

December 2023

2023 arbitration case law from the Singapore court



In this December issue of Arbitration Insights from Singapore, we continue our now established tradition of looking back on key arbitration cases from the Singapore courts as the year draws to a close. We consider three judgments from 2023 as well as one case from 2022 which proved highly relevant to our work this year. This 2022 case also allows us to consider recent authorities which together provide points of guidance for the entire life-span of an arbitration, from determining the arbitrability of a dispute to enforcement of an award.

Specifically, we look at three cases from 2023 which respectively concern determining the arbitrability of a dispute, when the confidential nature of an arbitration is lost and when records of a tribunal's deliberations may be disclosed. Finally, we consider whether a party not named in an award can nevertheless enforce it.

We have also picked up on a series of set-aside applications heard by the Singapore Courts in the last two months, all of which were unsuccessful.

The year in review for SIAC

Before turning to the cases themselves, we have taken the opportunity to examine the latest statistics released by the Singapore International Arbitration Centre ("**SIAC**") in its latest annual report.

This shows that SIAC had another busy year in 2022, receiving 357 new case filings.¹ Although this represents a dip in the SIAC case load from 2020 and 2021 when the continuing Covid-19 pandemic caused a surge in disputes, 2023 provided a record breaking first quarter for SIAC, with 332 new cases (including related cases) filed in the year to the end of March.²

As before, the SIAC was utilised by users originating from across the globe, with the vast majority of parties international.³ India continued to be the top user, with the US and China close behind. Disputes continued to be sent from parties in the United Kingdom, Australia, Hong Kong, Cayman Islands and Malaysia to name only a few.⁴ SIAC's strong international appeal and capabilities were further demonstrated by the fact that the laws of 28 different jurisdictions were applied to the disputes referred to SIAC in 2022.⁵

In this context, it is satisfying to see SIAC demonstrating its ability to stay relevant and keep-up with the ever-growing, global role the institution plays. In 2022, SIAC reorganised and strengthened its Secretariat (which is now comprised of 15 international arbitration lawyers who together are qualified in 13 jurisdictions)⁶ and published the Draft 7th Edition of the SIAC Rules.⁷

The 7th Edition of the Rules look set to enhance the efficiency and flexibility of the SIAC, no doubt ensuring that Singapore remains a key arbitration hub.

Case study 1: *Anupam Mittal v Westbridge Ventures II Investment Holdings [2023] 1 SLR 349: arbitrability and governing law of a dispute*

Judgment was given by the Court of Appeal on 6 January 2023 in respect of an anti-suit injunction granted by the High Court Judge. This anti-suit injunction prevented commencement of proceedings

before a domestic tribunal in India in breach of an arbitration agreement between the parties.

The Singapore Court of Appeal ("**SGCA**") laid out the approach on determining arbitrability of a dispute as well as the interplay between the law of the seat and the law of the arbitration agreement.

Background

A dispute arose between the appellant, who was an Indian resident and a founder of a company incorporated in India (the "**Company**"), and the respondent, a Mauritian private equity fund which had invested in the Company.

The shareholders' agreement (the "**SHA**") and supplementary agreement entered into between the parties contained identically worded governing law and arbitration clauses. The governing law clause provided that the SHA and the performance of the SHA shall be governed by and construed in all respects in accordance with the laws of the Republic of India.



On the other hand, the arbitration clause provided that any dispute relating to the "*management of the Company or relating to any of the matters set out in this [SHA]*" shall be referred to arbitration in Singapore.

The appellant commenced proceedings in the National Company Law Tribunal in Mumbai, India ("**NCLT**") to seek remedies for corporate oppression (the "**NCLT Proceedings**"). The appellant accused the respondent of (amongst other things) colluding with others to wrest control of the management of the day-to-day operations of the Company from him.

The respondent, in response, commenced proceedings in the Singapore Courts seeking an urgent *ex parte* interim anti-suit injunction against the appellant in respect of the NCLT Proceedings. The appellant further commenced a suit in the Bombay High Court, seeking amongst other things, a declaration that the NCLT was the only competent forum to hear and decide the disputes raised in the NCLT Proceedings.

