

Kluwer Arbitration Blog

It's No Secret(?) – Two Recent Singapore Cases on Confidentiality in the Context of International Arbitrations

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This might not be a secret: the Singapore courts recently issued two decisions in June 2023 about confidentiality in the international arbitration context.

The first, *The Republic of India v Deutsche Telekom AG [2023] SGCA (I) 4* (“*India v DT*”), concerned the availability of court-ordered confidentiality protections after information about the arbitration (whose confidentiality is sought to be protected) entered the public domain. The short answer: confidentiality substantially lost would no longer be protected.

The second, *CZT v CZU [2023] SGHC(I) 11*, examined when an arbitral tribunal’s deliberations might be disclosed to support an award setting-aside application. Here, a three-member coram of the Singapore International Commercial Court held that there were exceptions to the confidentiality of tribunal deliberations. However, none were applicable, despite a dissenting arbitrator’s serious allegations against the majority.

The issues raised and their implications are briefly examined below.

I. The Dangers of (In)voluntary Publicity: *India v DT*

The arbitration in *India v DT* concerning a cancelled satellite deal and its related proceedings have been highly publicised, including on GAR ([here](#), [here](#), and [here](#)). Both the partial award (upholding jurisdiction and finding India liable for contract repudiation) and the final award (ordering India to pay over USD 93 million plus interest) are also publicly available ([here](#) and [here](#)). Even India’s own lawyers had published a LinkedIn post (since taken down) “*naming India as a party to the Singapore enforcement proceedings, stating the size of the Final Award and providing a web link to the GAR Article*” (see *India v DT* at [34]). And there were yet other forms of disclosure.

Notwithstanding the above, India still sought orders that various Singapore proceedings: (1) be heard in private; (2) have their information and documents concealed; (3) have their case files sealed; and (4) have any related court-publicised information / judgment be anonymised / redacted.

In dismissing India’s application for such relief, the Singapore Court of Appeal held that courts would not “*go through an empty exercise to protect confidentiality when there is nothing left to protect*” (at [28]). Thus, while the orders sought might ordinarily be granted, none were warranted

here since “*there had already been multiple disclosures of considerable information relating to the Arbitration, the identity of the parties and enforcement proceedings in Singapore and abroad*” (at [30]).

The result is unsurprising. Attempting to make any confidentiality orders in this situation is akin to rearranging the deck chairs on the *Titanic*.

But the decision raises a few thoughts.

First, the standard apparently applied by the court was whether the confidentiality “*had substantially been lost*” (at [38]) – rather than “*entirely*” (i.e. India’s primary, rejected contention: see [25]). However, there was no discussion about when this standard would be met, likely because the disclosure here was so overwhelming (especially with the full awards being public). It will thus be interesting to see how future cases distinguish between confidentiality which has been “*substantially*” lost (thus not warranting protection) and that remaining sufficiently intact (to deserve protection). Is disclosure of the gist of the dispute sufficient? Will the parties need to be specifically identified? Only future cases will tell. For now, though, the line remains shrouded.

Second, in reaching its decision, the court was agnostic towards the source(s) of disclosure and who was responsible. This issue did not feature anywhere in the analysis, despite the varying source(s) of disclosure (including third-party sites, legal publications, through other related court proceedings, and even India’s own lawyers). All this makes sense since the court is concerned with whether its order(s) might be futile – and fault is immaterial to the issue of futility. But this lights a warning flare for parties and their counsel to ensure that the arbitration confidentiality remains “*substantially*” preserved if they do want the court’s assistance.

Last, and relating to the preceding point, one might wonder: what then can a party do if confidentiality has been lost and is now unprotectable? This is where blame is relevant. If the other party was the discloser (or, perish the thought, the arbitral institution or tribunal), then action may be available against the culprit(s). Depending on the arbitration framework, this may include allegations that a contractual / tortious breach of confidence has occurred. Remedies available for this will depend on the circumstances, but may include: (1) injunctive relief which deprives the blameworthy party of the fruits of its wrongful disclosure; and/or (2) damages, including *Wrotham Park* negotiating damages (i.e. the hypothetical amount that the blameworthy party would have paid to be released from its obligation of confidentiality at the time of the breach, which is available in jurisdictions including Singapore: see *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44). But it will clearly exclude injunctive relief trying to preserve the already-lost confidentiality since equity – the source of injunctive relief – will not act in vain.

II. The Confidentiality of Tribunal Deliberations (and its Exceptions): *CZT v CZU*

The arbitration in *CZT v CZU* concerned a dispute about the delivery of defective material packages (comprising materials, machinery and equipment). By the Final Award issued on 20 September 2021, the tribunal’s majority held the contractor (i.e. the material packages supplier) liable to the employer for non-performance of its obligation to deliver (due to a defective material package) and ordered it to pay damages, interest, and costs (at [16]). The minority, who did not sign the final award, issued his dissenting opinion on the same day.

