IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(I) 11

Originating Summons No 1 of 2023 (Summonses Nos 788, 789 and 790 of 2023)

Between

CZT

… *Plaintiff*

And

CZU

… *Defendant*

JUDGMENT

[Civil Procedure — Production of documents (SICC) — Objections]
[Arbitration — Confidentiality — Confidentiality of records of deliberations]

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CZT
v
CZU

[2023] SGHC(I) 11

Singapore International Commercial Court — Originating Summons No 1 of 2023 (Summonses Nos 788, 789 and 790 of 2023)
Chua Lee Ming J, Dominique Hascher IJ and Sir Jeremy Cooke IJ
31 May 2023

28 June 2023 Judgment reserved.

Chua Lee Ming J (delivering the judgment of the court):

Introduction

1 In arbitration proceedings commenced by the defendant against the plaintiff, the arbitral tribunal, by a majority, issued an award against the plaintiff. The minority issued a dissenting opinion in which he made several serious allegations against the majority.

2 The plaintiff has applied to set aside the arbitral award. The three summonses before us are applications by the plaintiff for orders that the three members of the arbitration tribunal produce their records of deliberations.

3 We dismiss the plaintiff's applications for the reasons set out below.

Background facts

4 The plaintiff entered into a contract with the defendant (the "Contract") under which the plaintiff contracted to deliver certain component packages that included materials, machinery and equipment (the "Material Packages") as well as other documentation, designs and services.[1] A third party to be appointed by the defendant (the "Contractor") was to use the Material Packages to construct certain products for the defendant.

5 Subsequently, the defendant appointed the Contractor. The plaintiff, the defendant and the Contractor then entered into an agreement for the transfer of the defendant's rights and obligations under the Contract to the Contractor, except for certain rights and obligations identified in an attachment to the agreement (the "Transfer Agreement").[2] The plaintiff also entered into an agreement with the Contractor for the supply of the Material Packages to the Contractor.[3]

6 The defendant alleged that it subsequently discovered that certain components of the Material Packages were defective. The defendant filed an action in its home jurisdiction against the Contractor and the plaintiff. The court found the Contractor liable for 30% of the damages suffered by the defendant. The claim against the plaintiff was dismissed due to lack of jurisdiction because of an arbitration agreement in the Contract.

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1 1st affidavit filed on behalf of the plaintiff on 17 December 2021 ("Plaintiff's 1st affidavit"), at pp 66–159.

2 Plaintiff's 1st affidavit, at pp 161–164.

3 Plaintiff's 1st affidavit, at pp 458–556.

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7 The arbitration agreement in the Contract provided for disputes to be settled by arbitration in Singapore by three arbitrators in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC").

8 On 25 April 2019, the defendant commenced arbitration proceedings against the plaintiff.[4] In due course, the arbitration tribunal (the "Tribunal") was constituted, comprising Professor Douglas Jones AO ("Prof Jones"), Professor Keechang Kim ("Prof Kim") and Dr Philipp Habegger ("Dr Habegger"). Prof Kim was the defendant's nominee while Dr Habegger was the plaintiff's nominee. Prof Jones was appointed by the International Court of Arbitration of the ICC ("ICC Court") as President of the Tribunal pursuant to Article 12(2) of the ICC Rules of Arbitration 2017 (the "ICC Rules"). The ICC Court is called a court only in name; it administers arbitrations under the ICC Rules and does not make formal judgments on disputed matters.

9 In brief, the defendant claimed against the plaintiff for damages suffered by the defendant as a result of the plaintiff's failure to perform its obligations, including its obligation to deliver the Material Packages free from any defect. The defendant asserted that, notwithstanding the Transfer Agreement, it retained certain important protections under the Contract that allowed it to make relevant claims directly against the plaintiff. The defendant also maintained that it had made its claim before the warranty period under the Contract expired.

10 The plaintiff asserted that it was not liable because, among other reasons, (a) the warranty period under the Contract had expired, and (b) as a result of the

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4 Plaintiff's 1st affidavit, at pp 626–648.

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Transfer Agreement, there was no relevant obligation on which the defendant could base its claims.

11 On 24 March 2021, the majority (the "Majority") submitted a draft award to the ICC Court,[5] pursuant to Art 34 of the ICC Rules. Art 34 states as follows:

> **ARTICLE 34**
>
> **Scrutiny of the Award by the Court**
>
> Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down 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. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

12 The scrutiny process under the ICC Rules serves to maximise the legal effectiveness of an award and to improve the award's general accuracy, quality and persuasiveness.[6]

13 The ICC Court scrutinised the draft award on 29 April 2021 and decided to further scrutinise it at one of its next sessions. On 28 May 2021, the Secretariat informed the parties' lawyers that the ICC Court approved the revised draft award on 27 May 2021 (the "May Award") and that it would notify the award to the parties once it had been finalised and signed.[7]

14 However, the May Award was not notified to the parties. Instead, in an email dated 9 July 2021, the Deputy Counsel to the ICC Court informed the

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5 Plaintiff's 1st affidavit, at p 1922.

