From Arbitration to Court: Protecting Parties' Identities

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Introduction

Court proceedings are subject to the principle of open justice. This principle allows the public to not only observe hearings and trials in court, but also to access court filings and obtain information such as the identities of parties. In contrast, confidentiality stands as a key advantage of arbitration over litigation. For some parties, confidentiality is crucial to avoid affecting their market standing, their business relationships, or public confidence in their business (see *CSR v CSS* [2022] 5 SLR 675).

On the face of it, the confidentiality of an arbitration appears to be a certainty. However, parties to an arbitration can commence arbitration-related court proceedings to, for instance, enforce or set aside the arbitral award. If so, some aspects of the arbitration (e.g. factual statements, circumstances or documentary evidence) will inevitably be disclosed in light of the principle of open justice. In these instances, would the "private and confidential" aspect of arbitration be rendered futile?

In this article, we consider the position of Malaysia and other Commonwealth jurisdictions with regard to maintaining confidentiality in arbitration-related court proceedings, and how parties to an arbitration may protect their identities.

Position in Commonwealth Jurisdictions

In various Commonwealth jurisdictions, (e.g. the UK, Singapore, Australia), a party may apply in court proceedings for a court order to have certain information kept confidential, including the identities of the parties. In *AZT and others v AZV* [2012] SGHC 116, for instance, a "sealing order" was granted by the court to anonymise the parties' identities in the published judgment, preserving the confidentiality of the arbitration. The court noted that the parties had agreed to

arbitrate confidentially. Moreover, the dispute between the parties was purely commercial, and there was no legitimate public interest which warranted a disclosure of their identities.

However, commercial reality dictates that parties are not only concerned with anonymising or redacting their identities. Other facts may expose the parties' identities when pieced together, such as:

(a) the name of the properties of the parties;
(b) the type of business engaged in and the relevant industry; or
(c) documents containing parties' information, such as business addresses.

Confidentiality therefore ought to be extended to these facts so as to preserve "true confidentiality". To do so, parties can apply to anonymise a decision or judgment of the court by:

(a) replacing the parties' names and names of their employees with fictional characters and/or pseudonyms;
(b) replacing geographical locations with fictional locations;
(c) removing all information about the specific nature of the subject matter or describing the subject-matter generically;
(d) expressing all sums of money using a fictitious currency symbol (see *COT v COU* [2023] SGHC 69).

Position in Malaysia

In Malaysia, the first statutory incorporation of the principle of confidentiality in arbitration came through the introduction of section 41A of the Malaysian Arbitration Act 2005 ("**Act**") under the 2018 amendments. Section 41A 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:

(a) protect or pursue a legal right or interest;
(b) enforce or challenge the award in court proceedings;
(c) any government body, regulatory body, court or tribunal where the party is obliged by law to disclose the same;
(d) any professional or adviser of the parties.

The obvious question would be how do the courts balance the protection of confidentiality against the four exceptions enabling the publication or disclosure of information, especially when court proceedings have been commenced?

In Malaysia, case law had previously suggested a restrictive approach. The courts had held that confidentiality only extends to the identities of parties (i.e. their names) in the arbitration (see *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* (2019) 1 LNS 1452). As discussed above, this alone may be insufficient to preserve "true confidentiality".

In a welcome move, the latest development of Malaysian jurisprudence indicates that the protection of confidentiality has been extended. 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 Act by way of a redaction order or a protective order (otherwise known as a sealing order).

Concluding Remarks

When it comes to arbitration-related court proceedings, Malaysian courts are gradually becoming more receptive to allowing parties to protect confidential information and identities of parties in an arbitration. This is a welcome approach,

as it will instil more confidence in Malaysia as a viable option for international arbitration since there is certainty that parties have the liberty to apply to the court to protect their rights of confidentiality.

That said, the court will not of its own motion make orders protecting the confidentiality of arbitration-related court proceedings. Rather, it is the duty of the parties who are concerned about confidentiality to apply to the court for an appropriate order protecting the confidentiality of the proceedings.

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