ADR PRIVILEGE AND CONFIDENTIALITY

The inspiration for this article came from an exchange at the Chartered Institute of Arbitrators Branch Chairman's Meeting in December 2005 when a colleague demanded to know when the CIArb would stop advising its trainee mediators that the Mediation process was privileged. There is some validity to the objection. Whilst privilege generally attaches to the mediation process, there are exceptional circumstances where the protective veil of privilege can be pierced. What then is the rationale underpinning privilege in the mediation process and when might the privilege be compromised?

State interest in supporting ADR.

Whilst the courts stand ready to act as final arbitrators in civil disputes between citizens, in the interests of keeping the peace, justice does not come cheap, be it for the parties who have to fund legal advice or for the State which subsidizes much of the costs of civil litigation. Unlike arbitration, the parties do not bear the full costs of the litigation process. They do no pay an economic price for the court amenities or the services of the judge. It is therefore in the public interest for the State to encourage the private settlement of disputes. Such encouragement goes beyond support of adjudication, arbitration, conciliation and expert determination, to negotiated settlement, with or without the assistance of a go-between such as a mediator.

Legal Privilege

The parties to litigation proceedings, including arbitration, benefit from legal privilege,[1] which guarantees and protects freedom of speech during the trial process.[2] If this were not the case a party might be put in terror of saying something in court which might lead to a libel action.

There are limits on this freedom and to exceed the boundaries of court etiquette could amount to contempt of court, but the objective here is control of the process not to place restrictions on the parties' freedom to pursue a particular cause of action[3] or to present evidence. It is for the judge to determine what is admissible, oft-times after the event when counsel has let the cat out of the bag, resulting in an order to strike offending material from the record, accompanied perhaps by a judicial reprimand. Where privilege information is disclosed the judge or arbitrator has a duty to ignore that information.[4]

Legal privilege extends to expert witness meetings to establish a common opinion to be presented to a court or arbitral tribunal but does not extend to the contents of the report.[5] The objective here is that the integrity of the joint report is protected in that agreement is reached without fear or prejudice.[6]

Privacy and the public interest

The principal distinction here between the public courts and the private tribunal lies in that privacy attaches to private proceedings, so that absent recourse to the courts in support of the arbitral process, whatever is said and done during the course of arbitral proceedings remains confidential as between the parties. The courts can and will, to the extent that that is compatible with the court proceedings, preserve that privacy.[7] Much of factual information what is evident in a law report in respect of litigation is likely to be absent from a judgment about aspects of an arbitration, with the report restricting itself to the principles at state and directly related facts. The courts can restrict the public reporting of arbitral awards.[8] This aspect of confidentiality applies equally to the mediation process.[9] The courts will injunct a party to a mediation to prevent disclosure to third parties of mediation what took place within the mediation.[10]

By contrast, in support of public confidence justice should be seen to be done and hence the full machinery of justice is both open to the public and

1 Privilege extends to legal representative's communications, their servants and agents and interpreters etc. ***Imam Bozkurt v Thames Magistrates Court [2001]*** *LAWTEL AC8001922.*

2 ***Rush & Tomkins v Greater London Council*** *1988] 3 All ER* ***737:*** application for discovery of terms of a settlement between employer and main contractor denied to a sub-contractor in dispute with the main contractor. See also ***Alizadeh v Nikbin*** *[1993] LAWTEL AC 1605019* and ***South Shropshire District Council v Amos*** *[1985] S3275 CA*

3 N.B. A litigant may nonetheless suffer penalties for pursuing a frivolous action and be held accountable for costs thrown away.

