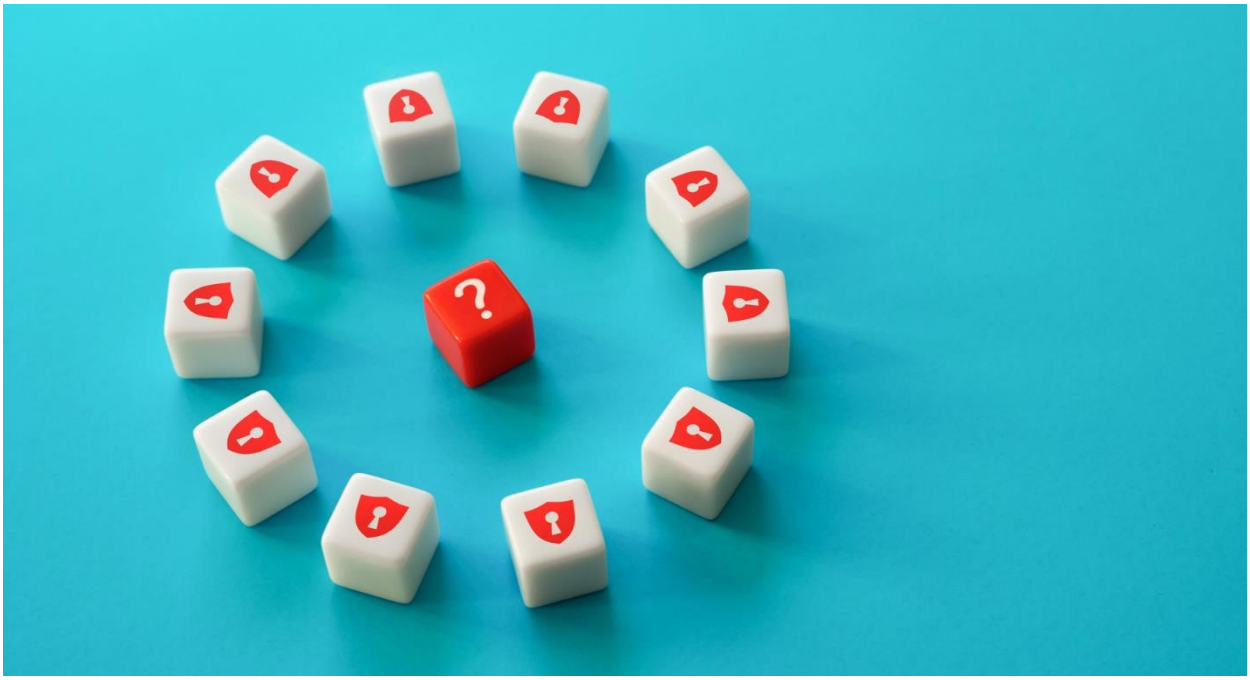
Confidentiality in Arbitration-related Court Proceedings – Positions in Singapore, Malaysia and China

December 2023 | Regional



Introduction

Most jurisdictions worldwide uphold the concept of open justice, with court proceedings generally being conducted in public by default. Conversely, arbitral proceedings and associated documents are generally subject to the principle of confidentiality, with parties to the arbitration prohibited from disclosing details of the arbitration to third parties. A tension arises when arbitration matters make their way to court, for instance in applications to set aside, recognise or enforce an arbitral award. Does open justice or confidentiality prevail?

Different jurisdictions offer different responses. In Singapore, confidentiality extends to arbitration-related court proceedings as a general rule although there are exceptions. In Malaysia, the protection of confidentiality in arbitration-related court proceedings originally extended only to parties' names. However, recent jurisprudence indicates that courts have an inherent jurisdiction to safeguard "any information" by way of sealing orders.

In contrast, China considers open justice the starting point. Court decisions (including judgments and civil rulings, the latter being a form of court decision on procedural and jurisdictional issues) must be publicly available regardless of whether they contain information on or relating to an arbitration. Surprisingly, there is little discussion or debate in China regarding whether the principle of confidentiality of arbitration should extend to arbitration-related court proceedings.

In this article, we look at the differing positions in Singapore, Malaysia, and China, and the issues that may arise when the positions conflict.

