

Bombay High Court Holds Contractual Confidentiality Cannot Override Court-Ordered Disclosure in Arbitration

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Introduction

In *Oil Field Instrumentation India Pvt. Ltd. v. Xcalibur Multiphysics Group S.L. & Ors.*¹, the Bombay High Court considered a challenge under Section 37 of the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**") to an order refusing interim relief under Section 17. The dispute concerned an exclusive joint venture arrangement for conducting airborne geophysical surveys across a defined territory and a contract independently undertaken in Bhutan by an affiliate of one of the joint venture partners. The Court held that a private confidentiality clause could not, without proper examination and appropriate protective measures, be relied upon to defeat a binding direction for disclosure issued by a court. It further held that the arbitral tribunal had impermissibly rewritten the parties' agreement by treating technology "offered" to the joint venture as meaning technology "accepted and paid for". The impugned order was set aside and the Section 17 application was remanded for fresh consideration, although the Court declined to restrain the continued performance of the Bhutan contract.

Facts

Oil Field Instrumentation India Pvt. Ltd. ("**the Promoter**") had incorporated Xcalibur McPhar International Private Limited ("**the JV**") to undertake airborne geophysical surveys, principally for government agencies. Under a Shareholders' Agreement dated 17 October 2022 ("**the Agreement**"), Xcalibur Multiphysics Group S.L., a Spanish company ("**the Investor**"), acquired a 51% shareholding in the JV, while the Promoter retained the remaining 49%.

The Agreement defined the relevant "Business" as the provision of airborne geophysical surveys for oil and gas exploration, mining exploration, groundwater exploration, and environmental and engineering applications. The "Territory" comprised India, Sri Lanka, Myanmar, Nepal, Afghanistan, Bangladesh, Bhutan, Maldives, Pakistan, Iran, and Iraq. The parties agreed that the JV would be their exclusive vehicle for carrying on the Business throughout the Territory, except in Iraq, where the relationship was expressly non-exclusive.

Clause 18.3 contained the non-compete and non-solicitation obligations. It prohibited the shareholders from directly or indirectly engaging in any competing business within the Territory. Clause 18.3.5 limited these restrictions to technologies "offered" by the Investor to the JV and excluded unique airborne survey technologies which had not been offered to the JV. The Agreement also recorded that no separate consideration was payable for the non-compete obligation, the reciprocal promises under the Agreement being treated as sufficient consideration.

The dispute arose when the Promoter learnt from public reports that the Investor, through Xcalibur Aviation (Australia) Pty. Ltd. ("**the Australian Affiliate**"), had secured a contract for an aerial geophysical survey in Bhutan ("**the Bhutan Contract**"). Since Bhutan formed part of the exclusive Territory, the Promoter alleged that the Investor had diverted a business opportunity which ought to have been pursued through the JV.

Proceedings Under Sections 9 and 17

The Promoter approached the Bombay High Court under Section 9 of the Arbitration Act. By an ad interim order dated 9 May 2025, the Court restrained the Investor from negotiating or entering into any new contract for the Business within the Territory except through the JV. The Court permitted the Bhutan Contract to continue, but directed disclosure of the contract, the technology deployed, and the supporting documents so that the alleged breach and its extent could be assessed.

The Investor subsequently filed an affidavit but did not disclose the Bhutan Contract or its supporting documents. On 24 July 2025, the Section 9 petition was converted into an application under Section 17 before the arbitral tribunal, with the existing ad interim protection continuing pending the tribunal's decision.

By an order dated 1 April 2026, the three-member arbitral tribunal declined to grant interim relief. It also excused the Investor from disclosing the Bhutan Contract on the ground that the Government of Bhutan had refused to waive the confidentiality obligation said to be contained in that contract. The tribunal further interpreted the word "offered" in Clause 18.3.5 as requiring the technology to have been actually made available, accepted, and paid for by the JV before the exclusivity obligation could apply.

The Promoter challenged the order under Section 37 of the Arbitration Act. The appeal was confined to two issues: the complete non-disclosure of the Bhutan Contract and the interpretation of the word "offered" in Clause 18.3.5.

