Dispute Resolution Hotline

July 12, 2023

COURT PROCEEDINGS AND SOCIAL MEDIA POSTS RESULT IN LOSS OF CONFIDENTIALITY OF ARBITRATION

- In Singapore, courts have an inherent power to grant sealing orders. However, the making of such orders – which is a departure from fundamental principle of open justice - should be the exception rather than the norm. Exceptional circumstances may include cases involving abuse of process, need to prevent miscarriage of justice, or when a statute provides for confidentiality.
- The Singapore International Arbitration Act, 1994 ("**IAA**") provides for confidentiality of court proceedings related to an arbitration by default (unless a court orders otherwise). However, courts would not pass confidentiality orders in arbitration related court proceedings where the confidentiality of the arbitration itself has been lost.
- Confidentiality may be lost due to: (i) court proceedings connected to arbitration not being confidential such as proceedings for interim reliefs, setting aside or enforcement of the award; (ii) LinkedIn/social media posts by party's legal representatives revealing information related to the proceedings (including the name of the parties and the size of the award); and (iii) awards being published on third party websites.
- Parties and their representatives should be careful to maintain the confidentiality of the arbitration proceedings (even after its conclusion).

In Republic of India v. Deutsche Telekom AG,[1] the Singapore Court of Appeal ("**SGCA**")refused to grant a sealing order to protect the confidentiality of enforcement proceedings of an award issued in an investment arbitration between the parties under the India-Germany BIT. The SGCA held that there is no compelling interest in this case to grant such orders considering that the confidentiality of the underlying arbitration had already been lost.

BRIEF FACTUAL BACKGROUND

An Indian state-owned entity, Antrix Corporation Ltd ("**Antrix**"), had entered into an agreement with Devas Multimedia Private Media Ltd. ("**Devas**") which was subsequently terminated. Deutsche Telekom AG ("DT"), a shareholder of Devas, commenced investment arbitration proceedings against India to challenge such termination. DT argued that India violated the fair and equitable treatment standard in the India-Germany BIT by terminating this agreement. In 2020, the arbitral tribunal in these proceedings issued a final award in favour of DT, ordering India to pay USD 132 million to DT.

On 3 September 2021, DT procured an ex-parte order by Singapore courts to enforce the final award in Singapore ("**Singapore Enforcement Order**"). In the meanwhile, DT also brought similar enforcement proceedings in other jurisdictions such as USA and Germany. Further, in 2021, Antrix commenced winding up proceedings against Devas before the National Company Law Tribunal (the "**NCLT**") in India. The NCLT ordered winding up of Devas which was upheld by National Company Law Appellate Tribunal (the "**NCLAT**") as well as the Supreme Court of India.

On 11 January 2022, India applied to set aside the Singapore Enforcement Order. Basis a consent order dated 19 January 2022, the parties agreed that if the enforcement proceedings (or related applications) for the final award are heard other than in open court, the court file would be sealed and any published judgment given in this respect would be redacted. On 31 March 2022, the enforcement proceedings (and related applications) were transferred to the Singapore International Commercial Court ("**SICC**"). In January 2023, the SICC dismissed India's application to set aside the Singapore Enforcement Order.

While filing an appeal to the SICC's decision, India also filed an application before the SGCA requesting for confidentiality orders to conceal information related to the appeal proceedings under Sections 22 and 23 of the International Arbitration Act, 1994 ("**IAA**") read with O 16, R 9(1) of the SICC Rules, 2021 as well as the inherent powers of the court. Such information included the identity of the parties, the court file, the documents in the matter, any potential judgment, or any other information related to the appeal proceedings (including the application seeking the confidentiality orders itself.

JUDGMENT

On 25 April 2023, the SGCA dismissed India's application. In the present judgment dated 9 June 2023, the SGCA set out detailed reasons behind its dismissal of India's application.

Parties' position

India argued that confidentiality orders are required to protect the confidentiality of the arbitration between the parties. It argued that the confidentiality of these arbitration proceedings was not completely lost even though some

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information related to the arbitration had been published online. India further argued that if confidentiality orders were not granted, it would suffer prejudice from misuse of publicly available information related to the arbitration.