6 The Secretariat's Guide to ICC Arbitration, at para 3-1181.

7 Plaintiff's 1st affidavit, at pp 1927–1928.

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parties' lawyers that the Secretariat had received the draft award from the Tribunal implementing the ICC Court's comments "made in the most recent scrutiny process on 28 June 2021" and that "[i]n consultation with the arbitral tribunal the Secretariat will invite the Court to further scrutinize the draft award at one of its next sessions".[8]

15 On 16 September 2021, the Deputy Counsel informed the parties' lawyers that the ICC Court approved the draft award at its session on 23 July 2021.[9]

16 On 20 September 2021, the ICC sent the final award (the "Final Award")[10] to the parties.[11] The Final Award was signed by the Majority comprising Prof Jones and Prof Kim. The Majority found the plaintiff liable to the defendant for non-performance of its obligation to deliver the Material Packages, due to its delivery of a defective Material Package and ordered the plaintiff to pay the defendant damages, interests and costs.

17 Dr Habegger (the "Minority") did not sign the Final Award. The Final Award stated that he "declined to do so in the light of his disagreement with the conclusions and reasoning of the other two arbitrators".

18 On the same day (20 September 2021), the Minority sent a copy of his dissenting opinion (the "Dissent")[12] to the parties' lawyers.[13] The Dissent dealt

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8 Plaintiff's 1st affidavit, at p 1930.

9 Plaintiff's 1st affidavit, at p 1932.

10 Plaintiff's 1st affidavit, at pp 166–298.

11 Plaintiff's 1st affidavit, at para 20.

12 Plaintiff's 1st affidavit, at pp 300–435.

13 Plaintiff's 1st affidavit, at p 1934.

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with Part Q1 of the Final Award. Part Q1 of the Final Award dealt with the defendant's entitlement to claim against the plaintiff for the plaintiff's incomplete performance of its obligation to deliver the Material Packages under the Contract. The Minority found the plaintiff not liable (para 247 of the Dissent).

19 In the Dissent (at para 248), the Minority acknowledged that he had expressed his views "with force". Indeed, he had, and the phrase "with force" might even be said to be an understatement. In addition to setting out the reasons why he disagreed with the Majority's decision, the Minority also accused the Majority of having "engaged in 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 the Minority's refusal to sign the Final Award (at paras 245, 248, 250 and 251 of the Dissent). The Minority's concluding words were that he had "lost any and all trust in the impartiality of [his] fellow arbitrators" (at para 251 of the Dissent). The plaintiff views the Dissent as the smoking gun in these proceedings.

20 On 17 December 2021, the plaintiff filed an originating summons in the General Division of the High Court, in which it seeks to set aside the Final Award (the "Setting Aside Application") pursuant to:

(a) section 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") and/or Art 34(2)(*a*)(ii) of the Model Law (*ie*, the Majority acted in breach of natural justice);

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(b) further or in the alternative, Art 34(2)(*a*)(iii) of the Model Law (*ie*, the Majority exceeded the terms or scope of the submission to arbitration);

(c) further or in the alternative, Art 34(2)(*a*)(iv) of the Model Law (*ie*, the arbitral procedure was not in accordance with the agreement of the parties); and

(d) further or in the alternative, Art 34(2)(*b*)(ii) of the Model Law (*ie*, the award is in conflict with the public policy of Singapore).

21 On 18 October 2021, the plaintiff's counsel wrote to the ICC Secretariat and the members of the Tribunal, requesting (among other things) preservation of the full arbitration record and the full record of all deliberations.[14] The Minority confirmed that he will preserve the records to the extent his professional duties so require.[15] Prof Jones confirmed that he will preserve the records in so far as they exist and without accepting that any of the documents can be disclosed.[16] Prof Kim declined to respond to the request regarding the preservation of records, taking the view that there was no ground for the request.[17]

22 In an email dated 25 October 2021, the plaintiff's counsel further queried the Tribunal and the Secretariat as to whether they would be willing to disclose their records of deliberations.[18] In response:

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14 Plaintiff's 1st affidavit, at pp 1937–1938.

15 Plaintiff's 1st affidavit, at p 1950.

16 Plaintiff's 1st affidavit, at p 1954.

17 Plaintiff's 1st affidavit, at p 1957.

18 Plaintiff's 1st affidavit, at pp 1960–1961.

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(a) Prof Kim replied to say that he had no further comments.[19]

(b) The ICC noted that the work of the ICC Court is of a confidential nature and that the Secretariat would not disclose any documents of a confidential nature without being ordered to do so by a final decision of the competent court in Paris.[20]

(c) Prof Jones replied that the record of deliberations is confidential and could only be disclosed if so ordered by a competent court.[21]

(d) Dr Habegger said that he was only willing to disclose the record of deliberations under a court order or similar order.[22]

23 On 21 March 2023, the plaintiff filed Summonses Nos 788 of 2023, 789 of 2023 and 790 of 2023 in which it seeks production of the records of deliberations from Prof Kim, Dr Habegger and Prof Jones respectively (the "Production Applications"). These are the three applications that are now before us.

24 On 31 March 2023, the proceedings were transferred to the Singapore International Commercial Court.

Applicable Rules

25 The new Singapore International Commercial Court Rules 2021 (the "SICC Rules 2021") apply to cases transferred from the General Division of the

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19 Plaintiff's 1st affidavit, at p 1974.

