

For your (attorney's) eyes only: Singapore court considers protective disclosure orders (and more)

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Singapore's High Court has upheld an award in an arbitration involving an 'attorney-eyes only' disclosure order. The court also refused challenges alleging bad faith, and that the tribunal failed to investigate corruption. The decision is yet another example of the Singapore courts' pro-arbitration stance.

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

Facts

Jaguar engaged CMNC as EPC contractor for a power plant project in Guatemala.

Several years into the project, the parties' relationship broke down. Jaguar complained of delay. CMNC purported to exercise 'step-in rights' to take control of Jaguar's interest in the EPC contract.² Jaguar then purported to terminate the EPC contract due to CMNC's delay.

Jaguar commenced a Singapore-seated ICC arbitration under fast-track arbitration provisions in the EPC contract.³ Jaguar sought liquidated damages for delay and the cost of completing the project. CMNC raised various defences and counterclaims, including that CMNC had been entitled to extensions of time. It also argued that Jaguar was unable to terminate the EPC contract after CMNC had exercised its step-in rights.

Tensions between the parties ran high. After the EPC contract's termination, a violent confrontation between workers and guards occurred at the project site. CMNC alleged that (among other things) Jaguar had harassed and intimidated potential witnesses; lodged motions in the Guatemalan court to interfere with the preparation of CMNC's arbitration filings; and seized computers containing relevant project documents.

During the arbitration, Jaguar refused to disclose certain documents to CMNC personnel. Jaguar cited

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² As part of the parties' contractual arrangements, CMNC agreed to finance the project by allowing Jaguar to defer project milestone payments. In return, Jaguar granted CMNC security over various assets, including Jaguar's interest in the EPC contract.

³ Under the EPC contract's arbitration agreement, the tribunal had to issue an award within 90 days of the third arbitrator's selection. A majority of the tribunal could extend this deadline by a further 90 days.

concerns that CMNC could use sensitive information in the documents to interfere with the arbitration or the project.

The tribunal made an 'attorney-eyes only' disclosure order. This permitted Jaguar to disclose certain documents to CMNC's counsel, on terms that prohibited them from sharing the documents with CMNC's employees. The order allowed CMNC to apply for disclosure to specified CMNC employees on confidential terms, so that they could give instructions to counsel. CMNC objected repeatedly to the attorney-eyes only regime. The regime was amended several times, and was ultimately lifted about three months before the main merits hearing (allowing unredacted documents to be disclosed to a designated list of CMNC employees).

Just days before the merits hearing, corruption allegations emerged. A report by a Guatemalan body⁴ implicated a Jaguar representative in bribery allegations relating to the CMNC dispute. Following the allegations, Jaguar withdrew part of its damages claim (which included a claim for payments made to the recipient of the alleged bribes).

Ultimately, the tribunal found for Jaguar on most issues. It ordered CMNC to pay Jaguar almost US\$ 130 million, plus interest and costs. CMNC applied to set aside the award.

Issues

CMNC sought set-aside on various grounds. In particular,⁵ it argued that:

- i. the attorney-eyes only disclosure order was a breach of the rules of natural justice and the agreed arbitral procedure;
- ii. Jaguar's 'guerrilla tactics' breached its duty to arbitrate in good faith (breaching the parties' agreed arbitral procedure), and also justified set-aside on public policy grounds; and
- iii. the tribunal breached its duty to investigate corruption, which also justified set-aside on public policy grounds.

Decision

The court upheld the award.

The attorney-eyes only regime did not breach natural justice or the parties' agreed arbitral procedure

In summary, the court concluded that:

- i. The tribunal had the power to make the attorney-eyes only order. This arose under the ICC Rules⁶ and the tribunal's inherent case management powers.⁷ Even though attorney-eyes only orders are rare in international arbitration, they are not unheard of.
- ii. The tribunal was obliged to respect the expedited timetable agreed by the parties.⁸ This was a vital point, because CMNC's core complaint was that the attorney-eyes only regime had deprived it of sufficient time to review Jaguar's documents. The court concluded that the parties themselves were primarily responsible for agreeing a timetable that ensured due process. The tribunal had no 'heightened duty' to police an expedited arbitration.

⁴ The International Commission against Impunity in Guatemala, an international body responsible for investigating corruption in Guatemala.

⁵ CMNC also argued that the tribunal failed to consider arguments relating to the deferred payment and security arrangements for the project. This is not considered in this alert.

