

Singapore High Court declines to set aside ICC award for allegations of breach of natural justice and use of "guerrilla tactics".

In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2018] SGHC 101 (“**CMNC**”), the Singapore High Court considered the novel issue of whether the Tribunal’s imposition of an “attorney-eyes only” document disclosure regime amounted to a breach of natural justice, against the backdrop of an expedited arbitration agreement. It also considered novel points concerning “guerrilla tactics” in arbitration and the duty of a tribunal to investigate allegations of corruption. The decision underlines Singapore courts’ policy of minimal curial intervention in arbitral awards.

Background

The dispute in *CMNC* arose under agreements between project owner Jaguar Energy (“**JEG**”) and contractor China Machine New Energy Corp (“**CMNC**”) for the construction of a coal-fired power plant in Guatemala at a cost of about USD 450 million. The contracts were governed by New York law and provided for Singapore-seated arbitration under International Chamber of Commerce (“**ICC**”) 1998 arbitration rules on an expedited basis. Following allegations of *CMNC*’s breach of contract, *JEG* terminated the contracts, expelled *CMNC*’s employees from the worksite, and reserved its right to claim liquidated damages. By the time *JEG* commenced arbitration against *CMNC* in January 2014, relations had deteriorated drastically and there were incidents of violence at the worksite between *JEG*’s security guards and *CMNC*’s employees. Following a merits hearing, the Tribunal unanimously found that *JEG* had validly terminated the contracts for *CMNC*’s default and awarded *JEG* damages of around USD 129 million.

CMNC applied to the Singapore High Court to set aside the Award, arguing, amongst others, that (i) the Award was made in breach of the rules of natural justice, in particular because the Tribunal employed an “attorney-eyes only” (“**AEO**”) regime toward certain documents disclosed by *JEG*; (ii) that *JEG* had breached its implied obligation to arbitrate in good faith; and (iii) that the Award contravened public policy because *JEG* used of “guerrilla tactics” and because the Tribunal failed to investigate allegations of corruption and fraud on the part of *JEG*’s employees.

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The Singapore High Court rejected CMNC's arguments. In holding that the Tribunal had not breached its duty to safeguard due process, the Judge reiterated that a Tribunal has a "*wide and flexible power to make procedural decisions*". An applicant seeking to set aside an award on procedural grounds must show that there was a "*radical breach*" of its right to be heard¹. Importantly, where the arbitration agreement provided, as in the present case, for arbitration on an expedited basis, the specific content of the Tribunal's duties would be informed by the strictures and time constraints that the parties had themselves placed on the process.

Key aspects of the Court's decision

A. AEO regime and other confidentiality regimes may be appropriate in arbitral proceedings

The Court observed that AEO orders are "*rare in international arbitration but are not unheard of*"². The Tribunal was empowered to make an AEO order either under Art 20(7) of the 1998 ICC Rules³, which provides for the use of measures to protect trade secrets and confidential information, or alternatively, under its broad powers of case management under Art 19(2) of the Model Law. The Court however noted that the 2016 SIAC Rules or the 2014 LCIA Rules do not contain a provision equivalent to Art 20(7) of the 1998 ICC Rules.

The Court rejected CMNC's argument that the AEO regime unfairly prejudiced CMNC because it restricted CMNC's inspection process and gave it insufficient time to review the documents disclosed by JEG. The following factors were relevant to the Court's decision:

- > **Agreement to expedited arbitration:** CMNC's complaint that it had insufficient time to analyse the documents had to be assessed in the context of the parties' agreement to conduct the arbitration under extremely compressed timelines. In particular, at the time they agreed to an expedited arbitration, the parties were aware that the contract was highly complex and that the disputes arising under it were likely to be complicated. While the Tribunal retained its responsibility to ensure due process, it had to do so within the strictures the parties had placed on it, and in this context the AEO regime could not be said to have unfairly deprived CMNC of sufficient time and opportunity to present its case⁴.
- > **Safeguards within the AEO regime:** The AEO regime in this case struck an appropriate balance between the competing interests of preserving confidentiality and enabling CMNC to present its case, as it contained a safeguard entitling CMNC to apply to the Tribunal for specified CMNC employees to be given access to unredacted copies of the documents subject to the AEO regime for the purpose of instructing