¹ SIAC 2022 annual report, page 22

² <https://siac.org.sg/siac-announces-2022-statistics-q1-2023-sees-high-filings>

³ SIAC 2022 annual report, page 22. 88% of cases were international cases

⁴ SIAC 2022 annual report, page 23

⁵ SIAC 2022 annual report, page 30

⁶ SIAC 2022 annual report, page 7

⁷ <https://siac.org.sg/siac-announces-public-consultation-on-the-draft-7th-edition-of-the-siac-arbitration-rules>

The Singapore High Court ("**SGHC**") granted a permanent anti-suit injunction against the appellant on the bases that:

- the law that governed the issue of arbitrability at the pre-award stage was the law of the seat;
- the disputes between the parties were arbitrable under Singapore law, being the law of the seat; and
- even assuming that Indian law governed the arbitration agreement, the disputes fell within the scope of the arbitration agreement.

The appellant appealed against the SGHC's decision, and submitted that:

- the disputes referred to NCLT related to oppression and the mismanagement of a company and such disputes were non-arbitrable under the law of the arbitration agreement which was Indian law; and
- in any case, the disputes did not fall within the scope of the parties' arbitration agreement as the parties could not have intended to refer disputes which were non-arbitrable under the governing law of the arbitration agreement.

This would have rendered the arbitration agreement liable to be nullified.

SGCA's decision

The SGCA dismissed the appeal but on different grounds from that of the SGHC.

In essence, the SGCA clarified that arbitrability will be first determined by the law of the arbitration agreement. If the dispute is determined under the law of the arbitration agreement to be non-arbitrable, the arbitration cannot proceed. If the dispute is determined to be arbitrable under the law of the arbitration agreement, but the law of the seat considers the dispute to be non-arbitrable, the arbitration would also not be able to proceed.

Further, the SGCA affirmed that, as a general rule, a choice of law for the main contract would lead a court to hold that the same law also applied to govern the arbitration agreement. However, in the present case, the SGCA found that the intention of the parties to settle their disputes by arbitration was:

"... not consistent with an implied choice of Indian law as the proper law of the arbitration agreement as such choice would negate the agreement, since oppression claims (which were often intertwined with management disputes) are not arbitrable in India..."

In deciding whether any particular dispute fell within the ambit of the arbitration agreement, the relevant terms of the arbitration agreement would be interpreted in accordance with the governing law of the arbitration agreement (Singapore law in the present case).

The SGCA took the view that practically all the complaints made by the appellant in the NCLT Proceedings either related to the management of the Company or the SHA in some way, and were thus *encompassed by the arbitration agreement*.

In this regard, the SGCA pointed out that the simple fact that these allegations might eventually support a finding of oppression could not take them out of the categories of dispute that the SHA expressly provided should be submitted to arbitration.



Key takeaways

In situations where:

- parties intend for the law of the arbitration agreement and the law of the seat to be different; and
- where it is foreseeable that disputes may arise in respect of issues which may not be arbitrable due to public policy considerations in *both* the laws governing the main agreement and the arbitration agreement contained within,

parties should be very careful in delineating the ambit of the arbitration agreement to ensure that the arbitration agreement remains enforceable.

Indeed, the SGCA observed that it is up to the parties and their legal advisors to investigate possible differences in public policy between the law of the contract and the law of the arbitration agreement, and craft an arbitration agreement which in its choices of proper law and seat would prevent such difficulties from rendering any intended arbitration unworkable.

Further, parties wanting to rely on the argument that the disputes are not arbitrable to avoid arbitration agreements are reminded to think twice, especially where the disputes could also be characterised as contractual disputes which would then fall within the arbitration agreement.

Case study 2: *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 4: the confidentiality of the arbitration

The Singapore Court of Appeal ("**SGCA**") refused an application for various confidentiality and sealing orders (the "**Orders**") that would have directed (i) certain Singapore proceedings be heard in private, (ii) related



information and documents be concealed, (iii) case files be sealed, and (iv) information relating to party identification be redacted.

