No Privacy Orders for Court Proceedings if Confidentiality of Arbitration Lost, Singapore Court of Appeal Rules

In *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 4, the Singapore Court of Appeal affirmed that the legal basis for making orders to protect the privacy of arbitration-related court proceedings in Singapore is the protection of the confidentiality of the arbitration itself. Such privacy orders will not be made if confidentiality of the arbitration has already been lost.

Our Koh Swee Yen, SC, Joel Quek, Axl Rizqy and Victoria Liu acted for the successful respondent in CA/SUM 4/2023 before the Court of Appeal.

Our Comments

While the court's power to grant privacy orders is statutorily provided for in sections 22 and 23 of the International Arbitration Act 1994 (**IAA**), this is ultimately rooted in the conventionally private (and confidential) nature of arbitration proceedings. The interest in keeping any court proceedings confidential under the IAA is essentially a derivative interest designed to protect the confidentiality of the underlying arbitration. In line with this, where the confidentiality of the arbitration has been lost, the hallowed principle of open justice would weigh strongly in favour of lifting the cloak of privacy that has been statutorily provided for in the IAA.

Further, while the court may grant sealing orders pursuant to its inherent powers, invoking the court's inherent powers to depart from the principle of open justice should be the exception rather than the norm. Recourse to the court's inherent powers would only be available where it is necessary to protect some other interest independent of that protected by the statutory provisions under the IAA. In this regard, the private interest of a party not to be seen in an adverse light does not warrant a grant of privacy orders in a departure from the principle of open justice.

In light of this decision, parties seeking to rely on the court's statutory power to grant privacy orders in arbitration-related court proceedings under the IAA should be mindful to ensure that information relating to the underlying arbitration and the arbitral award(s) is not publicly available. Where information and/or documents relating to the arbitration are found in the public domain, parties should take prompt and active steps to remove them from the public domain if parties wish to preserve the confidentiality of the arbitration and intend to obtain privacy orders pursuant to the court's statutory power in the IAA.

This update takes a look at the Court of Appeal's decision.

Background

The appellant was the Republic of India (**India**). The respondent was Deutsche Telekom AG (**DT**), a multinational company incorporated under the laws of the Federal Republic of Germany (**Germany**).

Antrix Corporation Ltd (**Antrix**), the commercial arm of the Indian Space Research Organisation (**ISRO**), was an Indian state-owned entity and was controlled by India's Department of Space. Devas Multimedia

Private Limited (**Devas**) was a company of which DT, through its wholly owned subsidiary Deutsche Telekom Asia Pte Ltd (**DT Asia**), was a shareholder.

Antrix and Devas were parties to an agreement under which Devas was to be leased S-Band electromagnetic spectrum on two satellites to be manufactured and launched by the ISRO (**Agreement**). The Agreement was subsequently annulled by India.

DT commenced arbitration proceedings (**Arbitration**) seated in Switzerland against India, contending that India's annulment of the Agreement violated a bilateral investment treaty between India and Germany (**BIT**).[1]

Following the arbitral tribunal's issuance of an interim award in DT's favour on 13 December 2017, India applied to the Federal Supreme Court of Switzerland (**Swiss Federal Supreme Court**) to set aside the interim award but was unsuccessful. The quantum stage of the Arbitration was then heard and the final award was rendered on 27 May 2020, with the tribunal ordering that India pay DT the amount of USD 93.3 million as well as costs and interest. As India did not apply to set aside the final award, on 20 August 2020, the Civil Court of the Republic and Canton of Geneva certified that the final award was enforceable and declared that it was legally binding in its form and content.

DT then commenced enforcement proceedings in Singapore (**Enforcement Proceedings**). On 3 September 2021, the General Division of the High Court of Singapore (**High Court**) granted DT leave on an *ex parte* basis to enforce the final award in Singapore (**Leave Order**).

Alongside the commencement of Enforcement Proceedings, the parties also arrived at a consent order dated 19 January 2022 for various confidentiality orders in respect of the proceedings.

On 11 January 2022, India applied in HC/SUM 155/2022 (**SUM 155**) to set aside the High Court's Leave Order.

On 31 March 2022, the Enforcement Proceedings and other related proceedings, including SUM 155, were transferred to the Singapore International Commercial Court (**SICC**).