20 Plaintiff's 1st affidavit, at p 1983.

21 Plaintiff's 1st affidavit, at p 1987.

22 Plaintiff's 1st affidavit, at p 1991.

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High Court to the Singapore International Commercial Court if the case was commenced in the General Division on or after 1 April 2022 (O 1 r 2(1)(*b*)) or with the parties' consent in writing if the case was commenced in the General Division before 1 April 2022 (O 1 r 2(2)(*a*)). The plaintiff filed the Setting Aside Application in the General Division on 17 December 2021. As the parties have not consented in writing otherwise, the SICC Rules 2021 do not apply. Instead, O 110 of the Rules of Court (2014 Rev Ed) (the "2014 Rules") applies to these proceedings.

26 Order 110 r 15(3) of the 2014 Rules sets out the requirements of a request to produce. These include describing the requested documents with sufficient particularity (r 15(3)(*a*)) and stating how the documents are relevant and material to the party's case (r 15(3)(*b*)).

27 Where an application for a production order is made, O 110 r 17(2)(*b*) of the 2014 Rules provides as follows:

> (2) In an application under paragraph (1), the Court may order the production of the documents objected to if —
>
> (*a*) …
>
> (*b*) none of the following objections apply:
>
> (i) lack of sufficient relevance to the case or materiality to its outcome;
>
> (ii) legal impediment or privilege;
>
> (iii) unreasonable burden to produce the requested documents;
>
> (iv) loss or destruction of the document that has been shown with reasonable likelihood to have occurred;
>
> (v) grounds of commercial or technical confidentiality that the Court determines to be compelling;

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> (vi) grounds of special political or institutional sensitivity (Including evidence that has been classified as secret by the Government, a foreign government or a public international institution) that the Court determines or the Attorney-General certifies to be compelling;
>
> (vii) such considerations of procedural economy, proportionality, fairness or equality of the parties as the Court determines to be compelling.

28 In our view, the plaintiff bears the burden of satisfying the court that the documents sought are relevant to the case and material to its outcome. This is logical and consistent with O 110 r 15(3)(*b*), which requires the requesting party to state (in the request to produce) how the documents requested are relevant and material to its case. However, the defendant bears the burden of making good any of the objections in r 17(2)(*b*)(ii) to (vii) that it relies on.

The Production Applications

29 The Production Applications seek similar orders for each of the arbitrators to produce documents, which are described in the respective Schedules (the "Schedules") as follows:

(a) Item 1 – The Tribunal's records of deliberations in coming to the findings in the Final Award in relation to the Q1 Issue (including correspondence, notes, and drafts between any members of the Tribunal and/or the ICC).

(b) Item 2 – Further and/or in the alternative, the documentary evidence within the Tribunal's records of deliberations specifically referenced in paras 9, 14–16, 17(d), 19–20, 22, 25, 37, 54, 95, 151, 161, 170, 213, 220, 248 and 250, and in footnotes 11, 14, 16, 34, 131, 141, 146, 178, 185 and 192 of the Dissent.

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30 Before us, the plaintiff withdrew its application for production of the records of deliberations as described in Item 1 of the Schedules,[23] and rightly so. That category is too broad and speculative. The plaintiff also withdrew its application for production of the documentary evidence described in Item 2(a) of the Schedules which are specifically referenced in para 9 of the Dissent.[24]

The plaintiff's case

31 The grounds in the IAA and the Model Law that the plaintiff relies on in the Setting Aside Application are set out in [20] above. The factual allegations that the plaintiff relies on to support those grounds are as follows:[25]

(a) The Majority reached conclusions in the Final Award based on facts or matters that were not argued by the parties during the arbitration.

(b) The Majority falsely attributed arguments and positions to the parties that are not supported by the arbitration record.

(c) The Majority in fact decided a key liability issue on grounds or true reasons that are not contained in the Final Award but are contained in the May Award.

(d) The Majority has attempted to conceal the true reasons behind the Award (by issuing the May Award for approval by the ICC Court, before making material changes to it in the Final Award following further concerns expressed by the Minority and despite the May Award having been approved by the ICC Court); and

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23 Transcript, 31 May 2023, at 11:21–12:1.

24 Transcript, 31 May 2023, at 12:2–3.

25 Plaintiff's Submissions dated 19 May 2023 ("Plaintiff's Submissions"), at para 27.

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(e) the Majority has lacked impartiality evidencing a fixed determination to find against the plaintiff even without the necessary evidence or legal basis for doing so.

32 In its written submissions, the plaintiff confirmed that it is not seeking production of the records of deliberations to make good the grounds that the Majority reached its conclusions based on facts/matters that were not argued, or that the Majority falsely attributed arguments/positions to the parties (see [31(a)] and [31(b)] above).[26] The plaintiff accepts that these grounds are apparent from the record of the arbitration proceedings. This must be correct since the arbitration record would include the pleadings, the parties' submissions and the transcripts of the proceedings. These grounds can be decided based on the arbitration record.

33 The plaintiff's case is that the records of deliberations are relevant and material to the plaintiff's case that:[27]

(a) The Majority in fact decided a key liability issue on grounds or for the true reasons that are not contained in the Final Award (but in the May Award as stated by the Minority) and/or as a result of a breach of the fair hearing rule. The plaintiff submits that a breach of the fair hearing rule can arise from the chain of reasoning adopted by the Majority.

(b) The Majority attempted to conceal the true reasons behind the Final Award (by issuing the May Award for approval by the ICC, before making material changes to it in the Final Award following further

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[26] Plaintiff's Submissions, at para 34.

[27] Plaintiff's Submissions, at para 35; see also, paras 28–29.

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concerns expressed by the Minority and despite the May Award having been approved by the ICC).