4 ***Contac (800) Ltd & Phonenames Ltd v Iris Online Ltd*** *[2004] DRS 1404*

5 ***Robin Ellis Ltd v. Malwright Ltd*** *[1999] EWHC TCC 256*

6 Evidence of fact eg witness reports contained in an expert report is not privileged. Indeed it is something that should be disclosed in advance of a trial. ***Malcolm Electropainting Group v West Midlands Passenger Transport Executive*** *[2003] ACQ 59*

7 ***Glidepath BV v Thompson*** *[2005] EWHC 818 (Comm)*

8 ***Dept. Economic Policy & Dev. City of Moscow v Bankers Trust [2004] EWCA Civ 314***

9 ***Percy v. Church of Scotland Board of National Mission (Scotland)*** *[2005] UKHL 73*

10 ***Venture Investment Placement Ltd v Hall*** *(2005) ChD.*

the press. Where a case contains an issue of public importance, proceedings will find themselves in the Law Reports. This is a necessary adjunct of the concept of binding precedent at common law, since the law of the land must be accessible. Arbitral awards are rarely published and only then with the consent of the parties. The absence of State authority apart, the privacy that attaches to arbitral awards acts as an immutable barrier to arbitral precedent.

Rationale underpinning Negotiation Privilege

The admission of fault or liability is likely to prove fatal to the maintenance of a claim or to the defense of an action at law. The litigation process can be likened to a cautious dance between two lethal adversaries. One false move and the game is over. Thus, the classic footprint of civil litigation will have followed the pattern of claim and outright denial of liability. Either that or the respondent maintains silence and does not even give the other side the benefit of a response, not due to a lack of courtesy but rather on the basis that unless one can afford to say something positive, it is best to say nothing, at least until one has consulted with one's lawyers.

As with the coin which has two sides, the same is likely to be true of litigation. Little in life is absolutely clean cut and crystal clear, a fact borne out time and again by litigation. Most times there are rights and wrongs of greater and lesser degree on both sides. The claimant rarely gets everything he asks for, particularly since many claims are inflated at the outset, on the basis that whilst it is possible to reduce the sum claimed, once quantified it is difficult, if not impossible, to increase thereafter. The prevailing defendant may avoid most but not necessarily all liability. No more is this so than when a case features claim and counterclaim. Clearly in such situations there will have been scope for negotiation, compromise and settlement.

Nonetheless, the only basis upon which the parties to pending litigation will be prepared to discuss the dispute will be subject to the caveat that any concessions offered amount to nothing more than ***"friendly gestures."*** It is a tentative offer to compromise a claim / counterclaim in the interests of closure or alternatively an "***ex gratia payment,***" to placate the other side and make the problem go away. Whichever of the above applies, it will be absent admission of fault or liability. The common terminology hence is that the compromise is made ***"without prejudice"*** to the concessionaire's legal position. Without such caveats negotiation would not take place at all. The courts acknowledge this and in order to encourage settlement negotiations at all stages, both pre and post commencement of legal action, accord negotiation privilege to settlement communications, be they written or oral.[11] In consequence, nothing said or written during settlement negotiations is admissible in evidence during court proceedings.[12] Negotiation in front of a judge or arbitrator are privileged.[13] The fact that negotiations have taken place is not privileged, only the contents of the negotiations.[14] The assertion of a claim, prior to negotiations is not privileged.[15]

The privilege rule applies whether or not the parties expressly state that the communications are privileged,[16] but it is common practice to make that fact clear by heading documents ***"without prejudice."***[17] Any move towards open offers removing an express reservation of privilege must be clearly indicated.[18]

As noted, there are exceptions to the privilege rule. These are set out below.

Mere contractual negotiations.

The existence of a dispute (be it founded in contract or tort etc) is central to negotiation privilege.[19] Whilst privacy is something valued by commerce, particularly in respect of competitive contractual negotiations, negotiation privilege is not the way to secure privacy, since pre-contract communications are admissible in court to establish the meaning of the terms of contracts.[20] Rather commerce must rely

11 ***Grace v Baynton*** (1877) 21 Sol Jo 631; ***Kitcat v Sharp*** (1882) 48 LT 64; ***Re Daintrey, ex p Holt*** *[1893] 2 QB 116.*

12 ***Noga D'Importation v Australia & New Zealand Banking Group Ltd*** *[1999] LAWTEL AC9500508,* privilege extends to subsequent related litigation. It is less clear whether or not third parties can seek disclosure in unrelated litigation., see **La Roche v Armstrong** [1922] 1 KB 485. but contrast ***Rabin v Mendoza & Co*** *[1954] 1 All ER 247, [1954] 1 WLR 271, CA.* where an application for disclosure was refused.