Overview

	Confidentiality of arbitration	Confidentiality of arbitration-related court proceedings
Singapore	• Implied duty of confidentiality at common law • The International Arbitration Act ("**IAA**") recognises the powers of the arbitral tribunal and the High Court to enforce confidentiality obligations • Principle of confidentiality is also set out in rules of arbitral institutions in Singapore	• Proceedings to be held in private by default, with judgments to be anonymised by replacing identifying details with pseudonyms • Court can grant permission to publish arbitration-related information under three specified circumstances
Malaysia	• The Arbitration Act ("**Malaysian Act**") restricts the publishing, disclosing and communicating of arbitration-related information save for certain exceptions • One exception is where the publication or disclosure is to enforce or challenge the arbitral award in court proceedings	• Courts previously held that confidentiality only extended to party identities, but not to other identifying details that may lead to the exposure of parties' identities • However, a recent High Court decision established that the courts have jurisdiction to safeguard the confidential nature of "any information"
China	• The Chinese Arbitration Law provides that an arbitration shall be conducted in private	• The Chinese Civil Procedural Law provides that all civil cases shall be heard in open court, with no exceptions for arbitration-related court proceedings • Parties may apply for leave on a case-by-case basis to prevent the judgment from being published

Position in Singapore

Confidentiality of arbitration

Singapore common law recognises an implied duty of confidentiality in an arbitration, owed by the parties and the arbitrators. Additionally, sections 12(1)(*j*) and 12A(2) of the IAA empower the arbitral tribunal and High Court respectively to enforce confidentiality obligations between parties arising from three sources:

1. a written agreement between the parties, whether in the arbitration agreement or any other document;
2. any written law or rule of law including at common law; or
3. the rules of arbitration (including institutional rules) agreed to or adopted by the parties.

The principle of confidentiality is also expressly set out in the rules of various arbitration institutions in Singapore, such as the Singapore International Arbitration Centre ("**SIAC**") and the Singapore Chamber of Maritime Arbitration ("**SCMA**"). Rule 39 of the SIAC Rules 2016 generally provides for confidentiality of all matters relating to the arbitral proceedings, including the existence of the proceedings, the arbitral award, and pleadings, evidence, documents and other materials. Rule 24.4 of the SIAC Rules 2016 further provides that by default, all meetings and hearings shall be held in private, and any related recordings, transcripts, or documents shall remain confidential. Similar rules are also set out in Rules 47 and 25.5 of the 4th Edition of the SCMA Rules.

The rules also provide for exceptions. For instance, Rule 39.2 of the SIAC Rules 2016 allows for documents to be disclosed to a third party for the purpose of making an application to any competent court of any state to enforce or challenge the award. This raises the question of the extent to which confidentiality is maintained in arbitration-related court proceedings.

Confidentiality of arbitration-related court proceedings

Section 22 of the IAA provides that proceedings to enforce or challenge an award are to be heard in private by default, without the need for any application by a party. When an arbitration-related judgment is published, the parties' names are typically replaced with pseudonyms while other identifying details (e.g. nationality and locations) are redacted or anonymised.

However, confidentiality in arbitration-related court proceedings is not absolute. For instance, section 23 of the Singapore IAA provides that a court can grant permission to publish arbitration-related information if:

1. All parties to the proceedings so agree;

2. The court is satisfied that the information, if published, would not reveal any matter that any party to the proceedings reasonably wishes to remain confidential. However, this would first require that the confidentiality of the arbitration is still intact. In *The Republic of India v Deutsche Telekom AG* [2023] 2 SLR 77 ("***India v Deutsche Telekom***"), multiple disclosures had already been made of considerable information relating to the arbitration in question, including the interim and final awards as well as the identities of the parties. As such, the Singapore Court of Appeal held that the confidentiality of the arbitration had already been lost, and there was therefore insufficient basis to override the strong interest in open justice in curial proceedings (for more information, please see our July 2023 article titled "Privacy and Confidentiality in the Enforcement of Arbitral Awards"); or

3. The court considers the judgment in respect of the arbitration-related court proceedings to be of major legal interest and therefore directs that reports of the judgment may be published in law reports and professional publications, subject to any party's application to conceal any matter.

Position in Malaysia

Confidentiality of arbitration

Section 41A of the Malaysian Act effectively restricts the publishing, disclosing and communicating of any information relating to an arbitration or an arbitral award except where the publication or disclosure is made to:

1. protect or pursue a legal right or interest;
2. enforce or challenge the award in court proceedings;
3. any government body, regulatory body, court or tribunal where the party is obliged by law to disclose the same;
4. any professional or adviser of the parties.

The second exception above again leaves open the question of whether confidentiality can be preserved in arbitration-related court proceedings.

Confidentiality of arbitration-related court proceedings

In Malaysia, case law had previously suggested a restrictive approach. The courts had held that confidentiality only covered the parties' names (see *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* (2019) 1 LNS 1452). This narrow remit is arguably insufficient to preserve "true confidentiality" as other facts outside the remit, such as property names and business addresses, may expose the parties' identities when pieced together.

