

Privacy and Confidentiality in the Enforcement of Arbitral Awards

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Introduction

As a general rule, court proceedings are subject to the principle of open justice. Departing from this principle by imposing a cloak of privacy on court proceedings is an exceptional measure taken only in certain circumstances, such as when a statute provides for it. For instance, ss 22 and 23 of the International Arbitration Act 1994 ("**IAA**") protect the confidentiality of arbitration by requiring any court proceedings under the IAA to be heard in private by default, and sets out restrictions on the reporting of such proceedings.

However, under what circumstances can this protection be lost? This was the key question in *The Republic of India v Deutsche Telekom AG* [2023] SGCA(l) 4 where the applicant, the Republic of India ("**India**"), sought to protect the confidentiality of arbitration-related court proceedings.

Background Facts

By way of background, the respondent Deutsche Telekom AG ("**DT**") commenced arbitration proceedings in Switzerland ("**Arbitration**") against India, alleging a violation of a bilateral investment treaty between India and Germany. The Tribunal issued a Final Award in DT's favour, and DT obtained a Leave Order to enforce the Final Award in Singapore. India unsuccessfully applied to set aside the Leave Order, and then appealed against the dismissal of its setting aside application ("**Appeal**").

India then applied to the Court of Appeal ("**CA**") for certain privacy orders to, among others, have the Appeal heard in private, the case file sealed, and for any published judgment to be redacted (collectively "**SUM 4 Orders**"). India relied on ss 22 and 23 of the IAA and/or the court's inherent powers as bases for the application.

Court of Appeal Decision

The CA noted that the effect of s 22(1) of the IAA is that court proceedings relating to arbitration matters under the IAA are presumptively private, and proceedings are to be heard in private by default. This is, however, subject to the courts' powers to issue directions pursuant to s 23 to permit certain disclosure of information to balance the interests of open justice and parties' reasonable interests in confidentiality.

However, in relation to India's application for the SUM 4 Orders, the CA noted that the threshold question was whether the confidentiality of the arbitral proceedings had already been lost. The court should not be made to go through an empty exercise to protect confidentiality when there was nothing left to protect, particularly since keeping court proceedings private was otherwise an exceptional measure that departed from the general principle of open justice.

On the facts, the CA found that the confidentiality of the Arbitration had been lost, and there was thus no compelling interest in keeping the Singapore enforcement proceedings confidential. Multiple disclosures had been made of considerable information relating to the Arbitration, the identity of the parties and enforcement proceedings in Singapore and abroad. Amongst others:

1. the Interim and Final Awards issued in the Arbitration were available online;
2. a Swiss court decision refusing India's application to set aside the Interim Award of the tribunal in the Arbitration was publicly available and named India as a party;
3. an online article had expressly identified India and DT as parties to the Singapore enforcement proceedings;
4. information pertaining to DT's enforcement proceedings in other countries (such as the United States and Germany) was also in the public domain; and
5. decisions of statutory tribunals and the India Supreme Court disclosing the identities of India and DT and the outcome of the arbitration were also publicly available.

As such, there was insufficient basis to override the strong interest in open justice in curial proceedings.

The CA also held that there was no basis to invoke the court's inherent powers, since India relied on essentially the same premise that the confidentiality of the Arbitration had not been lost. Since confidentiality had already been lost, the requirement of necessity for invoking the court's inherent powers could not be satisfied. Although India submitted that disclosure of information in the Appeal would allow third parties to tarnish India's reputation, the CA noted that the interest of a party not to be seen in an adverse light is a merely private interest and did not warrant granting privacy orders and departing from the principle of open justice.

The CA therefore dismissed India's application for the SUM 4 orders.

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