13 ***Stotesbury v Turner*** *[1943] KB 370*

14 ***Specialist Ceiling Contractors v. ZVI Construction*** *[2004] EWHC 4T-0006 1 (TCC)***:**

15 ***Kooltrade Ltd v XTS LTD [2001] ChD..*** *Lawtel AC9900018*

16 ***Belt v Basildon & Thurrocks NHS Trust*** *[2004] EWHC 783*

17 ***Paddock v Forrester*** *(1842) 3 Scott NR 715;* ***Re Harris*** *(1875) 44 LJ Bcy 33;* ***Peacock v Harper*** *(1877) 26 WR 109.*

18 ***Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd*** *[1992] ADR.L.R. 02/28*

19 ***Prudential Insurance Co America v Prudential Assurance Co Ltd*** *[2002] EWCA 1154;* ***Norwich Union Life Insurance Society v Tony Waller Ltd*** *[1984] LAWTEL AC2747471* ***Standrin v Yenton Minster Homes Ltd*** *(1991) Times, 22 July, CA.*

20 ***Schering Corp v CIPLA Ltd*** *[2004] EWHC 2587 (Ch)* attaching the words "without prejudice" to communications has no

on the general rules of confidentiality,[21] albeit that they may be subject to anti-trust rules to prevent anti-competition agreements and thus prescribe the conduct of secret negotiations. The scope for negotiation is restricted when prospective partners know in advance of what has been offered to their competitors and whilst competitive tendering has its advantages it precludes negotiation. Commerce therefore is forced to rely on the fact that it is not in the best interests of their business partners to disclose the terms of contracts to their competitors. Post settlement negotiations are not privileged, a fact easily overlooked. It is necessary to have recourse to privacy strategies at this stage.[22]

The contract documents that gave rise to a dispute which was settled are not privileged and similarly whilst insurance settlement negotiations are privileged the insurance policy itself is not.[23] Whilst the content of negotiations may be privileged, any record including that of a lawyer recording that a conversation took place is not,[24] paving the way for application for disclosure. The fact that negotiations have taken place is admissible evidence to defeat a defence of laches (failure to prosecute a claim).[25]

Contract interpretation

If there is a dispute as to whether or not there has been a settlement, it may be necessary to look to the detail of the negotiations to determine the terms[26] of that settlement, a fortiori where the court has to determine whether or not there has been a repudiatory breach of the agreement.[27] If the terms are clear and unambiguous this should not be necessary, and thus disclosure will be a last resort by the court, not the first port of call.[28]

Evidence of legal rights.

Where settlement negotiation communications disclose evidence of legal entitlement,[29] that information is admissible as evidence both as between the parties[30] and as between a party and a third party.[31] Thus where a landlord conceded during a mediation that a tenancy included use of a loft, even though not expressly included in the lease, that evidence was admissible as a defense to an action by the landlord to deprive the tenant of use of the loft. [32] This does not extend to evidence of waiver of a right, being restricted to proof of existing rights, so that the veil remained intact in respect of an alleged reaffirmation of liability that was otherwise statute barred.[33] Evidence of a fact, for instance that someone had written and signed a document, not related to the terms of the settlement are admissible.[34]

Waiver

If a party refers to negotiation communications in the course of a trial, Pandora's Box is opened and cannot subsequently be closes.[35] This is deemed to be a waiver of the privilege and assuming the other party has not objected on the grounds of privilege to admissibility, they can in their own turn rely on any thing in the communications which is in their favour.[36] A reference to information privileged in one forum in satellite litigation amounts to a waiver for the purposes of those proceedings.[37] However, whatever the circumstances, the reference must be intentional. A mere accidental reference or oversight may not be sufficient to pierce the veil.[38] Both parties can expressly consent to waive privilege.[39]

effect whatsoever unless a clear intention to negotiate a settlement is demonstrated.

