Kluwer Arbitration Blog

A View from Malaysia: Confidentiality in Arbitration-Related Court Proceedings

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Confidentiality is one of the distinctive features of arbitration and is often promoted as an advantage of arbitration. Most arbitral institutions require arbitral tribunals and parties to preserve confidentiality of arbitral proceedings. Having said that, commercial disputes which are subject to arbitration agreements most often do not simply disappear from the limelight. Quite the opposite, such commercial disputes are regularly reported in the media despite the existence of an agreement to arbitrate the matter. A recent development on confidentiality in arbitration is reflected in **La Kaffa International Co Ltd v Loob Holding Sdn Bhd & Another appeal (2018) 9 CLJ 593** where both parties sought the Malaysian court's aid in obtaining injunctive relief orders. Despite the fact that the dispute was to be heard by way of arbitration in Singapore, the Malaysian High Court and the Court of Appeal scrutinised the facts and evidence presented by the parties in ruling on the parties' applications. Whilst the parties were subsequently reported to have reached an amicable settlement, the judgments of the High Court and Court of Appeal were published and the disputes were widely reported.

The amendments in 2018: Requirement to preserve confidentiality

Prior to 2018, the Malaysian Arbitration Act 2005 ("Act") did not have provisions addressing confidentiality in arbitration proceedings. With the amendments introduced in 2018, the Act now regulates disclosure of information relating to arbitral proceedings and awards. Section 41A prohibits parties from publishing, disclosing or communicating information relating to the arbitral proceedings under the arbitration agreement and the award made in those arbitral proceedings (**Section 41A of the Act)**.

Exceptions

There are 5 exceptions to the restriction imposed i.e. (a) if the parties consented on the disclosure; or (b) where the publication, disclosure or communication is made:

(i) to protect or pursue a legal right or interest of the party;

(ii) to enforce or challenge the award;

(iii) to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or

(iv) to a professional or any other adviser of any of the parties.

The confidentiality obligation under Section 41A applies to parties to the arbitral proceedings only. In **Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd (2019) 1 LNS 1452**, Section 41A was invoked by the defendant to expunge reports produced by the plaintiff on the basis that the documents were prepared for the purposes of an arbitration where the defendant was one of the parties. The defendant argued that it did not consent to the publication, disclosure or communication of the impugned documents. The Malaysian High Court did not allow the expungement request as the obligation to preserve confidentiality in Section 41A applies only to parties to the arbitral proceedings, to which the plaintiff was not a party.

The parties' duty to maintain confidentiality under Section 41A does not apply in a situation where one party is seeking to register and enforce an arbitral award in Malaysia pursuant to Section 38 of the Act. Section 38 requires the applicant to make an application to the High Court for the award to be recognised as binding and enforced by its entry as a judgment. A party seeking to register and enforce an arbitral award is required to produce two documents with the High Court (**Order 69 rule 8, Rules of Court 2012)**]:

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

In another decision in the case of **Siemens Industry Software GMBH & Co KG (Germany) v Jacob and Toralf Consulting Sdn Bhd (2020) 3 MLJ 1**, the respondents sought to register the entire award. The appellant opposed the application on the ground that only the dispositive portion of the award which sets out the orders or the exact relief granted by the arbitral tribunal in Singapore was capable of being registered as a judgment of the High Court. The Federal Court ruled in favour of the appellant and held that the High Court would enforce the dispositive portion of the award which sets out the orders or the exact relief obtained in the arbitral award and not the reasoning or findings of the judgment of the foreign courts. As analysed in this blog post, on the issue of confidentiality, the Federal Court agreed with the appellant's argument that to register the entire award would undermine the confidentiality of the arbitration proceedings. Although the decision did not deal with Section 41A, the jurisprudence behind that decision is consistent with the objective of Section 41A.

Hearings are to be heard otherwise than in open court

With the exceptions in Section 41A, in real terms, the confidentiality enjoyed by parties in arbitration proceedings is not without limitation. This leads to another interesting provision in the Act which provides that all hearings are to be heard otherwise than in open court (**Section 41B)**. Section 41B does not distinguish between matters where disclosure is prohibited and those where disclosure is permitted under the exceptions in Section 41A.

Section 41B only prohibits matters to be heard in open court but does not preclude judgments on arbitration-related court proceedings from being published. The rationale is simple: there is a need

for open justice to ensure the development of arbitration jurisprudence in Malaysia and that such need is not stifled by upholding confidentiality in arbitration.

The question that arises is whether judgment for proceedings heard in camera should be published in its entirety or whether certain information such as identity of the parties or confidential information should be redacted to preserve confidentiality.

There may be lessons to be drawn from jurisprudence in Singapore courts. In Singapore, a party may apply to the court for directions that certain information, relating to the proceedings including the identity of the party, be kept confidential and not publishable. One such example is the case of **AZT and others v AZV (2012) 3 SLR 794**, where the Singapore court granted a sealing order and published the judgment with the parties' identity kept anonymous for the purposes of preserving confidentiality of the arbitration proceedings on the ground that the dispute between the parties was purely commercial, with nothing to suggest that there was any countervailing and legitimate public interest weighing in favour of disclosure.

In **CES v International Air Transport Association (2020) 4 SLR 44**, the Singapore court allowed CES's request to redact its name in the judgment and the references to its chairman and managing director were also anonymised by use of the letter 'M' in an arbitration-related court proceedings. The court however, refused IATA's belated request for its name to be redacted. The refusal was on the ground that IATA did not provide a basis for such application; the belated request merely objected to its name being published for the purpose of obtaining consistency subsequent to CES's aposition in redacting its name. That was not sufficient.

Conclusion

In arbitral-related court proceedings, the court is often required to consider matters related to arbitration proceedings. On the one hand, there is a need to preserve confidentiality of arbitration; on the other hand, if judgments are not published by reason of confidentiality, the law will not develop.

In such circumstances, a compromised position can be achieved by having cause papers sealed and relevant information redacted from judgments in matters where this is warranted by the circumstances. The Act does not have an express provision to that effect and the Malaysian courts have not embarked on that journey. It will be interesting to observe the legal developments in this area.

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