions. They include proceedings relating to minors, or under the Children Act 1989 or provisions in the Mental Health Act 1959, proceedings where the court sits in private for reasons of national security or where the information relates to a secret process, discovery or invention in issue in the proceedings and proceedings *"12(1)(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published."*

16. S.12(2) provides that *"the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication"*, and s.12(3) states that : *"12 (3) In this section references to a court sitting in private include references to a court sitting in camera or in chambers."*

The references in s.12(1)(e) and (2) to a court "***having power***" expressly to prohibit the publication takes one back to the common law principles indicated **in *Scott v. Scott***. A similar phrase appears in the Contempt of Court Act 1981, which provides:

"4(2)In any proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

11. In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

The restriction on the prejudice relevant under s.4(2) reflects the tenor of ***Scott v. Scott***, although the reference in s.12(1) to national security involves an interest not expressly mentioned in ***Scott v. Scott***, which would not, as it seems to me, fall within a narrow understanding of the exception there identified for cases where privacy was necessary to ensure that justice is done.

17. 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 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. Following the 1996 Act the Rules Committee (acting under s.85 of the Supreme Court Act 1981 *"for the purpose of regulating and prescribing the practice and procedure to be followed in the High Court "*) made the Rules of the Supreme Court (Amendment) Order 1996 S.I. No. 3219. Under Part II of the new O.73, 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). At this stage, there was also no Rule of the Supreme Court dealing explicitly with hearings in camera, but the notes to O.33 r.4, dealing with the place and mode of trial, covered the subject briefly.

18. The implications of an "in chambers" hearing remained surprisingly unexplored until the decisions in ***Forbes v. Smith*** in November 1997 and ***Hodgson v. Imperial Tobacco Ltd***. in February 1998. In the former case Jacob J was concerned with an appeal against the decision of a master refusing leave to a party to send copies of a chambers judgment given by Chadwick J to named persons and professional bodies or to use it in specified proceedings. Jacob J concluded that whether or not courts sat in chambers or in open court was generally merely a matter of administrative convenience. He pointed to differences in practice between different divisions and at different times, and continued: *"The concept of a secret judgment is one which I believe to be inherently abhorrent. Only in cases where there is a cause for secrecy, such as in a trade secrets case, can it in general be right that a judgment should be regarded as a secret document. Even then it may only be a part of the judgment which needs to be secret. I conclude, in the absence of binding authority to the contrary, that when judgments are given in chambers they are not to be regarded as secret documents. There is in principle all the difference between a judgment given in camera (i.e. a judgment which the judge has specifically ordered, for cause, to be treated as secret) and a judgment given in chambers merely for administrative reasons"*

He concluded that Chadwick J had ordered the matter to go into camera and ordered that his judgment should be regarded as given in camera. However, Chadwick J had not been asked to rule on the question whether leave might be given for its use in relation to complaints made by the other party to professional organisations or others. On that basis, Jacob J said: *" starting, as I do, with a bias in favour of the publication of judgments, coupled with the legitimate interest of these defendants in sending the judgment to the parties named, I think I should give leave."*

19. In ***Hodgson*** the judgment of the court was given by Lord Woolf MR. He endorsed Jacob J's approach: "*The general position is that any judgment including a judgment in chambers is normally a public document. This is the position notwithstanding that under RSC Ord 63, r 4(1) there is no right to inspect a judgment so given without leave.*

A distinction has to be clearly drawn between the normal situation where a court sits in chambers and when a court sits in camera in the exceptional situations recognised ***in Scott v Scott*** *[1913] AC 417 or the court sits in chambers and the case falls in the categories specified in s 12(1) of the 1960 Act (which include issues involving children, national security, secret processes and the like). Section 12(1) also refers to the court having prohibited publication. Such proceedings are appropriately described as secret; proceedings in chambers otherwise are not appropriately so described.*

Proceedings in chambers, however, are always correctly described as being conducted in ***private.*** *The word* ***chambers*** *is used because of its association with the judge's room so as to distinguish a hearing in chambers from a hearing in open court. While the public in general are normally free to come into and go from a court (as*

long as there is capacity for them to do so) during court hearings the same is not true of chambers hearings. Other than the parties and their representatives the public need the permission of the judge to attend."

Lord Woolf there used the description "**private**" and "**secret**" to reflect the distinction expressed in the traditional terms "in chambers" and "in camera". However, the CPR discards these terms, and in my view uses the word "**private**" in a sense corresponding with Lord Woolf?s description "**secret**".

