

# "Attorney eyes only" order does not breach settled arbitral norms or natural justice (Singapore High Court)

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Legal update: case report | [Published on 23-May-2018](#) | Singapore

In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101, the Singapore High Court rejected an application to set aside an arbitral award on the basis that there had been a breach of natural justice. In doing so, the court considered whether the imposition of an "attorney eyes only" order by the arbitral tribunal amounted to a breach of natural justice, and whether there is an implied obligation to arbitrate in good faith.

## Speedread

The Singapore High Court has refused an application to set aside an award on the basis that there had been a breach of natural justice. The central issue in the application was whether the imposition of an "attorney eyes only" order by the arbitral tribunal, restricting inspection of certain documents produced to counsel, amounted to a breach of natural justice that justified setting aside the award. The Singapore High Court rejected this argument on the basis that the tribunal had an inherent right to issue such an order, which is ingrained in both the ICC Rules and the Model Law, that it was entirely appropriate to do so, and that it caused no prejudice to the applicant.

The court also rejected an argument that the first respondent had breached its implied duty to arbitrate in good faith. While the court accepted that a duty of good faith will be implied into most or all arbitration agreements, given the inherently cooperative nature of the arbitral process, it rejected an argument that the first respondent had breached this duty by employing what the applicant described as "guerrilla tactics". The court found that there was no evidence of such tactics being employed to undermine the arbitration.

The judge's in-depth discussion and analysis of "attorney eyes only" orders raises points of wider significance for the arbitration community. The decision recognises that such orders are appropriate in circumstances where a tribunal is satisfied that such measures are necessary to protect a party's confidential documents. The "attorney eyes only" orders in this case appear to have contained some safeguards which may reflect good practice for parties or tribunals considering such orders. (*China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101, 26 April 2018.)

## Background

Article 34 of the UNCITRAL Model Law on International Commercial Arbitration provides, in relevant part:

"2. An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

.....

(i) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

....

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

....

(ii) the award is in conflict with the public policy of this State."

Section 24(a) of the International Arbitration Act (IAA) (Cap 143A, 2002 Rev Ed) provides:

"Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if –

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced."

To set aside an award, an applicant must establish:

- Which rule of natural justice was breached.
- How it was breached.
- In what way the breach was connected to the making of the award.
- How the breach prejudiced its rights.

*(Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86 at [29]).*

## **Facts**

The dispute between the parties arose from a contract for the construction of a coal-fired power generation plant located in Guatemala (Project) signed in 2008, between the contractor, China Machine New Energy Corporation (CMNC) and the owner, Jaguar Energy Guatemala LLC (Jaguar).

The contract provided for disputes arising out of the contract to be resolved by ICC arbitration in Singapore. Significantly, the contract also provided for an expedited arbitration, with a requirement for the award to be issued 90 days after the selection of the third arbitrator; or, if the majority of the arbitrators agreed, within a further 90 days.

In 2013, a dispute arose between the parties and Jaguar started the arbitration in January 2014.

## **The arbitration**

Jaguar's case in the arbitration was that CMNC had breached the contract, entitling Jaguar to validly terminated the contract, and that Jaguar was entitled to, amongst other relief, liquidated damages for delay and the costs of completing the Project. CMNC's case was, among other things, that Jaguar was not entitled to liquidated damages for delay because CMNC was entitled to extensions of time.

Although the contract provided for the dispute to be resolved within 90 days after the final member of the tribunal was appointed, the parties agreed to amend this requirement to provide for a hearing which would commence after the expiry of the deadline for the award being delivered.

In May 2014, the parties agreed to a timetable for the arbitration. Despite this, CMNC applied for a variation to the timetable, namely that the main hearing should be brought forward by approximately eight months. CMNC relied on the fact that the parties had agreed to an expedited arbitration. Jaguar opposed CMNC's request on the basis that it was not realistic. The tribunal rejected CMNC's request.

In the event, the arbitration took much longer to complete, with the merits hearing in July 2015 and the award being rendered in November 2015.