As the three-member coram High Court bench stated (at [19]), it would arguably be “*an understatement*” to say that the minority’s dissent was made “*with force*” (as the minority described it). It contained accusations that the majority had “*engaged in serious procedural misconduct*”, “*continued misstating of the record*”, attempted “*to conceal the true ratio decidendi from the Parties*”, “*distort[ed] the deliberation history*”, displayed a “*lack of impartiality*”, and “*knowingly stat[ed] an incorrect reason for [the minority’s] refusal to sign the Final Award*” (at [19]). The minority concluded that he had “*lost any and all trust in the impartiality of [his] fellow arbitrators*” (at [19]).

Dissatisfied with the arbitration’s outcome, the contractor made an application to set aside the award. To support this, and leveraging off the minority’s dissent, the contractor applied to the Singapore courts for the tribunal to produce their records of deliberations.

The court dismissed the contractor’s disclosure application. While the court agreed that tribunal deliberations were confidential and that there were exceptions, it determined that none were applicable in the case.

In doing so, the court’s decision addressed or raised the following points.

First, on the source of the confidentiality of arbitration deliberations, the court considered that it “*exists as an implied obligation in law*” (at [44]). In particular, there were “*well-recognised policy reasons*” for it, including: (1) allowing “*frank discussion between the arbitrators*”; (2) untrammelled conclusions (and changes in conclusions) based on the tribunal’s review of the evidence; (3) protecting the tribunal from outside influence; and (4) minimising spurious annulment or enforcement challenges (at [44]). But what did not feature in the court’s analysis is that it may exist beyond an implied obligation in law (for Singapore-seated arbitrations) – and find expression in the parties’ agreement (e.g. incorporation through institutional rules). In particular, of the top five preferred arbitral institutions (per the [QMUL 2018 International Arbitration Survey](#)), three expressly provide for the confidentiality of tribunal deliberations – i.e.: (1) SIAC ([SIAC Rules 2016](#), Rule 39.1); (2) HKIAC ([2018 HKIAC Administered Rules](#), Article 45.4); and (3) LCIA ([LCIA Arbitration Rules 2020](#), Article 30.2). This may become material when the seat of arbitration does not recognise the confidentiality of tribunal deliberations as a default (see e.g. the reference in *CZT v CZU* at [55] to the Swedish Code of Judicial Procedure, under which “*arbitrators may be called as witnesses in challenge proceedings and may be asked questions about the deliberations*”).

Second, the court expressly held that there was a “*distinction between process issues and substantive agreements*” – and the confidentiality protection for arbitration deliberations does not apply to the former (at [50]). In this sense, this is not a ‘true’ exception to the confidentiality of arbitration deliberations because the protection does not attach in the first place. An example of a process issue would be when “*a co-arbitrator has been excluded from the deliberations*” (at [50]). Similarly, it bears mention that the confidentiality protections in the rules of the SIAC, HKIAC, and LCIA attach only to the “*deliberations*” on the face of the provisions.

Third, a ‘true’ exception to the confidentiality of arbitration deliberations applies where two requirements are met: (1) there are allegations “*that are very serious in nature*”, such as corruption allegations that “*attack the integrity of arbitration at its core*”; and (2) the allegations must have “*real prospects of succeeding*” (at [53]). This is because there are conceivably situations where “*the interests of justice in ordering production of the records of deliberations outweigh the policy*

reasons for the protection of the confidentiality of deliberations” (at [53]). For the latter requirement (i.e. proof of prospects), “*bare allegations, even if made by a co-arbitrator, cannot be sufficient*”, especially when making “*serious allegations... of dishonesty*” (at [65]).

Fourth, and arising from the preceding point, is whether the exception to confidentiality of tribunal deliberations is appropriately defined. There are, as the court recognised (at [53]), competing considerations when deciding whether disclosure of tribunal deliberations should be ordered. The question is whether the requirements set out by the three-coram bench strike the proper balance between the two. After all, it is arguable that there is a catch-22: a party may require (some) disclosure of tribunal deliberations to prove its “*real prospects of success*” – yet can’t obtain disclosure of those very tribunal deliberations until it does. Or unless a dissenting opinion provides sufficient details, which the present position may encourage. Thus, **one commentator** has suggested that a middle ground is to allow a *prima facie* review of the tribunal’s deliberations by the court – with full disclosure to follow only if the allegations appear sustainable. If appealed, it will be interesting to see how the appellate court decides this issue.

Last, it has been asked whether the seat of arbitration even has the jurisdiction “*to order arbitrators who are not parties to the proceedings, and who have not submitted to the Court’s jurisdiction (by way of an arbitration agreement), to disclose their deliberations*”. But it is suggested that the answer may be simple: by agreeing to an arbitrator appointment, an arbitrator has (or is to be regarded as having) agreed to the seat of arbitration’s supervision of the arbitration, including its power to order disclosure of the tribunal deliberations. And this applies with even more force where the seat of the arbitration is selected by the tribunal itself.

Given the potential appeal: watch this space to see how this novel (and highly relevant) point is addressed.

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