20. Lord Woolf also gave the judgment of the court in ***Reg. v. Legal Aid Board ex p. Kaim Todner*** [1999] QB 966. The appellant solicitors had been granted leave to apply for judicial review in respect of the Legal Aid Board?s termination of their legal aid franchise following allegations of dishonesty of former employees; but they were refused an order that the proceedings be anonymous. They appealed and at the outset said that they wished to withdraw the appeal or consent to its dismissal if anonymity was refused. The Court of Appeal refused anonymity and refused to allow the appeal to be withdrawn. At p.976H, Lord Woolf drew from ***Scott v. Scott*** the conclusion that "an exception can only be justified if it is necessary in the interests of the proper administration of justice", and went on:

*"3. While Viscount Haldane L.C. in **Scott v. Scott** [1913] AC 417, 435 emphasised that the limits to the exceptions to the general principle that proceedings should be conducted in public could not depend on "the individual discretion of the judge," there are an immense variety of situations in which it is appropriate to restrict the general rule. These situations depend very much on their individual circumstances. So if a judge adopts the correct approach in determining any particular application, indicated by the passages from **Scott v. Scott** and the **Leveller Magazine** case [1979] AC 440 already cited, the Court of Appeal will not interfere with the decision of a judge on an issue of this nature."*

He then commented (at p.977C-E) on the danger of a court simply acceding to parties' wish for privacy:

*"4. Sometimes the importance of not making an order, even where both sides agree that an inroad should be made on the general rule, if the case is not one where the interests of justice require an exception, has been overlooked. Here a comment in the judgment of Sir Christopher Staughton **in Ex parte P**., The Times, 31 March 1998; Court of Appeal (Civil Division) Transcript No. 431 of 1998, is relevant. In his judgment, Sir Christopher Staughton states: "When both sides agreed that information should be kept from the public that was when the court had to be most vigilant." The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases.*

5. Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it.."

The Court also observed that the more limited the interference with the general rule of publication, the less objectionable any restriction may be (p.978B-C); that the nature of the proceedings is always relevant: interlocutory and financial and other family disputes were *"normally of no interest to anyone other than the parties"* (p.978C-D); and that another relevant factor is whether it is the plaintiff, the defendant or a third party whose anonymity is at issue (p.978E-G).

21. Lord Woolf was the principal architect of the CPR, which were introduced and developed over a period of years under ss.1 and 2 of the Civil Procedure Act 1997. These sections gave power to the new Civil Procedure Rule Committee to make rules of court governing the practice and procedure to be followed in inter alia the High Court, "with a view to securing that the civil justice system is accessible and efficient". Under Schedule 1, the matters about which rules may be made include any matters governed by the former rules of court. CPR 39.2 came into effect in April 1999. The modern CPR 62 was introduced with effect from 25th March 2002. CPR 39 enacts the general rule, expressed in ***Scott v. Scott,*** that hearings should be public, but provides for circumstances in which a hearing may be ***"private":***

"39.2 General rule : hearing to be in public

(1) The general rule is that a hearing is to be in public.

(2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.

(3) A hearing, or any part of it, may be in private if

(a) publicity would defeat the object of the hearing;
(b) it involves matters relating to national security;
(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
(d) a private hearing is necessary to protect the interests of any child or patient;
(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;
(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person?s estate; or
(g) the court considers this to be necessary, in the interests of justice.

(4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

Parallel provisions permitting privacy include CPR 32.13 (inspection of witness statements used in chief) and RSC O.52(6) (sc 56.6) (committal proceedings).

22. The first Practice Direction to CPR 39 states that it is for the judge conducting the hearing to decide whether it should be in public or in private under CPR 39.2, after hearing representations and having regard to article 6 of the European Convention on Human Rights. It identifies certain types of hearing which "shall in the first instance be listed by the court as hearings in private under rule 39.2(3)(c)". These include for example some claims for possession or relating to execution or the rate of payment of a judgment debt, claims for charging orders, orders to attend court for questioning and applications for security for costs against a claimant company on the ground that there is reason to believe that it would be unable to pay the defendant?s costs if it lost. The common theme is that such claims may involve confidential financial information. The reference to listing shows that, in these cases, the onus remains on a party seeking to maintain privacy to justify it in the light of the general rule set out in CPR 39.2(1). The Practice Direction continues:

"1.9 If the court or judge's room in which the proceedings are taking place has a sign on the door indicating that the proceedings are private, members of the public who are not parties to the proceedings will not be admitted unless the court permits.

1.10 Where there is no such sign on the door of the court or judge's room, members of the public will be admitted where practicable. The judge may, if he thinks it appropriate, adjourn the proceedings to a larger room or court.

1.11 When a hearing takes place in public, members of the public may obtain a transcript of any judgment given or a copy of any order made, subject to payment of the appropriate fee.

1.12 When a judgment is given or an order is made in private, if any member of the public who is not a party to the proceedings seeks a transcript of the judgment or a copy of the order, he must seek the leave of the judge who gave the judgment or made the order.

1.13 A judgment or order given or made in private, when drawn up, must have clearly marked in the title: "**Before** [*title and name of judge*] ***sitting in Private***"

The Practice Direction describes the incidents of privacy, where ordered under CPR 39.2, in terms which appear to me to make clear that "***private***" in this context is meant in the sense of "***secret***" as used by Lord Woolf in ***Hodgson.*** In other words, it may be equated with the old "***in camera***" procedure, rather than the old "***in chambers***" procedure.