Findings of the Bombay High Court

A Private Confidentiality Clause Cannot Trump a Court's Disclosure Direction:

The Court held that the tribunal had adopted an unreasonable approach in excusing disclosure solely on the basis of a confidentiality obligation contained in an unseen contract. The very document necessary to determine whether the Investor had breached the exclusivity arrangement had been withheld, and even the confidentiality clause relied upon to justify the withholding had not been produced before the tribunal.

The Court observed that commercial agreements commonly contain confidentiality clauses, but such clauses ordinarily recognise that disclosure may become necessary to comply with a legal, regulatory, or judicial obligation. A private contractual obligation cannot extinguish a direction having the force of law. At the highest, the parties may consult each other

regarding the manner of disclosure, seek suitable redactions, or request safeguards for commercially sensitive information.

The Court referred to the confidentiality provision in the parties' own Agreement as an illustration. That provision expressly permitted disclosure required by applicable law or by a governmental authority, subject to prior consultation. The Court clarified that it was not assuming that the Bhutan Contract contained identical language. The point was that the tribunal ought at least to have called for and examined the confidentiality clause before accepting it as a complete answer to the disclosure direction.

The Material Relied Upon to Excuse Disclosure Was Incomplete:

The tribunal had relied upon two letters as evidence that permission to disclose the Bhutan Contract had been sought and refused. The first was a heavily redacted letter dated 9 June 2025 from the Australian Affiliate seeking permission from the Bhutanese authorities. The second was a letter dated 23 June 2025 recording a refusal, but it responded to a different letter dated 18 June 2025 which had never been placed before the tribunal.

The Court found that the chain of correspondence was incomplete. The record did not reveal what transpired between 9 June and 23 June 2025, whether limited disclosure or redaction had been discussed, which officials were involved, or whether the request had been pursued or escalated. The tribunal had nevertheless treated the two disconnected letters as sufficient to excuse compliance with the earlier court order.

The Court held that this approach could make every non-compete obligation immune from scrutiny. A party accused of breach would only need to place a confidentiality clause in the allegedly offending agreement and then refuse to produce the agreement itself. Such a result would deprive the exclusivity provision of practical content and prevent the tribunal from examining the very transaction said to constitute the breach.

Confidentiality Could Have Been Protected Through Procedural Safeguards:

The Court identified several established mechanisms through which the Bhutan Contract could have been examined without unnecessary dissemination. The tribunal could have called for the confidentiality clause alone, permitted targeted redactions of sensitive provisions, restricted access to identified individuals through a confidentiality ring, or required appropriate non-disclosure undertakings.

None of these measures had been meaningfully explored. The Court emphasised that the arbitral tribunal remained the master of the evidentiary record and was best placed to determine which parts of the contract were relevant, what could be redacted, and what confidentiality safeguards should be imposed. The problem was not that the tribunal lacked discretion, but that it had excused disclosure without first subjecting the asserted confidentiality concern to adequate scrutiny.

The Court drew support from *State of Bihar v. Kripalu Shankar*², which recognises that even State documents may be directed to be produced when relevant to the litigation, and from *Interactive Avenues (P) Ltd. v. Tikona Digital Network (P) Ltd.*³, which illustrates the use of procedural arrangements such as redaction to protect confidential material.

The Word "Offered" Could Not Be Rewritten as "Accepted and Paid For":

The second issue concerned the iCORUS-X gravity survey technology deployed in Bhutan. The record showed that the Australian Affiliate had offered this technology to the JV in 2023. Correspondence also demonstrated that the JV's Chief Executive Officer had discussed its use with the Geological Survey of India and continued to pursue a pilot project and regulatory approvals. Minutes of a board meeting recorded that the technology could be purchased when project requirements arose.

The tribunal nevertheless held that "offered" meant technology actually made available to, accepted by, and paid for by the JV. The High Court held that this interpretation substituted words which the commercial parties had not used. If actual purchase had been intended as the trigger for exclusivity, the parties could readily have said so in the Agreement.

