IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 101

Originating Summons No 185 of 2016

Between

China Machine New Energy Corporation

… *Applicant*

And

(1) Jaguar Energy Guatemala LLC
(2) AEI Guatemala Jaguar Ltd

… *Respondents*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

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

[2018] SGHC 101

High Court — Originating Summons No 185 of 2016
Kannan Ramesh J
6, 14–16 November; 6, 15 December 2017

26 April 2018 Judgment reserved.

Kannan Ramesh J:

1 By this originating summons, the applicant, China Machine New Energy Corporation ("CMNC"), applies to set aside an arbitral award ("the Award"). The central issue in this application is whether the imposition of an attorney-eyes only ("AEO") order by the arbitral tribunal ("the Tribunal"), the scope of which the Tribunal then limited before lifting the order altogether, amounts to a breach of natural justice that justifies setting aside the Award. The application also raises novel points concerning "guerrilla tactics" in arbitration and the duty of a tribunal to investigate allegations of corruption. These matters arise against the backdrop of an arbitration agreement which provided for an expedited arbitration, and which therefore required a swift determination of the complex dispute concerning the construction of a coal-fired power plant in Guatemala that arose here. The Tribunal was of course constrained to uphold and give effect to this agreement between the parties for a swift determination of the dispute.

Facts

The parties

2 The applicant, CMNC, is a company incorporated under the laws of the People's Republic of China. The business of CMNC is the construction of power plants in China and abroad.

3 The first respondent, Jaguar Energy Guatemala LLC ("Jaguar Energy"), is a company incorporated under the laws of Delaware in the US. The second respondent, AEI Guatemala Jaguar Ltd ("AEI Guatemala"), is a company incorporated under the laws of the Cayman Islands. AEI Guatemala is the sole shareholder of Jaguar Energy. I will refer to Jaguar Energy and AEI Guatemala collectively as "Jaguar". At the material time, Jaguar was managed and controlled by AEI Services LLC ("AEI"), a company based in Houston.

The background to the dispute

4 The dispute between the parties arose from a project ("the Project") for the engineering, procurement, equipment and construction of a coal-fired power generation plant located near Puerto Quetzal, Guatemala ("the Plant").

5 In October 2007, Distribuidora de Electricidad de Occidente, SA and Distribuidora de Electricidad de Oriente, SA ("the Offtakers"), two Guatemala-based companies in the business of supplying electricity in Guatemala, issued bid documents for the Project. In preparing its bid, AEI began negotiations with CMNC. AEI and CMNC entered into a memorandum of understanding which envisioned the conclusion of an Engineering, Procurement and Construction Contract ("the EPC Contract") and the formation of a special purpose vehicle by AEI ("the SPV"). It was contemplated that the SPV would own the Plant and

enter into the EPC Contract with CMNC for the Project and power purchase agreements with the Offtakers ("the PPAs") for the sale of the power generated by the Plant. On 22 February 2008, Jaguar Energy was formed as the SPV for the Project.

6 On 29 March 2008, CMNC and Jaguar Energy executed the EPC Contract. Under this contract, CMNC agreed to construct the Plant for Jaguar Energy, as the owner, for the approximate sum of US$450m, which was to be paid progressively to CMNC in milestone payments.

7 The EPC Contract provided for disputes arising out of the contract to be resolved by arbitration in Singapore, under the 1998 Rules of Arbitration of the International Chamber of Commerce ("the ICC" and "the 1998 ICC Rules"). *Critically, the EPC Contract provided for an expedited arbitration*. Clause 20.2 of the EPC Contract stated as follows:

> … The arbitrators ***shall*** have ***ninety (90) Days*** *after the selection of the third arbitrator* within which to *allow examination of evidence, hear evidence and issue their decision or award* and ***shall*** *in good faith attempt to comply with such time limits*; provided, however, if two (2) of the three (3) arbitrators believe *additional time is necessary to reach a decision, they may notify the Parties and extend the time … but* ***in no event to exceed an additional ninety (90) Days.*** … In determining ***the extent of examination of evidence*** and all other pre-hearing matters, the arbitrators shall ***endeavor to the extent possible to streamline the proceedings and minimize the time and cost of the proceedings***. …
>
> *It is the intent of the Parties that the arbitration shall be conducted expeditiously*, without initial recourse to the courts and without interlocutory appeals of the tribunal's decisions to the courts. …
>
> [emphasis added in italics and bold italics]

In other words, the arbitration agreement required 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.

8 Clause 20.2 of the EPC Contract also identified New York law as the governing law of the contract.

9 On 30 May 2008, Jaguar Energy entered into the PPAs with the Offtakers. The PPAs provided for the Plant to start commercial operations by 1 May 2012, failing which the Offtakers were entitled to impose liquidated damages for delay.

10 On 13 November 2009, CMNC, Jaguar Energy and AEI Guatemala executed a deferred payment security agreement ("the DPSA"). At the time of the EPC Contract, the parties had anticipated that Jaguar would obtain external financing for the Project from a consortium of banks. When it became clear that this was no longer possible, the parties agreed on vendor financing. To this end, the DPSA provided Jaguar Energy with the option of issuing debit notes ("the Notes") to CMNC instead of making certain milestone payments under the EPC Contract. This enabled Jaguar Energy to defer certain cash payments due under the EPC Contract. The Notes were to be secured by security interests over assets of Jaguar ("the Security Interests"). In substance, in the event Jaguar Energy exercised the option, CMNC would provide financing for the Project by deferring collection of its milestone payments on the terms of the DPSA. The governing law of the DPSA was also New York law; and the DPSA provided for disputes arising thereunder to be resolved by the same dispute resolution mechanism under the EPC Contract, that is, arbitration in Singapore under the 1998 ICC Rules.

11 Section 3 of the DPSA provided that the EPC Contract was one of the Security Interests. Section 13(b) of the DPSA, which is material, also stated:

> … CMNC shall have the right to receive any and all proceeds with respect to the Collateral *and exercise any other rights and remedies available to it as a secured party or otherwise*, until all of CMNC's obligations under this Agreement have been paid in full. … [emphasis added]

12 Section 20(a) of the DPSA provided as follows:

> *The Parties agree to take all necessary steps and enter into all necessary documentation to evidence and perfect the Security Interests* on the Effective Date of this Agreement and, as and requested or as previously agreed, take all necessary steps to release the Security Interests. [emphasis added]

13 On 29 March 2010, Jaguar Energy authorised CMNC to commence works under the EPC Contract by issuing the Full Notice to Commence. The works comprised two phases, Phase 1 and Phase 2. Under the Full Notice to Commence as varied by subsequent variation orders, the "Scheduled Taking-Over Date" for Phase 1 and Phase 2 were 21 March and 19 June 2013 respectively.

14 In the course of the Project, the parties uploaded documents pertaining to the Project onto a shared online document platform called Project Solve. These documents included communications between CMNC and Jaguar regarding the Project, design drawings, technical specifications for construction equipment and project management documents. It would appear that the parties retained their own sets of some of these documents nonetheless.

15 On 15 November 2010, Jaguar Energy exercised the option of using the payment scheme under the DPSA by issuing the relevant notice thereunder. Thus, the DPSA became operational and Jaguar Energy began issuing the Notes

in place of milestone payments. In total, Jaguar Energy issued 61 Notes for the total value of approximately US$129m.

The breakdown in relations

16 In around 2013, disputes arose between the parties. Jaguar's complaint concerned the delay in completion of the Project. CMNC's grievance related to Jaguar's alleged failure to evidence and perfect the Security Interests in breach of s 20(a) of the DPSA (see [12] above). The key events in the breakdown in the relations were as follows.

17 CMNC did not meet the Scheduled Taking-Over Dates for Phase 1 and Phase 2 of the works. On 29 March and 28 June 2013, Jaguar Energy issued notices to CMNC stating that the Scheduled Taking-Over Dates for Phases 1 and 2 respectively had passed, and reserved its rights under the EPC Contract.

18 On 11 October and 26 October 2013, Jaguar Energy issued two notices to CMNC under the EPC Contract. In these notices, Jaguar Energy stated that CMNC was in material breach of its obligations under the EPC Contract for being in delay of the works. Jaguar Energy required CMNC to take corrective measures to remedy specified items by 29 October and 1 November 2013 respectively, and reserved its right to terminate the EPC Contract for CMNC's default.

19 On 30 October 2013, Jaguar Energy issued a notice to CMNC stating that CMNC had failed to take the corrective measures specified by Jaguar Energy in its notice dated 11 October 2013, and that it intended to undertake those corrective steps itself, deducting the cost of doing so from sums due to CMNC. Jaguar Energy reserved its right to terminate the EPC Contract for

CMNC's default and to assess liquidated damages for CMNC's delay.

20 In October 2013, additional security guards were deployed to the site ("the Site"). The Site comprised the area where the Plant was being constructed ("the Construction Area") and the living quarters of CMNC's employees ("the Living Quarters"). The Tribunal found that the increase in security in October 2013 was consensual.

21 On 4 and 19 November 2013, Jaguar Energy issued additional notices to CMNC alleging that it had breached its obligations under the EPC Contract, and reserved its rights and remedies under the EPC Contract.

22 By a letter dated 28 November 2013, CMNC issued a Take Over Notice ("the Take Over Notice") in its capacity as the lender under the DPSA to itself as a contracting party under the EPC Contract. Jaguar claimed that it did not receive a copy of the Take Over Notice until the Arbitration. Under the Take Over Notice, CMNC purported to exercise its alleged rights under s 13(b) of the DPSA ("the Step-In Rights") to take over Jaguar Energy's rights under the EPC Contract (see [11] above).

23 On 29 November 2013, Jaguar Energy notified CMNC by letter of its intention to terminate the EPC Contract, and requested CMNC to vacate the Site within 15 days as provided for under the EPC Contract.

24 Two emails sent by Mr Richard Ho ("Mr Ho"), the executive director of CMNC, to Mr Ron Haddock ("Mr Haddock"), the executive chairman of AEI, are material. The first, sent on 30 November 2013, stated as follows:

> I got the bad news this morning AEI and CMNC is on a confrontational footing. I [particularly] got alarmed when I was

> told *AEI is getting ready to use physical force to evict CMNC staff from site. …*
>
> …
>
> I would also like to warn and [remind] you Chinese are friendly people but are also very vindictive and personal. … *god help those affiliated with AEI or organizations and friends of the principals involved who happened to have to visit China.*
>
> [emphasis added]

25 In the second email, sent on 3 December 2013, Mr Ho stated as follows:

> … CMNC has now concluded this is the direct orders from senior management of AEI. … *they are ready to take off their gloves, dig in and fight what they perceived as illegal actions.*
>
> I would like to emphasis[e] the resolve of the Chinese to protect their rights … The rule of law concept to resolve dispute[s] is only a recent phenomenon in China, *protecting one's rights and property by force is the norm for the longest time. …*
>
> …
>
> … CMNC has *further informed all Jaguar subcontractors and it is clear all subcontractors will not ship any equipment to Jaguar until the matters between AEI and CMNC are resolved.*
>
> [emphasis added]

26 On 11 December 2013, in what appears at least in part to have been a reaction to Mr Ho's emails, Jaguar Energy began building a fence around the Construction Area, stationed armed guards at the perimeter and prevented CMNC's employees from entering the Construction Area. CMNC claims that after 11 December 2013, it no longer had access to its office in the Construction Area which contained documents related to the construction of the Plant. Notably, the Living Quarters were not subject to these strictures: CMNC's employees continued to have access to the Living Quarters which they only left on 20 June 2014 (see [32]–[33] below). Therefore, CMNC retained access to project documents saved in laptops and computers which were kept in the Living Quarters until 20 June 2014 (see [33] below).

27 On 14 December 2013, Jaguar Energy sent a letter to CMNC purporting to terminate the EPC Contract from that date for CMNC's default under that contract, and stating that the DPSA was also terminated from that date pursuant to its provisions. The Tribunal found that Jaguar Energy validly terminated the EPC Contract on 14 December 2013 by this letter, and that the DPSA was thereby also automatically terminated by operation of its express terms.

Events after the termination of the EPC Contract

28 On or about 14 December 2013, Jaguar terminated CMNC's access to Project Solve (see [14] above).

29 The tension between the parties escalated sharply shortly after Jaguar Energy terminated the EPC Contract and CMNC's access to Project Solve. On 15 December 2013, a violent confrontation between Jaguar Energy's guards and CMNC's employees occurred. The reasons for the confrontation are not entirely clear. During the confrontation, Jaguar Energy's guards shot CMNC's employees with plastic pellets, sprayed them with pepper spray and beat them with wooden sticks.

