

DUE PROCESS IN INTERNATIONAL ARBITRATION Singapore and Malaysia

国际仲裁之正当程序

Swee Im TAN



SINGAPORE 新加坡

[2020] 1 SLR

SINGAPORE LAW REPORTS

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**China Machine New Energy Corp
v
Jaguar Energy Guatemala LLC and another**

[2020] SGCA 12

With thanks to
Daniel Ang Wei En
LL.M. Candidate, University of Melbourne
Year 4, LL.B. (Hons.), National University of Singapore

Document Production 文件提交

- Contract - Jaguar (owner) and China Machine New Energy Corporation (“CMNC”) (contractor) entered into an EPC contract to build a power generation plant in Guatemala
- Arbitration clause - seated in Singapore / ICC Rules (1998)
- Agreed to “expedited arbitration” - strict compliance waived but arbitration to be conducted expeditiously
- Due to project delays owner terminated the EPC Contract and engaged replacement contractors to complete
- Valid termination – quantum of cost of completion

Issues 议题

- CMNC could not access pre-termination project documents after being forced to leave the work site
CMNC在被迫离场以后无法取得有关项目终止前的文件
- Jaguar did not want to disclose documents identifying its replacement contractors and its parent company's corporate information – CMNC might use the information to interfere with completion
Jaguar不愿披露其替代承建商之身份及其母公司信息 – CMNC有可能会将这些信息用于干涉完工

Orders 指令

- AEO Regime - “Attorneys’ Eyes Only” 仅限于律师过目
 - 1st stage: disclosed to CMNC’s external counsel and expert witnesses but not CMNC’s employees
 - 2nd stage: CMNC to apply to the Tribunal for disclosure of specific documents to CMNC’s employees.
- Redaction Ruling - disclose to CMNC’s employees while redacting the replacement contractors’ names 纂辑指令(在文件上除去替代承建商名字)
 - Small Claims Exception: Later, claims valued less than US\$100k were subject to the AEO Regime (other claims had to be redacted) These requirements were eventually lifted

Orders 指令

- **Costs of completion 完工成本:**

- Jaguar produced documents evidencing the costs of project completion on a rolling basis

Jaguar以滚动不断的方式提交文件证明项目完工的成本

- CMNC later complained it had insufficient time to prepare its case, because the production was late, disorganized and haphazard

CMNC后来抱怨其没有足够的时间准备提案，因为Jaguar延误提交文件，而提交的文件又零零散散和杂乱无章

Court of Appeal 上诉法院

- **AEO Regime: reasonable order for the Tribunal to make**
仅限于律师过目：是合理的指令
 - rightly balanced hindrances to CMNC's case preparation against the risk of CMNC misusing disclosed information
 - 2nd stage (applying for disclosure) was not onerous, and not invoked at all
- **Redaction Ruling: subsequently mitigated any prior unfairness to CMNC**
纂辑指令(在文件上除去替代承建商名字)：随后缓解之前对CMNC的不公平对待
 - CMNC had expressly agreed to the redaction
 - CMNC's complaint about Jaguar's over-redaction was brought to the Tribunal only much later
 - Small Claims Exception - CMNC had initially agreed to non-disclosure, but documents for claims amounting to most of Jaguar's total claim value were ultimately disclosed to CMNC's employees

Court of Appeal 上诉法院

- Construction / pre termination documents

有关项目终止前的文件

- CMNC never requested
- CMNC's own filings suggested that it did not need

- Costs documents

有关完工成本的文件

- CMNC agreed to the rolling nature of document production
- reasonable for Tribunal to balance Jaguar's interest in presenting supporting material, against CMNC's reasonable opportunity to defend
- reasonable for Tribunal to refuse further extensions of time as arbitration had to be expedited and it was requested perilously close to the evidentiary hearings
- CMNC itself had asked to bring forward the evidentiary hearings and complained only after CMNC had already missed its deadlines

Court of Appeal 上诉法院

- Late submission of material 有关文件之提交延误
 - Tribunal's direction that Jaguar need not to address CMNC's material submitted late did not mean that CMNC's evidence was excluded – the Tribunal could still subsequently deal with the evidence
 - other reports were rightly excluded as they were submitted only 2 weeks before hearings commenced
 - CMNC did not seek Tribunal's relief for Jaguar's disorganized document production and only informed Tribunal long after the extended deadlines had lapsed

