

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2020-485-734
[2022] NZHC 487**

UNDER the Arbitration (International Investment Disputes) Act 1979 and the High Court Rules 2016

IN THE MATTER OF an originating application for the recognition, by entry as a judgment, of an arbitral award made by the International Centre for the Settlement of Investment Disputes

BETWEEN SODEXO PASS INTERNATIONAL SAS Applicant

AND HUNGARY Respondent

On the Papers

Counsel: D R Kalderimis and N K Swan for the Applicant
I J Thain and I E Scorgie for the Respondent

Judgment: 17 March 2022

**JUDGMENT OF GWYN J
(Access to Court Documents)**

[1] Mr Vladislav Djanic has made an application to access specified Court documents in this case which was heard by Cooke J on 15 and 16 November 2021. The judgment was released on 10 December 2021.¹

[2] Mr Djanic's application came before me as Duty Judge. He requests access to an arbitral Award rendered by an arbitral tribunal constituted pursuant to the

¹ *Sodexo Pass International SAS v Hungary* [2021] NZHC 371.

International Centre for the Settlement of Investment Disputes (ICSID) Convention in the dispute between Sodexo Pass International SAS and Hungary (ICSID Case No. ARB/14/20), together with an attached separate and dissenting opinion of arbitrator J Christopher Thomas. The date of the Award and the attached separate and dissenting opinion is 28 January 2019. Mr Djanic's reason for requesting the documents is that they are the culmination of an arbitration proceeding brought against a sovereign state (of which he is a national). Mr Djanic says that, since such arbitration proceedings typically involve large compensation requests by foreign investors due to alleged breaches of international legal obligations by states, the Award is of great public interest both to Hungarian citizens and the international legal community.

[3] Mr Djanic notes that if the document contains personal information of a sensitive nature and otherwise not public, he would be happy to have that information anonymised.

[4] Counsel for Sodexo Pass International SAS (Sodexo) has filed a memorandum in opposition to Mr Djanic's request for access.

[5] In summary, Sodexo opposes disclosure of the Award because:

- (a) it remains confidential and subject to publication restrictions pursuant to the ICSID Tribunal's Procedural Order No. 1 dated 17 June 2015 (and art 48(4) of the ICSID Convention);
- (b) the Award was disclosed to the Court in accordance with art 54 of the ICSID Convention for the sole purpose of Sodexo's recognition and enforcement application; and
- (c) the underlying reasons for which the Award is sought have been satisfied by the limited public disclosure of aspects of the Award.

[6] Counsel for the respondent have also filed a memorandum opposing the application and agreeing with the reasons stated in the memorandum for Sodexo. They also confirm that Hungary has not provided consent to the disclosure of the Award and

note that a fundamental tenet of the ICSID Regime (and the participation of sovereign states in such a regime) is that of consent to jurisdiction, including the applicable procedural orders around confidentiality and privacy.

[7] Counsel for Hungary submits it would be inappropriate for disclosure of an Award to be obtained through the “back-door” as a result of a purely procedural application before the New Zealand Court that had no bearing on and no relation to the substance of the Award.

Discussion

[8] Mr Djanic’s application falls to be considered under rr 12 and 13 of the Senior Courts (Access to Court Documents) Rules 2017 (the Rules). Those rules provide:

12 Matters to be considered

In determining a request for access under rule 11, the Judge must consider the nature of, and the reasons given for, the request and take into account each of the following matters that is relevant to the request or any objection to the request:

- (a) the orderly and fair administration of justice:
- (b) the right of a defendant in a criminal proceeding to a fair trial:
- (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
- (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
- (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
- (f) the freedom to seek, receive, and impart information:
- (g) whether a document to which the request relates is subject to any restriction under rule 7:
- (h) any other matter that the Judge thinks appropriate.