30 On 2 January 2014, as further evidence of the growing discord between the parties, CMNC's subsidiary, CMNC Jaguar Guatemala, SA, issued a letter to contractors on the Site which stated as follows:

> On December 15, 2013, AEI/JEG has organized a group of over 200 armed guards, publicly shot the Chinese employees entering the site, *attempting to commit murder*. …
>
> …
>
> … Please be alerted after November 28th, 2013, *AEI/JEG has stopped serving as the Owner of JAGUAR Project* and it surely is not the EPC Contractor, as such, *in avoidance of unnecessary*

> *harm and loss to your company, please do not sign any contracts or agreements with AEI/JEG …*
>
> [emphasis added]

31 According to CMNC, from 19 to 24 January 2014, Jaguar harassed and intimidated its potential witnesses in the arbitration ("the Arbitration"). Notably, these alleged incidents all occurred *before* Jaguar filed its request for arbitration dated 28 January 2014 (see [35] below). They took the form, among other things, of preventing certain CMNC employees who had left the Site to give evidence regarding the incident on 15 December 2013 to Guatemalan officials from returning to the Living Quarters, offering some CMNC employees money to leave the Site, and installing cameras at the Living Quarters to monitor the movements of CMNC's employees present there.

32 CMNC's staff continued to reside in the Living Quarters until 20 June 2014. By this time, the parties were fairly deep into the arbitration proceedings (see [35] below). On that day, a hearing, presided over by a Guatemala magistrate, was held at the Site pursuant to a petition for *habeas corpus* by Jaguar in respect of CMNC's employees. Jaguar asserts that it filed the petition in response to a "public notice" published in the local media, which Jaguar claims CMNC paid for, containing allegations that CMNC workers were being held at the Site against their will and mistreated. On the other hand, CMNC alleges that Jaguar filed the petition to interfere with CMNC's preparation of its Statement of Case and witness statements, which were due to be filed in the Arbitration on 30 July 2014 (see [44] below). CMNC also contends that Jaguar used bribes to procure the eviction of its employees from the Living Quarters.

33 The *habeas corpus* hearing concluded on 20 June 2014 with an order made by the magistrate directing that CMNC's employees be sent to an

immigration shelter. According to CMNC, Jaguar then seized two desktop computers and hard drives containing documents concerning the Project from the Living Quarters. It is not clear whether the items seized were returned. CMNC's employees were released from the shelter on 28 July 2014.

34 Jaguar appointed new contractors to carry out the remaining works to complete the Project. The remaining works were carried out while the arbitration proceedings were ongoing and were completed on 26 July 2015 shortly after the conclusion of the main evidentiary hearing in Dublin on 6–21 July 2015 ("the Main Hearing").

The Arbitration

35 By a request for arbitration dated 28 January 2014, Jaguar commenced the Arbitration. Apart from multiple teleconferences, hearings were convened in London on 30 April and 1 May 2014 ("the London Hearing"), in Singapore on 16 and 17 June 2014, in Toronto on 6 and 7 November 2014 ("the Toronto Hearing"), in Hong Kong on 16–18 March 2015 ("the Hong Kong Hearing") and the Main Hearing on 6–21 July 2015. As noted below (see [39] and [43]), the time period in cl 20.2 of the EPC Contract was extended by the parties by mutual consent.

The parties' cases

36 In gist, Jaguar's case in the Arbitration was that CMNC had breached the EPC Contract; Jaguar had validly terminated the EPC Contract on account of those breaches; and Jaguar was entitled to, amongst other reliefs, liquidated damages for delay and the costs of completing the Project. I shall refer to Jaguar's claim for the costs of completion as "the ETC Claim".

37 CMNC's case was that Jaguar was not entitled to liquidated damages for delay because CMNC was entitled to extensions of time. CMNC also averred that it took over Jaguar Energy's rights under the EPC Contract in November 2013 by exercising the Step-In Rights through the issuance of the Take Over Notice (see [22] above); and Jaguar Energy was therefore not entitled to terminate the EPC Contract in December 2013. CMNC also made certain miscellaneous counterclaims.

The procedural history

38 The fulcrum of CMNC's case in this application is its claim that the Arbitration was marred by "procedural dysfunction", principally centred on the imposition of an AEO order by the Tribunal. Hence, it is critical to examine the procedural history of the Arbitration. I now set out the key events in the Arbitration.

(1) Events leading up to the filing of Jaguar's statement of case

39 As I have noted, Jaguar commenced the Arbitration on 28 January 2014 (see [35] above). On or around 27 March 2014, the chairman of the Tribunal ("the Chairman"), its third and final member, was appointed. The 90-day time period under cl 20.2 of the EPC Contract for the Tribunal to issue its award (see [7] above) therefore began on 27 March 2014, and would have expired by 25 June 2014 or, if further extended by the maximum 90 days permitted under cl 20.2, 23 September 2014. However, the parties agreed to amend this requirement (see [43] below).

40 On 1 May 2014, the second day of the London Hearing, the parties agreed to a timetable for the Arbitration. This was set out in Procedural Order

No 2 which the Tribunal issued under cover of Tribunal Communication ("TC") No 14 dated 7 May 2014. Procedural Order No 2 provided for the Main Hearing to be between 26 January and 6 February 2015. By that time, the stipulated deadline in cl 20.2 of the EPC Contract for issuance of the Award would have passed (see [39] above).

41 Notwithstanding that the parties had agreed on 1 May 2014 to a procedural timetable, by Respondent's Communication ("RC") No 9 dated 6 May 2014, counsel for CMNC informed the Tribunal that after taking instructions, CMNC was applying for a variation to it. It is important to note the reason cited by CMNC for its change of position. Relying on the fact that the parties had agreed to an expedited arbitration, CMNC sought for, in particular, the Main Hearing to be *brought forward* from between 26 January and 6 February 2015 to between 8 and 16 October 2014. CMNC wanted the procedural timelines further compressed. CMNC stated as follows:

> [Senior representatives of CMNC] have expressed *great concern and disappointment* at the proposed timetable extending through to a hearing in January/February 2015. *They observe again that the EPC Contract requires an award within 180 days from constitution of the tribunal, and that the ICC rules require an award within 6 months of signing of the Terms of Reference.* While they understand that absolute compliance with these time limits may not be possible in this case, they believe (rightly) that ***these provisions indicate the parties' strong original intention and desire that the matter should be completed at the earliest possible moment and under the shortest possible timetable***. [emphasis added in italics and bold italics]

42 By Claimants' Communication ("CC") No 11 dated 6 May 2014, Jaguar opposed CMNC's request in RC No 9 on the basis that it was not realistic.

43 By TC No 19 dated 14 May 2014, the Tribunal ruled that it would not accede to CMNC's request for the procedural timetable to be further

compressed. The Tribunal's reasoning is illuminating. The pertinent passages are as follows:

> 18. The impression which [cl 20.2 of the EPC Contract] gives is that [Jaguar Energy] and [CMNC] *hoped to conduct any arbitration speedily and without any undue delay*. ***That is their intention as evinced in the clause***. It should be noted that given that the Chairman was appointed on 27 March 2014, the Tribunal, in the ordinary course, has until Wednesday 25 June 2014 to render its final award. If that were extended by a further ninety days, the maximum, the Tribunal would be required to render its award by Tuesday, 23 September 2014.
>
> 19. *The Parties have agreed to amend this requirement.* The current timetable agreed between them and set out in Procedural Order No 2, *provides for a hearing commencing after the expiry of the deadline for the Award being delivered*, as does the Respondent's proposed amended timetable for the Award. … Nevertheless ***the Tribunal remains committed to delivery of an Award determining the issues in dispute between the Parties as expeditiously as possible.***
>
> …
>
> 49. *The Tribunal* ***has been, and remains, concerned to dispose of the matters in dispute between the Parties as expeditiously as possible***.
>
> 50. However *the amounts, and issues in dispute between the Parties are quite significant and* ***in order for there to be a fair hearing of all these matters at a single evidentiary hearing the steps envisaged by the Parties in Procedural Order No 2 are clearly essential***.
>
> 51. In the Tribunal's view, *the agreed timetable set out in Procedural Order No 2* ***represents as expeditious a process as is possible in this matter***. *It is fair to observe that the process is exceptionally so.*
>
> [emphasis added in italics and bold italics]

It is evident that while the Tribunal was aware of the need for expedition, it was equally conscious of the need to ensure due process given the complexity and scale of the dispute. The Tribunal therefore carefully weighed these considerations when calibrating the procedural timelines for the Arbitration.

44 By RC No 27 dated 28 July 2014, CMNC sought an extension of time of one month to file its Statement of Case (in relation to its counterclaims) and supporting evidence. CMNC cited two reasons for its application: the need to translate documents between Chinese and English, and deprivation of access to technical staff who had been allegedly held in unlawful detention in Guatemala (see [33] above).

45 By CC No 27 dated 28 July 2014, Jaguar objected to CMNC's request in RC No 27, adding that it was only agreeable to an extension of time of one week if any were permitted. Jaguar also stated that CMNC's reliance on its alleged deprivation of access to its employees as a reason for the extension could not have been raised in good faith as it was of its own making for two reasons. First, CMNC had refused to release its employees' passports to allow their repatriation. Second, CMNC had sued several of its employees in Guatemala for breach of their employment contracts in attempting to return to China, and had obtained a court order restraining the employees from leaving Guatemala.

46 By RC No 28 dated 28 July 2014, CMNC acknowledged that it had sued its staff in Guatemala. It claimed that this had been "on advice of local counsel, as a drastic measure to safeguard their presence in Guatemala against the unlawful efforts of certain people to detain and deport them".

47 By TC No 38 dated 31 July 2014, having considered RC No 27 and CC No 27, the Tribunal granted the parties an extension of two weeks (until 13 August 2014) to file their Statement of Case. It should be noted that CMNC's employees had been released on 28 July 2014 (see [33] above). The extension of time for the filing of the Statement of Case accommodated CMNC's request for more time.

(2) Jaguar's statement of case and subsequent events

48 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".

49 On 13 August 2014, CMNC and Jaguar filed their respective Statements of Case in the Arbitration. In paragraph 16 of its Statement of Case, Jaguar stated that apart from redacting certain documents and not including witnesses' full addresses, it was withholding production of 13 documentary exhibits ("the 13 Exhibits"), for the following reasons:

> … CMNC has engaged in *a series of threatening actions against Claimants and their contractors during and after the default termination*. As a consequence, Claimants have serious concerns that *if CMNC was to discover the identity of Jaguar's contractors, the full addresses of all witnesses, and certain other sensitive material, that information could be misused to interfere with the Project or the Arbitration*. [emphasis added]

Jaguar also stated the following in a footnote in its Statement of Case:

> Subject to agreed confidentiality protections, *Claimants are* ***willing to provide on an "attorneys' eyes only" basis to CMNC's counsel of record and any experts retained by them****, unredacted copies of witness statements and withheld documents intended to be relied upon* (only 13 of Claimants' nearly 375 exhibits are withheld). … [emphasis added in italics and bold italics]

50 Jaguar thus indicated that it was only willing to disclose unredacted copies of witness statements and the 13 Exhibits to CMNC on an AEO basis. The 13 Exhibits comprised post-termination contracts for re-procurement and completion-related services and post-termination schedules and reports. CMNC claims that these documents were necessary to evaluate the ETC Claim. The 13

Exhibits also included a proposal that was submitted to the Offtakers in 2008, which Jaguar claimed included sensitive details on AEI's corporate structure.

51 On 20 August 2014, the parties filed their respective requests to produce documents. CMNC requested Jaguar to produce 87 categories of documents.

52 On 2 September 2014, counsel for CMNC informed counsel for Jaguar that CMNC was unlikely to agree to an AEO disclosure order. Thereafter, on 8 September 2014, CMNC demanded immediate production of the 13 Exhibits. Further correspondence was exchanged between the parties but they could not ultimately come to an agreement on the disclosure of the 13 Exhibits.

53 By CC No 45 dated 22 September 2014, 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. Jaguar submitted that an AEO order should apply to three categories of documents: post-termination contracts, project schedules and reports; AEI high-level corporate information; and documents submitted in 2007 and 2008 to the Offtakers. The 13 Exhibits fell within these three categories as did certain documents falling within the 87 categories of documents requested by CMNC (see [51] above).

54 Jaguar claimed that an AEO order was justified based on uncontroverted evidence, contained in witness statements supporting its Statement of Case, that before and after the termination of the EPC Contract, CMNC "[had] gone to *extraordinary lengths to interfere* with Jaguar's completion of the Project" [emphasis added]. Jaguar's witnesses appear to have stated that CMNC had, amongst other things, offered money to contractors and suppliers in exchange

for not working with Jaguar, and had physically intimidated Jaguar's contractors, suppliers and employees.

55 By RC No 36 dated 23 September 2014, CMNC requested the Tribunal to reject Jaguar's request to produce documents subject to an AEO order for four reasons. First, an AEO order would be procedurally unfair. Second, CMNC would not misuse information. Third, Jaguar was inviting the Tribunal to pre-judge fiercely disputed matters about CMNC's conduct. Fourth, the concept of AEO disclosure, a feature of US dispute resolution, should not be imported into international arbitration.