Right to be Heard 倾述权

- Model Law / Art 18 right to a “full opportunity” of presenting one’s case is **not unlimited** – impliedly limited by considerations of reasonableness and fairness
- “Full opportunity” is **context specific** - overarching inquiry is whether the proceedings were conducted in a fair manner; what tribunal did falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done

Right to be Heard 倾述权

- In undertaking this exercise, the court must put itself in the shoes of the tribunal:
 - the tribunal's decisions can only be assessed by reference to what was **known to the tribunal at the time**,
 - it follows from this that the alleged breach of natural justice must have been **brought to the attention of the tribunal** at the material time
 - court will accord a margin of deference to the tribunal in matters of procedure and will not intervene simply because it might have done things differently

CA's Telling Remarks 评论

- CMNC's conduct in the proceedings contradicted its subsequent contention that the arbitration was irretrievably lost and doomed
- CMNC never said that the hearings could not go continue as scheduled
- Asserting that the Tribunal acted in material breach of natural justice was a very serious charge. So, a party cannot hedge against an adverse result by
 - (1) acting as if it were content to proceed during the arbitration, only to
 - (2) subsequently challenge the award if it is adverse to it

CA's Telling Remarks 评论

- At the very least, the complainant should have request to suspend the proceedings until the alleged breach has been remedied
- CMNC's continued participation evinced its consent to forge ahead with the main evidentiary hearing, notwithstanding the difficulties

**** Don't Wait Until it is Too Late ****

不要等到来不及了才提出来

MALAYSIA 马来西亚

[2019] 6 MLJ

Obnet Sdn Bhd v Telekom Malaysia Bhd
(Harmindar Singh JCA)

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Obnet Sdn Bhd v Telekom Malaysia Bhd

With thanks to

Yu Jian Woon

BPC Candidate, King's College London
(with the Inns of Court College of Advocacy)

Document Production 文件提交

- Obnet was appointed to provide high speed broadband network for state government of Selangor (“SELNET”)
Obnet被委托为州政府提供高速宽带网络
- Obnet appointed TM to design and build a network infrastructure
Obnet委任TM设计和构建宽屏设施
- Obnet filed a suit against the state government of Selangor, which was eventually settled Obnet对州政府提出法律诉讼，双方最终和解
- Settlement Agreement agreed 双方达成和解协议
- Consent judgement entered providing that terms of Settlement Agreement shall remain confidential 双方一致认同的诉讼裁决包含了和解协议保密条约
- Obnet commenced arbitration against TM, and TM sought discovery of the terms of the Settlement Agreement Obnet向TM启动仲裁，TM要求Obnet披露和解协议的条约

Orders 指令

- TM applied for discovery of the settlement agreement – they sought to ascertain whether Obnet was already compensated by the state government for the contested claims TM要求Obnet披露和解协议的条约，为求确认Obnet向其提出的索赔是否得到了州政府的赔偿
- Arbitrator refused TM’s application for discovery of the settlement agreement on the basis of confidentiality 仲裁员基于保密原则拒绝了TM的要求
- The settlement and consent judgment provided that the settlement shall be confidential and not to be disclosed to any third party without the consent of either party 和解协议保有的保密条文，未经双方同意皆不可向第三方透露

High Court 高等法院

AT THE HIGH COURT

[7] After hearing arguments of the parties, the High Court ordered discovery of the settlement agreement on, inter alia, the following grounds:

- (a) confidentiality is not the determinative factor in a discovery application;
- (b) the proper test that should have been adopted by the arbitral tribunal was whether the settlement agreement was necessary for the fair disposal of the arbitration proceedings; and
- (c) The High Court had the jurisdiction to order discovery of the settlement agreement pursuant to s 11 of the AA 2005 notwithstanding the presence of the consent judgement.

High Court 高等法院

[8] The learned judge also ordered special measures to preserve the confidentiality of the settlement agreement as follows:

- (a) the settlement agreement is to be disclosed in the arbitration proceedings only and it is to be redacted by the learned arbitrator as he deems fit, before being disclosed to TM;
- (b) TM is not allowed to make copies of the settlement agreement; and
- (c) TM is ordered to give an undertaking that it would not disclose any information contained in the settlement agreement to any third party.