21 An express confidentiality agreement between the parties is enforceable, subject to public policy limitations. ***Prudential Assurance Co Ltd v Prudential Insurance Co of America*** *[2003] EWCA 1154 (CA)*

22 ***Dixons Stores Group Ltd v Thames Television plc*** *[1992] LAWTEL AC0010428.* ***Holdsworth v Dimsdale*** *(1871) 19 WR 798;* ***Re River Steamer Co*** *(1871) 6 Ch App 822*

23 ***Standrin Phillip & Patricia v Yenton Minster Homes Ltd & NHBC*** *[1991] LAWTEL AC1602201*

24 ***Parry Deborah Jayne & Whelan Michael Timothy v News Group Newspapers Ltd [1990]*** *LAWTEL AC1912031*

25 **Walker v Wilsher** (1889) 23 QBD 335, CA

26 ***Tomlin v Standard Telephones & Cables*** *[1969] 3 All ER 201*

27 ***FAL Oil Trading Co Ltd v Petronas Trading Co*** *[2002] EWHC 1825 (QB):*

28 ***Assicurazioni Generali SPA v CGU International Insurance Plc*** *[2004] EWCA Civ 429:*

29 E.g. severance of a joint tenancy, ***McDowall v Hirschfield Lipson & Rumney*** (1992) Times, 13 February.

30 ***Bath & N.E.Somerset DC v Nicholson*** *(2002) 10 EG 156 (CS)*

31 ***Gnitrow Ltd v Cape Plc*** *[2000] 3 All.E.R. 763 CA.* Evidence of the terms of a settlement to be disclosed to underwriters to establish the extent of contribution due under a policy.

32 ***Munt v Beasley*** *[2006] EWCA Civ 370*

33 ***Bradford & Bingley Plc v Mohammed*** *Rashid [2005] EWCA 2005. see also* ***Cory v Bretton*** (1830) 4 C & P 462; ***Re River Steamer Co, Mitchell's Claim*** (1871) 6 Ch App 822, but compare ***Froysell v Lewelyn*** (1821) 9 Price 122.

34 ***Waldridge v Kennison*** *(1794) 1 Esp 143*

35 ***Somatra Ltd v Sinclair Roche & Temperley*** *[2000] 1 WLR 2453*

36 ***Turner v Fenton*** *[1982] 1 All.E.R.* ***Somatra Ltd v Sinclair Roche & Temperley*** *[2002] EWHC Com 1627*

37 ***In the matter of a company*** *(2005) Lawtel No. AC9100809*

38 ***Smith Group Plc v Weiss*** *(2002) Ch.D :*

39 ***McTaggart v McTaggart****, [1948] 2 All ER 754, CA;* ***Blow v Norfolk C.C.*** *[1966] 3 All ER 579, [1967] 1 WLR 1280, CA.*

Privilege and Costs.

Once the substantive issues are settled there is no longer a justification for asserting privilege in respect of risk assessment documents and allied documents upon which a costs claim are based,[40] a fortiori where a party relies on such documents for cost purposes, the waiver discharges the privilege.[41] By contrast, since the substantive matters have not yet been dealt with, the veil cannot be pierced in support of a defence to an application for security of costs.[42] Where an offer is made ***"without prejudice save as to costs"*** the veil is pierced for the purposes of taxation.[43]

Bad Faith

Where a settlement has been induced by bad faith,[44] blackmail,[45] duress,[46] undue influence or fraud[47] the veil of privilege may be pierced. Disclosure will be restricted to evidence related to bad faith and other aspects of mediation proceedings would remain privileged.[48] The test is unambiguous impropriety.[49] Thus evidence of an intention to dispose of assets by a party who had entered into insolvency was admissible.[50] Where the threat is perfectly lawful the veil remains intact.[51] Evidence of perjury is admissible, but not evidence of a future intention.[52]

Impartiality : Misconduct of mediator.