¹ CMNC at [117]

² CMNC at [130]

³ Now Art 22(3) of the 2017 ICC Rules

⁴ CMNC at [125]-[127] and [168]

its solicitors. CMNC had never taken up the opportunity to apply for its employees to access the documents⁵.

- > **Evidence of risk of misuse of documents:** The AEO regime was also appropriate given that JEG had satisfied the Tribunal, on a preliminary basis and based on witness statements, that there was a significant risk of CMNC misusing the documents disclosed by JEG to disrupt the arbitration as well as JEG's operations. The fact that the main contract contained a confidentiality clause did not render the AEO regime unnecessary, because that confidentiality clause was intended to protect each party's confidential information from release to third parties, rather than to address the risk of the counterparty's misuse of documents disclosed in the course of arbitration⁶.

B. A duty to arbitrate in good faith may be implied into the arbitration agreement

CMNC is the first Singapore decision to consider the issue of whether an arbitration agreement includes an implied duty to arbitrate in good faith. The Court in *CMNC* noted that in many jurisdictions, including Singapore and the UK, there is no general duty to perform contractual obligations in good faith. However, it held that “*given the inherently cooperative nature of the arbitral process*”, “*a duty to arbitrate in good faith will be implied into most or all arbitration agreements, even if there is no general duty to perform contractual obligations in good faith under that law*”⁷.

CMNC also argued that the Award should be set aside due to JEG's use of “guerrilla tactics”, such as harassing *CMNC*'s witnesses and disclosing documents in a disordered and delayed way. “Guerrilla tactics” and their potential effect on the procedural integrity of an arbitral award have not previously been considered in Singapore's arbitration jurisprudence. The Court drew on academic commentary which defines “guerrilla tactics” as the use of illegal or unethical means *with the aim* of obstructing, delaying, derailing or sabotaging an arbitration. Guerrilla tactics lie on a spectrum of severity – from “extreme” tactics such as violence or the blatant abuse of state power on one end; to “common” tactics such as bribery, intimidation or witness harassment; and “rough riding” such as withholding evidence or ambushing the opponent with evidence. The Court noted that the intention behind the acts is critical – it is not sufficient if the acts merely have an adverse effect on the arbitration⁸.

CMNC failed to establish that JEG had performed the alleged acts with the intention of undermining the arbitration. The fact that *CMNC* had not brought the alleged acts to the Tribunal's attention despite alleging that they occurred at an early stage of the arbitration also suggested that *CMNC* had not genuinely believed that JEG's acts were aimed at undermining the presentation of *CMNC*'s case in the arbitration⁹.

⁵ *CMNC* at [57]–[58]

⁶ *CMNC* at [139] and [146]

⁷ *CMNC* at [198]–[199]

⁸ *CMNC* at [202]–[203]

⁹ *CMNC* at [206]

C. A Tribunal may have a duty to investigate corruption, but a failure to investigate does not always mean that the award is liable to be set aside

Three days before the main hearing in *CMNC*, a UN agency released a report stating that one of JEG's representatives had bribed government officials in relation to JEG's dispute with CMNC. CMNC brought these allegations to the Tribunal's attention. However, the Tribunal declined to find that JEG's claims were infected with corruption, as the alleged corruption had not given rise to any convictions, and there was no evidence that the alleged corruption had any bearing on the subject matter of the arbitration.