23. In ***The Queen on the application of Pelling v. Bow County Court*** [2001] UKHRR 165, the Divisional Court (Buxton LJ sitting with Penry-Davey J) rejected a submission that the CPR 39.2 was ultra vires to the extent that it authorised certain hearings to be heard in private. Buxton LJ, giving the judgment of the Court, observed that the principle of publicity in ***Scott v. Scott*** was not an absolute one, because (as there said) it must yield to the yet more more fundamental principle that the chief object of courts must be to secure that justice is done. He went on:

"22. It is plain from reading it that [CPR] 39.2 is facultative. It permits in certain limited circumstances the judge to sit in private, always to be assumed subject to that being in the interests of justice; and that is subject to the general rule in r.39.2(1). The general rule is that the hearing is to be in public. It follows that this part of the Civil Procedure Rules 1998 does not in any event breach the principle of legality because it does not in itself legislate inconsistently with the content of the rule in ***Scott v. Scott****[1913] AC 417, for the reasons I have indicated."*

More far-reachingly, he added:

"23. That is the end therefore of this point, but in any event I would go on and say that it is clear from reading them, and clear from any informed knowledge of their origin, that it was the intention of Parliament in the Civil Procedure Act 1997, and the intention of those who made the Civil Procedure Rules 1998 carrying out Parliament's intention as set out in that Act, to make a new start in those areas of practice to which the ambit of the rule applies. It may well be a necessary inference, to use the formulation adopted by Lord Hoffmann in ***Simms,*** *from that circumstance that the general rules made in the Civil Procedure Rules 1998, were it in fact the case that they in turn were inconsistent with the Scott principle, had indeed properly reversed, replaced, or at least put another aspect on that principle. I do not need finally to conclude that point for the reasons that I have already indicated, but in considering the vires and status of the Civil Procedure Rules 1998 generally, it seems to me that the potency and the novelty that Parliament clearly intended to attach to the Civil Procedure Rules 1998 cannot be overlooked."*

I return to the latter passage in paragraph 33 below. Buxton LJ also concluded that CPR 39.2 was (because of its facultative nature) consistent with article 6 of the Human Rights Convention.

24. ***Clibbery v. Allan***, decided in this Court in January 2002, was concerned with family proceedings. It is not directly relevant and is concerned with different terminology to that found in the CPR. Nevertheless, it contains some helpful indications as to the general approach to issues like the present. C had sought an occupation and a non-molestation order, in proceedings heard "in chambers" in accordance with Rule 3.9 of the Family Proceedings Rules 1991, made under the Matrimonial and Family Proceedings Act 1984. A now sought to restrain C from further disclosure of details about those proceedings to the press, on the general premise that the case was heard in chambers and must therefore remain secret (cf paragraph 83 of the President's judgment). The Court, in upholding the refusal of any such injunction, rejected this premise. The President adopted the explanation given by Jacob J and approved by Lord Woolf of the significance of an "in chambers" hearing. She advanced a three-fold distinction between *cases "heard in open court, those heard in private and those heard in secret where the information disclosed to the court and the proceedings remain confidential"*. She went on, citing *Scott v. Scott*, to affirm that a hearing in the intermediate category ("***in private***" in her terminology) does not, of itself, prohibit the publication of information about the proceedings or given in the proceedings (paragraph 51), and to consider the scope of the implied duty of confidentiality arising in respect of documents disclosed in civil litigation. She said at paragraph 66 that: *"It would appear, although we have not heard argument on the point, that CPR 39.2 is wider than section 12 of the Administration of Justice Act 1960 and that the exceptions set out in rule 39.2(3), may be treated as heard in secret and that the information about them may not be made public without the permission of the court. I do not however consider that it is necessarily the position with regard to cases heard in private in chambers under the 1991 Rules."*

I comment that I prefer the analysis of CPR 39.2 in the first sentence of this passage to the President's apparent assimilation earlier in her judgment (in paragraph 18) of hearings in private under CPR 39.2 to the old in chambers procedure.

25. In later passages, the President emphasised that family proceedings were not and should not be seen as in a separate category "other than in recognised classes of cases or in other situations which can be shown manifestly to require permanent confidentiality" (paragraph 77), and that it was necessary, both in family cases and when applying s.11 of the Contempt of Court Act 1981, to take account of all the circumstances against the background of the general principle of open justice, when deciding whether a case fell within such a class of case or situation. She distinguished in paragraphs 77 and 79 between hearings in private and subsequent publicity, and said at paragraph 79: *"It cannot properly be*

a blanket protection of non-publication in all cases heard in private in chambers under the 1991 Rules. It can however apply not only to the actual case before the court but also to groups of cases arising out of the same type of circumstances, see Lord Edmund-Davies in ***Attorney-General v Leveller Magazine [****1979] AC 440, 465."*

When instancing cases in which an order might be made, she referred to applications for occupation orders in which the welfare of children was likely to be a major issue or often the major issue, and cases where "*the financial affairs of any of the parties have to be investigated"*. She concluded:

80. The statutory framework, providing the procedures in civil and family cases, recognises the necessity to hold some proceedings in private and that there should be protection against publication of some of those proceedings. Such protection must be proportionate to the requirements of the administration of justice. It might be thought to be inconvenient and time-consuming to have to look at this problem in individual cases heard in private. There are groups of cases in which the answer is obvious and, in my view, there will only be a small number of cases, in particular under Part IV, where the advocates and the court may have to consider the point."

