



# CASE SUMMARIES

## China Machine New Energy Corp v Jaguar Energy Guatemala LLC and anor [2020] SGCA 12

### SUPREME COURT OF SINGAPORE

**28 February 2020**

#### **Case summary**

***China Machine New Energy Corp v Jaguar Energy Guatemala LLC and anor [2020] SGCA 12***  
**Civil Appeal No 94 of 2018**

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#### **Decision of the Court of Appeal (delivered by Sundaresh Menon CJ):**

Outcome: CoA dismisses appeal against High Court's decision declining to set aside arbitral award on grounds of breach of natural justice.

#### **Introduction**

1 The appellant, China Machine New Energy Corporation (“CMNC”), sought to set aside an arbitral award (“the Award”) on the basis that it was obtained in breach of natural justice. CMNC’s case was that the arbitral tribunal’s (“the Tribunal”) mismanagement of the arbitral proceedings – in particular, its procedural decisions relating to the document production process and the submission of expert evidence – resulted in its being denied a reasonable opportunity of presenting its case.

## **Background**

2 The parties went to arbitration over disputes relating to the construction of a power generation plant in Guatemala (“the Plant”). The appellant, CMNC, was the contractor, and the respondents, Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd (collectively, “Jaguar”), were the owners of the Plant. The parties’ relationship was governed by an Engineering, Procurement and Construction Contract (“the EPC Contract”), under which CMNC was to construct the Plant for an approximate sum of US\$450m. In December 2013, after the works fell into delay, Jaguar terminated the EPC Contract, and engaged other contractors to complete the works.

3 In January 2014, Jaguar commenced arbitral proceedings against CMNC (“the Arbitration”) under the EPC Contract, and claimed, amongst other reliefs, the cost of completing the Plant (“the ETC Claim”). The substantive dispute between the parties centred on the quantum of the ETC Claim, and the parties’ preparations for the Arbitration focused on the production of contracts, invoices and other supporting documents evidencing the costs of completion, as well as the preparation of expert reports on the issue of quantum.

4 Broadly speaking, the procedural issues raised in relation to the production of documents fell into three categories. The first concerned restrictions placed on the disclosure of sensitive documents, which, CMNC submitted, had severely hindered its ability to assess and therefore address Jaguar’s case on the quantum of Jaguar’s ETC Claim. In this regard, Jaguar had sought

to withhold disclosure of documents containing information identifying its post-termination contractors on the basis that CMNC might misuse that information to interfere with the ongoing work to complete the Plant. In September 2014, the Tribunal ordered that the sensitive documents be produced on an “attorneys’ eyes only” basis (“the AEO Order”), meaning that sensitive documents would only be disclosed to CMNC’s external counsel and expert witnesses, and not to its employees (subject to CMNC’s right to apply for disclosure). This was superseded less than a month later by the Redaction Ruling, under which Jaguar would disclose the sensitive documents to CMNC’s employees, albeit with any information identifying Jaguar’s contractors redacted. The Redaction Ruling was itself subsequently modified by a procedural order relieving Jaguar of the obligation to redact and disclose (to CMNC’s employees) documents pertaining to claims with a value of less than US\$100,000. These restrictions (the AEO Order, as modified by the Redaction Ruling and the subsequent procedural order) were subsequently lifted in March 2015; sensitive documents were thereafter disclosed to CMNC’s employees without restriction.

5 The second concerned CMNC’s access to project documents documenting the work CMNC had completed before Jaguar’s termination of the EPC Contract (“the Construction Documents”), which was necessary so that CMNC might value the completed work, and thereby assess and challenge CMNC’s claim for the cost of completing the work that remained uncompleted. According to CMNC, it lost access to these documents after it was forced to leave the work site following the termination of the EPC Contract.

6 The third concerned Jaguar’s rolling production of documents evidencing the cost of completion (“the Costs Documents”). Over the course of the Arbitration, Jaguar produced four tranches of documents corresponding to four updates to the quantum of its ETC Claim. The first tranche of documents was produced in February 2015, and the fourth and final tranche was produced on 5 June 2015. In the present proceedings, CMNC challenged both the propriety of allowing Jaguar to continually produce the documents, as well as the manner in which they were produced.

On the former point, CMNC contended that the Tribunal's failure to put an earlier stop to the continual updates to the quantum of Jaguar's ETC Claim resulted in CMNC not having sufficient time to prepare its response. On the latter point, CMNC argued that its difficulties were compounded by the disorganised and haphazard manner in which the documents were produced.

7 According to CMNC, the Tribunal's mismanagement of the Arbitration (in the three aforementioned aspects) made it impossible for it to promptly prepare and file critical lay and expert evidence addressing the quantum of the ETC Claim. In particular, these difficulties meant that a key responsive expert report prepared by CMNC's quantum expert ("the Gurnham Responsive Report") was filed out of time, and was therefore not properly considered by the Tribunal, in breach of CMNC's right to be heard under Art 18 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), rendering the Award liable to be set aside under, amongst others, Art 34(2)(a)(ii) of the Model Law and s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA").

8 The High Court judge ("the Judge") dismissed CMNC's application to set aside the Award. The Judge rejected CMNC's submission that the Tribunal's management of the process of document disclosure was a breach of CMNC's right to be heard, and held, in any case, that CMNC did not suffer any prejudice that justified setting aside the Award.