Where there is an allegation that a mediator has acted in a manner prejudicial to the interests of the parties the court will hear evidence as to that misconduct. [53]

Med/Arb and Mini-trial

Where a judge, adjudicator or arbitrator acts at some stage during the proceedings as a mediator he will perforce be privy to confidential information disclosed during the mediation. Whilst once out of the bag the cat cannot be returned, thus preventing the application of the mediation privilege in such circumstances, it is generally considered best that the mediator and judge are not one and the same. Where they are the same individual the adjudication may be struck down in the absence of clear advice on the potential risk and thus informed consent to taking that risk.[54]

Conclusion

The above are exceptions to the rule that correspondence related to dispute settlement negotiations is privileged. It is not easy to pierce the veil. The first hurdle to overcome is to demonstrate to the court that there is a need to do so. This requires independent evidence, so that the privileged information alone is insufficient to render it admissible.[55]

Finally, information disclosed in a failed mediation whilst inadmissible as evidence in court can provide the other party with sufficient inside information to be able to successfully apply for discovery of documents, the existence of which they might not otherwise have been aware of.[56]

40 ***Donald McCrerry v Massey Plastic Fabrications Ltd*** *[2003] LAWTEL AC0104769 :* ***RBG Resources Plc (In Liquidation) v Rastogi*** *[2005] EWHC 994* (Ch) where evidence regarding a insistence on an apology which in the circumstances was not possible resulted in a failed mediation, leading to cost penalties.

41 ***Goldman v Hesper*** *[1988] LAWTEL AC1266056*

42 ***Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd*** *[1978] RPC 287. QBD;* ***Simaan General Contracting Co v Pilkington Glass Ltd*** *[1987] APP.L.R. 07/31 .*

43 ***Cutts v Head*** *[1984] 1 All ER 597*

44 ***Muller v Linsley & Mortimer*** *(1994) CA.*

45 ***Kristjansson v R Verney & Co Ltd*** *[1998] EWCA Civ 1029*

46 ***Carillion Construction Ltd v Felix UK Ltd*** *[2000] HT/00/223 & 232*

47 ***Vedatech Corp v Crystal Decision UK Ltd & Crystal Decisions (Japan) KK*** *[2003] EWCA Civ 1066*

48 ***Hall v Pertemps Group*** *Ltd [2005] EWHC 3110 (Ch) LAWTEL AC9900805*

49 ***Forster v Friedland*** (CA, 10th November 1992), ***Unilever Plc v The Procter & Gamble Co*** *[2000] 1 WLR 2436* : ***Savings & Investment Bank v Fincken*** *[2003] EWCA Civ 1630*

50 ***Optimum Solution Ltd v Yorkshire Electricity Group Plc*** *[2001] ChD Lawtel AC0101855 :* see also ***Re Daintrey, ex p Holt*** *[1893] 2 QB 116* regarding an admission of bankruptcy.

51 ***Unilever plc v Proctor & Gamble*** *[2000] FSR 344.* A threat to pursue a copyright action made during settlement negotiations was lawful and not admissible in evidence in separate proceedings.

52 ***Berry Trade Ltd v. Moussavi*** *[2003] EWCA Civ 715*

53 See ***B v O*** [2004] EWHC 2064 (Fam) regarding allegations of mediator bias and ***John Amorifer Usoamaka v Conflict & Change Ltd*** *[1999] CCRTF 98/0709/2* regarding an incompetent mediator.

54 ***Glencot Dev. & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*** *[2001] BLR 207:*

55 ***Wilkinson v West Coast Capital*** *[2005] EWHC 1606 (Ch)*

56 ***Re Anglo American Insurance Co Ltd [2000] ChD****. Lawtel AC0100565*