## **The attorney's eyes only regime**

Procedural Order No 2 provided for the parties' statements of case to be accompanied by "copies of all documents which the Party concerned relies on and considers essential... and which have not previously been submitted by any Party."

On 13 August 2014, CMNC and Jaguar filed their respective statements of case. Jaguar noted in its pleading, that apart from redacting certain documents and not including witnesses' full addresses, it was withholding production of 13 documentary exhibits. Jaguar claimed that CMNC had engaged in a series of threatening actions against Jaguar and its contractors, and Jaguar had serious concerns, that if CMNC was to discover the identity of Jaguar's contractors and certain other sensitive material, the information could be misused to interfere with the Project or the arbitration. However, Jaguar also offered to provide un-redacted copies of witness statements and withheld documents on an "attorney eyes only" (AEO) basis to CMNC's counsel and any experts retained by them. CMNC indicated that it was unlikely to agree to an AEO disclosure order.

The parties began the document production stage of the proceedings and CMNC demanded immediate production of the withheld documents. Jaguar invited the tribunal to issue an order allowing the parties to produce documents containing sensitive information on an AEO basis, subject to the receiving party's right to challenge such disclosure.

CMNC requested the tribunal to reject Jaguar's request to produce documents on an AEO basis for four reasons:

- An AEO order would be procedurally unfair.
- CMNC would not misuse information.
- Jaguar was inviting the tribunal to pre-judge fiercely disputed matters about CMNC's conduct.
- The concept of AEO disclosure, a feature of US dispute resolution, should not be imported into international arbitration.

The tribunal directed that a two-stage process would apply to the disclosure of the disputed documents. First, the documents would be disclosed to external counsel only. Second, CMNC could apply to the tribunal for certain employees to be given access to the documents that Jaguar had disclosed on an AEO basis, thereby providing a safeguard, which CMNC could resort to if its counsel needed instructions from employees on specific documents for the purpose of conducting its case in the arbitration. It appears that CMNC never applied under the second stage for its employees to be shown the AEO material.

The tribunal did not regard the AEO process as one limited to domestic dispute resolution in the USA, concluding:

"....it is in the experience of each of the tribunal members a process adopted in international arbitration for the purpose of preserving confidential documents disclosed in international arbitration proceedings."

### **The redaction ruling**

After an application by CMNC and a tribunal-convened teleconference with the parties, on 19 October 2014, the tribunal ruled that the AEO regime be lifted with respect to the 12 exhibits and other documents (the "Redaction Ruling"). Jaguar was to provide CMNC with the 12 exhibits in redacted form, and CMNC's personnel were entitled to view those redacted documents. This ruling occurred more than eight months before the main hearing. Eventually, Jaguar produced un-redacted versions of all documents to CMNC.

In its award dated 25 November 2015, the tribunal unanimously found that Jaguar had validly terminated the contract for default by CMNC and allowed Jaguar's claim for damages of more than US\$129 million (the award).

### **Application to set aside the award**

In 2016, CMNC applied to the Singapore courts to set aside the award. The crux of CMNC's case was that the arbitration was tainted by "procedural dysfunction". It argued that the award should be set aside as:

- The award was made in breach of the rules of natural justice, in breach of section 24(a) of the IAA, as the AEO regime deprived CMNC of a reasonable opportunity to present its case.
- The tribunal had breached Article 18 of the Model Law by failing to treat the parties equally and to ensure that CMNC was given a full opportunity of presenting its case.

- Jaguar breached its obligation to arbitrate in good faith, and the tribunal failed to restrain Jaguar from doing so in breach of Art 34(2)(a)(iv) of the Model Law.

CMNC submitted that the imposition of the AEO regime amounted to a breach of its right to natural justice which prejudiced its rights. It argued that the "inappropriate and indiscriminate use of an [AEO order] has the effect of denying a party adequate notice and opportunity to know the evidence against it and to meet that evidence."