### **The court's decision**

9 The Court of Appeal dismissed CMNC's appeal, and declined to set aside the Award on grounds of breach of natural justice.

10 The Court observed that the right to be heard – which refers to each party's right to present its case and respond to the case against it – was a fundamental rule of natural justice enshrined in Art 18 of the Model Law. However, the Art 18 right to a "full opportunity" of presenting one's case was not an unlimited one, and was impliedly limited by considerations of reasonableness

and fairness. What constituted a “full opportunity” was a contextual inquiry to be undertaken within the specific context of the particular facts and circumstances of each case. The proper approach for the court to take was to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. In undertaking this exercise, the court must put itself in the shoes of the tribunal, and this meant that (i) the tribunal’s decisions could only be assessed by reference to what was known to and brought to the attention of the tribunal at the material time, and (ii) the court would accord a margin of deference to the tribunal in matters of procedure and would not intervene simply because it might have done things differently (at **[104]**).

11 The Court dismissed CMNC’s contention that the Tribunal’s management of the disclosure of sensitive documents was so unfair as to constitute a breach of natural justice. The imposition of the AEO Order was not without basis – on the evidence that had been placed before it, the Tribunal’s conclusion that the possibility of misuse of the sensitive documents gave rise to “serious concern” was an entirely reasonable one. The fact that the AEO Order adversely affected CMNC’s ability to prepare its case was not fatal to its legality – the AEO Order was intended by the Tribunal to strike a balance between Jaguar’s interest in confidentiality and CMNC’s interest in access for the preparation of its case, and necessarily represented a compromise between Jaguar’s and CMNC’s interests. The Court further noted that, in any case, any unfairness occasioned by the AEO Order was substantially mitigated following the Redaction Ruling, under which redacted versions of the sensitive documents were disclosed to CMNC’s employees (at **[111]**, **[113]** and **[116]**).

12 The Court did not accept CMNC’s submission that it had been prejudiced by the Tribunal’s failure to order Jaguar to disclose the Construction Documents. First, CMNC never requested the production of the Construction Documents for the purpose of preparing its case. Second, CMNC’s own filings in the Arbitration

suggested that it had been perfectly able to assess the value of its pre-termination work with reasonable accuracy (at **[124]** and **[125]**).

13 The Court rejected CMNC's contention that the Tribunal had denied it its right to be heard in relation to its belated submission of the Gurnham Responsive Report. There was no basis to impeach the Tribunal's decision to allow Jaguar to continue producing the Costs Documents until 5 June 2015; the Tribunal had accounted for CMNC's interest in addressing those documents by granting it an extension of time for the filing of the Gurnham Responsive Report to 18 June 2015 in the exact terms sought by CMNC in its request for relief. The Tribunal's decision not to subsequently grant CMNC a second extension of time was not unfair or unreasonable; there was nothing unusual about the volume of the final tranche of documents produced on 5 June 2015, and even if there were, CMNC ought to have raised its request for an extension immediately after the documents were produced on 5 June 2015, but did not do so until some twelve days later, on the eve of the deadline (at **[131]**, **[132]**, **[134]**, **[140]** and **[141]**).

14 The Court considered that the Tribunal's direction that Jaguar *need not* address the material belatedly filed by CMNC should be distinguished from a direction that Jaguar *must not* do so. The former direction left it open to Jaguar to deal with the material to the extent it was able, and left it open to the Tribunal, in that light, to consider the material and give it such weight as it deems appropriate. In any case, even if the Tribunal's direction could be read as a *de facto* exclusion of the material belatedly filed by CMNC, such an exclusion was well within the competence of the Tribunal to order, and was not unfair or unreasonable in the circumstances (at **[148]**, **[149]** and **[151]**).

15 The Court found CMNC's complaint that the Tribunal had failed to consider the allegedly disorganised and haphazard production of the Costs Documents in its management of the Arbitration to be without basis. In assessing whether the Tribunal had acted unfairly, it was of crucial importance that the court

examine what exactly the Tribunal had been told about the alleged difficulties that the complaining party faced. In this regard, CMNC did not mention Jaguar's allegedly disorganised and haphazard production of documents in its requests to the Tribunal for extensions of time for the filing of the Gurnham Responsive Report. It was not until after the extended deadlines had lapsed that CMNC informed the Tribunal of these alleged difficulties in its application to belatedly admit the Gurnham Responsive Report (at **[159]**).

16 The Court rejected CMNC's submission that the cumulative effect of the Tribunal's management of the Arbitration resulted in the Arbitration becoming hopelessly and irretrievably lost. CMNC never said that it considered the Arbitration irretrievably lost (or, alternatively, that the scheduled evidentiary hearing could not proceed). On the contrary, CMNC had, by its continued engagement as a party in the Arbitration, consistently expressed its intention to forge ahead with the main evidentiary hearing. If indeed CMNC had believed that proceeding with the hearing in July 2015 was impossible, it was incumbent on CMNC to bring home its concern to the Tribunal. Not only was this not done, CMNC persisted in maintaining that it wished to press on with the July 2015 hearing. This put the lie to CMNC's submission that the Tribunal had conducted the Arbitration in breach of its due process rights (at **[165]**, **[171]** and **[172]**).

*This summary is provided to assist in the understanding of the Court's judgment. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's judgment.*