The Singapore High Court held that a Tribunal may come under a duty to investigate allegations of corruption if these matters would affect the issue under consideration in the arbitration. However, it agreed with the Tribunal's view that the alleged corruption had no bearing on the issues in the arbitration¹⁰. Further, a Tribunal's breach of the duty to investigate corruption would not *per se* render an award liable to be set aside for breach of public policy without more but would only expose the award to a risk of being set aside¹¹. The Court reiterated that the threshold for setting aside an award for breach of public policy is a high one – the threshold will only be crossed if upholding the award would “*shock the conscience*” or would be “*clearly injurious to the public good*”¹².

Implications for parties involved in arbitral proceedings

- > **Use of measures to protect confidential information in arbitration:** CMNC had clarified that the use of restricted disclosure regimes to preserve the confidentiality of documents (such as AEO regimes, redaction, or other forms of limited inspection) does not contravene the norms of arbitration proceedings and may be appropriate in certain cases. This is a welcome clarification, and potentially powerful in arbitrations between trade competitors, where the primary concern might not be disclosure of confidential information to third parties (which concern is already addressed by the confidential nature of arbitration proceedings generally), but disclosure of sensitive information which may be misused by the opponent. The use of measures such as confidentiality clubs (where inspection of documents is limited to select individuals who have signed non-disclosure agreements) and time-limited inspections is relatively well-established in Court proceedings, particularly those concerning intellectual property. Parties involved in arbitration involving sensitive information should creatively consider and actively suggest the use of such measures to the Tribunal, but in doing so should also consider building in any safeguards necessary to enable both sides to adequately prepare for and present their cases – in *CMNC*, the presence of a built-in “safeguard” allowing CMNC to apply for employee access to the AEO documents was a key consideration in the

¹⁰ *CMNC* at [226]-[227]

¹¹ *CMNC* at [228]

¹² *CMNC* at [217]

Court's finding that the regime did not breach the requirements of due process. Parties applying for confidentiality regimes should also ensure that the justification for the measures requested is well-documented and might wish to request that the Tribunal record its reasons for the imposition of any confidentiality regime as a preliminary decision, to avoid the later allegation that the regime was unjustifiably imposed. Contracting parties might also wish to consider whether to expressly provide for the use of such confidentiality regimes in their arbitration agreements.

- > **Considerations when agreeing to expedited arbitration:** Contracting parties are often keen to provide for arbitration to be conducted on an expedited basis, whether by way of formal expedited procedures available under certain institutional rules (such as the ICC and SIAC rules) or by expressly providing for the arbitration to be conducted according to expedited timelines under the arbitration agreement (as was the case in CMNC). As the content of the Tribunal's duty to ensure due process will be informed by whether the parties have agreed to conduct the arbitration on an expedited basis, contracting parties should carefully consider the nature of the main contract and the level of complexity of any disputes which might arise therefrom – an expedition clause might not be appropriate if complicated disputes can be foreseen. It is, however, possible to provide for the parties to use their best endeavours to conduct the arbitration expeditiously, without shackling the parties to specific timelines and procedures.
- > **Implied duty to conduct arbitration in good faith:** The decision in CMNC makes it clear that a party's conduct and its intentions in engaging in such conduct during the arbitration, can have a direct effect on the validity of the award. A failure to act in good faith can render the award liable to being set aside for breach of the parties' arbitration agreement (under Art 34(2)(a)(iv) of the Model Law)— a test /standard that is likely to be more readily satisfied than the test applicable to setting aside for breach of public policy (under Art 34(2)(b)(ii) of the Model Law).
- > **Misconduct should be brought to the Tribunal's attention at the earliest opportunity:** A party who has cause to believe that the opponent has engaged in corruption or intentional acts to disrupt the arbitration should raise the same to the Tribunal as early in the proceedings as possible, and not wait until the award is rendered before seeking to set aside it aside on these grounds. In CMNC, the fact that CMNC failed to bring the alleged corruption and guerrilla tactics to the Tribunal's attention as soon as these acts allegedly occurred, led to inferences being drawn against CMNC when it belatedly raised these matters to support its setting aside application.

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