26. Keene LJ agreed with the President, and endorsed *"the need to scrutinise more closely than has happened in practice in the past whether a hearing in private can be justified"*, adding that *"in some cases, such as in some instances of applications for occupation orders, there may be little justification for the proceedings to be heard in private"*. He observed that the burden of showing that such an application falls within one of the exceptions to article 6(1) of the European Convention on Human Rights *"is likely to be particularly difficult to discharge where children are not involved"*. Thorpe LJ was concerned to emphasise the extent to which family proceedings may be distinguishable from ordinary civil proceedings and outside the principle of ***Hodgson,*** by virtue of their more inquisitorial nature and the duty of full and frank disclosure which the parties may incur to the court.

Article 6 of the European Convention on Human Rights

27. Article 6(1) of the European Convention on Human Rights provides:

"6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest 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 require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The Strasbourg jurisprudence establishes that:

i. *"The public character of court hearings constitutes a fundamental principle enshrined in paragraph (1) of Article 6":* ***Häkansson v. Sweden*** (1990) 13 EHHR 1, paragraph 66; ***Werner v. Austria*** (1997) EHHR 310, paragraph 45.

ii. The rationale, as stated in ***Werner v. Austri****a*, paragraph 45, is that *"This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society "*

iii. Although article 6(1) states as a general rule that proceedings should take place in public, it is not inconsistent with this for a state to designate an entire class of case as falling within one of the recognised exceptions, subject always to the court's control: ***B. v. United Kingdom*** (2002) 34 EHHR 19, paragraph 39; and cf domestically, in proceedings under s. 97 of the Children Act 1989, ***P v. BW*** [2003] EWHC 1541 (Fam); [2004] 2 WLR 509 (Bennett J).

iv. Nevertheless, as ***Häkansson v. Sweden*** also establishes: *"neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public. However, a waiver must be made in an unequivocal manner and must not run counter to any important public interest."* (paragraph 66).

v. More fundamentally, nothing in article 6 conflicts with the voluntary waiver by parties of court proceedings in favour of arbitration, although even such a waiver *"should not necessarily be considered to amount to a waiver of all rights under Article 6":* ***Osmo Suovaniemi v. Finland*** (Decision as to the Admissibility of Application No. 31737/96), where the European Court of Human Rights added, with reference to ***Håkansson v. Sweden***, that: *"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."*

The issue in **Suovaniemi** was whether parties could waive *"the fundamental right to an impartial judge"*, which the Court concluded that they could in arbitral proceedings, without deciding whether they could also do so in the context of purely judicial proceedings.

vi. Although on a literal reading of article 6 it might appear that there is an absolute obligation to give judgment publicly, *"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 purpose of Article 6(1)"* See ***B v. United Kingdom*** (2002) 34 EHHR 19, at p.529, paragraph 45.

vii. Thus, where, in that case, applications for a residence order had been conducted in chambers to protect the privacy of children and to avoid prejudice to the interests of justice, it was sufficient that: *"anyone who could establish an interest could consult or obtain a copy of the full text of orders and/or judgments of first instance courts in child residence cases and that judgments of special interest were routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them"*. (paragraph 47)

In these circumstances, public pronouncement of judgments: *"would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of Article 6(1), which is to secure a fair hearing"*.

viii. Also in ***B v. United Kingdom*** Judge Bratza in a concurring opinion observed that the wording and historical background to the Convention showed that: *"stricter standards have been imposed as regards the publication of court judgments than as regards the public character of the underlying proceedings* ***reflecting*** *the view that some of the factors which might justify a secret hearing would not justify delivery of the judgment in private."* (paragraph O-17)

Nonetheless, he was prepared to read into the Convention a similar qualification, relating to the interests of juveniles, to that expressed in article 14 of the International Covenant on Civil and Political Rights, on the ground that: *"There is, as the majority judgment recognises, a logical relationship between the public nature of the proceedings and the public pronouncement of the judgment which is the result of the proceedings. If the public may legitimately be excluded from the hearing for the purpose of protecting the interests of children or the private lives of the parties to a matrimonial dispute, the requirement that the judgment should be pronounced publicly should not be interpreted in such a way as to undermine that protection."* (paragraph O-19)

ix. The exceptions formulated in article 6(1) are permissive. However, in so far as they contemplate the possibility of private hearings to protect Convention rights, such as "the private life of the parties", which do not feature directly in *Scott v. Scott*, they seem to require the Court (having regard to section 6(1) of the Human Rights Act 1998) to consider whether the strictness of the rules in ***Scott v. Scott*** require some qualification. The alternative, supported perhaps by Lord Woolf's statement of principle in ***ex p. Kaim Todner*** (paragraph 20 above) and the President's approach in ***Clibbery v. Allan*** (paragraph 26 above), is that they involve a more developed understanding of the interests of justice than ***Scott v. Scott*** might suggest. It is not surprising that principles now recognised in the Human Rights Convention, particularly those relating to privacy, should involve a somewhat expanded or developed view of such interests in certain contexts. The Strasbourg jurisprudence considered in sub-paragraphs (iii) and (iv) above can also be seen as taking a more relaxed view of the possibility of parties waiving publicity where this does "not run counter to any important public interest". However, there is nothing in Strasbourg

jurisprudence, any more than in ***Scott v. Scott,*** to suggest that parties can by simple agreement insist on a court restricting publication.