(c) The Majority lacked impartiality.

34 The plaintiff accepted that the Tribunal's records of deliberations are confidential but submitted that the protection of this confidentiality is subject to exceptions and that the present case is an exception.

The defendant's case

35 The defendant submitted that production of the documents sought should not be ordered because:

(a) the documents requested are not sufficiently relevant or material – O 110 r 17(2)(*b*)(i);

(b) there is legal impediment to production of the documents requested – O 110 r 17(2)(*b*)(ii);

(c) it would be an unreasonable burden to produce the documents requested – O 110 r 17(2)(*b*)(iii);

(d) compelling grounds of commercial confidentiality exist – O 110 r 17(2)(*b*)(v);

(e) compelling grounds of institutional sensitivity exist – O 110 r 17(2)(*b*)(vi); and

(f) the documents requested are not described with sufficient particularity – O 110 r 15(3)(*a*).

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36 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 arbitrators' positions

37 Production orders may be made against persons who are not parties to the proceedings: O 110 r 15(1) of the 2014 Rules.

38 Prof Kim and Dr Habegger did not participate in the hearing of the Production Applications. Prof Jones was represented by Mr Toby Landau KC who explained that Prof Jones, as a member of the Tribunal, has to remain neutral and non-partisan and that he (Mr Landau) was present on instructions to assist the court.[28]

39 Mr Landau submitted that although the protection of the confidentiality of arbitral deliberations is not absolute, the exceptions would be very rare.

The issues before us

40 The issues before us are:

(a) When can arbitrators be ordered to produce their records of deliberations as evidence in aid of applications to set aside their awards?

(b) Whether any of the objections in O 110 r 17(2)(*b*)(i)–(iii) and (v)–(vi) applies?

(c) Whether the documents requested have been described with sufficient particularity?

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[28] Transcript, 31 May 2023, at 70:7–11.

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When can arbitrators be ordered to produce their records of deliberations?

41 It is generally accepted that arbitration proceedings are confidential. The confidentiality may be provided for in the relevant rules applicable to the arbitration proceedings. However, independent of any such rules, the confidentiality of arbitration proceedings has also found expression as an implied obligation of law: *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR(R) 945 at [82].

42 What of arbitrators' deliberations? Evidence of deliberations may be given by way of testimony (whether oral or through affidavits) or through the production of the records of deliberations. There is no statutory provision in Singapore that expressly protects the confidentiality of arbitrators' deliberations. We are also given to understand that this question has not been decided by any Singapore court to date.

43 In the present case, it is common ground that the default position is that arbitrators' records of deliberations are confidential and are therefore protected against production orders. In our view, it can scarcely be argued otherwise. Case law and commentaries confirm the protection of the confidentiality of deliberations: see, *eg*, *Duke of Buccleuch v The Metropolitan Board of Works* (1872) LR 5 HL 418 ("*Duke of Buccleuch*") at 457, *P v Q* [2017] EWHC 148 at [59], Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 3rd Ed, 2021) at §20.06, Philippe Fouchard *et al*, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at para 1374. In Marc Joel Goldstein, "Living (or not) with the partisan arbitrator: are there limits to deliberations secrecy?" in *Arbitration International* (William W Park ed) (Oxford University Press, Volume 32 Issue 4, 2016) ("*The Partisan*

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Arbitrator"), the author refers to the universality of the confidentiality of deliberations as an arbitration norm (at para 3.2).

44 In our view, 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. As Prof Jones summarised in his submissions:[29]

> (a) Confidentiality is a necessary pre-requisite for frank discussion between the arbitrators: David Caron, "Regulating Opacity: Shaping How Tribunals Think" in *Practising Virtue: Inside International Arbitration* (David Caron *et al* ed) (Oxford University Press, 2015) ("Regulating Opacity") at 5. This secrecy is indispensable if the deliberation is to produce a true discussion and argument and not become a mere exchange of cautiously expressed and selected views: Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) ("*International Arbitration*") at para 16.6.7.
>
> (b) Freedom from outside scrutiny enables 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): *Noble China Inc v Lei* 42 OR (3d) 69 ("*Noble*"); Regulating Opacity at 5.

[29] Prof Jones' Submissions, at para 18.

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(c) The duty on the tribunal to keep deliberations confidential protects the tribunal from outside influence. For example, the existence of such a duty would discourage an arbitrator from leaking or publicising discussions or decisions with which he disagreed.

(d) The rule helps to minimise spurious annulment or enforcement challenges based on matters raised in deliberations or differences between the deliberations and the final award and is thereby critical to the integrity and efficacy of the whole arbitral process: *International Arbitration* at para 16.6.7.

See, also, the observations by the English High Court in *P v Q* at [60]–[67].

Exceptions to the confidentiality of deliberations

45 It is also common ground that the protection of the confidentiality of deliberations is not absolute but is subject to exceptions. However, the parties disagree as to the scope of the exceptions.

46 The plaintiff submitted that the confidentiality of deliberations will yield, in appropriate circumstances, to considerations of due process, the interests of justice and the public policy of preserving the integrity and reputation of Singapore as a seat of arbitration.[30] According to the plaintiff, cases involving challenges that the arbitrators went beyond the parties' cases could also fall within the exception.

47 The plaintiff also referred to three cases in support of its case – *The Czech Republic v CME Czech Republic B.V.* (Judgment of the Svea Court of

[30] Plaintiff's Submissions, at para 49(b).

