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Singapore International Commercial Court sets out test for the production of confidential arbitral deliberations

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SUMMARY

In the recent decision of *CZT v CZU* [2023] SGHC(I) 11, the Singapore International Commercial Court declined to grant orders for the production of an arbitral tribunal's records of deliberations because these records were confidential and the interests of justice did not warrant lifting the veil of confidentiality. This is the first time that a Singapore court has decided the question of when arbitrators can be ordered to produce their records of deliberations, and the decision reflects the Singapore courts' pro-arbitration stance.

On 28 June 2023, a three-judge bench of the Singapore International Commercial Court (the SICC) – consisting of Chua Lee Ming J (authoring), Dominique Hascher IJ and Sir Jeremy Cooke IJ – in *CZT v CZU* [2023] SGHC(I) 11 (*CZT v CZU*) rejected a party's applications for orders to produce an arbitral tribunal's records of deliberations, holding that evidence of tribunal deliberations was confidential and any exception to the confidentiality of deliberations would be found only in the "very rarest of cases". In the case at hand, the interests of justice did not outweigh the policy reasons for protecting the confidentiality of deliberations.[1]

1 *CZT v CZU*, ¶ 80.

This decision is the first time that a Singapore court has decided the issue of when it would order the production of the records of deliberations. It affirms the confidentiality of tribunal deliberations, and holds that an exception to such confidentiality would require that the "interests of justice in ordering the production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations", and in particular, would have to: (a) involve very serious allegations that (b) have "real prospects" of succeeding. This decision reflects Singapore's pro-arbitration jurisprudence.

Background

The defendant had commenced arbitration proceedings (the Arbitration) against the plaintiff under the 2017 Rules of Arbitration of the International Chamber of Commerce (ICC).[2]

A draft award was submitted to the International Court of Arbitration of the ICC (the ICC Court) for scrutiny, and the Secretariat of the ICC Court informed the parties in May 2021 that the ICC Court had approved the revised draft award (the May Award), which would be sent to the parties once it had been finalized and signed.[3] However, the tribunal later submitted another draft of the award to the ICC Court for scrutiny, and the Final Award was issued in September 2021.[4]

The Final Award was signed by a majority of the tribunal (the Majority), and found the plaintiff to be liable for damages.[5] One arbitrator (the Minority) did not sign the Final Award and instead

2 *CZT v CZU*, ¶ 8.
3 *CZT v CZU*, ¶ 13.
4 *CZT v CZU*, ¶¶ 14-16.
5 *CZT v CZU*, ¶ 16.

sent a copy of his dissenting opinion (the Dissent) to the parties.[6] In the Dissent, the Minority accused the Majority of "serious procedural misconduct", "continued misstating of the record", attempting "to conceal the true *ratio decidendi* from the Parties", "distortion of the deliberation history", lack of impartiality, and knowingly stating an incorrect reason for his refusal to sign the Final Award.[7] The Minority concluded that he had "lost any and all trust" in the Majority's impartiality.[8]

The plaintiff sought to set aside the Final Award in the Singapore High Court, on the grounds that: (a) the Majority had acted in breach of natural justice; (b) the Majority had exceeded the scope of submission to arbitration; (c) the agreed arbitral procedure of the parties had not been followed; and (d) the Final Award conflicted with the public policy of Singapore.[9]

In support of the setting aside application, the plaintiff also applied for orders for the production of the records of deliberations from each of the tribunal members (the Production Applications).[10] The proceedings were subsequently transferred to the SICC.[11]

The SICC's decision

The SICC declined to grant the Production Applications.[12]

It was undisputed that "the default position is that arbitrators' records of deliberations are confidential and are therefore protected against production orders".[13] The SICC noted that such protection is not expressly provided for in any statute,[14] but observed that it is an implied obligation in law, justified by several policy reasons: (a) confidentiality is a "necessary pre-requisite" for arbitrators to discuss the case frankly among themselves;[15] (b) it provides "[f]reedom from outside scrutiny" which thus enables arbitrators to reach their decisions "without restriction" and "without fear of subsequent criticism";[16] (c) it protects the tribunal from "outside influence", for example by discouraging the leaking of discussions or decisions by a dissenting arbitrator;[17] and (d) it helps to minimise "spurious" post-award challenges based on "matters raised in deliberations" and "is thereby critical to the integrity and efficacy of the whole arbitral process".[18]

However, the SICC also noted that the protection of the confidentiality of deliberations was not absolute.[19]

First, the SICC drew a distinction between: (a) situations where deliberations were protected by confidentiality, but an exception applied; and (b) situations where confidentiality did not apply in the first place.