Application of these principles

28. The move towards greater privacy in the hearing of arbitration applications starts with the rule amendments made with effect from 31st January 1997 in the light of the Arbitration Act 1996. But these only provided for hearings in chambers. The limited significance of a hearing being in chambers may not always have been appreciated, until ***Forbes v. Smith*** and ***Hodgson.*** But I do not think that such hearings were, even prior to those decisions, equated in all respects with hearings in camera. Further, it was common for a judge, at the parties? request or of his own motion, to release a judgment given in chambers for publication, when it contained any matter of general interest. Nevertheless, when, 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. I regard 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). That corresponds with the last sentence of paragraph 66 in ***Clibbery v. Allan.*** It also corresponds with the explanation of the significance of public and private hearings in CPR PD 39.1.9 to 39.1.13; and with Buxton LJ's approach to the issues in ***Pelling.*** Buxton LJ?s conclusion, that CPR 39.2 was consistent with the principles in ***Scott v. Scott*** and article 6, was based on the judge's power and duty in any particular case to consider whether it was appropriate to sit other than in public.

29. No challenge has been made before us to the vires of CPR 62.10, although it introduces a starting point of privacy for many arbitration claims which is the contrary to that which, as Buxton LJ noted in ***Pelling,*** applies under CPR 39.2(1). That such a starting point can be appropriate is clear (cf paragraphs 25 and 27(iii) above for statements both by the European Court of Human Rights and by the President of the Family Division). Mr Dunning QC for Moscow accepts CPR 62.10 as an appropriate scheme which enables the court to consider in private the material before it, in order to decide whether to continue in public. However, he submits that, whatever decision the court might reach regarding the hearing, it should, barring truly exceptional circumstances, deliver judgment in public. We have therefore to consider the weight and significance of the arguments in favour of privacy, in the light of the impetus given to them by CPR 62.10.

30. The rule changes in 1997 and 2002 rest 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. 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, has 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, although the objection was, I think, rooted more in the consequent lack of finality and the exposure to further delay and cost than in any consequent publicity.

31. ***Scott v. Scott*** was dealing with sensitive personal information about a marriage in the context of ordinary court proceedings. Even so, its immediate subject-matter has been affected by later legislation (paragraph 15 above) and might anyway have to be reviewed today in the light of the Convention on Human Rights (paragraph 27(ix) above). However that may be, *Scott v. Scott* was not dealing with a situation where Parliament has set out, in the Arbitration Act 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic fairness.

32. 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. Their conclusion in this regard has not been challenged. It may be justified on the simple basis that arbitration represents a special case, in relation to which there has been very considerable development during recent years. An alternative and overlapping consideration is that parties may be deterred from arbitrating or at any rate from invoking the court?s supervisory role in relation to arbitration if their understanding regarding arbitral confidentiality and privacy is ignored. I would personally doubt whether it can be said without any positive evidence that the publication that has in the past frequently followed applications to set aside arbitration awards, e.g. for misconduct, has itself been likely to be detrimental to parties? keenness or otherwise to agree to arbitrate in London. But I find it easier to accept that, having arbitrated unsuccessfully here, a party could well be deterred from making an arbitration claim in court if there was a risk that by doing so really confidential matters might be disclosed.

33. I would find difficulty in accepting Buxton LJ's suggestion in ***Pelling*** that the Rule Committee could without more have power to reverse or replace the fundamental principles in ***Scott v. Scott***. But I do see attraction in the further suggestion that it may "at least put another aspect" on the principles in ***Scott v. Scott***, bearing in mind that its mandate from Parliament was to facilitate access to justice. What would render the administration of justice impracticable or would reasonably deter parties entitled to justice from seeking it at the hands of the court (to take two phrases from Earl Loreburn?s speech) are to some extent matters of judgment and may develop to meet new contexts as well as over time, as social perceptions of the need to protect personal privacy and confidential information change. The Rule Committee was well-placed to identify appropriate starting points in the context of situations such as those identified in CPR 39.2 and, following the 1996 Act, CPR 62.10. Both Lord Shaw in *Scott v. Scott* and Lord Woolf in ***ex p. Kaim Todner*** warned that rule makers and judges should be careful not to erode fundamental principles. But the Arbitration Act 1996 and CPR 62.10 present a special situation, where there was scope for the Rule Committee to evaluate and give effect to its perception of the requirements to ensure access to justice.

34. 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.