Jaguar argued that, under the AEO regime, CMNC was entitled to apply for designated materials to be disclosed to its employees – a point repeatedly reiterated by the tribunal - yet failed to do so. Jaguar submitted that any disadvantage that CMNC suffered due to the AEO regime was due to its own strategic choices and failures, rather than a breach of natural justice. It also argued that even if there was a breach of natural justice, CMNC did not suffer any prejudice due to the breach.

### **The good faith argument**

CMNC contended that parties to an arbitration both bear an implied duty to arbitrate in good faith. It also contended that Jaguar employed "guerrilla tactics" in the arbitration that amounted to a breach of its duty to arbitrate in good faith and accordingly, a breach of the agreed arbitral procedure. Those alleged guerrilla tactics included:

- Seizing the construction area and terminating CMNC's access to an online document platform which the parties shared.
- Seizing documents by securing the eviction of CMNC's employees from the site and detaining them elsewhere by bribing government officials.
- Harassing and interfering with CMNC's potential witnesses before the arbitration.
- Disclosing documents in a disordered and delayed way.

## **Decision**

Kannan Ramesh J rejected all of CMNC's arguments and dismissed its application to set aside the award.

The court considered the general principles regarding the setting aside of an arbitral award for breach of natural justice pursuant to Article 34(2)(ii) of the Model Law and section 24 of the IAA, which are settled law.

The court also noted that "it is also trite that natural justice requires that parties be afforded a reasonable opportunity of presenting their case", which it said also means that it should have an opportunity to respond to the case against it, referring to the *Soh Beng Tee* decision.

In addition, the court explained that Singapore courts adopt a policy of minimal curial intervention which entails that a court "will not intervene merely because it might have resolved the various controversies in play differently" (see *Soh Beng Tee* at paragraph 65). It said that in light of the wide power accorded to a tribunal to conduct an arbitration, a court will exercise its supervisory role over the tribunal's exercise of this power with a "light hand" (see *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd [2015] 3 SLR 154* at paragraph 51). There must be a "radical breach of [the right to be heard] which is 'serious or egregious' (see *ADG and another v ADI and another matter [2014], 3 SLR 481* at paragraph 116, affirmed in *Triulzi* at paragraph 134).

### **The AEO regime**

The court held that the imposition of the AEO regime did not amount to a breach of natural justice.

In setting out its reasons, the court, having considered expert evidence on the issue, made some general observations about AEO orders in international arbitration. It concluded that while AEO orders are not entrenched in Singapore jurisprudence, that is not the same as saying it is not an appropriate order in international arbitration.

In addressing the tribunal's power to impose an AEO order, the court referred to Article 20(7) of the 1998 version of the ICC Rules which states that "[the] Arbitral Tribunal may take measures for protecting trade secrets and confidential information". This language is also mirrored in the second limb of Art 22(3) of the 2012 ICC Rules, which states:

"Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information."

Accordingly, the court found that the tribunal was empowered to impose an AEO order. It observed, in passing, that there is no equivalent provision under the 2015 SIAC Rules, the 2014 LCIA Rules or the 2013 HKIAC Rules.

The court rejected CMNC's contention that the AEO regime significantly undermined its opportunity to present its case. The court referred to the fact that CMNC never applied under the second stage of the regime for its employees to access the AEO designated material, despite the tribunal's repeated reminders, and without good reason.

The court also rejected CMNC's argument that the Redaction Ruling was only a "slight reprieve". The court explained that the Redaction Ruling in fact "cured any prejudice caused by the application of the AEO regime to the 12 exhibits and the Further Documents that were disclosed by Jaguar in redacted form". While the court accepted that Jaguar made unauthorised redactions, CMNC could have sought the appropriate order from the tribunal in respect of those redactions.

The court considered that CMNC did not suffer any prejudice that justified setting aside the award. The thrust of CMNC's complaint was that it did not have sufficient time to review the documents purporting to support Jaguar's claim for costs of completion. However, the court found that that was at least partly due to its own actions.

### **Good Faith**

The court did not accept CMNC's good faith arguments.