SUM 155

Before the SICC, India sought to set aside the Leave Order on the basis that India, as a sovereign state, was immune from the jurisdiction of the Singapore courts pursuant to section 3(1) of the State Immunity Act 1979 (2020 Rev Ed) (**SIA**), and the exception to state immunity under section 11(1) of the SIA that India had agreed to submit the dispute to arbitration under article 9 of the BIT did not apply because DT's investment fell outside the scope of Article 9 of the BIT for the following four reasons:

(a) DT's investment was not in accordance with India's national laws by reason of fraud or illegality;

(b) DT's investment merely amounted to pre-investment expenditure for which further steps (such as obtaining the requisite licences and approval) were required before it could be admitted as a covered investment within the terms of the BIT;

[1] Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments dated 10 July 1995.

(c) DT did not make a direct investment, but an indirect investment which did not fall within the ambit of article 2 of the BIT because DT Asia, and not DT, had acquired the shares in Devas; and

(d) The subject matter of the parties' dispute fell within the "essential security interests" carve-out in article 12 of the BIT.

In addition, India contended that the Leave Order should be set aside because:

(a) The arbitral tribunal lacked jurisdiction under sections 31(2)(b) and 31(2)(d) of the IAA;

(b) Enforcement of the final award would be contrary to public policy under section 31(4)(b) of the IAA; and

(c) DT did not make full and frank disclosure when applying to the court *ex parte* for leave to enforce the final award.

On 30 January 2023, the SICC comprising a *coram* of S Mohan J, Roger Giles IJ and Anselmo Reyes IJ dismissed SUM 155 in its entirety with costs, rejecting all the arguments raised by India, and held that the final award was enforceable by DT against India. The SICC's decision on SUM 155, among other matters, is available here.

Our Koh Swee Yen, SC, Joel Quek and Axl Rizqy successfully represented DT in SUM 155 before the SICC.

India then brought an appeal against the dismissal of SUM 155 in CA/CAS 1/2023 (**Appeal**).

India's application for various confidentiality and sealing orders

In the Appeal, India applied, by way of CA/SUM 4/2023 (**SUM 4**), for:

(a) The Appeal and any other application filed in the Appeal, including SUM 4, to be heard in private;

(b) Any information (including the identities of the parties) or document relating to the Appeal or any application filed in the Appeal not to be revealed or published and to be concealed;

(c) The court file for the Appeal to be sealed from inspection by any third parties;

(d) The parties not to be identified in any hearing lists; and

(e) The identities of the parties or any other information that may reveal the parties' identities not to be published in any judgment or grounds of decision that may be issued in the Appeal, SUM 4 or any other applications filed in the Appeal

(collectively, **SUM 4 Orders**).

India relied on two bases in support of its application in SUM 4:

(a) Sections 22 and 23 of the IAA (**Sections 22 and 23**) read with Order 16 rule 9(1) of the SICC Rules 2021; and/or

(b) The inherent powers of the court.

India contended that the SUM 4 Orders were necessary to protect the confidentiality of the Arbitration. While India accepted that some information relating to the Arbitration had been published online, it maintained that the confidentiality of the Arbitration had not been entirely lost, and that there was information which was not yet in the public domain.

India also argued that it would be in the interests of justice to grant the SUM 4 Orders. It asserted that there was a real risk that India would otherwise suffer prejudice because information relating to the Arbitration had already been misused by third parties to paint India in a negative light.

In response, DT submitted, *inter alia*, that the SUM 4 Orders would serve no real purpose as information pertaining to the Arbitration and the related proceedings was already in the public domain.

The Court of Appeal's Decision

Ruling in favour of DT, the Court of Appeal declined to grant the SUM 4 Orders.

The Court of Appeal noted that, on either of the two bases advanced by India, the threshold question was whether the confidentiality of the Arbitration had been lost. The Court of Appeal found that it had. There was therefore no basis for making the SUM 4 Orders.

Sections 22 and 23

The present iteration of Section 22 came into effect on 1 April 2022 by virtue of the Courts (Civil and Criminal Justice) Reform Bill (Bill No 18/2021) (**Bill**), which brought the IAA in line with prevailing practice by providing that court proceedings relating to arbitration would be private unless the court ordered otherwise. Section 22 reads as follows:

> **Proceedings to be heard in private**
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> 22.—(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.