In a welcome move, a recent decision extends this remit. In *Otis Elevator Company (M) Sdn Bhd v Desaru Convention Centre Sdn Bhd and other cases* [2023] MLJU 917, the High Court ruled that the courts have an inherent jurisdiction under Order 92 rule 4 of the Malaysian Rules of Court 2012 to safeguard the confidential nature of "any information" protected under the Malaysian Act by way of a redaction order or a protective order (otherwise known as a sealing order). This indicates that Malaysian courts are gradually becoming more receptive to allowing parties to protect confidential information and identities of parties in an arbitration.

For more information, please see our October 2023 article titled "From Arbitration to Court: Protecting Parties' Identities".

Position in China

Confidentiality of arbitration

Similar to the position in Singapore and Malaysia, Article 40 of the Chinese Arbitration Law provides that an arbitration shall be conducted in private. Notwithstanding this, parties may agree to waive the confidentiality of an arbitration unless it concerns state secrets.

Confidentiality of arbitration-related court proceedings

However, the principle of confidentiality does not apply to arbitration-related court proceedings. Article 137 of the Chinese Civil Procedural Law ("**CCPL**") provides that all civil cases shall be heard in open court, except those concerning state secrets or personal privacy or where the law provides otherwise. The statute does not provide a specific exception for arbitration-related court proceedings. More importantly, Article 159 of the CCPL provides that the public shall be entitled to access to judgements and civil rulings that have come into legal effect unless they concern state secrets, business secrets and/or personal privacy.

That said, in practice, the Chinese courts rarely call for a hearing for setting aside or enforcement proceedings. This may be because such applications do not engage the underlying merits of the case, and therefore the importance of open justice is diminished. However, even if a public hearing is not held, a judgment or civil ruling will be issued. Although the Chinese courts may sometimes allow a party to apply for leave for the judgment or civil ruling to be sealed on a case-by-case basis, the mere fact that the case concerns an arbitration is insufficient in itself to persuade a Chinese court to seal the judgment or civil ruling.

Impact of Different Rules

Given the varying degrees of protection, the confidentiality of arbitration may be weakened when, for instance, a Singapore arbitral award is to be enforced in China. In such cases, the Chinese court will likely disclose the parties' identities and details of the disputes in its civil ruling, which is in principle available to the public.

Once such information is in the public domain, the confidentiality of that arbitration may be deemed to be lost, as noted in *India v Deutsche Telekom*. In the event of subsequent proceedings in Singapore, parties may face difficulties in

obtaining privacy orders to protect the confidentiality of the arbitration, potentially leading to publication of further information on the arbitration.

It is also worth mentioning that under Chinese law, it is very hard to quantify the damages arising from a breach of confidentiality, and an injunction to prevent the disclosure of confidential information is generally unavailable. Therefore, even if one party to the arbitration has breached its confidentiality obligations, there is no clear legal consequence imposed by Chinese statute on the party in breach.

Concluding Remarks

Although many jurisdictions uphold the confidentiality of arbitration, they likewise provide for exceptions to this rule, particularly when the principle of open justice comes into play for arbitration-related court proceedings. Singapore courts routinely ensure that judgments are anonymised to preserve confidentiality, although they will not do so if confidentiality has already been lost, making it a meaningless exercise. Malaysia, too, is moving toward greater protection of confidentiality by permitting the sealing of information beyond merely the parties' names. In contrast, China prioritises the principle of open justice even in arbitration-related court proceedings, although in practice hearings are rarely held and parties can apply for non-publishment of judgments, reducing the risk of having confidential details disclosed through a published judgment or ruling.

Parties should be aware that the confidentiality of arbitration is not absolute. Even if their arbitration is conducted in private, confidentiality may be lost when a party seeks to set aside or enforce the arbitral award, particularly if proceedings take place in a jurisdiction that emphasises open justice rather than confidentiality.

For further queries, please feel free to contact our team below.

Visit *Arbitration Asia* for insights from our thought leaders across Asia concerning arbitration and other alternative dispute resolution mechanisms, ranging from legal and case law developments to market updates and many more.

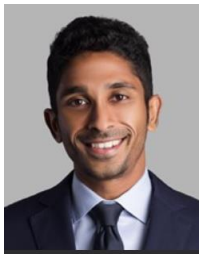
Contacts

Avinash Pradhan
Partner, Malaysia
Partner, Singapore

T +65 6232 0234
avinash.pradhan@rajahtann.com

Yu Zheng
Partner (Foreign Lawyer), Singapore

T +65 6232 0613
yu.zheng@rajahtann.com



Devathas Satianathan
Partner, Singapore

T +65 6232 0238
devathas.satianathan@rajahtann.com

Please feel free to contact the editorial team of *Arbitration Asia* at arbitrationasia@rajahtannasia.com, and follow us on LinkedIn here.