The SGCA was mindful that information relating to the arbitration was already public to the extent that confidentiality had been "substantially lost".

Background

Deutsche Telekom obtained a final arbitration award against the Republic of India, and applied successfully for leave to enforce the final award in Singapore. Having failed to set aside the order for leave to enforce at first instance, India appealed to the SGCA. In conjunction with the appeal, India also applied for a sealing order which, if granted, would have directed that the appeal proceedings be heard in private, and that all information and documents pertaining to the arbitration be concealed.

SGCA's decision

The SGCA analysed section 22 and 23 of the International Arbitration Act 1994 ("**IAA**"), which aims to protect the confidentiality of arbitration-related court proceedings. This "*cloak of privacy*" on arbitration-related court proceedings is an exceptional statutory

departure from the principle of open justice which ordinarily applies to court proceedings.

The SGCA noted that the purpose of a sealing order under the IAA is to "*protect the confidentiality of the arbitration itself.*" Therefore, if the confidential nature of the arbitration had already been lost, the principle of open justice would require the "*cloak of privacy*" to be lifted.

The SGCA found that the "*cloak of privacy*" had already been lifted based on the following:

- The interim and final arbitral awards were available online.
- Information about other enforcement proceedings in relation to the arbitration award in the USA and Germany was publicly available.
- India's Singapore lawyers had published a LinkedIn post acknowledging the Singapore enforcement proceedings.
- Decisions published in related legal proceedings in India revealed the identities of the parties and the outcome of the arbitration.

The SGCA therefore concluded that the confidentiality of the arbitration had been lost. Given that the SGCA did not find any compelling reason to keep the Singapore enforcement proceedings confidential, the SGCA refused to grant the Orders. The SGCA dismissed India's argument that confidentiality was required because third parties could use information from the Singapore proceedings to tarnish India's reputation.

The SGCA stressed the principle of open justice allows the actions of all parties to be scrutinised, and it was in India's interest for the proceedings to be in open court so that the public was apprised of its side of the story.

Key takeaways

The court's decision serves as a useful reminder to parties engaged in arbitration (as well as their legal representatives) of the importance of ensuring that information related to the arbitration is not put into the public domain. Doing so may mean that the confidential nature of the arbitral proceedings is lost when one seeks to rely on it.

Case study 3: *CZT v CZU* [2023] SGHC(I) 11: confidentiality of arbitral deliberations

The Singapore International Commercial Court ("**SGICC**") declined to grant three summons applications for orders that the three members of an arbitration tribunal produce records of their deliberations. In doing so, the SGICC confirmed that

ordinarily, arbitrators' deliberations are protected from disclosure and provided guidance as to when an exception to this protection might be found.

Background

The defendant commenced arbitration proceedings against the plaintiff in respect of a contract between the parties for the supply of goods. In those proceedings, an award was issued against the plaintiff (the "**Award**"). This award was signed by two of the arbitrators (the "**Majority**"), but not the third (the "**Minority**"), who the award stated had "declined to do so in light of his disagreement with the conclusions and reasoning of the other two arbitrators".

On the same day as the Award was issued, the Minority issued his dissenting opinion. This contained serious allegations against the Majority, including allegations that the Majority "*engaged in serious procedural misconduct*", "*continued misstating of the record*", attempted to "*conceal the true ratio decidendi from the Parties*", "*distorting of the deliberation history*", lack of impartiality and knowingly stating an incorrect reason for the Majority's refusal to sign the Award.

The plaintiff filed an application in the High Court of Singapore to set aside the award on various grounds. Subsequently, the plaintiff filed three summons (one directed at each arbitrator) which sought production of the records of the arbitrators' deliberations. It was those applications that were in front of the SGICC for consideration.



SGICC's decision

The court noted that whilst there is no statutory provision in Singapore that expressly protects the confidentiality of arbitrators' deliberations, such protection clearly exists as an implied obligation of law given the well-recognised policy reasons (the "**Protection**"). However, the court also held that the Protection "*is not absolute but is subject to exceptions*".