Importantly, the court noted that the issue of whether an arbitration agreement includes an implied duty to arbitration in good faith does not appear to have been decided in Singapore before, but referred to a passage in Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014), at pages 1257 – 1259, which states that an arbitration agreement necessarily includes an implied duty to arbitrate in good faith:

"...the positive obligation to participate in the resolution of disputes by arbitration also necessarily includes more general duties to participate in good faith and cooperatively in the arbitral process. This follows both from the nature of the arbitral process and from the general rule of *pacta sunt servanda*."

Therefore, the court concluded that an agreement to arbitrate is an agreement to participate in a process that requires the mutual cooperation of the parties. This is not necessarily implied as it is inherent in the very nature of an arbitration agreement. However, the judgment notes that it was unclear as to whether this duty to cooperate can be assimilated to, or falls under a more general duty of good faith. This matter is not settled under Singapore law. The court concluded at that:

"the answer will turn on the interpretation of the arbitration agreement under the governing law of the same, which will differ between arbitration agreements." (paragraph 196, Judgment)

The court also noted that not all jurisdictions recognise a general duty to perform contractual obligations in good faith, and indeed there does not seem to be such a duty under English law, or under Singapore law. Despite this, the judge held that:

"a duty of 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, given the inherently cooperative nature of the arbitral process." (paragraph 198, Judgment)

The judge proceeded on the basis that Jaguar did have an implied duty to arbitrate in good faith, but that it did not breach that duty. The judgment notes that the academic commentaries that CMNC had brought to its attention on guerrilla tactics indicate that such tactics are employed with the aim of obstructing, delaying, derailing or sabotaging an arbitration. He found no evidence that Jaguar performed any of the alleged acts with the aim of undermining the arbitration. The court added that whilst the academic commentaries suggest that an arbitral award may be set aside on the basis of guerrilla tactics employed by the successful party, none of those commentaries suggested that guerrilla tactics may justify the setting aside of an arbitral award on the ground that they reflect bad faith.

### **Failure to investigate allegations of corruption**

The court also rejected a challenge on public policy grounds arising from the tribunal's failure to investigate allegations of corruption. The court accepted that in certain cases tribunals bear "a duty to raise and enquire, even sua sponte, into the issue of corruption". The judge accepted this, but held that no duty arose in this case because the allegations had no bearing on the issues in the arbitration. Finally, the court did not accept that a breach would per se render the award liable to be set aside on public policy grounds.

## **Comment**

In rejecting CMNC's argument that there had been a breach of natural justice, the Singapore High court has reaffirmed the high threshold that is required to set aside an arbitral award.

Kannan Ramesh J's in-depth discussion and analysis of AEO orders raises points of wider significance for the arbitration community. The decision recognises that AEO orders are appropriate in circumstances where a tribunal is satisfied that such measures are necessary to protect a party's confidential documents. The AEO orders in this case appear to have contained some safeguards, which may reflect good practice for parties or tribunals considering such orders.

The discussion as to the tribunal's duty to investigate corruption is also of wider significance, as is the practical requirement for a connection between the allegations and the matters in dispute in the arbitration.

Finally, the ruling is also significant for its consideration of the duty to arbitrate in good faith. Clearly challenges based on allegations of guerrilla tactics will be hard to make out. The court proceeded on the basis that the parties had implied obligations to arbitrate in good faith. Although it found no breach, this is significant given that the Singapore International Arbitration Act has no provision equivalent to Article 2A (1) of the Model Law which provides that in interpreting the Model Law, "regard is to be had to ...the observance of good faith".

Given that a number of institutions have now adopted expedited procedures, it is of some note that it appears to have been common ground that a reasonable opportunity of presenting a party's case in an expedited arbitration was not going to be the same reasonable opportunity as in a full-length arbitration. The court was evidently sceptical of a submission that a tribunal in an expedited process bore a heightened duty to police the process or that additional vigilance was required regarding due process.

## Case

*China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another [2018] SGHC 101.*

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