- With regard to the latter category, the SICC held that the confidentiality of deliberations does not apply to "essential process issues" (for example, where an arbitrator has been excluded from deliberations), because they "do not involve an arbitrator's thought processes or reasons for [his or her] decision".[20]
- With regard to the former category, the SICC held that exceptions to confidentiality could be made "if the facts and circumstances are

6 *CZT v CZU*, ¶¶ 17-18.
7 *CZT v CZU*, ¶ 19.
8 *CZT v CZU*, ¶ 19.
9 *CZT v CZU,* ¶ 20.
10 *CZT v CZU*, ¶ 23.
11 *CZT v CZU,* ¶ 24.
12 *CZT v CZU*, ¶¶ 3, 80.
13 *CZT v CZU*, ¶ 43.
14 *CZT v CZU*, ¶ 42.
15 *CZT v CZU*, ¶ 44(a).
16 *CZT v CZU*, ¶ 44(b).
17 *CZT v CZU*, ¶ 44(c).
18 *CZT v CZU*, ¶ 44(d).
19 *CZT v CZU*, ¶ 45.
20 *CZT v CZU*, ¶ 50.

such that the interests of justice in ordering production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations".[21] Such an exception would be found only in the "very rarest of cases", as it would "take a very compelling case" to overcome the policy reasons for protecting the confidentiality of arbitral deliberations.[22] In particular, such a case would need to involve: (a) "very serious" allegations that (b) have "real prospects of succeeding".[23]

With the above principles in mind, the SICC then turned to consider the plaintiff's allegations that the Majority: (a) had decided a key issue on liability for reasons that were not contained in the Final Award, but in the May Award and thus breached the fair hearing rule; (b) had concealed its true reasoning behind the Final Award by submitting the May Award for scrutiny and later making material changes to it; and (c) lacked impartiality.[24]

The SICC held that an alleged breach of the fair hearing rule would not suffice to displace the confidentiality of deliberations, and in any event could be decided based on the arbitration record alone.[25]

The SICC also expressed doubt over whether an allegation that a tribunal had concealed its true reasoning was sufficient to constitute an exception, but opined that an alleged lack of impartiality could arguably constitute an exception because of the fundamental importance of impartiality in arbitration.[26]

However, the SICC did not come to a definitive conclusion on the issue because it held that the plaintiff had not shown that any of its allegations had real prospects of succeeding.[27] In support of its allegations, the plaintiff relied on various paragraphs in the Dissent.[28] However, the SICC held that the Dissent by itself was not sufficient because it did not "state any basis" for the "bare allegations", and represented only the Minority's "subjective views or opinions".[29] Further, it held that the Minority's allegation that the Majority lacked impartiality was based on his own "impression".[30]

Key takeaways

The SICC's decision is likely to be appealed given the novelty of the issue, and it remains to be seen whether and to what extent the Singapore Court of Appeal agrees with the SICC's approach. However, the SICC's decision as it stands provides some guidance to parties who may be considering to make (or resist) future similar applications for production.