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Appeal) of 15 May 2003) (2003) 15(3) WTAM 171 ("*Czech Republic*"), *Petition of Fertilizantes Fosfatados Mexicanos, S.A.* 751 F.Supp. 467 (1990) ("*FFM*"), and *Dobish v Rain Hail, LLC* 2011 WL 3300073 ("*Dobish*").

48 The defendant and Prof Jones relied on *P v Q* in which the court said (at [68(3)(d)]) that "it will only be in the very rarest of cases, if ever, that arbitrators will be required to give disclosure of documents; it would require the most compelling reasons and exceptional circumstances for such an order to be made, if ever." The defendant suggested that an exceptional case might be one involving allegations of corruption of the arbitrators: *eg*, exchanges between arbitrators evidencing the offer or acceptance of a bribe or inducement to produce a given result.

49 Prof Jones drew a distinction between process issues and disagreements on substance.[31] Prof Jones submitted that it may be appropriate for the court to enquire further in the former case, but not in the latter. For example, an allegation that one arbitrator has been excluded from deliberations would relate to the process and evidence from the arbitrators would be permissible. However, the confidentiality of deliberations must be protected if the allegations concern substantive disagreements. The fact that one arbitrator has been unable to persuade his or her co-arbitrators is simply not enough to override the protection of the confidentiality of deliberations. Prof Jones submitted that the exceptions cannot be articulated with precision but must be focused upon the process, not the substance of the deliberations.

50 We deal first with Prof Jones' distinction between process issues and substantive disagreements. We agree with Prof Jones that the protection of the

[31] Transcript, 31 May 2023, at 71:23–72:25.

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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. An example of an essential process issue is, as Prof Jones suggested, where the complaint is that a co-arbitrator has been excluded from the deliberations. However, cases involving such process issues are, strictly speaking, not really exceptions to the protection of the confidentiality of deliberations. The protection does not apply to such process issues 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. The parts of the records of deliberations that need protection do not have to be disclosed. If and when the arbitrator gives oral evidence, his testimony will be limited to the process issues and he may not be questioned as to his thought processes or reasoning. Where the evidence is in the records of deliberations, parts of the records that deal with the arbitrator's thought processes or reasoning need not be produced or may be redacted.

51 The view that the confidentiality of deliberations does not apply to essential process issues is consistent with case law. In *Duke of Buccleuch*, the court held (at 457) that an arbitrator may be questioned as to what had taken place before him, including what matters had been submitted to him for decision, but he could not be questioned as to how he arrived at his decision. In *Nathan v MJK Constructions* [1986] VR 75 ("*Nathan*"), the Australian Supreme Court of Victoria held that whilst an arbitrator may not be questioned as to his reason for making a particular decision, there was no policy reason why he should not give evidence as to what took place before him.

52 Essential process issues aside, can there be any exceptions to the protection of the confidentiality of deliberations? We are not prepared to go so far as to say, as Prof Jones submitted, that exceptions to the protection must be

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focused upon the process. In our view, 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. We do not think that we should dismiss the possibility that such a case may arise even though no essential process issues are involved. There may also well be some issues which are described as "process issues" which raise questions of fact and degree as to the extent of consultation between arbitrators which could give rise to the need to explore deliberations, which would require further elucidation, but we do not need to consider that here.

53 However, we disagree with the plaintiff's formulation of the scope of the exceptions (see [46] above). The plaintiff's formulation is far too wide. There are very strong policy reasons for protecting deliberations' confidentiality. In our view, it would take a very compelling case to overcome these policy reasons. We therefore agree with the defendant and Prof Jones that the exceptions are only to be found in the very rarest of cases. Clearly, the facts and circumstances of the case must be so compelling as to persuade the court that the interests of justice in ordering production of the records of deliberations outweigh the policy reasons for the protection of the confidentiality of deliberations. In our view, such a case 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. For example, allegations of corruption would be serious enough because such allegations attack the integrity of arbitration at its core. If it can also be shown that such allegations have real prospects of succeeding, in our view, the case would fall within the exception to the protection of the confidentiality of deliberations. An order should be made in such a case for the production of the records of deliberations if none of the

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objections in O 110 r 17(2)(*b*) applies. On the other hand, if the case does not fall within the exception, a production order will *not* be made even if the documents are relevant or material and none of the other objections in O 110 r 17(2)(*b*) applies.

54 We turn next to the three cases referred to by the plaintiff. In our judgment, these cases are of limited or no assistance to the plaintiff.

55 In *Czech Republic*, one of the grounds to annul the arbitration award was an allegation that one of the arbitrators was excluded from crucial parts of the tribunal's deliberations. All three arbitrators gave evidence on this issue. However, it has been pointed out that under the Swedish Code of Judicial Procedure, arbitrators may be called as witnesses in challenge proceedings and may be asked questions about the deliberations (see J Ole Jensen, "The Proof Conundrum" in *Tribunal Secretaries in International Arbitration* (Oxford University Press, 2019) at para 9.08). *Czech Republic* is therefore distinguishable. In any event, the issue of exclusion from deliberations was a process issue.