The court held that such an exception would apply 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 a scenario would require a "*very compelling case*" and so exceptions are "*only to be found in the very rarest of cases*".

The court proposed a two-stage test for assessing whether an exception exists. First, the allegations would have to be of a very serious nature and secondly, the allegations must have a real prospect of succeeding.

The court also provided guidance as to the scope of the Protection. In particular, the court noted that process issues, such as an allegation that one arbitrator has been excluded from deliberations, or questions as to what matters have been submitted to an arbitrator for decision, are not properly covered by the Protection.

This is so as such process issues do not involve an arbitrator's thought processes or reasons for his decisions, and therefore the policy reasons for protecting the confidentiality of arbitrators' deliberations are not invoked.

Key takeaways

This decision is the first time that a Singapore court has decided the question of when arbitrators can be ordered to produce their records of deliberations.

It sets a high bar, reflecting the courts' pro-arbitration stance. Not only must allegations be very serious before a court will consider ordering arbitrators to produce their records, it must also be shown that the allegations have real prospects of succeeding. Indeed, the court itself noted this bar would only be met in the "*very rarest of cases*".

It is also worth noting that essential process issues are not protected by the confidentiality of deliberations because such issues do not involve an arbitrator's thought processes or reasoning.

Further developments

We note that this case proceeded to its main set-aside hearing, for which a judgment was handed down in November.

The application for set-aside was unsuccessful, making it one of multiple judgments in the last few months of 2023 in which the Singapore courts have refused to set-aside an arbitration award (see also, for example, from November *DBX v DBZ* [2023] SGHC(I) 18 and *DBO v DBP* [2023] SGHC(I) 21 and from December, *CVV v CWB* [2023] SGCA(I) 9).

Case study 4: *National Oilwell Varco Norway AS v Keppel FELS Ltd [2022] SGCA 24: enforcement of the award by a non-party*

The Singapore Court of Appeal ("**SGCA**") has recently heard a case concerning the enforcement of an arbitral award by a party that was not named in that award. Ultimately, the SGCA found that enforcement was permitted as the legal personality of the original participant continued in the new company.

Background

In 1996, a contract was entered into between Keppel FELS Ltd ("**KFELS**") and A/S Hydralift ("**Hydralift**") for the design and supply of certain equipment.

A dispute arose in 1999, leading to arbitration proceedings initiated by KFELS against Hydralift in 2007.

Hydralift underwent mergers in 2004, becoming part of National Oilwell-Hydralift AS, and subsequently merging with National Oilwell Norway AS, which later changed its name to National Oilwell Varco Norway AS ("**NOV Norway**").

NOV Norway did not inform KFELS about the merger nor of the dissolution of Hydralift. Instead, throughout the arbitration process, NOV Norway used the Hydralift name to successfully defend the claim and bring a counterclaim against KFELS.

The arbitral tribunal issued an award in 2019, ordering KFELS to pay damages and costs to Hydralift.

NOV Norway subsequently sought to enforce the award. KFELS argued that the award was intended for Hydralift and should not be enforced in favour of a different party.

Decision of the lower court

The lower court in this case gave leave to NOV Norway to enforce a final arbitral award issued in the name of a company that no longer existed, Hydralift.

KFELS in turn applied to set aside the order obtained *ex parte*. The lower court judge subsequently set aside the enforcement order obtained by NOV Norway, ruling in favour of KFELS for several reasons, including that the use of Hydralift's name was not a mere misnomer but rather a significant issue, as both parties objectively intended to refer to Hydralift as the respondent in the arbitration.

It was, however, found that there was a clause in the contract which allowed for the transfer of rights between Hydralift and NOV Norway under Norwegian

law and therefore that there was an arbitration agreement between NOV Norway and KFELS.

Ultimately, the lower court ruled against NOV Norway's enforcement of the award, finding that the award was intended for Hydralift, which no longer existed as a separate entity, and that NOV Norway could not enforce it in its favour. The judge also cited issues related to estoppel and the understanding of the parties involved.