Further, Section 23 sets out restrictions on reporting of proceedings heard in private.

The Court of Appeal observed that the purpose of Sections 22 and 23 is to protect the confidentiality of the *arbitration itself* and that the interest in keeping any enforcement proceedings confidential under the IAA is essentially a derivative interest designed ultimately to protect the confidentiality of the *underlying arbitration*.

This is clear not only from the text of Sections 22 and 23 but also from the Second Minister for Law's statement in Parliament when the Bill was read. This is also consistent with the fact that imposing a cloak of privacy on court proceedings is an exceptional measure that departs from the general rule that such proceedings are subject to the principle of open justice. Here, the departure from that principle was provided for by statute (*i.e.*, the IAA). However, as this stemmed from the need to protect confidentiality

of the underlying arbitration proceedings, where the confidentiality of the arbitration has been lost, then the principle of open justice would weigh strongly in favour of lifting the cloak of privacy provided for by statute.

In the Court of Appeal's view, this was a clear case where the confidentiality of the Arbitration had been lost, in consequence of which there was no basis for maintaining the confidentiality of the Enforcement Proceedings in Singapore under Sections 22 and 23.

Among other things, the Court of Appeal noted that there had already been multiple disclosures of considerable information relating to the Arbitration, the identities of the parties and enforcement proceedings in Singapore and abroad. In particular, the Court of Appeal took into account the disclosures of the following information:

(a) First (and most significantly), both the interim and final awards issued in the Arbitration were available online on third-party sites. Further, the award issued in a related arbitration between Devas and Antrix was also available online.

(b) Second, the Swiss Federal Supreme Court's decision refusing India's application to set aside the interim award was publicly available, with India's identity revealed in the decision.

(c) Third, an article had been published in the Global Arbitration Review (**GAR Article**), which expressly identified India and DT as parties to the Enforcement Proceedings.

(d) Fourth, India's lawyers had effectively confirmed the identities of the parties through the publication of a LinkedIn post, by naming India as a party to the Enforcement Proceedings, stating the size of the final award of the Arbitration, and providing a web link to the GAR Article. The LinkedIn post was only taken down after DT's lawyers wrote to India's lawyers on the matter.

(e) Fifth, information pertaining to DT's enforcement proceedings against India in other jurisdictions, such as the United States of America and Germany, had also entered the public domain.

(f) Sixth, the decisions of India's National Company Law Tribunal, National Company Law Appellate Tribunal, and the Indian Supreme Court on the winding-up of Devas were also publicly available. These decisions had disclosed the identities of India and DT as well as the outcome of the Arbitration.

Given how the confidentiality of the Arbitration had substantially been lost, the Court of Appeal pointed out that the court should not be made to go through an empty exercise to protect confidentiality when there is nothing left to protect. Indeed, section 23(3)(b) of the IAA speaks of protecting information that a party wishes to "remain" confidential. This suggests that the court is not required to protect information that is already in the public sphere.

In addition, the Court of Appeal was satisfied that there was insufficient basis to override the strong interest in open justice in curial proceedings.

Inherent powers of the court

The Court of Appeal also took the view that it was not in the interests of justice to exercise its inherent powers to grant the SUM 4 Orders.

It noted that recourse to the court's inherent powers was unhelpful here. There was no basis for invoking the court's inherent powers unless this was done to protect some other interest that was independent of that protected by the statutory provision. However, India's position was advanced on essentially the same grounds, namely that the Arbitration was confidential. Having held that that was no longer the case here when considering the position under Sections 22 and 23, any argument for the exercise of inherent power founded on the same grounds would not stand scrutiny.

The Court of Appeal further highlighted that India's submission that the disclosure of information in the Appeal would provide more ammunition to third parties to tarnish India's reputation, thereby justifying invoking the court's inherent powers, was untenable. The Court of Appeal observed that the private interest of a party not to be seen in an adverse light does not warrant a grant of privacy orders in a departure from the principle of open justice. In fact, an intrinsic feature of open justice is that the conduct of all parties is open to be scrutinised by those who may be interested.

In the circumstances, the Court of Appeal dismissed SUM 4.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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