(3) The creation of the AEO Regime and its implementation

56 By TC No 49 dated 25 September 2014, the Tribunal noted at [10] that three categories of documents – as identified by Jaguar in CC No 45 (see [53] above) – were in dispute. The Tribunal directed that a two-stage process would apply to the disclosure of the disputed documents ("the AEO Regime"). The documents were to be disclosed as follows:

> *First they will be disclosed to external Counsel only.* Secondly, upon application by the Respondent to the Tribunal it will consider allowing *specified employees of the Respondent to be shown the documents by external Counsel for the purpose of obtaining instructions* on the basis that *those individuals be identified, the need for them to be shown the material be established, and each person proposed to be shown the documents providing a clearly enforceable undertaking as to confidentiality* in favour of the Claimants. [emphasis added]

57 Notably, the second stage of the AEO Regime expressly entitled CMNC to apply to the Tribunal for its employees to be given access to documents that Jaguar had disclosed on an AEO basis ("the AEO Designated Material") *for the purpose of giving instructions to counsel*. In other words, the AEO Regime

contained a built-in safeguard which CMNC could resort to if its counsel needed instructions from its employees on specific documents for the purpose of conducting its case in the Arbitration. However, CMNC *never* applied under the second stage of the AEO Regime for its employees to be shown AEO Designated Material.

58 The Tribunal gave the following reasons in TC No 49 for its decision to impose the AEI Regime. These reasons are again illuminating:

> 15. The Tribunal does not regard a process as requested by the Respondent as one limited to domestic dispute resolution in the USA. *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.
>
> 16. Whether it is needed in this case is the question which needs to be addressed.
>
> 17. *The Tribunal views with* ***serious concern*** *the possibility that* ***disclosed documents could be used for the ulterior and quite improper purposes*** *which the Claimants assert may be undertaken by the Respondent.* On an application such as this *it is* ***not possible to reach any concluded view*** *of the risk that the Respondent may undertake such improper use of disclosed documents.* Indeed the Tribunal wishes to make very clear that it has not done so and although noting the competing contentions of the Parties it will not be subsequently influenced by these contentions which, if ultimately relevant, will be decided by the Tribunal after a full evidentiary hearing. In the interim it is sufficient to say that any use of disclosed documents by the Respondent as suggested by the Claimant may occur would be entirely improper and prejudicial to the fair and just determination of the disputes between the Parties.
>
> 18. It is noted that *tensions between the Parties in relation to this dispute are running high and therefore it is appropriate that the Tribunal adopt an approach to this issue which is likely to minimise these tensions and* ***provide assurance to both Parties that, to the extent possible, the sensitive documents disclosed will not have a chance of being used other than for the purposes of this dispute***.

> 19. ***Also to be taken into account is the need for both Parties to have an adequate opportunity of presenting their cases***.
>
> [emphasis added in italics and bold italics]

It is evident that the Tribunal was of the view that AEO orders were used in international arbitration to preserve the confidentiality of disclosed documents. It is also evident that after fully weighing the concerns and considerations of the parties, the Tribunal crafted the AEO Regime in a way that it felt struck an appropriate balance between CMNC's need for access for the purpose of making its case and Jaguar's concern that its case in the Arbitration would be prejudiced by use by CMNC of the AEO Designated Material for an ulterior and improper purpose.

59 By RCs Nos 38 and 39 dated 26 September 2014, CMNC requested the Tribunal to reconsider its decision to allow Jaguar to disclose documents under the AEO Regime. CMNC invited the Tribunal to direct the immediate production of the 13 Exhibits.

60 By TC No 51 dated 30 September 2014, the Tribunal affirmed its order in TC No 49. However, the Tribunal issued an important clarification. It clarified that CMNC's experts were to be regarded as external counsel for the purposes of the AEO Regime. By this, the Tribunal made clear that it was not just CMNC's external counsel but also their expert witnesses who were entitled to view AEO Designated Material. This was a significant expansion of the AEO Regime. Much of the dispute in the Arbitration centred on CMNC's entitlement to extensions of time and the quantification of the ETC Claim which made the work of expert witnesses critical. This expansion therefore facilitated the identification of those areas where instructions from specific employees of CMNC would be required. This is precisely the point made by the Tribunal in

TC No 51 at [36]. I now set out the pertinent aspects of the Tribunal's reasoning in TC No 51:

> 35. In adopting the disclosure regime articulated in [TC No 49], *the Tribunal was conscious of the general principle that full disclosure of documents relied on by a Party must be made to the other Parties to an arbitration.* The Tribunal notes the Respondent's concerns that by adopting the procedure in [TC No 49], the Tribunal has come to a view about the merits, or otherwise, of the Parties' respective cases in the main case. This concern is without foundation. Not only has the Tribunal not come to any views on the merits of the Parties' cases, but *it has not come to any view regarding the allegations by the Claimants made in support of its request for confidentiality, either as to their merits or indeed their relevance to the matters in contention between the Parties.*
>
> 36. The Tribunal is confident that ***once the Respondent's external counsel and expert witnesses have had the opportunity of inspecting the documents in question, they will be able to make an assessment of whether it is necessary for the Respondent for those documents to be disclosed to employees of the Respondent. Once such an assessment is made, it will be open to the Respondent to make application to the Tribunal for disclosure of those documents to its employees, as provided for by the Tribunal.*** …
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> …
>
> 38 The Tribunal permits the Respondent to make any further application with regard to document production, *including a review of the orders made herein and in [TC No 49], should the situation change.*
>
> [emphasis added in italics and bold italics]

61 CMNC asserts that by its ruling in TC No 51, the Tribunal "expanded the scope of documents that could be designated as AEO … from the [13 Exhibits] to any document that Jaguar deemed to be 'sensitive' enough". I do not agree. TC No 49 was made pursuant to Jaguar's concerns in CC No 45 relating to the three categories of documents it identified therein (see [53] above). Reading TC No 49 in its totality, it is clear that the AEO Regime was

to apply not just to the 13 Exhibits, but to documents falling within the three categories of documents identified by Jaguar in CC No 45, which, as noted earlier, included certain documents falling within the 87 categories of documents requested by CMNC (see [51] and [53] above). TC No 51 affirmed TC No 49 and clarified that experts would be regarded as external counsel. I therefore do not accept that the Tribunal expanded the scope of the AEO Regime in TC No 51.

62 On 2 October 2014, Jaguar disclosed the 13 Exhibits on an AEO basis to CMNC's counsel.

(4) Events leading up to the Redaction Ruling

63 By RC No 43 dated 5 October 2014, CMNC sought to lift the AEO Regime. It requested the Tribunal to direct Jaguar to immediately produce without the AEO designation 11 of the 13 Exhibits, and the post-termination contracts and daily reports, with the contractors' names redacted. CMNC also requested the Tribunal to rule that the remaining two exhibits out of the 13 Exhibits did not contain sensitive information and were therefore not properly subject to the AEO Regime. It would appear that the 87 categories of documents as an independent request for disclosure were no longer an issue as they were not pursued by CMNC (albeit that, as I have noted, the AEO Regime applied to some documents falling within the 87 categories of documents requested by CMNC (see [61] above) and CMNC subsequently requested for the AEO Regime to be lifted in respect of certain of these documents (see [73] below)).

64 By TC No 54 dated 6 October 2014, the Tribunal reiterated that if a party "wish[ed] to make an application for a document disclosed under the [AEO Regime] to be disclosed to that Party and its employees, it may do so".

65 By TC No 55 dated 7 October 2014, the Tribunal encouraged the parties to co-operate to find a solution to the matters which CMNC had raised in RC No 43. The Tribunal added that if this did not prove possible, it would deal with the matter on further application by the parties.

66 By RC No 45 dated 8 October 2014, CMNC informed the Tribunal that the parties had come to an agreement regarding the production of one of the 13 Exhibits; and requested a hearing with the Tribunal by conference or video call "to express its concerns regarding the use of the [AEO] designation".

67 By CC No 56 dated 8 October 2014, Jaguar opposed CMNC's request for a hearing on the basis that the Tribunal had already reaffirmed in TC No 51 and TC No 54 its decision in TC No 49 (to impose the AEO Regime); and CMNC had not applied for any documents to be disclosed to CMNC's employees under the second stage of the AEO Regime.

68 By TC No 57 dated 9 October 2014, the Tribunal reiterated that the parties were entitled to apply for disclosure beyond their external counsel and experts in accordance with the second stage of the AEO Regime. The Tribunal also stated that unless a party applied for disclosure of documents beyond its external counsel and experts *or made another application*, the Tribunal did not have before it any application which could be helpfully ventilated in a teleconference hearing.

69 In response, by RC No 46 dated 13 October 2014, CMNC requested the Tribunal to rule that the AEO Regime did not apply to the remaining 12 exhibits (out of the 13 Exhibits) whose disclosure the parties could not agree on ("the 12 Exhibits") (see [66] above).

70 By RC No 48 dated 15 October 2014, CMNC averred that it was "necessary to reset the timetable for expert evidence, [reply] submissions and fact witness evidence". This was a request to reset the timelines in Procedural Order No 2. CMNC stated that its preparations were insufficiently advanced; the dispute over the AEO Regime had "imposed severe practical limitations on effective defence preparation". CMNC averred that it was "highly doubtful that anything valuable [could] be achieved" at the Toronto Hearing. This was the first attempt by CMNC to reset the procedural timetable on account of the AEO Regime.

71 By CC No 59 dated 15 October 2014, Jaguar opposed CMNC's request in RC No 48 for the procedural timetable in Procedural Order No 2 to be reset.

72 On 17 October 2014, the Tribunal convened a teleconference, during which the following matters were ventilated:

(a) CMNC stated that its experts would require two or three months more than planned to file their opinions. CMNC said that its lack of access to project records and Project Solve had impeded its preparations.

(b) The Tribunal indicated that the Toronto Hearing should proceed for the parties to discuss, amongst other things, case management.

(c) CMNC submitted that redaction of the names and identifying information of post-termination contractors would address Jaguar's concerns, and the AEO designation should therefore not apply to the 12 Exhibits. Jaguar submitted that apart from information that would reveal the identities of its contractors, information relating to the dates when upcoming construction activities were anticipated to occur should also

be redacted, on the basis that such information was sensitive because CMNC had interfered with the completion of the Project. The Tribunal requested the parties to file further submissions on the issue of redaction.

73 After the teleconference, CMNC requested that Jaguar produce further documents besides the 12 Exhibits in redacted form ("the Further Documents"). These requests related to Jaguar's pre-qualification package, relevant AEI board resolutions and AEI board meeting minutes, cost estimates for the completion of the Project, project reports and/or meeting minutes about the completion of the Project, documents relating to or relied upon in preparing the estimated completion costs and contracts with Chinese subcontractors. Jaguar addressed these requests in its submissions to the Tribunal following the teleconference. The issue before the Tribunal was therefore the continued applicability of the AEO Regime to the 12 Exhibits and the Further Documents. It should be noted that CMNC did not attempt to invoke the second stage of the AEO Regime as an alternative position.

(5) The Redaction Ruling and Procedural Order No 3

74 By TC No 64 dated 19 October 2014, the Tribunal ruled as follows:

(a) The Tribunal ruled that the redactions that *CMNC had proposed* "adequately represent[ed] an appropriate balance of the interests of the [parties]" ("the Redaction Ruling"). In other words, *the Tribunal ruled that the AEO Regime be lifted with respect to the 12 Exhibits and the Further Documents.* Jaguar was to provide CMNC with the 12 Exhibits and the Further Documents in redacted form, *and CMNC's officers, employees and staff* were entitled to view these redacted documents.

(b) Further, the Tribunal clarified that CMNC was at liberty to seek further relief in respect of the redacted documents, and that it would entertain further applications in relation to the issue of redaction or other issues regarding the AEO Regime.

TC No 64 was a critical ruling and a key milestone in the procedural history of the Arbitration. By this ruling, the AEO Regime was lifted and replaced by an order providing for limited redactions of documents (albeit that Procedural Order No 3 later provided that the two-stage AEO Regime would apply to AEO Designated Material disclosed after the date of that order and of a value less than US$100,000: see [80] below). It is also critical that this ruling happened more than eight months before the Main Hearing which was rescheduled from January and February 2015 to July 2015 (see [77(b)] below). Accordingly, any prejudice that might have resulted from the imposition of the AEO Regime by TC No 49 on 25 September 2014 had been ameliorated if not removed *within four weeks after its imposition* (*ie*, between 25 September 2014 and 19 October 2014). That was not all. Effort was made thereafter, starting with the Toronto Hearing in November 2015, to reset the procedural timelines to further address CMNC's concerns.

75 On or about 25 October 2014, pursuant to the Tribunal's ruling in TC No 64, Jaguar began to provide redacted documents to CMNC. It is undisputed that Jaguar provided "sister production sets" of documents to CMNC. One set contained unredacted documents (for CMNC's counsel and experts). The other contained redacted documents (for CMNC's employees). The production sets contained file identifiers that identified the CMNC request number to which the produced documents corresponded, though they did not contain an index.

76 It is also undisputed, however, that Jaguar did not provide redacted versions of every document initially. In an email dated 25 October 2014, Jaguar clarified that it had redacted information "where practical and/or reasonable" and was not producing redacted versions of post-termination contracts and purchase orders that were "of a relatively low dollar value, with some as low as a few hundred dollars". Nonetheless, *Jaguar later produced redacted versions of these documents as well to CMNC on 15 November 2014*.