56 *FFM* concerned a majority arbitration award. The dissenting arbitrator accused the majority of misfeasance and malfeasance. Specifically, the dissenter accused the majority of bias and excluding him from deliberations. To deal with the accusations, the US Southern District Court of New York conducted a hearing in which the arbitrators gave evidence. The Court found that there was nothing more to the extraordinary charges levelled by the dissenter than frustration in failing to convince the majority of his position. In our view, *FFM* is of limited assistance. The allegation of exclusion from deliberations does not require evidence of the arbitrators' thought processes and reasoning. As for the allegation of bias, there are no details apart from a reference to the serious nature

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of the charges by the minority. Further, the judgment does not deal with the arguments or considerations relating to the confidentiality of deliberations at all and any issue of weighing the competing factors for and against disclosure. In the circumstances, *FFM* is best confined to the facts before the Court. As the Court itself cautioned, the case should not be viewed as a precedent for inquiry into the deliberations of an arbitration panel, noting that such matters should remain confidential and inviolate.

57 In *Dobish*, the basis of the plaintiff's application to vacate the award was that the arbitrator failed to take into account the fact that the defendant had waived one of its defences during the arbitration proceedings. The plaintiff sought documents (including the records of deliberations) from the arbitrator as evidence of such waiver. The US District Court of Nebraska ordered disclosure of the documents. However, it must be noted that the documents were sought to establish the objective fact of waiver, rather than to enquire into the thought processes of the arbitrator. In coming to its decision, the Court expressly noted the "objective and limited nature of the facts" that the documents were sought to prove. The Court went further to order production of the documents to the Clerk of Court for the magistrate judge's review in camera in view of the potential for production of irrelevant, sensitive and private materials. In our view, *Dobish* is consistent with the proposition that arbitrators may be required to give evidence as to matters that took place before them, but not as to their reasons for their decisions, similar to the views expressed in *Duke of Buccleuch* and *Nathan* (see [51] above).

Whether the plaintiff's case falls within the exception

58 As stated in [33] above, the plaintiff seeks production of the records of deliberations to support its case that:

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(a) The Majority in fact decided a key liability issue on grounds or for the true reasons that are not contained in the Final Award (but in the May Award as stated by the Minority) and/or as a result of a breach of the fair hearing rule, which can arise from the chain of reasoning adopted by the Majority.

(b) The Majority attempted to conceal the true reasons behind the Final Award (by issuing the May Award for approval by the ICC, before making material changes to it in the Final Award following further concerns expressed by the Minority and despite the May Award having been approved by the ICC).

(c) The Majority lacked impartiality.

59 The allegation of breach of the fair hearing rule in [58(a)] above is not sufficient to displace the protection of the confidentiality of deliberations. Besides, this allegation can be decided based on the arbitration record; the records of deliberations are unnecessary (see [32] above).

60 The plaintiff's case in [58(b)] above is difficult to follow. How does issuing the May Award for approval and making material changes in the Final Award following further concerns expressed by the Minority after the May Award had been approved amount to an attempt to conceal the true reasons behind the Final Award? During oral submissions, the plaintiff clarified that the complaint was that the Majority concealed the fact that the revised draft award that was sent to the ICC Secretariat (after the May Award had been approved) was actually substantially changed, although it appeared to have been in response to the comments made by the ICC Court.[32] If changes were made in

[32] Transcript, 31 May 2023, at 17:14–18:6 and 21:2–5.

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the light of the dissent of the Minority, that is no more than might be expected and is not evidence of any impropriety. The reasons for the Final Award are those that the Majority chose to give to justify the findings they made, and they stand or fall on their own merits.

61 The question remains then whether the allegations, that (a) the reasons in the Final Award are not the true reasons, (b) the Majority concealed the fact that the revised draft award included substantial changes that went beyond the ICC Court's comments, and (c) the Majority lacked impartiality, can constitute an exception to the protection of the confidentiality of deliberations. We doubt whether (a) and (b) are sufficient to constitute an exception. In our view, it seems arguable that lack of impartiality *could* constitute an exception because impartiality is fundamental to the integrity of arbitration proceedings. Further, as argued in the conclusion in *The Partisan Arbitrator*, the "general principle of the secrecy of deliberations exists to protect the arbitrators from undue pressures from the parties and the public, and surely not to facilitate the concealment from the parties of an arbitrator's partisanship."

62 However, we do not have to come to a definitive conclusion because, in any event, the plaintiff has not shown that these allegations have real prospects of succeeding.

63 As stated in [29]–[30] above, the plaintiff seeks production of the documentary evidence within the Tribunal's records of deliberations specifically referenced in certain paragraphs/footnotes of the Dissent. The allegations in the relevant paragraphs in the Dissent that are referred to relate to or revolve around the following allegations:

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(a) The Majority was wrong in its findings/reasons and ignored defects that were flagged by the Minority. In some instances, the Majority did not provide explanations or gave reasons that were vague or imprecise, or the Majority was deliberately evasive in discussing crucial issues.

(b) The Majority relied on facts/matters that were not pleaded or argued and the defendant was not given the opportunity to comment on the same. In some instances, the Majority did so despite the fact that the Minority had pointed out that they were not part of the parties' cases.

(c) The Final Award does not state the true reasons for the Majority's decision; instead, the true reasons are to be found in the May Award. The Majority reversed some of its previous views without providing any explanation. The reason that the Majority submitted the draft award to the ICC Court the second time was not that the Majority refused to implement a comment from the ICC Court but that the Majority had revised and amended its reasoning in Part Q1 substantially.

(d) The Majority provided an untruthful account of the deliberation history and misstated the record.