SGCA's decision

The case was subsequently heard by the SGCA, who overturned the lower court's decision, finding that:

1. **True Misnomer:** the lower court erred in not recognising that, under Norwegian law, NOV Norway and Hydralift were effectively the same legal entity due to the mergers. The situation amounted to a true misnomer.
2. **Enforceability of the Award:** the court has the power and should enforce the award when there is a true misnomer. It rejected the lower court's rigid and mechanical approach to enforcement, which focused solely on the name in the award.
3. **Intention of the Parties:** the court disagreed with the lower court's interpretation that the arbitral tribunal intended the award for Hydralift. Instead, it recognised that NOV Norway was the only possible respondent to the arbitration, given the mergers and the fact that Hydralift no longer existed as a separate entity.
4. **Estoppel:** NOV Norway was not estopped by its representations from enforcing the award in its favour. KFELS would have continued with the arbitration even if it had known of the true state of affairs before its commencement, and the award was to be in NOV Norway's favour.
5. **Contractual Prohibition:** clause 21.1 of the contract did not prohibit the transfer of rights under the contract from Hydralift to NOV Norway. Therefore, there was an arbitration agreement between NOV Norway and KFELS.

Key takeaways

The SGCA allowed the appeal by NOV Norway and held that the award should be enforced in its favour, recognising that the situation was a true misnomer, and NOV Norway was the rightful entity to enforce the award.

The court's decision focused on the substance of the matter rather than a rigid interpretation of the award's name.

Authors



Chris Bailey

Partner
T: +65 6622 9685
E: christopher.bailey@shlegal.com



Daryll Ng

Partner, Virtus Law
T: +65 6835 8656
E: daryll.ng@shlegalworld.com



Justin Gan

Partner
T: +65 6622 9640
E: justin.gan@shlegal.com



Rebecca Crookenden

Managing associate
T: +65 6622 9560
E: rebecca.crookenden@shlegal.com



Tiffany Handjaja

Associate, Virtus Law
T: +65 6661 6895
E: tiffany.handjaja@shlegalworld.com



Nur Hijazi Jaffar

Associate
T: +65 6622 9650
E: nurhijazi.jaffar@shlegal.com



Anna Purvis

Trainee solicitor
T: +65 9389 0772
E: anna.purvis@shlegal.com

Key contacts in Asia

Singapore

Chris Bailey

Partner
T: +65 6622 9685
E: christopher.bailey@shlegal.com

Michelle Yong

Partner
T: +65 6622 9691
E: michelle.yong@shlegal.com

Justin Gan

Partner
T: +65 6622 9640
E: justin.gan@shlegal.com

Daryll Ng

Partner, Virtus Law
T: +65 6835 8656
E: daryll.ng@shlegalworld.com

Lauren Tang

Partner, Virtus Law
T: +65 6835 8664
E: lauren.tang@shlegalworld.com

Greater China

Andrew Rigden Green

Partner, Hong Kong
T: +852 2533 2761
E: andrew.rigdengreen@shlegal.com

Alexander Tang

Partner, Hong Kong
T: +852 2533 2881
E: alexander.tang@shlegal.com

Elizabeth Sloane

Partner, Hong Kong
T: +852 3166 6926
E: elizabeth.sloane@shlegal.com

Evangeline Quek

Partner, Shanghai
T: +86 21 5385 2195
E: evangeline.quek@shlegal.com

Henry Zhu

Partner, Guangzhou, Wei Tu
T: +86 20 8388 0590
E: henry.zhu@shlegalworld.com

Seoul

Michael Kim

Partner
T: +82 2 6138 4888
E: michael.kim@shlegal.com

Stuart Burrell

Partner
T: +82 2 6138 4877
E: stuart.burrell@shlegal.com

Our success is built on your success



200+
Partners



1300+
People worldwide



49
Top ranking for individuals



8
Offices worldwide



40
Languages spoken by our staff



26%
Of our people are based in Asia