The Court also rejected the suggestion that postponing a purchase amounted to rejection of the technology. In a business dependent upon securing government survey contracts, it would make little commercial sense for the JV to purchase specialised technology before a realistic opportunity for deployment arose. The continued engagement with the Government of India, including correspondence as late as January 2025, was inconsistent with any express or deemed rejection.

The Court observed that Clause 18.3 was not merely a restraint on trade. It embodied the parties' affirmative commitment to conduct the Business collaboratively through their joint venture. Reading "offered" as "accepted and paid for" substantially diluted that bargain and enabled the Investor to avoid exclusivity merely because the JV had not purchased technology before securing a project for its deployment.

The Bhutan Contract Was Not Stayed, but the Arbitral Subject Matter Required Protection:

The Court did not interfere with the tribunal's refusal to restrain continued performance of the Bhutan Contract. It recognised that stopping an ongoing sovereign project could cause serious and irreversible consequences. However, the absence of an injunction did not eliminate the need to preserve the JV's potential claim for damages arising from the alleged diversion of an exclusive business opportunity.

To assess the scale of any injury and determine an appropriate protective measure, the tribunal required the commercial and technical particulars of the Bhutan Contract. The Court therefore held that the contract and the

related correspondence had to be disclosed to the tribunal, subject to such confidentiality safeguards as the tribunal considered appropriate.

Conclusion

The Bombay High Court allowed the Section 37 petition by way of remand and set aside the arbitral tribunal's order. It held that the tribunal's decision to excuse disclosure on the basis of an unexamined confidentiality clause and two incomplete letters could not be sustained. It also set aside the finding equating technology "offered" to the JV with technology "accepted and paid for", holding that the interpretation amounted to an impermissible rewriting of the Agreement.

The Investor was directed to provide the tribunal with a complete and unredacted copy of the Bhutan Contract, including the confidentiality and notices clauses, together with the full correspondence exchanged with the Government of Bhutan and the identities and designations of the officials concerned. The unredacted contract was to be made available exclusively to the tribunal in the first instance. The tribunal was authorised to determine subsequent redactions, establish a confidentiality ring, and require non-disclosure agreements before placing the relevant material on the arbitral record.

After compliance with the disclosure directions, the tribunal was directed to rehear the Section 17 application afresh and consider appropriate measures for preserving the subject matter of the arbitration. The parties were directed to appear before the tribunal within four weeks. The Court also requested the tribunal to take the costs of the interim proceedings into account when deciding the remanded application.

Comment

The judgment provides an important reconciliation between confidentiality and procedural fairness in arbitration. Confidentiality is a significant feature of the arbitral process, but it cannot be converted into a mechanism for suppressing the principal evidence required to adjudicate an alleged contractual breach. Where genuinely sensitive material is involved, the appropriate response is controlled disclosure through redaction, restricted access, and confidentiality undertakings, rather than complete non-production.

The ruling is equally significant for the interpretation of sophisticated commercial contracts. An arbitral tribunal may adopt a commercially sensible construction, but business efficacy does not permit the substitution of materially different words for those selected by the parties. Particularly at the interim stage, the tribunal must preserve the bargain reflected in the contractual language rather than narrow it in a manner that may deprive the final relief of practical value.

The Court's refusal to halt the Bhutan Contract, while ensuring disclosure and preserving the JV's potential monetary claim, also reflects a calibrated approach to interim protection. It avoids disruption of an ongoing

international project while ensuring that the alleged breach of exclusivity remains capable of meaningful adjudication and effective relief in arbitration.

Endnotes

1. *Oil Field Instrumentation India Pvt. Ltd. v. Xcalibur Multiphysics Group S.L. & Ors.*, Commercial Arbitration Petition (L) No. 16156 of 2026 (Bombay High Court, judgment dated 8 June 2026).
2. *State of Bihar v. Kripalu Shankar*, (1987) 3 SCC 34.
3. *Interactive Avenues (P) Ltd. v. Tikona Digital Network (P) Ltd.*, 2018 SCC OnLine Bom 4725.

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