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Arbitral Tribunals to
Only Produce Records
of Deliberation in the
“Very Rarest of Cases”

CZT v CZU [2023] SGHC(I) 11

14 July 2023

**LEGAL
UPDATE**

In this Update

In the recent decision of *CZT v CZU* [2023] SGHC(I) 11, the Singapore International Commercial Court held that the Court may exercise its discretion to order the production of an arbitral tribunal’s records of deliberations if the facts and circumstances are such that the interests of justice in ordering the production outweigh the policy reasons for protecting the confidentiality of deliberations. Such a case would have to involve allegations that are very serious in nature, and it must be shown that the allegations have real prospects of succeeding. It is only in the “*very rarest of cases*” where exceptions to the norm of maintaining confidentiality of an arbitral tribunal’s records of deliberations can be found.

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INTRODUCTION

In the recent decision of *CZT v CZU* [2023] SGHC(I) 11, the Singapore International Commercial Court dismissed the plaintiff's applications for the members of the arbitral tribunal to produce their records of deliberations.

The Court held that, whilst one exception to the norm of maintaining confidentiality of an arbitral tribunal's records of deliberations is where the facts and circumstances of the case are such that the interests of justice in ordering the production of the records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations, the plaintiff failed to provide compelling reasons as to why its case fell within the said exception.

Our update discusses the Court's decision.

BACKGROUND

The plaintiff applied to set aside an arbitral award issued against it by the majority of an arbitral tribunal ("**Tribunal**") and filed applications for orders that the three members of the Tribunal produce their records of deliberations. The plaintiff alleged, among other things, that the Majority lacked impartiality. Its case was that the records of deliberations are relevant and material to its setting aside application.

The parties agreed that whilst the records of deliberations of an arbitral tribunal are confidential and generally protected against production orders, this protection is not absolute and is subject to exceptions. The present dispute concerned the scope of such exceptions and whether the present case was an exception.

The defendant submitted that records of deliberations should be protected except in the rarest of cases and that the present case is not one of those cases. The defendant also argued that the relevant requirements prescribed under the Rules of Court for production of documents were not met.

DECISION OF THE SINGAPORE INTERNATIONAL COMMERCIAL COURT

The Court dismissed the plaintiff's applications for the members of the Tribunal to produce their records of deliberations. It found that there were no compelling reasons as to why the interests of justice in ordering production of the records of deliberations outweigh the policy reasons for the protection of the confidentiality of deliberations.

The confidentiality of deliberations, like the confidentiality of arbitration proceedings, exists as an implied obligation in law. There are well-

recognised policy reasons for the protection of confidentiality of arbitrators' deliberations, including:

- (a) facilitating a frank discussion between the arbitrators, instead of an exchange of cautiously expressed and selected views;
- (b) enabling the arbitrators to reflect on the evidence without restriction, to draw conclusions untrammelled by any subsequent disclosure of their thought processes, and, where they are so inclined, to change these conclusions on further reflection without fear of subsequent criticism or of the need for subsequent explanation (eg, to the party who appointed them);
- (c) protecting the arbitral tribunal from undue pressure from the parties and the public; and
- (d) minimising spurious annulment or enforcement challenges based on matters raised in deliberations or differences between the deliberations and the final award. This is critical to the integrity and efficacy of the whole arbitral process.

The protection of the confidentiality of deliberations does not apply where the challenge is to what may be described as the essential process rather than the substance of the deliberations. This is because they do not involve an arbitrator's thought processes or reasons for his decision. The policy reasons for the protection of the confidentiality of deliberations are therefore not engaged.

KEYPOINT

A case would fall within the exception if the facts and circumstances are such that the interests of justice in ordering the production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations.

Such exceptions are only to be found in the very rarest of cases and would have to involve allegations that are very serious in nature. In addition, it must be shown that the allegations have real prospects of succeeding.

If it can be shown that the allegations have real prospects of succeeding *and* the relevant requirements prescribed in the Rules of Court for production of documents are met, then the Court should exercise its discretion to order production of an arbitral tribunal's records of deliberations.

In the present case, the plaintiff's allegations were either not sufficient to outweigh the policy reasons for the protection of the confidentiality of deliberations (and could be decided based on other available evidence) or had no real prospects of succeeding.

COMMENTARY

The high standard of proof required before production of an arbitral tribunal's records of deliberations will be ordered safeguards the fundamental concept of confidentiality in arbitration proceedings.

It should be noted however, that the exceptions to confidentiality are not closed. The "*interests of justice*" test is a broad one and the Court has not limited the specific types of allegations which would justify an order for the production of an arbitral tribunal's deliberation records. It therefore remains open to future applicants to argue how their specific facts and circumstances warrant the courts' intervention.

As this is the first instance before the Singapore courts where the issue of whether an arbitral tribunal's records of deliberations may be disclosed is discussed, this case provides important guidance to parties engaged in arbitral proceedings in relation to the grounds upon which they may seek the disclosure of such records. In this regard, this case offers added clarity on the scope of the confidentiality protection afforded to an arbitral tribunal's records of deliberations whilst giving the Singapore courts the flexibility to do justice as may be required in a particular case.

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