35. We were referred by Mr Dunning to ***Television New Zealand Ltd.*** **["TVNZ"]** ***v. Langley Productions Ltd.*** [2000] 2 NZLR 250. The dispute centred on a contract for the provision by Langley of television news presentation services by a Mr. Hawkesby. In court proceedings, he had insisted on the need for resolution of the dispute in court, to preserve his reputation and TVNZ strongly resisted this. But all three parties then agreed arbitration under an agreement confirming its strict confidentiality, something for which s.14 of the New Zealand arbitration law would, absent contrary agreement, anyway have implied. There was however no New Zealand equivalent of CPR 62.10. After an award in Langley's favour, TVNZ applied to appeal and Langley to enforce the award. TVNZ applied for the court proceedings to be public, and Mr Hawkesby now resisted this. The judge rejected any suggestion that the agreed confidentiality *"**automatically**" or "**necessarily**"* extended to subsequent High Court proceedings. The question was whether in the particular circumstances the proceedings should be subject to *"**normal open process**".* He concluded that they should, because of the "serious and public interest" in the nature of the contract, because it is "in the long run the public?s money which is at stake and one can understand a real interest in knowing the remuneration received by those that read the news" and because *"the parties have adopted a view about the right of others to know which changes with the seasons"* (p.256). He went on: *"There may be some cases where the Court, in having to*

exercise a discretion as to whether to order suppression of some material in a particular case, might have regard to the fact that the proceeding in the Court had its genesis in an arbitral process in which confidentiality was an essential ingredient. Considering the way in which the parties have blown "hot and cold" from time to time no such concern arises in this case."

The last passage is relevant to the issue on this appeal, although delivered in a context lacking the added impetus of CPR 62.10. In contrast, in ***Aegis Ltd. v. European Re*** [2003] UKPC 11; [2003] 1 WLR 1041, the Privy Council mentioned Bermudan arbitration legislation which expressly empowers courts to hear proceedings under such legislation in private, and to restrict reporting or publication of the proceedings, and commented that this enabled *"the rights of privacy of the parties to be protected, notwithstanding the court proceedings"*. There is no such legislation in England, but CPR 62.10 represents a step in that direction.

36. Under CPR 62.10, the Rule Committee considered that, 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 Committee saw the starting point as reversed. As required by article 6(1) (cf paragraph 27(iii) above) and as stressed in ***Pelling, Clibbery v. Allan*** and ***P v. BW*** in the family context, the matter remained under the court's control in any particular case.

37. More fundamentally, the Rule Committee was in CPR 62.10 dealing in terms with a hearing. Whatever the starting point or actual position during a hearing, it is, 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*), underline the distinction between the considerations governing a hearing and the resulting judgment and order.

38. The range of arbitration claims within the definition in CPR 62.10 is very wide. Adapting words of the President, there *"cannot 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. I find it difficult, as at present advised, 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. In every case, while it will be appropriate to start the hearing in private as contemplated by CPR 62.10, the court should be ready to hear representations from one or other party that the hearing should be continued in public, and should anyway if appropriate raise this possibility with the parties, as Lord Woolf stressed in ***ex p. Kaim Todner.***

39. 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 s.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 is no surprise that there have 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: see e.g. ***Hussman (Europe) Ltd. v. Pharaon*** [2003] EWCA Civ 266, [2002] CLC 1030, ***Electrosteel Castings Ltd.***

v. Scan-Trans Shipping and Chartering Snd Bhd [2002] EWHC 1993 (Comm), [2003] 1 Ll.R. 190, ***Agrimex Ltd. v. Tradigrain SA*** [2003] EWHC 1656 (Comm), [2003] 2 Ll.R. 537, ***Lesotho Highlands Development Authority v. Impregilo SpA*** [2003] EWCA Civ 1159, [2003] 1 AER (Comm.) 22, ***Nisshin Shipping Co. Ltd. v. Cleaves & Co. Ltd.*** [2003] EWHC 2602 (Comm), [2004] 1 Ll.R. 38, ***Equatorial Traders Ltd. v. Louis Dreyfus Trading Ltd*** [2002] EWHC 2023 (Comm), [2002] 2 Ll.R. 638 and ***Guardcliffe Properties Ltd. v. City & St. James*** [2033] EWHC 215 (Ch), [2003] 2 EGLR 16. In each case, there appears to have been nothing about the subject matter that could justify a private judgment, even if the parties had wished it. Some of these decisions (e.g. the last two) also appear of slight legal or general interest.

40. 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 is a spectrum. At one end is the arbitration itself, and at the other an order following a reasoned judgment under s.68. In between is the hearing under s.68. An order will normally give very limited information, disclosure of which has not been controversial before us. Even a s.68 hearing is likely to cover only limited aspects of the subject-matter of the original arbitration, although the present s.68 hearing took as long as 5 days. A reasoned judgment under s.68 will in likelihood disclose very much less about the subject-matter of the arbitration than will have been covered during the s.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. There could sometimes be advantage in discussing the position in this regard in advance with counsel.

41. 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. That was the prime focus of attention of *Scott v. Scott*, and, I would add, also of s.4(2) of the Contempt of Court Act 1981. The concerns or fears of other parties cannot be a dominant consideration. Nor can 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, business-men 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 (and in my view unfounded concern) that their publication would upset the confidence of the business community in English arbitration.