77 The Toronto Hearing was held on 6 and 7 November 2014 (see [35] above). The following matters transpired at the Toronto Hearing:

(a) It was decided that it was no longer possible to hold the Main Hearing in January and February 2015 given "the delays by [CMNC] in the preparation of its case in relation to counterclaims". In this regard, the Tribunal gave Jaguar leave to submit for wasted costs due to CMNC's delays in the preparation of its case and the consequent vacation of the dates in January and February 2015. Subsequently, by TC No 142 dated 9 March 2015, the Tribunal awarded wasted costs attributable to the vacation of the hearing in January to Jaguar.

(b) It was also decided that the Main Hearing would now take place in July 2015 and that a new procedural order would be created to reflect the changes in the procedural schedule for the rest of the Arbitration. This meant that the Main Hearing would take place more than a year and a half after the issuance of the request for arbitration on 28 January 2014.

(c) It was also agreed that a shared data room ("the Data Room") would be created to allow each party's experts to access the documents relied on by the other party's experts.

78 The parties subsequently worked together on a draft procedural order that would set out the timetable for the rest of the Arbitration. I note that by CC No 69 dated 10 November 2014, CMNC indicated that it agreed to deadlines that were ultimately reflected in Procedural Order No 3. These included the deadlines relating to the parties' pleadings – the filing of replies and applications for leave to amend the parties' cases – and the filing of outline opinions by the parties' design, scheduling and quantum experts. This is critical as these timelines were agreed to by CMNC in the context of the Redaction Ruling. It is therefore fair to surmise that the timelines took into account any prejudice CMNC would have felt was caused by the AEO Regime.

79 By Procedural Order No 3 dated 18 December 2014, the Tribunal set out a new procedural timetable, which the parties had agreed to, and further directions for the Arbitration. The Tribunal ordered, amongst other things, as follows:

> (a) The parties were to progressively complete their production of documents responsive to the counterparty's requests for the same, by no later than 5 December 2014. Nonetheless, Jaguar would "continue to supplement their production of [certain] documents … on a continuing basis (to the extent such documents exist or come into existence) due to the ongoing nature of the Project completion effort".
>
> (b) Documents that had already been disclosed as AEO Designated Material would be "produced with only the contractor's name and identifying details redacted", subject to CMNC's right to apply for the documents to be produced in unredacted form.

(c) With regard to *further* contracts, purchase orders and invoices, to the extent that such documents were designated AEO: (a) Jaguar would produce a redacted version of the document if the value of the document was US$100,000 or greater; and (b) subject documents of a value less than US$100,000 to the two-stage process in the AEO Regime. However, CMNC was entitled to apply to the Tribunal for the production of any contract, purchase order or invoice of a value less than US$100,000.

(d) With effect from 18 December 2014, documents upon which the parties' experts relied would be added to the Data Room for sharing with their counterparts and counsel.

80 *The effect of Procedural Order No 3 was two-fold. First, it reset all the procedural timelines, in particular the dates of the Main Hearing, to take into account the concerns and considerations of the parties, in particular CMNC. It must be emphasised that the timelines were agreed to by the parties. Second, with regard to further contracts, purchase orders and invoices, there was (1) the two-stage AEO Regime for documents of a value less than US$100,000 subject to CMNC's right to apply for production and (2) a regime providing for limited redactions to be made to all documents with a value of US$100,000 or more*. In other words, the AEO Regime was not imposed with regard to the documents in the second category. To this extent, Procedural Order No 3 modified the Redaction Ruling by imposing the AEO Regime for certain documents that were to be disclosed. Significantly, on *CMNC*'s estimate, there were 143 documents each of more than US$100,000 in value, which Jaguar redacted on a limited basis, carrying a total value of US$188,790,048.92. On the other hand, there were 2,900 documents each of less than US$100,000 in

value which were disclosed to CMNC's external counsel and experts in unredacted form under the AEO Regime carrying a total value of US$14,521,839.56. Thus, the redacted documents were of a much higher value than those under the AEO Regime. Furthermore, Procedural Order No 3 also empowered CMNC to apply to the Tribunal for the production of documents of less than US$100,000 in value. However, it does not appear that any such application was made. Finally, and significantly, CMNC did not, either when Procedural Order No 3 was issued or subsequently, request for the procedural timelines to be further adjusted on account of the direction that the Tribunal had made, apart from the one application referred to at [81] below.

(6) Events after the issuance of Procedural Order No 3

81 By RC No 70 dated 19 December 2014, CMNC's counsel sought an extension of time until 22 December 2014 for filing of the Statements of Reply and reply witness statements stipulated under Procedural Order No 3, on the basis that they had "received extensive relevant amendments to CMNC's witness evidence" which they had been unable to process in time. Jaguar objected to CMNC's application. Nonetheless, the Tribunal granted CMNC an extension of time to submit its Statement of Reply and reply witness statements by no later than 22 December 2014.

82 Despite its concerns over the disclosure of documents by Jaguar, CMNC delayed in agreeing on the service provider for the Data Room. By CC No 83 dated 23 December 2014, Jaguar informed the Tribunal that while it had proposed a service provider for the Data Room which Procedural Order No 3 had directed, several weeks earlier (see [79(d)] above), CMNC had not agreed to Jaguar's proposal and had failed to provide alternative recommendations. By RC No 73 dated 23 December 2014, CMNC informed the Tribunal that there

was no need for the Tribunal to deal with this issue on the basis the parties would work together to resolve it. Notably, however, CMNC only executed the contract for the Data Room on around 5 February 2015, more than a month later. This delayed the uploading of documents into the Data Room (see [89] below).

83 By RC No 78 dated 15 January 2015, CMNC informed the Tribunal and Jaguar that it was replacing its external counsel, Herbert Smith Freehills LLP and Reed Smith LLP, with new counsel. CMNC appointed Minter Ellison and Kings & Wood Mallesons ("KWM") as its new counsel.

84 By RC No 81 dated 19 January 2015, CMNC through its new counsel KWM requested extensions of time for its design experts, Uniform Commercial Code ("UCC") experts and scheduling experts to file draft outline opinions. Nonetheless, KWM stated in RC No 81 that "our firm and [Minter Ellison] *are fully aware of the fixed procedural dates including the two hearing dates, and have accepted instructions on that basis*" [emphasis added].

85 In a teleconference held on 19 January 2015, CMNC's counsel KWM reiterated that it had accepted instructions based on the hearing dates in March and July 2015. During the same teleconference, Jaguar noted that there had been a delay in setting up the Data Room attributable to CMNC. CMNC stated that it would proceed to resolve the issue regarding the Data Room.

86 By RC No 89 dated 24 January 2015, CMNC informed the Tribunal that it had appointed a new quantum expert, Mr Charles Gurnham ("Mr Gurnham"), "*bearing in mind the availability of Mr Gurnham to meet the procedures in* [Procedural Order No 3]" [emphasis added].

87 By RC No 93 dated 26 January 2015, CMNC reiterated that KWM had "accepted instructions on the basis that [CMNC] would be able to meet the hearing dates in March and July 2015".

88 On 27 January 2015, the Tribunal convened another teleconference. The following matters transpired during this teleconference:

(a) The parties' UCC and design experts confirmed that they could meet the deadlines set out in Procedural Order No 3.

(b) Mr Gurnham stated that he "should have no difficulty at all in meeting the dates [in Procedural Order No 3]" and that he did not foresee any issues with the procedural deadlines.

Therefore, as of 27 January 2015, CMNC and its expert Mr Gurnham had confirmed that they were able to meet the procedural deadlines and keep to the hearing dates that had been designated for the Main Hearing.

89 During a teleconference on 4 February 2015, CMNC stated that it had yet to enter into the contract for the Data Room. The Chairman noted that CMNC had been "going around the mulberry bush on this for quite some time". Subsequently, by RC No 103 dated 5 February 2015, CMNC informed the Tribunal that it had executed the contract for the Data Room. As I have noted, CMNC's delay in executing the contract for the Data Room had caused the uploading of information into the Data Room to be consequently delayed (see [82] above). This process only started on 10 February 2015.

90 On 10 February 2015, Jaguar uploaded invoices and other material which evidenced the entries in a transaction log. The transaction log reflected

the costs which Jaguar claimed it incurred to complete the Project. In other words, these costs were the basis of the ETC Claim. CMNC's case is that Jaguar disclosed the transaction logs and the supporting invoices in a delayed and disorganised matter, and that this impeded its preparation of its case.

(7) Events leading up to the lifting of the AEO Regime

91 By RC No 119 dated 17 February 2015, CMNC applied to the Tribunal for the AEO Regime to be lifted. CMNC stated the following:

(a) CMNC noted that by TC No 51 (see [60] above), the Tribunal had permitted CMNC to apply to review the Tribunal's orders regarding the AEO Regime if the situation changed. The situation had changed: the Project was due to be completed by May 2015 and the names of the contractors were public knowledge. There was therefore no risk of impropriety by CMNC that could affect the completion of the Project.

(b) CMNC submitted that its lawyers and quantum experts had been prejudiced in testing Jaguar's claim for damages due to the redactions applied to AEO Designated Material. This was with reference to the documents with a value of US$100,000 or more to which Procedural Order No 3 applied. CMNC noted that some of these redactions were unauthorised because certain pages had been redacted entirely (as opposed to merely having the names of the contractors and other identifying details redacted). I would observe that this argument appears to be old wine in a new bottle being a rehash of earlier arguments.

92 By CC No 120 dated 19 February 2015, Jaguar proposed that the parties negotiate to reach a confidentiality agreement regarding the documents that were the subject of CMNC's application in RC No 119.

93 By TC No 133 dated 20 February 2015, the Tribunal invited the parties "to exhaust the possibility of reaching an agreement" on the AEO Regime. Significantly, the Tribunal further noted that CMNC had "not to date sought any relief from the Tribunal … regarding difficulties it may experience … [in] obtaining instructions regarding documents the subject of the Tribunal's orders".

94 On 17 March 2015, the parties informed the Tribunal during the Hong Kong Hearing that they had reached an agreement regarding the disclosure of the AEO Designated Material. Subsequently, by TC No 152 dated 18 March 2015, the Tribunal issued a supplemental order to record the parties' agreement ("the Supplemental Order"). The Supplemental Order stated:

> 5. This Supplemental Order applies to *all AEO Designated Materials*.
>
> 6. Subject to the terms of this Supplemental Order, ***unredacted*** *versions of the AEO Designated Materials may be disclosed to Respondent's Employees by Respondent's Counsel* as listed in the Appendix to the Respondent's Application; the Appendix also appears as an Annex to this Supplemental Order. On that basis, *any further documents designated as "attorneys' eyes only" that Claimants produce to Respondent following the making of this Supplemental Order will be produced in* ***unredacted*** *form only*.
>
> …
>
> 9. This Supplemental Order *shall not prevent or prejudice any Party from applying to the Tribunal for relief therefrom, or from applying to the Tribunal for further or additional orders*, or from agreeing with the other Party to a modification of this Supplemental Order, subject to the approval of the Tribunal.
>
> [emphasis added in italics and bold italics]

95 The Supplemental Order provided for AEO Designated Material to be disclosed in *unredacted* form to 28 CMNC employees listed in the Annex to the order. The Tribunal thereby lifted the AEO Regime completely. It is important to note that this was *about three and a half months before the Main Hearing* in early July 2015. Significantly, CMNC did not make any application at this stage to postpone the procedural timelines.

(8) Events after the AEO Regime was lifted

96 By RC No 217 dated 29 May 2015, CMNC sought an extension of time for its quantum expert, Mr Gurnham, to file his responsive expert report by 10 June 2015 rather than 5 June 2015. CMNC formally applied for an extension of time in a teleconference on 1 June 2015. Notably, during this teleconference, counsel for CMNC raised the fact that the ETC Claim had not been finalised to justify CMNC's application for an extension of time. The Chairman remarked that the reason why the completion costs were changing was "not that there has been necessarily delay in preparation for the hearing by [Jaguar] but rather that the actual costs sought to be claimed are changing as the Project is completed". The Chairman also observed that Mr Gurnham was "crunched so far as [CMNC's] case is concerned, by the decision of [CMNC] regarding the way in which it was resourcing and undertaking the preparation for the case".

97 By TC No 208 dated 2 June 2015, the Tribunal issued directions relating to the matters which the parties had disputed at the teleconference on 1 June 2015. *Notably, the Tribunal recognised the complaint raised by CMNC in relation to the evolving nature of the ETC Claim by imposing a cut-off date of 5 June 2015 for Jaguar to provide particulars of and material supporting the ETC Claim*. The Tribunal also extended the time for Mr Gurnham to file his responsive expert report to 18 June 2015. It should be noted that Jaguar did not

object to an extension of time for Mr Gurnham to file his report by 18 June 2015. The Tribunal also made the following pertinent observations:

> The Tribunal has previously identified *the difficulties arising in the procedure for this Arbitration from the Parties' specific agreement on a very expedited determination of the disputes between them.*
>
> …
>
> It is clear from the Parties' submissions at the Pre-Hearing Teleconference that counsel for each Party, and their experts, are working under very considerable pressure. *It [is] also clear that no procedural solutions can be devised which allow either Party a perfect opportunity to prepare its own case, or to meet the case advanced by the other.* Counsel for both Parties very properly seek to protect their respective Parties' positions with submissions which are replete with references to procedural fairness and expressions of grave concern about their capacity to do their clients' case justice within the time available. ***The circumstances in which the Tribunal finds itself are, however, driven by the Parties' agreement to arbitrate complex disputes to finality within a very short period of time, an agreement which must be respected by the Tribunal.***
>
> [emphasis added in italics and bold italics]

By these observations, the Tribunal reiterated the point that it had made more than a year before in TC No 19 (see [43] above). The Tribunal was required to give effect to the parties' agreement to an expedited arbitration. However, it was doing its utmost to ensure due process given this constraint.