⁶ Article 20(7) of the 1998 ICC Rules of Arbitration (the rules applicable under the arbitration clause in the EPC contract). The 2012 ICC Rules of Arbitration have a similar provision (Article 22(3)).

⁷ Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration.

⁸ See footnote 3 above. The parties agreed to extend these deadlines, but CMNC itself stressed that the arbitration should still be completed as soon as possible.

- iii. The tribunal's *preliminary* view of the risks of disclosure was sufficient to make the attorney-eyes only order. The tribunal, after reviewing Jaguar's witness evidence, had expressed 'serious concern' that CMNC might misuse disclosed documents. The tribunal did not need – and it would have been premature – to reach a 'concluded view' about this risk. In any event, the court found that legitimate confidentiality concerns did likely exist. The court noted that it should only intervene if a 'material breach of procedure' had occurred. No such breach had occurred here.
- iv. The attorney-eyes only order contained a safeguard to protect CMNC's interest. This allowed CMNC to apply for attorney-eyes only documents to be disclosed to designated employees. The tribunal repeatedly reminded CMNC about this, but CMNC never applied.
- v. CMNC agreed to a new arbitration timetable *after* the attorney-eyes only regime was in place. This timetable should have accommodated any delay that CMNC anticipated due to the attorney-eyes only regime. After the new timetable was agreed, CMNC did not apply for any significant further amendments, and its counsel assured the tribunal that they would abide by it.
- vi. The attorney-eyes only regime did not otherwise undermine CMNC's opportunity to present its case or right to equal treatment, or cause prejudice that justified set-aside. The court also concluded that CMNC itself was at least partly responsible for any delays in reviewing disclosure.

Jaguar's alleged 'guerrilla tactics' were not a breach of good faith or public policy

The court declined to decide whether parties to Singapore law-governed arbitration agreements have a duty to arbitrate in good faith. It noted that the Singapore courts have not decided this issue before. Although Singapore law does not recognise a general duty to perform contracts in good faith,⁹ the court considered that a duty of good faith might be implied into an arbitration agreement as a matter of contractual interpretation. It also observed that 'while it seems clear that an arbitration agreement includes a duty to cooperate in the arbitral process, it is not clear if this is the same as or falls under a duty of good faith'.¹⁰ Ultimately, the court proceeded on the basis that Jaguar did have a duty to arbitrate in good faith, without deciding the point.

The court held that, even if there was a duty of good faith, Jaguar did not use 'guerrilla tactics' in breach of that duty. There was also no breach of public policy for similar reasons.

The court considered that 'guerrilla tactics' require the use of illegal or unethical means and an intention to obstruct the arbitration. It found no evidence that Jaguar had that intention. The alleged 'guerrilla tactics'¹¹ all occurred before or at an early stage of the arbitration. During the arbitration, CMNC made no submission to the tribunal alleging bad faith on Jaguar's part. This suggested that CMNC did not suspect bad faith at the time. In addition, some of Jaguar's actions were justified under the EPC contract, and during the arbitration Jaguar had assisted CMNC with certain disclosure issues.

The tribunal did not breach any duty to investigate corruption

The court accepted that in appropriate cases a tribunal has a duty to investigate corruption allegations. However, it found that no duty arose here because the corruption allegations had no bearing on the issues in the arbitration. Even if the tribunal had breached its duty, the award would not be set aside unless upholding the award risked legitimising corrupt activities.

Comment

The Singapore courts are generally reluctant to interfere with arbitral awards, and exercise their supervisory jurisdiction with a 'light hand'.¹² This decision reinforces that approach, and confirms that attorney-eyes only orders are a legitimate feature of Singapore-seated arbitration.

⁹ See *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR 518 at [60], and *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [44].

¹⁰ At [196] and [199], considering *The One Suites (ibid.)* at [44].

¹¹ According to CMNC, these included: (i) seizing the construction area and terminating CMNC's access to a shared project document platform; (ii) seizing documents by securing the eviction of CMNC's employees from the site and detaining them elsewhere (by bribing government officials); (iii) harassing and interfering with CMNC's potential witnesses; and (iv) disclosing documents in a disordered and delayed way.

¹² See also *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114

In upholding the award, the court was particularly influenced by the parties' agreement to arbitrate within a very tight timeframe. It viewed CMNC's due process complaints in this context. Parties considering expedited arbitration clauses should bear these potential consequences in mind.

The decision also highlights the importance of attempting to resolve procedural issues during, not after, the arbitration. Where (as here) a tribunal has implemented specific procedural safeguards, a party that chooses not to use those safeguards is likely to find set-aside an uphill struggle.

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