42. In his carefully formulated judgment in this case, Cooke J covered many of these points, and acknowledged the distinction which exists between the hearing of an arbitration claim and the order and judgment following it. I differ from him perhaps only in emphasis on two aspects. First, the tenor of his judgment might, I think, be read as giving greater and more generalised weight to the starting point established by CPR 62.10 than I would. It is, I think, better to describe CPR 62.10 and indeed 39.2 as establishing starting points, rather than as presumptions. If neither the parties nor the judge of his or her own motion raises any question about the appropriateness of a private hearing, where that is the starting position, then the hearing will remain private. But, once the question of publication is raised, the judge?s task is to weigh all relevant circumstances; and, even where it is not raised by the parties, he or she may if appropriate raise it of his own motion.

43. Second, although the judge said at one point that "self-evidently" it did not follow that, because the hearing had been in private, the judgment should not be available for publication, I would lay greater stress on the importance and factors militating in favour of giving a public judgment on arbitration claims. A reasoned judgment following the hearing in private of an arbitration claim stands at a different point on the spectrum to the hearing itself, and so raises distinctly different considerations.

The judge's decisions

44. I turn to the judge's decisions in the instant case. The judge was after a five day hearing under s.68 very well-placed to assess the factual sensitivity of the situation, and the extent to which his judgment included truly confidential subject-matter by the confidentiality of which the parties had set store. His assessment was that its text covers "*sensitive matters of greatest confidentiality*".

He said at paragraph 27: *"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."*

45. We have been given and have read in private a copy of his judgment under s.68. Having read its text, I see no reason at all to disagree with the judge's assessment. It is true that the judgment also discusses and applies a considerable volume of case-law, in a way which, although not representing any great development of legal principle, would be likely to interest legal and arbitral practitioners as a clear and useful discussion of the relevant principles. Indeed, the judge concluded, in the light of such authority, that the approach of IIB and Bankers Trust to the arbitrator's approach to his decision-making role "was essentially misconceived" and the award sufficiently reasoned. These conclusions were highlighted and explained (without reference to the underlying facts) in the Lawtel summary to which I shall come. The judge indicated that he might, perhaps, have been able to formulate his own judgment in less explicit factual terms, had he received notice, prior to its delivery, of any wish that it should be delivered in public. But no request for any form of publication was made until after the judgment had been supplied to the parties in draft and, hence, after Moscow knew that it had won. The judge was not at this or any point asked to and did not consider revising or summarising his judgment to produce a factually neutral formulation of such part of it as might be of general legal interest.

46. The judge took into account the fact that IIB and Bankers Trust "*could provide little evidence of actual detriment should the judgment be published*". But I do not consider that a party inviting the court to protect evidently confidential information about a dispute must necessarily prove positive detriment, beyond the undermining of its expectation that the subject-matter would be confidential. Further, the judge was entitled (as he did) to balance the absence of any substantial evidence of actual detriment to IIB and Bankers Trust against Moscow?s failure, in his view, 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". Mr Dunning submitted that Moscow should be entitled to a public judgment under s.68 in order to be able to demonstrate to its financiers and the financial world at large that the arbitration award in its favour had been upheld by a clear-cut and convincing judgment of the English court. But the award remains private, and the judgment under s.68 necessarily only deals with certain aspects of its subject-matter and the arbitrator's approach in it. The picture would not be a full one, and the judge was entitled to conclude that Moscow had, objectively, no good reason for insisting on publication of the judgment.

47. Before us, Mr Dunning submitted that it was relevant that it was Bankers Trust and IIB who had invoked the court?s jurisdiction, and so opened the possibility of a public hearing and/or a public judgment. They had even sought unsuccessfully to appeal Cooke J's judgment of 21st March 2003. Mr Dunning suggested that Bankers Trust and IIB had thereby breached UNCITRAL rule 32.2, and he also relied on Lord Woolf's remarks in ***ex p. Kaim Todner*** about the potential relevance attaching to the fact that it was the plaintiff there who was claiming anonymity. But I do not see these as significant factors in this case. In ***ex p. Kaim Todner*** the courts were the appellants? only means of recourse and the appellants were the only persons whose confidentiality was at stake. Here the parties agreed contractually on a confidential alternative to litigation. The Arbitration Act and the CPR allow access to the court in the public interest, in order to support fundamental principles of fairness governing arbitration. It cannot be a breach of UNCITRAL rules to invoke the court's supervisory jurisdiction. It could serve as an inappropriate deterrent to such access, if the making of such an application were to dispose a court to order, at the instance of the other party, a public hearing or judgment, in circumstances when the sensitivity and confidentiality of the subject-matter would

otherwise point in an opposite direction. I would also note, that even if that would be relevant, which I am far from accepting, it has not been (and could not, I think, be) suggested that Bankers Trust?s and IIB's application was hopeless to the point where it was abusive even to make it. Further, it is not the making of the application that has led to Moscow's wish for publication. It is Moscow's success in defeating the application.

48. In the circumstances set out in paragraphs 44-47, I consider that the judge's conclusion that his judgment under s.68 should remain private was justified. This is so despite such difference in emphasis as I would adopt in formulating the principles which should govern a decision whether to proceed in public or in private (a) when hearing and (b) when giving judgment on an application under s.68. I do not consider that this difference would have affected or should now affect the decision which he reached that the judgment should remain private.