98 By RC No 226 dated 17 June 2015, CMNC sought another extension of time for Mr Gurnham to file his responsive expert report by 25 June 2015. The Tribunal denied this request by TC No 215 dated 18 June 2015, and Mr Gurnham subsequently filed his report out of time on 22 June 2015 ("the Gurnham Response Report"). Although the Gurnham Response Report was filed out of time, the Tribunal admitted it into the evidence and considered it in the Award.

99 Upon receiving the Gurnham Response Report, Jaguar discovered that it referred to a further report by CMNC's design expert, Mr Adam Aspinall ("Mr Aspinall" and "the Aspinall Report"). By CC No 203 dated 22 June 2015, Jaguar brought this matter to the attention of the Tribunal.

100 Under cover of RC No 242A dated 25 June 2015, CMNC submitted the Aspinall Report. Under cover of RC No 242B dated 25 June 2015, CMNC submitted five new witness statements ("the Five Witness Statements").

101 By CC No 208 dated 25 June 2015, Jaguar objected to CMNC's submission of the Aspinall Report and the Five Witness Statements. Jaguar emphasised that CMNC had not applied, nor provided any grounds, for the admission of the Aspinall Report and the Five Witness Statements, and the Main Hearing was to commence in barely more than a week's time.

102 Under cover of RC No 245 dated 27 June 2015, CMNC applied for the Aspinall Report and the Five Witness Statements to be admitted.

103 By TC No 225 dated 29 June 2015, the Tribunal stated that it would be premature to make orders excluding material then. However, Jaguar applied for and obtained leave to respond to CMNC's application for the admission of the Aspinall Report and the Five Witness Statements. Jaguar then issued its response to CMNC's application under cover of CC No 213 dated 28 June 2015, requesting the Tribunal to deny CMNC's application and to exclude the Aspinall Report and the Five Witness Statements in their entirety.

104 By TC No 230 dated 3 July 2015, the Tribunal stated that it would not grant leave for CMNC to rely on the Aspinall Report. The pertinent portions of the Tribunal's reasoning are as follows:

> The Tribunal appreciates that *counsel continue to undertake very significant work leading up to the [Main Hearing]* ***that is to commence next week***. It is understood that the pressures associated with this work is behind the recent submissions and materials received by the Tribunal …
>
> As the Tribunal has noted … *there is a difficult balance to be struck between the Parties having an opportunity to present their cases in light of the compressed timeframe (in which this Arbitration* ***must*** *be conducted) and having an opportunity to meet the cases presented by the other Parties.*
>
> *There is a very real concern that the Claimants are put to procedural disadvantage* since they are not just attempting to respond to materials which have been provided contrary to the Tribunal's directions, *but they have a dilemma as to whether to attempt to do so in which, what the Claimants submit, is an impossible timeframe. …*
>
> *Of the Disputed Materials, the Tribunal considers that there can be a judgement made now regarding the expert report of Mr Aspinall.* ***No leave was sought for such expert evidence to be adduced despite this being a requirement for all expert evidence in this Arbitration. It came without notice. Its provision is contrary to the Tribunal's directions not just as to time, but also as to substance.*** *In the interests of fairness the Tribunal believes that it is appropriate and necessary to indicate that leave should not be granted for it to be relied upon.*
>
> It is not presently possible for the Tribunal to rule on the admissibility of the additional witness statements of fact. …
>
> [emphasis added in italics and bold italics]

(9) The allegations of corruption

105 On 3 July 2015, three days before the commencement of the Main Hearing (see [106] below), the International Commission against Impunity in Guatemala ("the CICIG") released a report ("the CICIG Report") stating that Mr Ernesto Cordova ("Mr Cordova"), a Jaguar representative and one of Jaguar's witnesses in the Arbitration, had bribed government officials in relation to Jaguar's dispute with CMNC and the completion of the Project. According to the CICIG, Jaguar had made payments to Ms Karen Cancinos ("Ms

Cancinos"), who was linked to public officials, under fictitious consultancy contracts. I will refer to these allegations as "the Corruption Allegations".

106 The Main Hearing commenced on 6 July 2015.

107 On 9 July 2015, the CICIG released a press release based on the CICIG Report. On 10 July 2015, counsel for CMNC brought the Corruption Allegations to the Tribunal's attention.

108 By CC No 218 dated 12 July 2015, Jaguar informed the Tribunal that in view of the Corruption Allegations, Jaguar had reviewed its damages claim and was withdrawing its claim for public relations fees of US$2,526,071 ("the PR Fees Claim"), which included fees paid to Ms Cancinos.

The Award

109 On 25 November 2015, the Tribunal rendered the Award. In summary, the Tribunal unanimously found that Jaguar Energy had validly terminated the EPC Contract for default by CMNC and allowed Jaguar's claim for liquidated damages and the ETC Claim. The Tribunal dismissed all but one of CMNC's claims for extensions of time. The Tribunal ordered CMNC to pay Jaguar a total sum of US$129,389,417, interest and costs.

The parties' cases

110 CMNC's case is that the Award should be set aside pursuant to:

(a) Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") and s 24(*a*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), on

the basis that the Award was made in breach of the rules of natural justice, which breach prejudiced CMNC's rights, for two reasons:

(i) The AEO Regime deprived CMNC of a reasonable opportunity to present its case.

(ii) The Tribunal failed to consider CMNC's arguments in relation to the DPSA.

(b) Art 34(2)(*a*)(iv) of the Model Law, on the basis that the arbitral procedure was in breach of the Model Law and the parties' agreement, on the following grounds:

(i) the Tribunal breached Art 18 of the Model Law in failing to treat the parties equally and to ensure that CMNC was given a full opportunity of presenting its case; and/or

(ii) Jaguar breached its obligation to arbitrate in good faith, and the Tribunal failed to restrain Jaguar from doing so.

(c) Art 34(2)(*b*)(ii) of the Model Law, on the basis that Jaguar's "guerrilla tactics" render it appropriate to set aside the Award for breach of public policy.

(d) Art 34(2)(*b*)(ii) of the Model Law and s 24(*a*) of the IAA, on the basis that the Tribunal failed to investigate allegations of corruption and fraud and/or the Award was induced or affected by corruption.

I will refer to CMNC's grounds for setting aside the Award in [(a)] and [(b)] above as "the Due Process Ground" and "the Defective Arbitral Procedure Ground" respectively. I will refer to the grounds in [(c)] and [(d)] collectively as "the Public Policy and Corruption Ground".

111 I shall examine the Due Process Ground, the Defective Arbitral Procedure Ground and the Public Policy and Corruption Ground in turn.

The Due Process Ground

112 The Due Process Ground comprises two limbs. The first limb pertains to the AEO Regime. The second limb pertains to CMNC's arguments in relation to the DPSA. I will examine each limb of the Due Process Ground in turn.

The AEO Regime

The parties' submissions

113 CMNC submits that the imposition of the AEO Regime amounted to a breach of its right to natural justice, which breach prejudiced its rights:

(a) CMNC contends 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". Thus, the unjustified imposition of an AEO order deprives a party who is subject to that order of a reasonable opportunity to respond to its opponent's case. This amounts to a breach of the rules of natural justice, because natural justice requires that parties have the right to present their positive case *and* to respond to the case advanced against them.

(b) CMNC submits that the AEO Regime was unjustifiably imposed in this case, in breach of established rules and norms in court and arbitral proceedings, for the following main reasons:

(i) First, the Tribunal did not make any determination as to whether there were compelling grounds for the AEO Regime, in

breach of its duty to be satisfied that there was a legitimate basis for objecting to the disclosure of AEO Designated Material. On the facts, there were no compelling grounds of commercial or technical sensitivity that could have justified the AEO Regime here. Moreover, in any event, cl 1.11 of the EPC Contract itself provided for a detailed confidentiality regime which would have sufficed to address any confidentiality concerns.

(ii) Second, the AEO Regime enabled Jaguar to subject any document that it deemed sensitive to the AEO Regime. Jaguar was not required to meet its burden of proof to show, in respect of each *particular* document, that the document ought not to be disclosed. Jaguar was allowed to embark on the mass designation of documents as AEO Designated Material. The burden of proof was instead placed on CMNC to either show that the AEO Regime was not necessary for the document, or to show that it was necessary to disclose a document to an employee who had to sign a confidentiality agreement.

(iii) Third, the Tribunal did not carefully weigh the hardship and prejudice that would be occasioned to CMNC as a result of the AEO Regime, although CMNC repeatedly highlighted the difficulties and impracticalities of the same to the Tribunal.

(c) CMNC argues that the AEO Regime "significantly undermined" its opportunity to present its case for the following reasons:

(i) First, due to the AEO Regime, CMNC's lawyers and experts could not effectively analyse the documents which Jaguar relied on for the ETC Claim ("the Costs Documents"),

including completion schedules, contracts with post-termination contractors, transaction logs, work reports and site records. This is because input from CMNC's employees, who had first-hand knowledge and experience relating to the Project, was necessary to detect costs Jaguar was not entitled to recover.

(ii) Second, while the Tribunal granted a "slight reprieve" by making the Redaction Ruling on 19 October 2014, the reprieve was only slight since Jaguar refused to redact documents it deemed too onerous to redact, and the Tribunal subsequently held in Procedural Order No 3 on 18 December 2014 that Jaguar was not obliged to redact and produce documents of a value of less than US$100,000 (see [79(c)] above). Jaguar also made unauthorised redactions beyond the scope permitted by the Tribunal.

(iii) Third, by the time the AEO Regime was lifted by the Supplemental Order on 18 March 2015, the prejudice was irreversible because there was a mere three months before the Main Hearing. Further, Jaguar continued to disclose new documents until 5 June 2015. The consequences of the AEO Regime were also magnified by Jaguar's breaches of the agreed arbitral procedure and guerrilla tactics.

(d) Finally, CMNC contends that it was prejudiced by the breach of natural justice. Due to the AEO Regime, CMNC was unable to present evidence of irregularities in invoices supporting the ETC Claim. Further, CMNC could not rely on the Aspinall Report, which Mr Gurnham relied on in the Gurnham Response Report, in disputing the quantum of the

ETC Claim and which supported CMNC's own counterclaims. Mr Gurnham was also unable to "properly assess and interrogate" the ETC Claim.

114 Jaguar makes the following submissions:

(a) First, it is settled law that subject to any arbitral procedure agreed by the parties, an arbitral tribunal has a wide power over the procedural management of the arbitration.

(b) Second, under the AEO Regime, CMNC was entitled to apply for AEO Designated Material to be disclosed to its employees – a point repeatedly reiterated by the Tribunal. Yet CMNC failed to do so, without good reason; in this regard, Jaguar contends that an application for disclosure to CMNC's employees would not have been as cumbersome as CMNC claims. Jaguar submits 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.

(c) Third, even if there was a breach of natural justice, CMNC did not suffer any prejudice due to the breach because:

(i) Jaguar provided redacted copies of AEO Designated Material (*ie*, the 12 Exhibits and the Further Documents) to CMNC from 22 October 2014 following the Redaction Ruling on 19 October 2014; and

(ii) Jaguar provided *unredacted* copies of AEO Designated Material to 28 CMNC employees from 18 March 2015 following the Supplemental Order.

(d) Fourth, it was CMNC's multiple changes of counsel and experts, and failings on CMNC's part, including its delay in relation to the Data Room, which disrupted CMNC's preparation for the Arbitration.

The law

115 The general principles regarding the setting-aside of an arbitral award for breach of natural justice, pursuant to Art 34(2)(*a*)(ii) of the Model Law and s 24(*a*) of the IAA, are settled law. The applicant must establish "(a) which rule of natural justice was breached, (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights": *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29]. In relation to requirement (d), it suffices for the applicant to show that the material it did not present, due to the breach of natural justice, could reasonably rather than necessarily have made a difference to the tribunal: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54].

116 It is also trite that natural justice requires that parties be afforded a reasonable opportunity of presenting their case. This means not just that a party should have an opportunity to present its positive case, but also that it should have an opportunity to respond to the case against it: *Soh Beng Tee* at [42].

117 However, the following general propositions are also well-established:

(a) First, our courts adopt a policy of minimal curial intervention in dealing with allegations of breach of natural justice. This policy entails that a court "will not intervene merely because it might have resolved the various controversies in play differently": *Soh Beng Tee* at [65(c)].

