Records of Arbitrators' Deliberations to be Produced Only in Very Rarest of Cases, Singapore International Commercial Court Rules

The Singapore International Commercial Court (**SICC**) has ruled that records of arbitrators' deliberations are confidential, and should be protected against production orders save in "*the very rarest of cases*" where there is a compelling case that the interests of justice outweigh well-recognised policy reasons for such records' confidentiality: *CZT v CZU* [2023] SGHC(I) 11. This is the first time the Singapore courts have decided on this issue.

Our Koh Swee Yen, SC, Alessa Pang, Claire Lim and Samuel Teo acted for the successful defendant before the SICC.

Our Comments

The SICC's decision was based on the recognition of the general principle that arbitrators' deliberations, as with arbitration proceedings, are confidential by virtue of an implied obligation of law. The SICC highlighted well-recognised policy reasons for protecting confidentiality of arbitrators' deliberations. The protection of confidentiality exists, among other reasons (as will be elaborated on below), to enable arbitrators to reflect on evidence without restriction and, where so inclined, to change conclusions without fear of criticism. It also serves to protect the tribunal from outside influence.

Therefore, the default position is that an arbitral tribunal's deliberations are confidential and protected against production orders except in the very rarest of cases, where the party requesting production can establish a very compelling case that the interests of justice in ordering production outweigh the policy reasons for protecting confidentiality of deliberations. Such a case would involve allegations (as against the arbitrators) that are very serious in nature, e.g., allegations of corruption, and it must be shown that the allegations have real prospects of success. This is a high threshold for a party requesting production of records of arbitrators' deliberations to meet.

The SICC also found that arbitrators' deliberations would include earlier iterations of, or subsequently revised, draft arbitral awards. The protection of confidentiality of deliberations therefore applies to draft awards as well.

This update takes a look at the SICC's decision.

Background

The plaintiff applied to set aside an arbitral award issued against it by a 2-1 majority of an arbitral tribunal (**Majority**). The arbitral award arose out of proceedings commenced by the defendant against the plaintiff pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce (**ICC**) 2017 (**ICC Rules**). The dispute between the parties related to a contract to deliver, among other things, certain component packages, including materials, machinery and equipment. In the arbitration, the defendant claimed against the plaintiff for damages suffered as a result of the plaintiff's failure to perform its obligations under the contract.

On 24 March 2021, the Majority submitted a draft award to the International Court of Arbitration of the ICC (**ICC Court**) pursuant to Article 34 of the ICC Rules. Article 34 of the ICC Rules provides that any awards must be submitted to the ICC Court in draft form before they are signed by the arbitral tribunal, and that the ICC Court may "*make modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance*".

The draft award was scrutinised by the ICC Court on 29 April 2021, and it was decided that the draft award would be further scrutinised at one of its next sessions. On 28 May 2021, the ICC Secretariat informed the parties' lawyers that the ICC Court had approved the revised draft award (**May Award**) and that it would notify the award to the parties once it had been finalised and signed.

However, the May Award was not notified to the parties. Instead, parties were informed that a further draft award from the arbitral tribunal implementing the ICC Court's comments "*in the most recent scrutiny process on 28 June 2021*" had subsequently been submitted for scrutiny.

On 16 September 2021, the parties were informed that the ICC Court had approved the revised draft award at its session on 23 July 2021. On 20 September 2021, the ICC sent the final award (**Final Award**) to the parties. In the Final Award, the Majority found the plaintiff liable to the defendant for breach of the contract and ordered the plaintiff to pay the defendant damages.

The Final Award was not signed by the dissenting member of the tribunal (**Minority**), who wrote an opinion accusing the Majority, *inter alia*, of having "*engaged in serious procedural misconduct*", attempting "*to conceal the true ratio decidendi from the [p]arties*", and of lack of impartiality (**Dissent**). The Minority sent a copy of the Dissent to the parties' lawyers on the same day the Final Award was sent to the parties.

On 17 December 2021, the plaintiff filed an originating summons in the General Division of the High Court of Singapore seeking to set aside the Final Award (**Setting Aside Application**). To support aspects of its case in the Setting Aside Application, the plaintiff filed three summonses seeking production of the records of deliberations from all three members of the arbitral tribunal (**Discovery Applications**).

The proceedings were transferred to the SICC on 31 March 2023. As the Setting Aside Application had been commenced before 1 April 2022, Order 110 of the Rules of Court 2014 applied to the proceedings.

In the Discovery Applications, the plaintiff's case was that the records of the arbitrators' deliberations were relevant and material to its case in the Setting Aside Application that: (a) the Majority, in fact, decided a key liability issue on grounds or for the true reasons that were not contained in the Final Award (but in the May Award) and/or as a result of a breach of the fair hearing rule, (b) the Majority attempted to conceal the true reasons behind the Final Award by making material changes to the May Award despite its having been approved by the ICC, and (c) the Majority lacked impartiality.

