

Singapore High Court Upholds Multi-Million Dollar ICC Award Relating To A Power Plant Project In Guatemala

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On 26 April 2018, the Singapore High Court ("**Court**"), in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] - SGHC 101, has upheld an ICC award of a truly international nature. The case raised intriguing procedural questions in international arbitration: The impact of an "*attorney-eyes-only order*" ("**AEO Order**"), handling allegations of corruption and the possible use of "*guerilla tactics*".

Two Guatemala-based companies invited bids for the erection of a coal-fired power plant near Puerto Quetzal, Guatemala in October 2007. One bid – and ultimately the successful one – was submitted by AEI Services LLC, based in Houston, Texas. It manages and controls its subsidiaries, Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd (collectively referred to as "**AEI**"). AEI entered into a contract for the engineering, procurement and construction of the power plant ("**EPC Contract**") with Chinese construction company CMNC for an approximate amount of USD 450 million to be paid progressively in milestone payments. The EPC Contract provided for expedited ICC arbitration seated in Singapore applying New York substantive law.

The financial structure of the project envisaged external funding by a syndicated loan facility. However, AEI and CMNC later agreed to a deferred payment security agreement ("**DSPA**"), pursuant to which AEI was to issue debit notes secured by security interests over assets to CMNC instead of making milestone payments. On 29 March 2010, AEI authorized CMNC to commence works under the EPC Contract.

In 2013, AEI complained about delays while CMNC alleged that security interests were neither evidenced nor perfected pursuant to the DSPA. Tensions between the parties increased and on 29 November 2013, AEI notified CMNC that it considered terminating the EPC Contract. Two e-mails by CMNC followed, containing threats to AEI affiliates that would later be subject to review by an arbitral tribunal and the Court. On 11 December 2013, AEI erected a fence around the work site. It further stationed armed guards at the premises and prevented CMNC's employees from entering. Only four days later, on 15 December 2013, the dispute between the parties escalated. In a violent confrontation between CMNC's employees and the stationed guards, the latter fired plastic pellets, used pepper spray and wooden sticks.

Between 19 and 24 January 2014, CMNC claimed, AEI harassed and intimidated certain individuals

that would later serve as witnesses in the arbitration (the “**Arbitration**”). AEI claimed that it had validly terminated the EPC Contract and was entitled to liquidated damages. CMNC filed a counter-claim, alleging that it had exercised so-called “step-in rights” under the DSPA, leaving AEI with no right to termination and seeking payment of around USD 900 million. The arbitral tribunal conducted hearings in London, Singapore, Toronto and Hong Kong. During the Arbitration, the arbitral tribunal issued an AEO Order, restricting review of certain documents to the parties’ counsel. The arbitral award found AEI to have validly terminated the EPC Contract. It granted USD 129.4 million in liquidated damages plus interest and costs to AEI.

CMNC sought to have the arbitral award set aside in Singapore as the seat of the Arbitration on various grounds: (i) a breach of rules of natural justice, (ii) a breach of the arbitration agreement, particularly by unequal treatment, a lack of opportunity to present its case and failure to arbitrate in good faith, (iii) a breach of rules of Singaporean public policy in view of employed guerilla tactics and (iv) the arbitral tribunal’s failure to investigate allegations of corruption. The Court simplified its reasoning by distinguishing between what it termed the “**Due Process Ground**”, the “**Defective Arbitral Procedure Ground**” and the “**Public Policy and Corruption Ground**”.

As regards the Due Process Ground, CMNC argued that the use of the AEO Order denied it the opportunity to know the evidence against it and to meet that evidence, breaching its right to natural justice. The Court rejected CMNC’s argument. It found that determining the scope of natural justice in each case would depend largely on the arbitration agreement. In view of the expedited nature of the Arbitration, the Court ruled that the arbitral tribunal was to give effect to such arbitration agreement despite the scale and intricacy of the dispute. Thereby, the Court predominantly highlights the importance of far-sighted drafting of arbitration agreements, strengthening party autonomy: the explicit parameters of such arbitration agreements may implicitly impact the threshold for a breach of natural justice.