(b) Second, as Jaguar emphasises (see [114(a)] above), a tribunal has a "wide and flexible power to make procedural decisions": *ADG and another v ADI and another matter* [2014] 3 SLR 481 ("*ADG*") at [107]. Art 19(2) of the Model Law vests such a power in the tribunal: it states that absent agreement by the parties on the arbitral procedure, the tribunal "may, subject to the provisions of [the Model Law], conduct the arbitration in such manner as it considers appropriate".

(c) Third, in the light of the wide power accorded to the tribunal to conduct the arbitration, a court will exercise its supervisory role over the tribunal's exercise of this power with a "light hand": *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi*") at [132]. The policy of minimal curial intervention is even more apparent where the alleged breach arose from a procedural or case-management decision of the tribunal: *ADG* at [114]. In this context, the applicant must show "a material breach of procedure serious enough that it justifies the exercise of the court's discretion to set aside the award": *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [51]. There must be a "radical breach of [the right to be heard] which is 'serious or egregious'": *ADG* at [116], affirmed in *Triulzi* at [134].

118 Further, in my judgment, two more specific propositions are pertinent:

(a) First, what natural justice demands in any case turns on, amongst other things, "a proper construction of the particular agreement to arbitrate": *Trustees of Rotoaira Forest Trust v Attorney-Genera*l [1999] 2 NZLR 452 at 463, cited with approval in *Soh Beng Tee* at [55].

(b) Second, even where a breach of natural justice obtains, a court must consider whether any prejudice is due to that breach or to the applicant's own choices or failings: *Sobati General Trading LLC v PT Multistrada Arahsarana* [2010] 1 SLR 1065 at [28], citing *Soh Beng Tee* at [38]; *Triulzi* at [51] (regarding the minimum procedural requirements imposed by Art 18 of the Model Law). In my judgment, this reflects the settled principle that the applicant must show "a causal nexus" between the breach of natural justice and the award: *Soh Beng Tee* at [73].

My decision

119 Having carefully considered the evidence and the parties' submissions, I have come to the view that the imposition of the AEO Regime did not amount to a breach of natural justice which warrants the setting aside of the Award. My analysis on this point is structured as follows:

(a) I first discuss two preliminary but pertinent points regarding the arbitration agreement and the Tribunal's power to make an AEO order.

(b) I then set out a chronology of the key facts pertaining to the AEO Regime with accompanying analysis. In my judgment, this is critical to the assessment of CMNC's submissions in relation to both the Due Process Ground and the Art 18 Ground (see [179] below).

(c) I then address CMNC's specific submissions in relation to the AEO Regime, with reference to the key points alluded to at [(b)] above.

(1) The arbitration agreement

120 As noted at [118(a)] above, what natural justice requires in any case turns on, among other things, the arbitration agreement. In my judgment, it is vital to keep the arbitration agreement here in mind in assessing Jaguar's claims that the imposition of the AEO Regime constituted a breach of natural justice.

121 Clause 20.2 of the EPC Contract provided for a very swift arbitration for this complex and complicated dispute. Under the terms of cl 20.2, the Tribunal would have had to render the Award by 23 September 2014 (see [39] above). While the parties agreed to amend this requirement by agreeing to the timelines reflected in Procedural Order No 2, their intention as evinced in cl 20.2, as the Tribunal noted, was plainly that the arbitration would be conducted "speedily and without any undue delay" (see [43] above). *This point was plainly made by CMNC itself* in RC No 9 (see [41] above), where it observed that the parties had a "strong original intention and desire that the matter should be completed at the earliest possible moment and under the shortest possible timetable".

122 The Tribunal was therefore required to give effect to the agreement of the parties to an expedited arbitration, despite the scale and intricacy of the dispute before them. The Tribunal noted this in TC No 208, where it remarked on the procedural difficulties arising from the parties' agreement to an expedited arbitration for complex disputes but observed that, nonetheless, the agreement "*must be respected by the Tribunal*" [emphasis added] (see [97] above).

123 The Tribunal also made the same point at the beginning of its discussion of the issues in the Award, at [671]–[672]:

> 671. This case has been bitterly fought. The Tribunal has been inundated with procedural disputes throughout this

> arbitration. *The parties have served on the Tribunal thousands of pages of witness statements, exhibits, submissions and legal materials.* There have been over 750 communications by email; 65 witness statements; 27 expert reports *and the total record runs to well over 250,000 pages.*
>
> 672. *The Tribunal has been faced with a gargantuan task and have attempted to deal with this matter promptly* ***in line with the [parties'] somewhat optimistic agreement***.
>
> [emphasis added in italics and bold italics]

124 The Tribunal reiterated the point at [1895]–[1897] of the Award:

> 1895. At the outset, *it has to be appreciated that the Parties agreed to an expedited hearing*. …
>
> 1896. Given the huge nature of this dispute it was quite impossible (as both parties realized) for the award to be rendered within 90 days (or 180 days with extensions) from the date of appointment of the presiding arbitrator.
>
> 1897. Nevertheless, *the Claimants consistently reminded the Tribunal of the Parties' intentions as to expedition* ***and the Tribunal has done its best to give effect to that agreement in the procedure it has adopted***.
>
> [emphasis added in italics and bold italics]

125 In my view, it is vital to the analysis that the parties agreed to an expedited arbitration which the Tribunal was bound to give effect to. This is because *the prejudice that CMNC claims it suffered due to the AEO Regime arose because it allegedly did not have sufficient time to fully and adequately review the documents supporting the ETC Claim due to the AEO Regime.* In this regard, counsel for CMNC, Mr Toby Landau QC ("Mr Landau"), accepted that there was "a potential for [CMNC's complaint relating to the AEO Regime] to fall away if we had been given enough time" and that "in theory", "[it] could come down to time … but that is something we simply did not have". In assessing CMNC's claims about the prejudice that it suffered, it must be borne in mind that the Tribunal was constrained by the parties' agreement to an

expedited arbitration. As counsel for Jaguar, Mr Michael Hwang SC ("Mr Hwang") emphasised, that agreement required the procedural timelines for the Arbitration to be compressed with concomitant implications for the quality of due process that could be afforded to the parties within that framework.

126 Mr Landau accepted that a reasonable opportunity of presenting one's case in an expedited arbitration was "not going to be the same reasonable opportunity as [in] a full-length arbitration". However, he emphasised two points. First, he contended that the breach of natural justice here was manifest and thus, even in the context of an expedited arbitration, CMNC's rights to due process had been violated. Second, he submitted that since the Arbitration was expedited, the Tribunal bore a "heightened duty … to police the process": additional vigilance regarding due process was required from the Tribunal.

127 I do not accept Mr Landau's first point that there was a manifest breach of natural justice for the reasons given at [138]–[166] below. I have doubts about Mr Landau's second submission as well. What does a heightened duty entail? No doubt, it would require more of the arbitral tribunal in relation to ensuring due process than otherwise. But what more would be required and where does one draw the line? When can it properly be said that the arbitral tribunal has failed to discharge such a duty? The difficulties inherent in these questions speak against the imposition of a heightened duty simply by reason of an arbitration agreement that requires the arbitration to be expedited. As the Tribunal lamented in TC No 208, "[it is] *also clear that no procedural solutions can be devised which allow either Party a perfect opportunity to prepare its own case, or to meet the case advanced by the other*" [emphasis added] (see [97] above). It must be emphasised that the parties decided on an expedited arbitration. They did so well aware of the nature of the contract and the type of

disputes that it could engender, which the arbitration agreement would relate to. They were well aware that the contract in question was a highly complex EPC Contract which if disrupted would likely spawn complex and complicated disputes. The dispute before the Tribunal is a crystal clear example of this. The parties should have foreseen this when they agreed to an expedited arbitration. Surely therefore, having shackled themselves and the Tribunal to an expedited arbitration, the primary responsibility must have been on the parties to also agree on an arbitral procedure that would ensure due process in this context. Article 19(1) of the Model Law allows the parties this option. It would seem that the parties did this by stipulating in the EPC Contract that the 1998 ICC Rules would apply without adding any riders or qualifications. Having agreed to have the 1998 ICC Rules regulate the arbitral proceedings, it seems intuitively incorrect for CMNC to now seek to impose a heightened duty, which has no defined parameters, on the Tribunal to ensure due process. That is not to say that the Tribunal did not have a responsibility to ensure due process. Yet the Tribunal had to do so within the strictures that the parties had placed it in, principally the constraint of time. Indeed, the Tribunal itself made this observation, on multiple occasions (see [122]–[124] above). These considerations give me pause in endorsing Mr Landau's second point. In any event, I am of the view that the point is moot on the facts of this case because even if there was such a heightened duty, the Tribunal did not breach it.

(2) The Tribunal's power to grant an AEO order

128 Before examining the source of the Tribunal's power to grant an AEO order, I make some brief remarks on AEO orders in international arbitration.

129 The AEO order is not entrenched in our jurisprudence. That is not the same as saying it is not an appropriate order in international arbitration. In

particular, it does appear to be one answer to a concern about preserving the confidentiality of the documents that are disclosed. The evidence of CMNC's expert, Mr John Beechey ("Mr Beechey"), the former President of the ICC International Court of Arbitration, is that an AEO order is "a protective order, which is intended to limit the number of individuals … who may be afforded access to documents or information relied on by a party in legal proceedings". Generally, an AEO order only permits the opposing party's counsel to access the material which is the subject of the order but in some cases the order may also entitle the opposing party's experts to access the material. The AEO Regime here was of the latter, broader variety. Indeed, it went further by providing the safeguard of the second stage where access could be granted to specific employees of CMNC upon application for the purpose of taking instructions.

130 It is not in dispute that AEO orders are rare in international arbitration but are not unheard of. Mr Beechey states that although AEO orders are "not yet commonplace in ICC arbitration, they are not unknown". The AEO order is alluded to in Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) ("*Born*") at pp 2387–2388 as follows:

> Tribunals also have the power to *condition a discovery order on compliance with specified protective conditions, aimed at safeguarding the confidentiality of discovery materials or imposing other safeguards*. The purpose of such conditions is to ensure that the discovery process does not inflict unnecessary damage on the parties.
>
> *Protective orders are generally issued to safeguard the confidentiality of materials produced in discovery in the arbitration*, particularly commercial confidences, intellectual property, or internal governmental or corporate records. …
>
> … There are also circumstances in which it is appropriate to include *heightened protections for certain materials, including by* ***limiting its review to specified individuals, requiring***

> ***"counsel only" review,*** or restricting inspection of documents to a single location (with no right to copy).
>
> [emphasis added in italics and bold italics]

131 I now turn to the issue of the Tribunal's power to impose an AEO order in the Arbitration. The 1998 ICC Rules applied in the Arbitration (see [7] and [10] above). Art 20(7) of the 1998 ICC Rules states that "[the] Arbitral Tribunal may take measures for protecting trade secrets and confidential information". This language is mirrored in the second limb of Art 22(3) of the 2012 ICC Rules of Arbitration ("the 2012 ICC Rules"), which replaced Art 20(7) of the 1998 ICC rules. Art 22(3) of the 2012 ICC Rules 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.* [emphasis added]

132 In Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC, 2012), the authors makes the following remarks at paras 3-811 to 3-812 in relation to the second limb of Art 22(3):

> 3-811 **Measures for protecting trade secrets and confidential information**. The second part of Article 22(3) concerns orders to protect the confidentiality of trade secrets or other information *before it is disclosed or otherwise produced in an arbitration.* …
>
> 3-812 In a protective order, *the arbitral tribunal can, for example, authorize a party to* ***redact a document to remove all parts that are not relevant to the dispute, restrict access to documents that the parties produce,*** or prohibit use outside the proceedings of any document produced by the opposing side. The provision places *no limit on the arbitral tribunal's creativity in making protective orders.*
>
> [original emphasis omitted; emphasis added in italics and bold italics]

133 In this light, in my judgment, the Tribunal was empowered to impose an AEO order pursuant to Art 20(7) of the 1998 ICC Rules. (I would observe here that there does not appear to be an equivalent provision in the Singapore International Arbitration Centre Rules 2016, the London Court of International Arbitration Rules 2014 or the Hong Kong International Arbitration Centre Administered Arbitration Rules 2013.) In the alternative, the Tribunal was entitled to do so pursuant to its broad powers of case management under Art 19(2) of the Model Law (see [117(b)] above). I do not understand CMNC to be disputing this. CMNC's case, as I understand it, is not that the Tribunal had no power to grant an AEO order, but that the order was made in an inappropriate and indiscriminate way (see [113(a)]–[113(b)] above).

(3) The chronology

134 The chronology pertaining to the AEO Regime is as follows:

(a) On 25 September 2014, the Tribunal imposed the AEO Regime. The AEO Regime balanced the interests of both parties, a point that the Tribunal took pains to make in TC No 49 (see [58] above). CMNC's interest was safeguarded by both (1) the second stage of the AEO Regime (see [57] above) and (2) the clarification and expansion of the first stage of the AEO Regime in TC No 51, which provided for AEO Designated Material to be also disclosed in *unredacted* form to CMNC's experts, thus facilitating the identification of areas where instructions from specific employees of CMNC would have been required (see [60] above). The Tribunal repeatedly stated that CMNC was entitled to apply for its staff to review AEO Designated Material after imposing the AEO Regime, in TC No 54, TC No 57 and TC No 64 (see [64], [68] and [74(b)] above). CMNC never did so.