- "Essential process issues" do not enjoy the protection of confidentiality of deliberations because such issues do not involve an arbitrator's thought processes or reasoning.[31]
- The production or disclosure of arbitral deliberations may be ordered if the interests of justice in making such an order outweigh the policy reasons for protecting the confidentiality of deliberations.[32] This would require allegations that are "very serious in nature" and have "real

21 *CZT v CZU,* ¶ 52.
22 *CZT v CZU*, ¶ 53.
23 *CZT v CZU*, ¶ 53.
24 *CZT v CZU,* ¶ 58.
25 *CZT v CZU*, ¶ 59.
26 *CZT v CZU*, ¶ 61.
27 *CZT v CZU,* ¶ 62.
28 *CZT v CZU*, ¶ 63.
29 *CZT v CZU*, ¶ 65.
30 *CZT v CZU*, ¶ 68.
31 *CZT v CZU,* ¶¶ 50-51.
32 *CZT v CZU*, ¶ 52.

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prospects of succeeding".[33]

- A "very serious" allegation would be one that "attack[s] the integrity of arbitration at its core". For example, the SICC held that an allegation of corruption would qualify.[34] The SICC also observed that allegations of lack of impartiality "could" qualify, but did not reach a definitive conclusion on this issue.[35]
- For an allegation to have "real prospects of succeeding",[36] it must be more than a "bare allegation".[37] This leaves open the question of what level of detail would suffice to show that an allegation had "real prospects of succeeding". One possibility may be evidence from the Minority himself, either through affidavit or oral testimony, but this may be difficult to obtain voluntarily in practice.

The SICC's broad "interests of justice" standard may raise concerns over dissenting arbitrators tailoring their opinions in a way that exposes tribunal deliberations to publicity. However, this decision has also made it clear that any allegation must be sufficiently supported by evidence and cannot simply be conclusory in nature. This standard of proof should be sufficient to quash any unmeritorious production applications in the future. Overall, this is consistent with the Singaporean courts' pro-arbitration stance: intervention is only warranted in the most exceptional circumstances.

It should also be noted that the SICC's approach is broadly in line with cases from other jurisdictions:

- For example, in the English case of *P v Q* and others [2017] EWHC 148 (Comm) (*P v Q*), which the SICC referenced, a party applied to remove two arbitrators for misconduct,[38] and sought disclosure of communications between the arbitrators and the tribunal secretary to support its application.[39] Similar to the SICC's approach, the English Commercial Court held that disclosure would be ordered only if the allegation has a "real prospect of success",[40] the documents sought are "strictly necessary for the fair disposal" of the application,[41] and it is appropriate for the court to exercise its discretion and make such an order considering all the circumstances of the case.[42] Applying this standard, the English Commercial Court declined to order disclosure.[43]
- Second, in the case of *Vantage Deepwater Co. v. Petrobras Am., Inc.*, 966 F.3d 361 (5th Cir. 2020) (*Vantage v Petrobras* (5th Cir.)), in which Tai-Heng Cheng had obtained an award of US$622 million plus 15.2% compound interest for the client, a dissenting arbitrator alleged unfairness in the proceedings.[44] The losing party sought to vacate the majority award and also filed motions for discovery from the dissenting arbitrator as well as the American Arbitration Association (which had conducted the arbitration). The Fifth Circuit affirmed the lower court's decision to dismiss the motions for discovery, holding that a "court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process".[45] It then held that none of the examples raised by the losing party (including the dissent) was enough to establish that the first instance court was wrong to refuse the discovery motions.

33 *CZT v CZU*, ¶ 53.
34 *CZT v CZU,* ¶ 53.
35 *CZT v CZU,* ¶ ¶ 61-62.
36 *CZT v CZU,* ¶ 53.
37 *CZT v CZU,* ¶¶ 65, 70.
38 *P v Q*, ¶ 1.
39 *P v Q,* ¶ 22.
40 *P v Q,* ¶ 68(1).
41 *P v Q,* ¶ 68(2).
42 *P v Q,* ¶ 68(3).
43 *P v Q,* ¶¶ 69, 77.
44 *Vantage v Petrobras* (5th Cir.), 5.
45 *Vantage v Petrobras* (5th Cir.), 15.

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Tai-Heng Cheng is global co-head of Sidley's international arbitration and trade practice and co-managing partner of Sidley's office in Singapore. Clients turn to him to solve their most significant legal problems. He has won and collected nine-figure awards for clients both in commercial and investment-treaty arbitrations.

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