13 Approach to balancing matters considered

In applying rule 12, the Judge must have regard to the following:

- (a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair

administration of justice may require that access to documents be limited:

- (b) during the substantive hearing, open justice has—
 - (i) greater weight than at other stages of the proceeding; and
 - (ii) greater weight in relation to documents relied on in the hearing than other documents:
- (c) after the substantive hearing,—
 - (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but
 - (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

[9] As counsel for Sodexo note, the Award is confidential in the context of the ICSID Arbitral Tribunal. Following the first session of the Tribunal it ordered the following:

23.1. The ICSID Secretariat shall not publish any ruling issued in the present proceeding without the consent of the parties.

...

24.1. Unless both parties consent, neither party shall unilaterally disclose to any third party information that relates to the proceedings, including:

- (a) all correspondence exchanged between the parties, ICSID, and/or the Arbitral Tribunal,
- (b) all party submissions filed in the arbitration, including pleadings, memorials, witness statements, annexes and evidence supplied to the Arbitral Tribunal;
- (c) all awards, decisions and orders of the Arbitral Tribunal;
- (d) all minutes, records, and transcripts of hearings and meetings; and
- (e) information contained in or derived from any such documents.

Such documents and information may be disclosed to third parties, such as expert witnesses, to the extent necessary for the purpose of the arbitration. These third parties shall undertake the same confidentiality obligations as the parties to the arbitration.

[10] While those publication restrictions and confidentiality orders are binding only on the parties and the Tribunal, the parties did conduct their arbitral proceedings in confidence. I agree that r 12(d) – “protection of other confidentiality and privacy

interests” – has some application to this case. In addition, as counsel note, greater weight is afforded to confidentiality and privacy interests after a substantive hearing.²

[11] The reason for the disclosure of the Award to this Court is relevant. A certified copy of the Award was provided to the Court, annexed to the first affidavit of Stuart Dutson, in accordance with art 54 of the ICSID Convention, which requires a party seeking recognition or enforcement to “furnish to a competent court... that limited disclosure is permitted by the ICSID Convention and also necessary for a party to the Award to bring a proceeding in New Zealand.” It had to be disclosed, but for that sole purpose.

[12] Rule 12(c) provides that parties’ rights to bring civil proceedings should be respected “without the disclosure of any more information about... matters that are commercially sensitive, than is necessary to satisfy the principle of open justice.”

[13] The proceedings themselves have not resulted in a recognition or enforcement order in relation to the Award. In that context, r 12(c) weighs against the Award now being publicised against the Tribunal’s own, earlier orders and where to do so would disclose matters of commercial sensitivity to both parties.

[14] Counsel for Sodexo observes that, although the Arbitration (International Investment Disputes) Act 1979 is not among the list of enactments for which access is restricted under r 7 of the Rules, the Arbitration Act 1996 is one of those Acts. Section 14H of the Arbitration Act 1996 provides a useful analogy. That provision recognises that there are particularly strong privacy and confidentiality interests in arbitral proceedings. I agree those interests are engaged here.

[15] Finally, I refer to Mr Djanic’s reasons for requesting the Award, as noted at [2] above. Counsel for Sodexo submits that those matters have already been publicly disclosed, through public reporting, and the extent to which they are set out in Cooke J’s judgment. In particular, the quantum of the Award has been publicised (on 4 February 2019).

² Senior Courts (Access to Court Documents) Rules 2017, r 13(c)(ii); and *Greymouth Petroleum Holdings Limited v Empresa Nacional Del Petroleo* [2017] NZCA 490, [2017] NZAR 1617 at [25].

[16] As the Court of Appeal observed in *Schenker AG v Commerce Commission*, each access request will give rise to different considerations and require a specifically focussed evaluation.³ Here, I am convinced that disclosure is not required for the orderly and fair administration of justice,⁴ nor to uphold the principles of open justice,⁵ and would offend against the confidentiality and privacy interests of the parties. Further, disclosure risks undermining the procedures and jurisdiction of the ICSID Arbitral Tribunal.

[17] In summary, for the reasons set out above, I decline Mr Djanic's request to access the Award.

Gwyn J

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³ *Schenker AG v Commerce Commission* [2013] NZCA 114 at [37].

⁴ Rule 12(a).

⁵ Rule 12(e).