(b) On 19 October 2014, the Tribunal passed the Redaction Ruling, favouring CMNC's position over Jaguar's regarding the extent of redactions (see [72(c)] above). The Redaction Ruling lifted the AEO Regime subject to the later order in Procedural Order No 3 for the AEO Regime to apply to AEO Designated Material disclosed after the date of that order and of less than US$100,000 in value (see [74] above and [(d)] below). *The Redaction Ruling thus 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* (see [75]–[76] above). The Redaction Ruling came just four weeks after the imposition of the AEO Regime.

(c) Pursuant to CMNC's request in RC No 48 for new timelines for the Arbitration (see [70] above), it was decided at the Toronto Hearing that a new procedural timetable for the Arbitration would be created (see [77(b)] above). The parties then agreed to a revised timetable for the Arbitration in November 2014 that was later reflected in Procedural Order No 3. Importantly, CMNC agreed to the revised timelines *in the context of the AEO Regime and the Redaction Ruling*. The timelines thus presumably accounted for any concerns that CMNC might have had in relation to the AEO Regime and the Redaction Ruling (see [78] above).

(d) The Tribunal then issued Procedural Order No 3 on 18 December 2014. This laid down a disclosure regime for *further* AEO Designated Material, under which documents of a total value of US$188,790,048.92 were disclosed with limited redactions to CMNC, while documents of a total value of US$14,521,839.56 were subject to the two-stage AEO

Regime (see [80] above). Procedural Order No 3 also expressly entitled CMNC to apply for access to the latter documents which were subject to the AEO Regime but CMNC never did so. Again, Procedural Order No 3 provided that Jaguar would continue to supplement production of some documents on a continuing basis (see [79(a)] above). At that stage, apart from a request for an extension of time for the filing of its Statement of Reply and reply witness statements, which the Tribunal granted over Jaguar's objections (see [81] above), CMNC *did not seek any adjustment of the procedural timelines*. This is unsurprising since Procedural Order No 3 gave effect to the agreed revised timelines, under which the Main Hearing was postponed from January and February 2015 to July 2015.

(e) KWM assumed conduct of CMNC's case in mid-January 2015 (see [83] above), and gave multiple assurances up to 27 January 2015 that they were aware of the procedural timelines and that they and Mr Gurnham would abide by them (see [84]–[88] above). Furthermore, at or around this time, CMNC was dilatory in agreeing to the service provider for the Data Room, which caused the uploading of the documents into the Data Room to be delayed until 10 February 2015 (see [82] and [89] above). Even then, CMNC did not apply for the timelines to be adjusted.

(f) Finally, the AEO Regime was lifted on 17 March 2015 by the Supplemental Order more than three months before the Main Hearing (see [95] above). Even then, CMNC did not apply for the procedural timelines to be extended.

(g) Although Jaguar continued to disclose new material up to June 2015, this was in accordance with Procedural Order No 3 (see [(d)] above). The reason for the continuing disclosure was that, as the Chairman observed during the teleconference on 1 June 2015, the costs to complete were changing as the Project was being completed (see [96] above). Nevertheless, the Tribunal recognised the concerns raised by CMNC regarding the evolving nature of the ETC Claim by imposing a cut-off date of 5 June 2015 for Jaguar to finalise the particulars and material supporting the ETC Claim (see [97] above).

135 With this factual matrix as the backdrop, I now address CMNC's submissions regarding the AEO Regime.

(4) CMNC's submissions regarding the AEO Regime

136 CMNC advances two principal submissions:

(a) First, the AEO Regime was imposed in breach of settled court and arbitral rules and norms (see [113(b)] above).

(b) Second, the AEO Regime resulted in CMNC being denied a reasonable opportunity to present its case (see [113(c)] above).

137 I now turn to CMNC's first principal submission. CMNC contends that the AEO Regime violated settled rules and norms in three ways.

(A) THE FIRST CONTENTION

138 CMNC's first contention has three limbs (see [113(b)(i)] above):

(a) First, the Tribunal did not make any determination regarding whether there were compelling grounds to impose the AEO Regime.

(b) Second, there were no such grounds.

(c) Third, even if there were grounds to impose the AEO Regime, cl 1.11 of the EPC Contract included a confidentiality regime which rendered the imposition of the AEO Regime unnecessary.

139 I do not accept the first limb (see [138(a)] above). It is plain from [17] of TC No 49 (see [58] above) that the Tribunal arrived at a view on the risk of CMNC misusing documents. TC No 49 states the following at [17]:

> 17. *The Tribunal views with* ***serious concern*** *the possibility that* ***disclosed documents could be used for the ulterior and quite improper purposes*** *which the Claimants assert may be undertaken by the Respondent.* On an application such as this *it is* ***not possible to reach any concluded view*** *of the risk that the Respondent may undertake such improper use of disclosed documents.* Indeed the Tribunal wishes to make very clear that it has not done so and although noting the competing contentions of the Parties it will not be subsequently influenced by these contentions which, if ultimately relevant, will be decided by the Tribunal after a full evidentiary hearing. In the interim it is sufficient to say that any use of disclosed documents by the Respondent as suggested by the Claimant may occur would be entirely improper and prejudicial to the fair and just determination of the disputes between the Parties. [emphasis added in italics and bold italics]

140 I make the following observations in relation to this reasoning:

(a) The Tribunal first noted that it viewed "with *serious concern*" [emphasis added] the possibility that CMNC might use documents for ulterior purposes. This indicates that the Tribunal considered that there was a not insignificant risk of CMNC misusing documents. Otherwise, the Tribunal would not have viewed the risk with "serious concern".

(b) The Tribunal then stated, *not* that it had not come to a view of such a risk, but that it had not reached a *concluded* view, and would decide the matter if relevant after the Main Hearing. This indicates that the Tribunal did come to a *preliminary* view on the risk of CMNC misusing documents, and imposed the AEO Regime on that basis.

141 While the Tribunal did not expressly state that it was making a *finding* that there was a risk of CMNC misusing documents, this is explicable for two reasons. First, it would have been inappropriate to do so because the Tribunal was making an interim order and therefore only required to take a provisional view. CMNC's conduct was an issue in the Main Hearing and a conclusive view would only be taken after hearing the evidence. The Tribunal made this plain in TC No 49. Second, in RC No 36, CMNC contended that to impose the AEO Regime would be to pre-judge disputed issues about CMNC's conduct (see [55] above). Notably, this point runs against the grain of CMNC's submission before me that the Tribunal simply accepted Jaguar's allegations. In my view, these reasons explain the circumspect manner in which the Tribunal set out in TC No 49 its decision to impose the AEO Regime.

142 I also note that this is not a case in which there was a complete absence of an evidentiary basis upon which the Tribunal could have come to a view that CMNC might misuse documents. Jaguar appears to have put witness statements before the Tribunal containing evidence that CMNC had interfered with Jaguar's completion of the Project (see [54] above). It is difficult to believe that the Tribunal did not consider the witness statements and thereby reach a preliminary view on the risk of CMNC misusing documents. Indeed, there is nothing to suggest that the Tribunal simply accepted Jaguar's assertions at face value. As the facts outlined above show, there was a rich vein of deep distrust

and acrimony, in some instances involving violence, between the parties which formed the backdrop to the imposition of the AEO Regime.

143 In sum, reading the plain text of TC No 49 in the light of its context, it is clear to me that the Tribunal did reach a preliminary view that there was a risk of CMNC misusing documents and imposed the AEO Regime on this basis. I note that in TC No 51, the Tribunal stated that it had not "come to any view regarding the allegations by [Jaguar] made in support of its request for confidentiality" (see [60] below). In my judgment, however, this statement must be read in the light of TC No 49 which indicates that the Tribunal did form a preliminary view that there was a risk of CMNC misusing documents. I do not understand the Tribunal in TC No 51 to be indicating anything more that it had not reached a *final* view that there was a risk of CMNC misusing documents.

144 Further, I do not accept the second limb of CMNC's first contention, *ie*, that there were no legitimate confidentiality concerns that could have justified imposing the AEO Regime (see [138(b)] above) for the following reasons:

(a) The words of the Tribunal in TC No 49 (see [58] above) make important reading. The Tribunal observed that "any use of disclosed documents by [CMNC] as suggested by [Jaguar] may occur would be *entirely improper and prejudicial to the fair and just determination of the disputes between the Parties*" [emphasis added]. It further remarked on the need to ensure that "sensitive documents disclosed *will not have a chance of being used other than for the purposes of this dispute*" [emphasis added]. The Tribunal was clearly concerned with ensuring the confidentiality of information in the disclosed documents so that the fair and just determination of the issues would not be compromised by the

use of such information for a collateral purpose. As noted earlier, there was a rich vein of deep distrust and acrimony, including violence, that formed a compelling backdrop to the imposition of the AEO Regime (see [142] above). It is difficult to understand why this could not be regarded as a legitimate confidentiality concern within the scope of Art 20(7) of the 1998 ICC Rules (see [131] above).

(b) In any event, it is settled law that a supervisory court should take a "light hand" in reviewing case management or procedural decisions made by a tribunal and only intervene if a "material breach of procedure" obtains (see [117(c)] above). It is also trite that the supervisory court will not intervene "merely because it might have resolved the various controversies in play differently" (see [117(a)] above). These principles imply that any review of the grounds upon which the Tribunal imposed the AEO Regime must be limited. Having regard to the events pertaining to the breakdown in relations between the parties, including Mr Ho's emails (see [24]–[25] above) and the letter issued by CMNC's subsidiary (see [30] above), it is not manifestly clear that there was no basis for the AEO Regime. It is not obvious that the Tribunal had no reason to give weight to the concerns of confidentiality raised by Jaguar. Thus, I do not accept CMNC's challenge to the AEO Regime based on the claim that there were no grounds for the Tribunal to impose the same.

145 I also do not accept the third limb of CMNC's first contention, *ie,* that the AEO Regime was unnecessary in view of cl 1.11 of the EPC Contract which set out a confidentiality regime (see [138(c)] above). Clause 1.11 states:

> **1.11 Confidential Information; Exclusivity** – All documents, plans, drawings, specifications owned by a Party … and any information provided by either Party or its Affiliates or representatives … to the other Party *in connection with the performance of this Contract or relating to the Project* … shall be held confidential by the receiving Party and shall not be used or disclosed by the receiving Party for any purposes other than those for which they have been prepared or supplied, unless otherwise permitted with the prior written consent of the disclosing Party. … the receiving Party agrees to hold all such Confidential Information confidential and not to use, discuss or disclose such Confidential Information ***with or to third parties*** for a period of five (5) calendar Years following termination of this Contract, without the prior written consent of Owner. … [emphasis added in italics and bold italics]

146 I agree with Mr Hwang that cl 1.11 was intended to "protect the confidential proprietary information of each party as against the other, in terms of release to the outer world". It was not intended to address the risk that a party might misuse documents disclosed in the course of an arbitration after a dispute arose. Given the egregious nature of the allegations against CMNC, and the backdrop that I have referred to (see [142] above), the Tribunal was surely entitled to take the view that the clause would have been of cold comfort in addressing the concerns articulated by Jaguar.

147 Furthermore, even if the Tribunal could have adopted the confidentiality regime in cl 1.11 of the EPC Contract in the Arbitration, they chose to impose the AEO Regime instead in the exercise of their wide procedural powers. In my judgment, the AEO Regime cannot be impugned just because the Tribunal could have made a different confidentiality order, since it is not manifestly clear that there was no basis for the order which the Tribunal did make (see [144(b)] above). The supervisory court cannot intervene merely because it might have made a different order from the Tribunal (see [117(a)] and [144(b)] above). This is especially because it is plain that the Tribunal was fully conscious of the competing interests of the parties. This is clear from the reasoning in TC No 49,

where the Tribunal noted at [19] that it had taken into account "the need for both [parties] to have an adequate opportunity of presenting their cases" (see [58] above). It is also evident from the actual order which was made: although the first stage sought to protect Jaguar's interests, the second stage was created to preserve CMNC's ability to present its case (see [134(a)] above). In my view, since the Tribunal was fully aware of the parties' competing interests, there is even less scope for a challenge to be mounted, before the supervisory court, to the AEO Regime imposed by the Tribunal.

(B) THE SECOND CONTENTION

148 CMNC's second contention is that the AEO Regime unjustifiably shifted the burden of proof onto CMNC to show why disclosure was necessary, whereas the Tribunal should have required Jaguar to establish, *in respect of each particular document*, that an AEO order was warranted (see [113(b)(ii)] above).

149 This submission raises two distinct issues which I will address in turn. First, whether the AEO Regime shifted the burden of proof of establishing that an AEO order was necessary from Jaguar to CMNC. Second, whether Jaguar should have satisfied that burden in respect of *each particular document* subject to the AEO Regime, before it could properly be subject to an AEO order.