(e) The Majority lacked impartiality.

(f) The Majority is aware that the reason they provided in the Final Award for the Minority's refusal to sign is incorrect. The Minority had explained to the Majority that he refused to sign the Final Award because he did not believe that there was honest disagreement between them.

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The footnotes generally allege that the documentary evidence of the allegations can be found in the records of deliberations.

64 At the outset, it is clear that the allegations in [63(a)] and [63(b)] above, *ie*, that the Majority was wrong in its findings, exceeded the parties' cases or did not afford the defendant the opportunity to comment, are irrelevant to the Production Applications. Whether the Majority is wrong in its findings is not even a legitimate ground for the purposes of the setting aside application. As for the allegations that the Majority exceeded the parties' cases or did not give the defendant the opportunity to comment, these allegations can be determined based on the arbitration record, as the plaintiff has itself accepted.

65 With respect to the allegations in [63(c)] and [63(d)] above, *ie*, that the true reasons for the Majority's decision are to be found in the May Award and not the Final Award, and the Majority has given untruthful accounts of the deliberation history and made misleading statements, the plaintiff has provided no basis for these allegations. The plaintiff relies on the Dissent. However, the Dissent does not state any basis for the Minority's allegations. The Dissent does not explain why the reasons in the Final Award are not the true reasons or why the reasons in the May Award are the true reasons. The Dissent does not even explain how the reasons in the Final Award differ from those in the May Award, or what the untruthful accounts of the deliberation history were, or what the misleading statements were. The Minority's allegations represent his own subjective views or opinions, as he in part expressly recognised in his Dissent. He has not stated the facts that allegedly support his views or opinions. Clearly, such bare allegations, even if made by a co-arbitrator, cannot be sufficient. This is all the more so when the Minority has made serious allegations tantamount to accusing the Majority of dishonesty.

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66 The plaintiff submitted that the Minority is in an invidious position because that is all that he could say in the Dissent. In our view, the plaintiff's submission is not borne out by the Dissent. The Dissent includes allegations concerning what happened during the deliberations, *eg*, that the Minority had brought the alleged deficiencies to the attention of the Majority (at para 5 of the Dissent), and that the Majority ignored the Minority's objections (at paras 8, 9 and 16(a)). In addition, the Minority himself applied the following principles (at para 11 of the Dissent):

> (a) An arbitrator is under a duty to disclose misconduct to the parties.
>
> (b) Where an arbitrator witnesses improprieties in the course of the arbitral proceedings, which go to the integrity of the proceedings, he might properly raise these matters in a dissenting opinion.

It seems to us that the Minority did not at all feel constrained about disclosing what he alleged to be misconduct and improprieties.

67 The plaintiff also submitted that this Court should order production of the records of deliberations so that the plaintiff can investigate the allegations made by the Minority. We disagree. It is trite that production of documents will not be ordered to support what is nothing more than a fishing expedition.

68 The Minority's allegation of lack of impartiality in [63(e)] above is based on his other allegations set out in [63]. We have dealt with [63(a)] to [63(d)]. The Minority states (in para 251 of the Dissent) that he has "difficulties to avoid the impression that the Majority is determined to have the [defendant] prevail in this arbitration on however untenable the grounds." First, this statement shows clearly that the Minority's allegation of bias is based on his

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"impression". Second, even if it were to be argued that the Majority was so wrong in its conclusions and reasoning in the Final Award that the only inference is that they lacked impartiality, that argument can be dealt with on the basis of the arbitration record alone.

69 In our view, the allegation in [63(f)] (even if true) does not assist the plaintiff. The reason stated in the Final Award is that the Minority declined to sign the Final Award in the light of his disagreement with the Majority's conclusions and reasoning. It is correct that the Minority did disagree (vehemently, in fact) with the Majority's conclusions and reasoning. However, the Minority says that the reason for his refusal to sign the Final Award was his lack of belief that there was honest disagreement between the Majority and him.[33] The Minority's stated reason was an accusation that the Majority were dishonest in their conclusions and reasoning. Obviously, the Majority disagreed with this characterisation by the Minority. In our view, the manner in which the Majority chose to describe the reason for the Minority's refusal to sign the Final Award does not support the allegation that the Majority was partial towards the defendant.

70 As for the plaintiff's allegation that the Majority concealed the fact that its revised draft award included substantial changes that went beyond the ICC Court's comments, we note first of all that this allegation is not one of the grounds that the plaintiff relies on in its setting aside applications (see [31] above). In addition, this is another bare allegation. The plaintiff has not stated how the concealment was carried out; neither has the plaintiff given any basis to support this alleged concealment. In fact, as part of the scrutiny process, revised draft awards are submitted to the ICC Secretariat and reviewed by the

[33] Dissent, at para 250.

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counsel in charge of the file. The review by the counsel and any subsequent scrutiny by the ICC Court would be a review/scrutniy of the whole revised draft award. It seems to us highly unlikely that the fact that the changes in the revised draft went beyond the ICC Court's comments would not have been noticed by the counsel in charge or by the ICC Court.

Plaintiff's argument that the May Award is not part of the records of deliberations

71 During oral submissions, the plaintiff submitted that the May Award was not part of the records of deliberations as it was not a discussion between the arbitrators.[34] However, this position is different from that taken in the Production Applications. Item 2 in the Schedules seeks production of documentary evidence within the records of deliberations and item 2(b) expressly refers to the May Award as one such document. There is no application for production of any document that is not part of the records of deliberations.