On the other hand, DT argued that any such confidentiality orders would serve no real purpose since information regarding the arbitration was already in the public domain. It further argued that interest of open justice would be a predominant consideration in the present circumstances since the matter was an investment treaty arbitration which touched on matters of public interest. Lastly, DT argued India's concerns lacked bona fides since India published information related to the arbitration when it was in India's interests.

SGCA's decision

The SGCA observed that under O. 92 R 4 of the Rules of Court (Cap 322, 2014 Rev Ed), it has 'inherent powers' to regulate its process and make appropriate orders to achieve 'ends of justice'. It, however, noted that an order granting privacy of proceedings is an exception and departure from the generally applicable 'principle of open justice' which ensures public confidence in and the integrity of the judicial system. These exceptional circumstances included abuse of court process, need to prevent miscarriage of justice or when an applicable statute provides for confidentiality.

I A A

The SGCA noted that courts have the power to grant privacy orders under Sections 22 and 23 of the IAA. Section 22 of the IAA provides that proceedings under the IAA are required to be heard in private by default, unless the court orders otherwise.[2] Further, Section 23 of the IAA provides that a court may issue further directions to permit disclosure of information in a way which would maintain a party's 'reasonable interest in confidentiality'.

After analyzing the drafting history of IAA as well as the UNCITAL Model Law, the SGCA held that Sections 22 and 23 of the IAA did not originally intend to provide for confidentiality as the default position.[3] It was only in 2022 vide Courts (Civil and Criminal Justice) Reform Bill (Bill No 18/2021) that Section 22 was amended to give effect to the prevailing practice that court proceedings related to an arbitration would be kept confidential unless the court orders otherwise. The underlying purpose behind the amendment was to protect the "confidentiality of the arbitral proceedings" by ensuring confidentiality of related court proceedings, and there was no independent interest in ensuring the confidentiality of court proceedings. Thus, where the confidentiality of an arbitration has been lost, principle of open justice strongly weighs in favour of lifting the cloak of privacy provided for by the statute.

The SGCA found that in this case, there was no compelling interest to maintain the confidentiality of the enforcement proceedings in Singapore when confidentiality of the arbitration itself had been lost since:

- interim and final awards in this arbitration (and the related commercial arbitration between Antrix and Devas) were available on third party websites.
- Swiss Federal Supreme Court's decision refusing India's application to set aside the interim award in this case was publicly available. India's identity was revealed in this decision.
- In an article dated 15 March 2022 published by Global Arbitration Review ("**GAR**"), India and DT were expressly identified as the parties to the enforcement proceedings in Singapore.
- India's own lawyers in Singapore published a linkedin post on 16 March 2022 naming India as a party to the Singapore enforcement proceedings, stating the size of the final award and sharing a link to the GAR article.
- Information relating to DT's enforcement actions in other jurisdictions had entered the public domain.
- Decisions of NCLT, NCLAT and the Indian Supreme Court on winding up of Devas were publicly available. These decisions disclosed the identities of India and DT as parties to the arbitration as well as the outcome of the arbitration.

Analysis and outlook

This judgment reminds parties about the importance of maintaining confidentiality of arbitration proceedings even after their conclusion. It is also instrumental in highlighting instances which compromise the confidentiality of an arbitration. It is an important reminder that seemingly innocuous actions such as putting up LinkedIn posts or sharing GAR articles may also be considered to decide if the confidentiality of an arbitration has been lost. Parties should also be mindful that confidentiality of an arbitration may be lost from public availability of records / information from court proceedings (connected to the arbitral proceedings) even in other jurisdictions.