Court of Appeal 上诉法院

- Court of Appeal set aside the High Court's order for discovery
- High Court is bound by the findings of fact which led to the refusal of discovery by the arbitrator

Confidentiality 保密性

[12] So how did the learned judge deal with this issue? The learned judge accepted the position on confidentiality as advanced by the English cases of *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 321 (Ch) and *Science Research Council v Nasse* [1979] 3 All ER 673 and came to the following view at para 18:

18. It will be seen therefore that the general principles of discovery are not displaced by the mere fact that a document that is sought to be discovered is subject to a duty of confidentiality. The fact a document is subject to confidentiality obligations, however, may be validly taken into account in determining whether or not the judicial discretion ought to be exercised in allowing discovery of the document.

Confidentiality 保密性

[13] In our view, the learned judge was quite right to take that position. It is settled law that confidentiality itself is not a ground to resist discovery of a document. Leaving aside public interest privilege and legal professional privilege which are not relevant to the present proceedings, if the document is necessary for the fair disposal of the proceedings or is required by the demands of justice, discovery can be ordered notwithstanding confidentiality. However, in the exercise of discretion to order discovery, regard must be taken of the fact that disclosure of confidential documents may involve a breach of confidence (see *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1973] 2 All ER 1169; *Science Research Council v Nasse*; *BL Cars Ltd (formerly Leyland Cars) v Vyas* [1979] 3 All ER 673; *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589).

Confidentiality 保密性

[14] We also do not think that the argument by learned counsel for Obnet, that to order discovery would be a collateral attack on the consent judgment, had any merit. We consider it implicit in the consent judgment that a court of law or an arbitral tribunal could order disclosure if warranted by the demands of justice. That this must be the case is due to the fact that there was no total prohibition in the disclosure of the settlement agreement. It could be disclosed with the consent of the parties. In any case, the consent order could not preclude the court from ordering disclosure as the court has an inherent power to prevent injustice (see *Law Mun & Ors v Chua Lai Seng & Ors* [1984] 2 MLJ 328). So disclosure through a court order was permissible in this case.

Right to be Heard 倾诉权

- Greater flexibility must be conferred to procedural matters in arbitration **even if such flexibility comes at the expense of parties' fair opportunity to be heard** and to present their case
- Courts must not treat a discovery application as an appeal towards an arbitrator's decision. Courts must adopt minimal intervention in arbitration proceedings, so as 'to support the arbitral process' and not 'to exercise some kind of supervisory role over arbitration proceedings.'

Right to be Heard 倾诉权

[25] It should also not be overlooked that, in many instances, arbitration proceedings are undertaken by arbitrators who are not legally trained and therefore greater flexibility rather than rigidity to procedural matters is required barring the one fundamental principle that parties in the arbitral process must be given a fair opportunity of being heard and presenting their case.

- Power afforded to courts under s11 (power to grant interim measures e.g. discovery of document) must be used to ‘support and facilitate the arbitral process and not to displace it’, they must not be used to ‘encroach on the procedural powers of the arbitrators but to reinforce them’; citing *Channel Tunnel Group Ltd v Balfour Beatty Construction* [1993]

Right to be Heard 倾诉权

- If necessary for the fair disposal of the case, Arbitrator could order disclosure subject to appropriate safeguards

This would be in keeping with the approach and mind-set to preserve confidentiality and to order discovery with the protective measures only as a last resort. For this reason as well, we considered that it was unnecessary to order disclosure at the time it was sought.

*** Confidentiality is not a complete cloak ***

保密并不是绝对的

Takeaways 要点

- Do not take anything for granted
不要把所有事情都视为理所当然
 - if you need or want something, ask for it
 - and in a timely manner
- The Tribunal has wide discretion
仲裁庭有很宽泛的裁量权
 - but be sensible in what you ask for
 - it may be a compromise position
- Don't expect courts to easily overrule / change Tribunal directions
不要期望法院会轻易地推翻 / 改变仲裁庭的自由裁量权

THANK YOU 谢谢



Swee Im TAN

Arbitrator

Adjudicator / Mediator

SweeIm.Tan@39essex.com

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