72 In any event, we disagree with the plaintiff's submission. The plaintiff's notion of what constitutes deliberations is unjustifiably narrow and does not reflect reality. A rule of the confidentiality of the deliberations must, if it is to be effective, apply generally to the *deliberations stage* of a tribunal's proceedings; the form or forms the deliberation takes varies greatly from one tribunal to another: Alan Redfern, "Dissenting Opinions in International Commercial Arbitration: The Good, The Bad and The Ugly" in *Arbitration Insights* (Julian DM Lew QC and Loukas A Mistelis eds) (Kluwer Law International, 2004) at para 18-50.

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[34] Transcript, 31 May 2023, at 8:1–8 and 10:4–10.

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73 It is clear from Art 34 of the ICC Rules and the explanation in the Secretariat's Guide to ICC Arbitration (see [11]–[12] above) that the scrutiny process by the ICC Court forms part of the deliberations stage of the tribunal. Under Art 34, the ICC Court may comment on points of substance. Although the arbitral tribunal makes the final decision on points of substance, it would consider the ICC Court's comments. Until the award is finally signed and notified to the parties, the award cannot be said to have been finalised. In our view, therefore, the protection of confidentiality of deliberations applies to the May Award as well.

Whether any of the objections in O 110 r 17(2)(*b*)(i)–(iii) and (v)–(vi) applies?

74 In view of our conclusions above, it is not necessary for us to deal with the defendant's submissions on r 17(2)(*b*)(i)–(iii) and (v)–(vi) of the 2014 Rules, save to make the following points.

75 First, under O 110 r 17(2)(*b*)(i), a document is "relevant" if it is connected to (or has a bearing on) an issue in the case so that it might be considered by the court for the purpose of reaching a decision; the term "material" signifies that the document has potential significance beyond mere relevance so that it is necessary for the court to consider it: Jeffrey Pinsler SC, *Singapore Court Practice* (LexisNexis, 2023) at para 110/14–21/7. In this regard, we note the following:

(a) Item 2(d) in the Schedules seek documents "establishing how the Majority incorrectly explained away its findings on issues that Parties were not given an opportunity to comment". In our view, this item is neither relevant nor necessary. Whether the Majority was correct in its explanations is not relevant for purposes of the Setting Aside

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Application. Whether the parties were given an opportunity to comment can and should be decided based on the arbitration record.

(b) Items 2(g), 2(h) and 2(k) in the Schedules essentially refer to documents demonstrating the Majority's reliance on facts/matters that were not pleaded or argued and that the parties had no opportunity to comment. The records of deliberations are not necessary for this purpose and both issues can and should be decided based on the arbitration record.

76 Second, it seems to us that the protection of the confidentiality of deliberations would be a "legal impediment" under r 17(2)(*b*)(ii). In any event, even if it is not, the court still has a discretion to decide whether to order production where none of the objections enumerated under r 17(2)(*b*) apply: *Arovin Ltd and another v Hadiran Sridjaja* [2019] 5 SLR 1 ("*Arovin*") at [9]. Therefore, the court can still refuse to order production on the ground that as a matter of law, the confidentiality of deliberations is protected since it has not been shown that the case falls within the exception.

Whether the documents requested have been described with sufficient particularity

77 Requests for production "must be properly focused on the specific documents or a narrow category of documents": *Arovin* at [11].

78 The Production Applications seek documents which form part of the record of deliberations "specifically referenced in the Dissent, and which [the Minority] cited in support of various allegations in relation to the procedural irregularities and misconduct". Item 2 in the Schedules set out 14

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sub-categories[35] of documents which purport to describe the documents sought by referencing allegations in specific paragraphs in the Dissent.

79 The defendant submitted that the Production Applications should be dismissed because the documents sought have not been described with sufficient particularity. As the plaintiff has not persuaded us that its case falls within the exceptions to the protection of the confidentiality of deliberations, it is unnecessary for us to deal with the defendant's submission in detail. However, we would make the following comments:

(a) We agree with the defendant that the references to specific paragraphs in the Dissent do not therefore mean that the documents are sufficiently identified. Nevertheless, documents that relate to the differences in the Majority's views or reasoning between the May Award and the Final Award can be identified.

(b) However, it may be said that some of the documents have not been sufficiently particularised. For example, some of the documents are described as documents evidencing the Minority's subjective view that the Majority had given an inaccurate/untruthful account of the deliberative history but no particulars of the inaccurate/untruthful accounts have been given. The Majority cannot be expected to be able to identify the documents to be produced.

(c) Applicants for production orders should comply with the requirement to describe the documents sought with sufficient particularity. However, the fact that the documents have not been described with sufficient particularity in an application for production is

[35] The plaintiff withdrew Item 2(a) during oral submissions: see [30] above.

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not necessarily fatal. A production order may still be made in respect of a more defined set of documents where the interests of justice require it.

Conclusion

80 For the reasons stated above, we dismiss Summonses Nos 788 of 2023, 789 of 2023 and 790 of 2023. The Dissent simply fails to provide 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 plaintiff will have to proceed with its setting aside application on the basis of the arbitration record, without the records of deliberations.

81 We will hear parties' submissions on costs.

Chua Lee Ming
Judge of the High Court

Dominique Hascher
International Judge

Sir Jeremy Cooke
International Judge

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