The analysis of the drafting history of the IAA and the UNCITRAL Model Law in this judgment brings to forefront the fact that there is no duty of confidentiality under any principal convention governing international commercial or investment arbitration (such as the New York Convention or the UNCITRAL Model Law). This is even though users of arbitrations have generally placed high importance on confidentiality as a feature of arbitration.[4]

Despite such absence in principal arbitration conventions, rules of numerous arbitral institutions as well as domestic laws of several countries provide for confidentiality of arbitration proceedings. For example, Rule 39 of the SIAC Rules, 2016 sets out that unless agreed otherwise by the parties, all matters related to the arbitration proceedings and the award shall be confidential. Similarly, Article 30 of the LCIA Rules, 2020 provides that as a general principle, all awards, deliberations of tribunal, materials created for the purpose of the arbitration and documents disclosed by the other parties should be kept confidential.

Under English and Singapore law, there is an implied duty of confidentiality emanating from the parties' agreement.[5] Further, Section 42-A of the Indian Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**") explicitly imposes an obligation upon the parties to maintain confidentiality of the arbitration proceedings.[6] However, this section creates a carve out for disclosure required for implementation or enforcement of arbitral awards.

In India, a party seeking confidentiality of enforcement proceedings related to an award may make an application invoking inherent powers of the court under Section 151 of the Indian Civil Procedure Code, 1908. The party may also make an application under rules of specific Indian courts which provide for the "confidentiality club" regime. For example, Chapter VII Rule 17 of the Original Side Rules of the Delhi High Court provides that the court may form a

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confidentiality club to allow limited access to commercially sensitive or confidential documents/information in a commercial suit.[7] While the use of such confidentiality clubs are more common for intellectual property disputes, a party may ask for such clubs to be formed while seeking enforcement of confidential awards. However, it is likely that a party would have to prove that the confidentiality of such award is not lost while seeking the formation of a confidentiality club for this purpose.

Considering the lack of a uniform and universally accepted confidentiality regime in international arbitration, parties seeking confidentiality should draft appropriate provisions to this effect in their arbitration agreement. Further or alternatively, such parties may consent to administer any potential arbitrations between them by institutions providing for confidentiality in their rules. In any case, it is important for parties and their representatives to exercise caution while publishing, sharing or approving any information related to the arbitration proceedings. Otherwise, not only may this prevent the party's ability to seek confidentiality orders in related proceedings in the future, it may also open such party to potential sanctions or penalties for violating confidentiality.

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You can direct your queries or comments to the authors.

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[1][2023] SGCA(I) 4.

[2]22.— Proceedings to be heard in private

(1) Subject to subsection (2), proceedings under this Act in any court are to be heard in private.

(2) Proceedings under this Act in any court are to be heard in open court if the court, on its own motion or upon the application of any person (including a person who is not a party to the proceedings), so orders.

[3]Original Section 22 of the IAA provided "Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court".

[4]The 2018 Queen Mary and White & Case Survey showed that 87% of the survey respondents attached some importance to confidentiality as a characteristic of arbitration, while 57% of these users rated confidentiality as "very important". The survey is available at: https://arbit ration.qmu l.ac.uk/me dia/arbitr ation/docs /2018-Inter national-Arbitrati on-Survey ---The-E volutio n-of-Int ernation al-Arbi tration -(2).PDF.

[5]Ali Shipping Corp v. Shipyard Trogir, [1998] 2 All ER 136, Hassneh Insurance Co of Israel v. Mew [1993] 2 Lloyd's Rep. 243; AAY v. AAZ, [2011] SLR 1093; Myanma Yaung Chi Oo Co Ltd v. Win Win Nu, [2003] 2 SLR(R) 547.

[6] **"42A. Confidentiality of information.** —

Notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentially of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award." This section was introduced in the Indian Arbitration and Conciliation (Amendment Act), 2019 and came into force from 30 August 2019.

[7]"**17. Confidentiality Club.** –

When parties to a commercial suit wish to rely on documents/information that are commercially or otherwise confidential in nature, the Court may constitute a Confidentiality Club so as to allow limited access to such documents/information. In doing so, the Court may set up a structure/protocol, for the establishment and functioning of such Club, as it may deem appropriate. An illustrative structure/protocol of the Confidentiality Club is provided in Annexure F. The Court may appropriately mould the structure/protocol of the Club, based upon the facts and circumstances of each case."
