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LinkedIn Lips Sink Ships

→ The Singapore Court of Appeal has explained the kind of circumstances that need to be present if parties want proceedings to be heard in private.

LinkedIn lips sink ships

Singapore Court of Appeal finds India had already posted into the public domain

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In a recent decision, *The Republic of India v Deutsche Telkom AG* [2023] SGCA(I) 4, the Singapore Court of Appeal helps clarify the circumstances where the amended privacy provisions of Singapore's International Arbitration Act may not apply.

Background

In 2005, Devas Multimedia Pvt Ltd (**Devas**), a company of which Deutsche Telekom AG (**DT**) is a large shareholder, entered into an agreement with the Indian state-owned entity, Antrix Corporation Ltd (**Antrix**). Devas was to construct throughout India a hybrid satellite and terrestrial communications service. By 2011, the agreement had been terminated and DT commenced arbitration proceedings in Geneva against the government of India, the whole owners of Antrix. DT argued that the annulment of the agreement violated the bilateral investment treaty between Germany and India.

The arbitral tribunal issued an award against India. In an attempt to have the award set aside, India initiated proceedings in the Swiss Federal Supreme Court but was unsuccessful. DT sought to have

the award enforced in Germany and the United States, as well as in Singapore.

A plea for privacy in the Singapore Court of Appeal

For India, it was important that the Singapore Court of Appeal (the **Court**) dealt with matters confidentially. Part of the Court's orders for privacy included the direction that any information (including the identity of the parties) not be publicly revealed.

India rested its arguments for privacy on the clear fact that revealing information in the proceedings would exhibit crucial information from the arbitration proceedings. It would also reveal information from another arbitration between the companies involved in the dispute, Devas and Antrix.

One of India's primary fears was that any reputation it had as a worthwhile location for foreign investment would be damaged. As an example of what they feared, a public relations campaign against the Indian government had already begun. The website for the campaign heavily criticised the supposed mishandling of the business relationship between Devas and Antrix by the Indian government.

DT argues for open justice

Initially, DT shared India's view that the proceedings needed to be heard privately. DT had concerns about its creditors' potential fears. When this ceased to become an issue, DT took the position that the proceedings should be made public. DT highlighted the fact that the information was mostly in the public domain and so it did not matter if the Court proceedings were heard in public.

Parts of DT's arguments included the principles of allowing open justice and promoting the public interest. If successful, India would be relying on the Court's inherent powers to grant confidentiality orders. To invoke these powers would not be in the interests of justice. Furthermore, the case concerned an investment treaty arbitration. DT argued that this meant the subject matter was one of public interest. Where public interest is present, giving power to the principle of open justice should be a priority.

Should the information be public?

The Court, led by Chief Justice Sundaresh Menon, dismissed India's application for confidentiality.

In coming to the decision, the Court first outlined the general balancing act between making the subjected information public and keeping it confidential. The Court began by stating that although the

Court had an inherent power to make information confidential, its default should be to make the information accessible. The Court stated that to make a confidentiality order would contravene the hallowed principle of open justice. This disruption would mean that a confidentiality order should be an exception and not the norm.

After stating the Court's preference for open justice, the Chief Justice contended with the reality that this preference would have to be overruled if a statute mandated otherwise. That was the case here, as sections 22 and 23 of Singapore's International Arbitration Act (the **Act**) provided for *proceedings to be held in private* and that there are to be *restrictions on reporting of proceedings heard in private*. In short, proceedings concerning international arbitration will by default be held in private and made confidential. This, however, was subject to the Court's own views and it could direct that the enforcement proceedings be heard in open court at section 22(2) of the Act.

However, the Court questioned whether it was a specific type of information that was to be made confidential, rather than a blanket requirement. Sections 22 and 23 did little to comment on the type of information to be confidential by default, so the Court explored the history of the legislation.

The position that proceedings should be confidential by default had come into effect after a change in the legislation in 2022. Until that point, the position was that a party was to apply for confidentiality if it felt the proceedings needed to be such. At the time of the change, the minister responsible made clarifications around the intentions of Singapore's parliament.[1] Going forward, the default position of court proceedings dealing with arbitral awards was that they are to be held privately as a default. However, the Court could still order the hearing to be held in public and its judgment made public.

The Court read the minister's statement to mean that court

1 See discussion under Courts (Civil And Criminal Justice) Reform Bill.

proceedings would be private by default for the sake of the parties. It would attempt to keep the ordinarily private arbitration process confidential. This last point was important. It meant that the ordinarily strong preference for open justice would only be overruled if it meant the arbitration process could remain private. It stood to reason then, that if the arbitration process was not confidential, the Court could revert to its preference of open justice.

Citing *Dorsey James Michael v World Sport Group Pte Ltd,* the Court stated the principle as *the court should not be made to go through an empty exercise to protect confidentiality when there is nothing left to protect.*[2]

In response to India's fear of reputational harm, the Court suggested that, in fact, it was perhaps best for India for the proceedings to be held in the open.[3] If potential investors could hear India's side of events, they may be more inclined to trust the Indian government's processes in dealing with foreign investment.

Was India and DT's arbitration private?

The Court then found it necessary to see if the arbitration between India and DT fitted the description of arbitration undertaken privately. The Court looked at several instances relevant to the proceedings that indicated it had not been:

- Third-party websites had hosted the contents of interim and final awards issued in the arbitration.
- The Swiss Federal Supreme Court's decision was publicly available. The names of DT, Devas and Antrix were redacted, but not India's.
- Details were made public from enforcement proceedings occurring in the USA and in Germany. A publicly accessible news outlet covered the proceedings in Germany.
- A prominent international arbitration journal had expressly identified India and DT as parties to enforcement proceedings in Singapore.

Concerning the last point, India submitted that the journal had been published without verification from formal court documents. Unfortunately for India, they themselves had essentially confirmed their presence as a party in the proceedings. In March 2022, lawyers representing India in Singapore had published a post on LinkedIn identifying India as a party to the court proceedings. The lawyers stated the size of the award and provided a link to the article India has now distanced itself from. This post was only taken down when DT's lawyers contacted India's to highlight their concern at the information being shared.

Mindful of these elements, the Court viewed that the confidentiality of the arbitration had been lost.

Conclusion

The Republic of India v Deutsche Telkom AG outlines how the courts in Singapore may approach the changes to Singapore's International Arbitration Act. The amendment to the Act intended to change the default setting of how privacy is to be treated. However, the Court has still identified an inherent value in open justice; and indicated that proceedings should be conducted in this way when possible. Invoking section 22(2), as Chief Justice Sundaresh Menon did here, led the Court to actively assess whether the dispute warranted the default deference to privacy and confidentiality. Considering the Court of Appeal's approach, parties looking to enjoy confidentiality in Singapore should be cautious about what they share, and importantly, where they share it.

About the author

Alexander Lyall is a Research Clerk in The ADR Centre's Knowledge Management team, working with NZDRC and NZIAC. He gained his LLB from the University of Canterbury, and he also holds a BA in political science, media studies, and Te Reo Māori. His writing has previously been published by Radio New Zealand, The Spinoff and The Press.

2 *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 at [63].

3 *The Republic of India v Deutsche Telkom AG* [2023] SGCA(I) 4 at [46].