The defendant submitted that the objections to an order for production of documents pursuant to Order 110 rule 17(2)(b)(i) to (iii) and (v) to (vi) of the Rules of Court 2014 applied, namely, that: (a) the documents requested were not sufficiently relevant or material, (b) there was legal impediment to producing the documents requested, (c) it would be an unreasonable burden to produce the documents requested, and (d)

there were compelling grounds of commercial confidentiality and institutional sensitivity. The defendant also argued that the documents requested had not been described with sufficient particularity, as required by Order 110 rule 15(3)(a) of the Rules of Court 2014.

The SICC's Decision

The SICC dismissed the plaintiff's Discovery Applications.

This decision was based on the SICC's recognition of the general principle that records of the arbitrators' deliberations are confidential. While there is no statutory provision in Singapore expressly to this effect, such confidentiality exists as an implied obligation of law, founded on well-recognised policy reasons. These reasons are, primarily, that:

(a) Confidentiality is a necessary pre-requisite for frank discussion, and not the mere cautious exchange of selected views, between the arbitrators.

(b) Freedom from outside scrutiny enables arbitrators to reflect on the evidence without restriction and where so inclined, to change these conclusions on further reflection without fear of criticism or need for explanation.

(c) The duty on the tribunal to keep deliberations confidential protects it from outside influence.

(d) Keeping deliberations confidential minimises unmeritorious satellite litigation, that is, spurious annulment or enforcement challenges based on issues raised during such deliberations and is thereby critical to the integrity and efficacy of the whole arbitral process.

The SICC also affirmed the observations of the English High Court in *P v Q* [2017] EWHC 148, in which the court recognised that there are obvious policy reasons for such an obligation of confidentiality, namely:

(a) All adjudicating functions need to be conducted in confidentiality from the sight of parties if they are to be carried out with the freedom which is necessary for what is typically an iterative process.

(b) If a tribunal member creates a document in the course of the process of adjudication for the purposes of discussion as part of this iterative process, the tribunal member should not feel constrained by the fear that the document might be disclosed to parties, as this would inhibit proper deliberation and strike at the heart of the deliberative process.

(c) The tribunal must be free to explore lines of thought which may ultimately prove fruitless if he is to have the opportunity for mature reflection which is most calculated to produce the just result.

(d) If arbitrators feel that their internal documents and communications are likely to be disclosed by court order to one of the parties, it would have an inhibiting and chilling effect both on their willingness to serve on tribunals and on their ability to properly conduct their adjudicative functions.

In light of these policy reasons, the SICC agreed with the defendant that it would only be in "*the very rarest of cases*" where there is a compelling case in the interests of justice which overcomes the established policy reasons, that an exception to the default position on confidentiality of deliberations would be made. This would require allegations that are very serious in nature and it must be shown that they have real prospects of succeeding.

The SICC also observed that the protection of confidentiality of deliberations does not apply where the challenge is to the "*essential process*" (such as where there is a complaint that a co-arbitrator has been excluded from deliberations) rather than the substance of the deliberations. Cases involving such process issues are not *exceptions* to the protection of confidentiality of deliberations. Rather, the protection does *not apply* because such process issues do not involve an arbitrator's thought processes or reasons for his decision, such that they do not engage the policy reasons for the protection of confidentiality of deliberations.

The SICC found that the plaintiff's case did not fall within the exceptions to the rule protecting confidentiality of deliberations. As to the first two parts of its case, i.e., that the Majority decided a key liability issue on grounds or for true reasons not contained in the Final Award and/or as a result of the fair hearing rule, and that the Majority tried to conceal its true reasons behind the Final Award by making material changes to the May Award, the SICC decided that these were not even sufficient to constitute an exception in principle. As to the third part of its case, i.e., lack of impartiality, the SICC was of the view that it seemed arguable that a lack of partiality could constitute an exception. However, the SICC concluded that the plaintiff had not proven that this allegation had any real prospects of succeeding.

The SICC decided three further issues.

The first related to the plaintiff's argument that the May Award did not count as part of the records of deliberations as it was not technically a discussion between the arbitrators. In dismissing this submission, the SICC determined, based on Article 34 of the ICC Rules, that the protection of confidentiality would apply to draft awards before they are finalised as they are part of the deliberations stage of an arbitral tribunal's proceedings.

The second issue concerned the defendant's argument that the objections in Order 110 rule 17 of the Rules of Court 2014 applied. While it was not necessary to deal with the arguments in light of the SICC's conclusions above, the SICC went on to observe that:

(a) A document would be "*relevant*" so long as it was connected to an issue in the case that might be considered by the court for the purpose of reaching a decision, and a document would be "*material*" where it had potential significance beyond mere relevance so that it was necessary for a court to consider it.

(b) The protection of the confidentiality of deliberations would seem to fall within the definition of a "*legal impediment*" under Order 110 rule 17(2)(b)(ii). Even if it did not, the court would still have a discretion to decide whether to order production where none of the objections enumerated under Order 110 rule 17(2)(b) applies.

These observations are likely to be applicable and relevant to the interpretation of Order 12 rules 2(3)(b) and 4(2) of the SICC Rules 2021.

The third and final further issue considered by the SICC was the defendant's submission that the plaintiff's applications for production had not been described with sufficient particularity. While the SICC held that some of the documents had not complied with this requirement, the SICC opined that a production order may still be made in respect of a better defined set of documents where the interests of justice require it.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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