

Keeping Hush — when oversharing leads to losing confidentiality

An advantage of arbitral proceedings over court proceedings is that arbitration is private and only involves the named parties. This is reflected in sections 41A and 41B of the **Arbitration Act 2005**.

In brief, section 41A prohibits the disclosure of the arbitral proceedings or of the arbitral award, except in limited situations. Section 41B further provides that all court proceedings under the **Arbitration Act 2005** are not to be heard in open court, unless one party applies otherwise, or the court is of the view that the proceedings should be heard in open court. These provisions are also similarly reflected in Singapore under the **International Arbitration Act 1994**.

However, recently an arbitration between the Republic of India (“India”) and Deutsche Telekom AG (“Deutsche Telekom”) lost its confidentiality when the Singapore Court of Appeal dismissed India’s application to keep confidential the court proceedings filed to enforce an arbitration award.

In brief, Deutsche Telekom applied in the Singapore Courts to enforce an arbitration award for US\$132 million against India. India applied for the court proceedings to be heard in private. India argued that confidentiality was necessary as disclosure would result in information for third parties to use to tarnish India’s reputation.

The Singapore Court of Appeal found that notwithstanding the default position that all arbitration related proceedings in Court are to be heard in private, confidentiality of the underlying arbitration had been lost because of the arbitration award being published online, documents filed in enforcement proceedings in Switzerland, United States and Germany were publicly available and press coverage of the Singapore proceedings had been posted on LinkedIn by India’s lawyers.

The Singapore Court of Appeal therefore took the position that since substantial information relating to the arbitration had already entered the public domain, it would be unrealistic and pointless to protect confidentiality which had already been lost.

Arbitration Update

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Bearing this decision in mind, in the future parties can reduce the risk of “losing” their right to privacy by refraining from publishing or allowing to be published information relating to the arbitration and ensuring that when related proceedings are filed in other jurisdictions the documents therein also remain confidential.

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