As regards the Defective Arbitral Procedure Ground, the Court dwelled on a possible duty to arbitrate in good faith. The Court highlighted that no Singaporean court has yet decided the matter. However, neither did the Court, ruling that, in any case, AEI did not breach such duty and a decision was thus not necessary. Nevertheless, the Court deemed it “*clear that an arbitration agreement includes a duty to cooperate in the arbitral process*” and opined that “*it may be that most or all arbitration agreements include a duty of good faith*”.

At the same time, the Court touched upon the use of “*guerilla tactics*” in international arbitration, a novel issue in Singaporean jurisprudence. CMNC argued that AEI’s conduct between 19 and 24 January 2014, which predated the arbitration, constituted such “*guerilla tactics*”. These, it argued, (i) reflect bad faith, (ii) amounting to a breach of the duty to arbitrate in good faith and thus finally (iii) constituting a breach of the agreed arbitral procedure. The latter link is crucial and the Court described it as possessing “*forensic attraction*”. However, the Court did not follow CMNC’s argument. In relying upon commentaries, the Court stressed that “*guerilla tactics*” refer to the “*use of illegal or unethical means with the aim of obstructing, delaying, derailing or sabotaging an arbitration*”. It ruled that such conduct was not at hand. It noted, however, that conduct predating an arbitration may amount to a breach of the duty to arbitrate in good faith. It follows that certain conduct may affect the enforcement stage of an arbitration, even if it occurred prior to the commencement of such. The Court appears to view the arbitration agreement as providing an underlying protective notion towards the parties’ choice for arbitration and the subsequent arbitral process. Such “pre-arbitration safeguard” is a powerful derivative of party autonomy, capable of balancing certain misconduct by a party aimed at sabotaging the other party’s recourse to legal relief.

As regards the Public Policy and Corruption Ground, the Court held that the threshold for a public policy violation “*would only be crossed if upholding the award would ‘shock the conscience’, or would*

be 'clearly injurious to the public good...wholly offensive to the ordinary reasonable and fully informed member of the public', or would violate 'the forum's most basic notion of morality and justice' ".

As regards corruption, the Court provided a broader analysis. It held that "*in appropriate cases, an arbitral tribunal would be required to investigate allegations of corruption*". However, certain requirements must be fulfilled for an omitted investigation of corruption to be contrary to public policy: First, there must be a nexus between the allegations of corruption and the issues under consideration in the arbitration. The allegations must be relevant to the claims in dispute. An arbitral tribunal does not investigate corruption as an end in itself. Second, the breach of the duty to investigate must carry "*the risk that upholding the award that is subsequently issued may legitimize the corrupt activities*". On this basis, the Court rejected the argument of a public policy violation. It relied on the arbitral tribunal's (factual) finding that no nexus between the allegations of corruption and the claim in the arbitration existed, stating that such factual finding was not subject to appeal. The approach is in line with the Court's (limited) mandate at the enforcement stage and contributes to the efficiency of the proceedings.

The ruling by the Singapore High Court touches on myriad contentious issues in international arbitration: An AEO Order, handling allegations of corruption and the possible use of "*guerilla tactics*". First, the reasoning is clear evidence of the parties' responsibility in concluding an arbitration agreement. It gives effect to their autonomy and that of arbitral tribunals empowered by the will of the parties, adopting an approach of minimal intervention and ensuring utmost efficiency. Second, the ruling confirms the power of an arbitral tribunal to make AEO Orders in arbitrations seated in Singapore. Such AEO Orders are still a rare occurrence in international arbitration. Third, there exists a duty to arbitrate in good faith. Conduct contrary to such duty may even – albeit on a very narrow basis – lead to an arbitral award being set aside. Fourth, public policy remains a concept that may only cause the setting aside of an arbitral award in highly exceptional circumstances. Tribunals should be alert to allegations of corruption and apply a two-prong test. Only such test may then, if the requirements are fulfilled, lead a tribunal to investigate further.