49. The Lawtel summary raises different considerations. It offers a brief and factually neutral insight into the legal issues which the judge addressed and states his resulting decision. It does not disclose any sensitive or confidential information at all. Mr Bloch QC for Bankers Trust in these circumstances ultimately raised very little objection to its publication. The judge took the view that it could not be said to have entered the public domain, and that its more general release ought to be prohibited for reasons similar to those leading to the conclusion that his judgment under s.68 should remain private. I have difficulty in agreeing with him on the first point. We are told that Lawtel has some 15,000 subscribers, mostly no doubt English lawyers, practitioners or academics. Moscow has a not insignificant connection with the London financial market, and so do at least some of the sub-participants in Credit Agreement No. 750, to whom Moscow wishes to send the summary. At present, there is no sensible means of preventing further publication by subscribers to Lawtel of the summary, or of knowing who may have seen or who may in future be shown the summary. The summary exists. It was created by Lawtel in good faith. It is in entirely neutral terms, and although its brevity reduces its worth in legal terms, it is not without some interest to lawyers and others interested in understanding the respective roles of an arbitrator and the court. I add that it has been exhibited in evidence to a fourth witness statement by Jean Staudt Moore and included in the bundles before us (and presumably the judge) as an exhibit accordingly. Since there is no reason of arbitral sensitivity or confidentiality militating against its publication, I see no basis for any court order precluding its publication by Moscow, for any purpose. To that extent I would allow the appeal against Cooke J?s judgment, and discharge and vary his order, so as to permit publication by Moscow of the Lawtel summary. Nothing I say affects any copyright or other right which Lawtel may have.

Conclusions

50. I would therefore dismiss Moscow's appeal in relation to paragraph 1 of the order made by Cooke J (publication of the judgment generally), but allow the appeal in respect of paragraph 2 of the order so as to permit publication generally of the Lawtel summary.

Lord Justice Carnwath:

51. I agree.

The Vice-Chancellor

52. The hearing of the application under s.68 Arbitration Act 1996 was, in accordance with CPR Rule 62.10, held in private. The order thereon made by Cooke J on 21st March 2003 dismissing the application, whether or not so given, appears to have been treated as made in public for the purpose of CPR Rule 5.4(2)(b) and is readily available. The issue with which we are concerned relates to the judge's judgment, that is to say his reasons for making that order and the Lawtel summary of it.

53. With regard to the Lawtel summary of the judge's judgment I agree with the reasoning and conclusion of Mance LJ for allowing the appeal from paragraph 2 of the order of Cooke J made on 5th June 2003. The summary is inherently unobjectionable and, for all practicable purposes, in the public domain.

54. The position with regard to the judge's judgment is not so clear. The fact that the hearing was held in private is no doubt a necessary pre-condition to the judgment being withheld from the public. But it is

not a sufficient justification. It is not uncommon for all or part of a hearing to be held in private on one or more of the grounds recognised in **Scott v Scott** [1913] AC 417 but for the judgment to be given in public. The necessary confidentiality may be achieved by judicial and judicious selection of what facts need to be recounted, the use of initials or pseudonyms to describe the parties or the relegation of the relevant information to a separate and confidential appendix to the judgment.

55. That there is a distinction between the hearing and the judgment is recognised by the terms of Article 6 ECHR, quoted by Mance LJ in paragraph 27 of his judgment. The apparently absolute requirement to pronounce the judgment publicly has been recognised by the European Court of Human Rights to be subject to some qualification to be assessed in the light of the special features of the proceedings in question. **B v United Kingdom** (2002) 34 EHHR 19. But, as Judge Bratza recognised in para O-17, stricter standards have to be imposed in relation to the public pronouncement of the judgment than to the public hearing of the underlying proceedings. (See also **Re: The Trusts of X Charity** [2003] 1 WLR 2751, 2755 para 11.)

56. In paragraph 40 of his judgment Mance LJ has used the analogy of a spectrum. In relation to the strictness of the test for confidentiality it runs from the hearing at one end to the order as finally drawn up at the other. A greater need must be shown for imposing a requirement for confidentiality on the latter than on the former. There is also a spectrum in relation to the nature of the proceedings. Plainly not all the arbitration claims referred to in CPR Rule 62.10(3)(b) need to be treated as confidential. And those that do will vary in the extent to which they should be so treated and the method by which to do so.

57. I have added these comments by way of emphasis to, not difference from, the comprehensive judgment of Mance LJ. I too consider that the judge may not have fully appreciated the weight of the onus resting on those who seek to keep from the public the judge's reasons for the order he made. Nevertheless, for the reasons given in paragraphs 45 to 48 of his judgment, I agree with Mance LJ that this court is not entitled to interfere with the conclusion of Cooke J., as expressed in paragraph 1 of his order, that the full text of his judgment delivered on 21st March 2003 should not be published. In that respect I too would dismiss this appeal.

Mr Graham Dunning QC & Mr Paul Key (instructed by Hogan & Hartson) for the Appellants
Mr Michael Bloch QC (instructed by Clifford Chance LLP) for the Respondent (BTC)
Mr Michael Sullivan (instructed by Watson Farley & Williams) for the Respondent (IIB)