150 I do not accept the second claim. The evidence of Mr Beechey, which I accept, was that under international arbitral practice, "a party must make an application to the Tribunal before disclosure of a particular document *or class of information* may be made subject to an AEO [order]" [emphasis added]. In other words, it is consistent with international arbitral practice for a party to apply for a *class of documents* to be subject to an AEO order, and for the Tribunal to then grant such a category-based order. I therefore do not agree that

the Tribunal's imposition of the AEO Regime in respect of specific categories of documents identified by Jaguar in its application (see [53] above) was inconsistent with international arbitral practice.

151 Moreover, I do not accept the first claim. In my judgment, it elides two different burdens of proof. Mr Beechey's evidence, which I accept, is that the burden of proof falls on the party applying for an AEO order to establish that a document or class of information should be subject to an AEO order. But in my view, the Tribunal held Jaguar to this burden and imposed the AEO Regime because it found that Jaguar had met its burden. As I have noted, the Tribunal reached a preliminary view that there was a risk of CMNC misusing documents and imposed the AEO Regime on this basis (see [143] above).

152 CMNC bore a quite different burden under the second stage of the AEO Regime. This was the burden of satisfying the Tribunal that it was necessary for its employees to access certain documents upon application. However, CMNC did not bring my attention to evidence or authorities indicating that *this aspect of the AEO Regime* – namely, CMNC being required to satisfy the Tribunal of the necessity of documents being shown to its employees, *the Tribunal having already been satisfied that it was appropriate to limit disclosure to CMNC* – rendered it inconsistent with international arbitral practice. It is difficult to believe that that is in fact the position. Once it is accepted that the Tribunal had the power to impose an AEO order to preserve the confidentiality of documents disclosed by Jaguar (see [133] above), it surely cannot be maintained that the imposition of the second stage of the AEO Regime was wrong. The Tribunal could have stopped at the first stage given that it had the power and the basis to impose the AEO Regime. The point of the second stage was to ameliorate the effect of the AEO order in the first stage of the AEO Regime. It was introduced

for CMNC's benefit. It is thus strange for CMNC to contend that it was procedurally unfair. There is no basis for the second stage of the AEO Regime to be challenged on due process grounds.

(C) THE THIRD CONTENTION

153 CMNC's third contention is that the Tribunal did not carefully weigh the prejudice occasioned to CMNC due to the AEO Regime (see [113(b)(iii)] above). I do not accept this submission for the following reasons.

154 First, the second stage of the AEO Regime empowered CMNC to apply for its employees to review AEO Designated Material. This was a safeguard built into the AEO Regime by the Tribunal to protect CMNC's interest, which CMNC never utilised despite the Tribunal's repeated reminders (see [134(a)] above). The very fact that the Tribunal, *of its own volition*, devised and imposed the second stage of the AEO Regime, *and* the fact that it expanded the first stage of the AEO Regime to provide for AEO Designated Material to be disclosed to CMNC's experts as well as its external counsel, demonstrates that it carefully weighed, in making the order, the prejudice that CMNC might sustain due to the AEO Regime. This is clear from the grounds in TC No 49.

155 I note that CMNC contends that the process of applying for access under the second stage of the AEO Regime was "onerous and impractical":

(a) First, CMNC would have had to apply to the Tribunal on a document-by-document basis, each time its lawyers or experts wanted to discuss a document with CMNC's employees.

(b) Second, CMNC would have to show that there was a need for a particular employee to be shown a specific document, and this would

have revealed to Jaguar how CMNC "was preparing its case and thinking about documents".

(c) Third, under the second stage of the AEO Regime, the employee who was obtaining access had to sign a confidentiality agreement. This was not workable because Jaguar and CMNC could not agree on the governing law and venue for disputes arising out of the same.

156 I do not accept this submission for the following reasons:

(a) First, a key premise of this submission is that CMNC would have had to apply on a document-by-document basis for its staff to view AEO Designated Material. However, I agree with Jaguar that the Tribunal did not make any such order. Nothing in TC No 49, where the Tribunal set out the AEO Regime, indicates that the Tribunal required Jaguar to apply for access on a document-by-document basis (see [56] above).

(b) Second, Mr Landau submitted that CMNC expressed the view, in RC No 38, that applications under the second stage of the AEO Regime would have had to be on a document-by-document basis; but neither Jaguar nor the Tribunal informed CMNC at the time that this view was incorrect. Mr Landau also contended that both Jaguar (in communications with the Tribunal) and the Tribunal (in TC No 54) took the position that applications under the AEO Regime would have to be on a document-by-document basis. I do not accept these submissions.

(i) First, I do not agree that the Tribunal expressed the view in TC No 54 that applications under the second stage of the AEO Regime would have to be on a document-by-document basis. In my view, the mere fact that the Tribunal used the singular article

"a" in TC No 54, in stating that the parties were entitled to apply for access to documents (see [64] above), is insufficient basis to infer this.

(ii) Second, in this light, and since TC No 49 also did not suggest that applications on a document-by-document basis were necessary, I do not think that the view Jaguar expressed in its communications is very material.

(iii) Third, in RC No 38, CMNC did not expressly state that its view was that it had to apply for AEO Designated Material to be shown to its staff on a document-by-document basis. Rather, it stated that, if its application were opposed by Jaguar, the Tribunal "[would] then have to decide the matter on a document by document basis". I therefore do not think that the fact that Jaguar and the Tribunal did not correct CMNC regarding its view of how the AEO Regime operated is very relevant.

(c) Third, I find it difficult to believe that the Tribunal would have required such a cumbersome procedure for CMNC to apply to access AEO Designated Material given that it was introduced by the Tribunal to safeguard CMNC's interest. Even if that were the original understanding, I struggle to imagine that the Tribunal would not have revised the AEO Regime if CMNC had applied for groups of documents to be disclosed to its employees, pointing out the impracticalities of applications on a document-by-document basis. I observe in this regard that I was not shown any correspondence in which CMNC expressly and specifically raised this issue at the material time.

(d) Fourth, the notion that CMNC would have had to reveal its case strategy to Jaguar, in explaining the need to show AEO Designated Material to its employees (see [155(b)] above), is far-fetched. CMNC's submission here presupposes that it would have been required to delve into much detail in explaining why its employees needed to be shown AEO Designated Material. I am not convinced that would have been necessary. The second stage of the AEO Regime ought to have been a relatively straightforward exercise. The relevance of the document to the issues would not have been in dispute as it had been disclosed. The only issue would have been the necessity of showing the document to a particular individual or a group of individuals. It would probably have sufficed to establish that the relevant employee was closely related to the making of the document or the facts asserted in it. In any event, CMNC's submission that it would have had to reveal its case strategy in applying under the second stage of the AEO Regime is unsubstantiated because, as I have stressed, no application under the second stage of the AEO Regime was ever made. There is thus no evidence on the detail which the Tribunal would have required to have been satisfied that there was a need to disclose AEO Designated Material to CMNC's employees.

(e) Fifth, if CMNC found the requirement that its employees sign a confidentiality agreement impractical (see [155(c)] above), it could and should have brought the matter up with the Tribunal, and sought a modification of the second stage of the AEO Regime to accommodate its concerns. Having failed to do so, it does not lie in CMNC's mouth to raise the matter now.

157 I therefore do not accept CMNC's argument that the application process under the AEO Regime was onerous. *The key point is that there is no evidence of this because CMNC never made any such application*. It therefore seems that the AEO Regime did provide a mechanism for CMNC's employees to obtain access to AEO Designated Material. In this light, there does not seem to be any good reason why CMNC did not make an application under the second stage of the AEO Regime if it was in fact suffering the prejudice it claims.

158 Second, in any case, *less than a month* after it imposed the AEO Regime, the Tribunal issued the Redaction Ruling which cured any prejudice that would have arisen due to the application of the AEO Regime to the 12 Exhibits and the Further Documents that were disclosed by Jaguar in redacted form. In doing so, the Tribunal agreed with CMNC rather than Jaguar on the extent of redactions which were appropriate (see [134(b)] above).

159 Third, pursuant to CMNC's request in RC No 48, the Tribunal reset the procedural timetable for the Arbitration by issuing Procedural Order No 3 (see [134(c)] above). This reflected the timelines which CMNC had agreed to in the context of the AEO Regime and the Redaction Ruling.

160 Fourth, after Procedural Order No 3, KWM gave multiple assurances that they were aware of the compressed timelines and that they and Mr Gurnham would be able to meet them (see [134(e)] above). Subsequently, apart from one extension of time request granted by the Tribunal over Jaguar's objections (see [134(d)] above), CMNC did not apply for the timelines to be adjusted. Rather, CMNC delayed in executing the contract for the Data Room which is difficult to understand if a delayed access to Jaguar's documents was the principal source of its prejudice. In sum, on and after the issuance of Procedural Order No 3,

CMNC did not highlight to the Tribunal that it was suffering prejudice and seek appropriate relief. Hence, the contention that the Tribunal did not weigh the prejudice CMNC suffered is unpersuasive as CMNC was itself not raising prejudice as a concern.

161 For these reasons, I do not accept CMNC's contentions that the AEO Regime was imposed in breach of settled court and arbitral rules and norms.

(D) CMNC'S OPPORTUNITY TO PRESENT ITS CASE

162 Furthermore, I do not accept CMNC's contentions that the AEO Regime significantly undermined its opportunity to present its case (see [113(c)] above).

163 First, CMNC submits that its counsel and experts could not effectively analyse the Costs Documents due to the AEO Regime (see [113(c)(i)] above). I disagree. As I have emphasised, CMNC never applied under the second stage of the AEO Regime for its employees to access AEO Designated Material, despite the Tribunal's repeated reminders (see [134(a)] and [154] above). There does not appear to be good reason for this, because it does not seem that the application process was unduly onerous or impractical (see [157] above). This criticism of the AEO Regime falls flat because CMNC never invoked the safeguard which was built into the regime to protect its interests.

164 Second, CMNC submits that the Redaction Ruling was only a "slight reprieve" because the AEO Regime continued to apply for documents of a value of less than US$100,000, and Jaguar made unauthorised redactions. I do not accept this submission for the following reasons:

(a) First, the Redaction Ruling cured any prejudice caused by the application of the AEO Regime to the 12 Exhibits and the Further Documents that Jaguar redacted and disclosed (see [134(b)] above).

(b) Second, while Procedural Order No 3 subsequently provided that the AEO Regime would apply to further documents disclosed by Jaguar of less than US$100,000 in value, the Tribunal had to strike a balance between enabling disclosure to CMNC and imposing too onerous a duty on Jaguar to redact AEO Designated Material. The Tribunal had the option of requiring all documents to be disclosed subject to redaction or imposing the AEO Regime with regard to one category and lifting it, subject to redaction, with regard to another. The Tribunal chose the second option. It is important to bear in mind the effect of the option the Tribunal chose. The total value of the further documents subject to the AEO Regime (US$14,521,839.56) was far less than the total value of documents of more than US$100,000 that Jaguar disclosed with limited redactions (US$188,790,048.92) (see [134(d)] above). In this light, the Tribunal's decision, to require Jaguar to redact only documents of more than US$100,000 in value, is eminently explicable. It was the path of least prejudice to CMNC bearing in mind Jaguar's concerns. I note further that the Tribunal expressly empowered CMNC to apply for access to documents of less than US$100,000 in value which were subject to the AEO Regime. However, no such application was made (see [80] and [134(d)] above).

(c) Third, CMNC claims that it experienced difficulties in working with two sets of documents – a redacted set and an unredacted set – since Jaguar did not provide an index. However, with respect, it does not

appear that such logistical difficulties were very different from those typically experienced in other large construction disputes. One difference perhaps was the compressed schedule that CMNC had to meet. However, as I have emphasised, this feature of this case directly arose from the expedited arbitration that CMNC agreed to.

(d) Fourth, while I accept that there were unauthorised redactions (I was shown a few documents that were entirely redacted), CMNC could have sought the appropriate order from the Tribunal in respect of these redactions. I also note that CMNC raised the unauthorised redactions in RC No 119 dated 17 February 2015 (see [91(b)] above), several months after the Tribunal modified the AEO Regime by issuing the Redaction Ruling dated 19 October 2014. The AEO Regime was lifted one month later when the Supplemental Order was issued on 18 March 2015.

165 Third, CMNC contends that by the time the AEO Regime was lifted on 18 March 2015 by the Supplemental Order, it had suffered irreversible prejudice because three months was not sufficient time for it to prepare its response to the ETC Claim, and Jaguar continued to disclose new documents until 5 June 2015 (see [113(c)] above). I do not accept these submissions for the following reasons:

(a) First, CMNC agreed to the timelines set out in Procedural Order No 3 against the backdrop of the AEO Regime and the Redaction Ruling and presumably on the basis that the revised timelines would account for any concerns due to the Tribunal's rulings (see [134(c)] above). As I have noted, after Procedural Order No 3 was issued, KWM gave multiple assurances that they and Mr Gurnham were aware of and would be able to meet the compressed timelines (see [134(e)] above). Further,

CMNC could have but did not apply for timelines to be adjusted when Procedural Order No 3 was issued, when there was delay in the uploading of the document to the Data Room or when the Supplemental Order was made, or indeed, at any time in between (see [160] above). If the lifting of the AEO Regime at a very late stage of the Arbitration caused CMNC prejudice, one would have expected the application to have been promptly made. Bearing in mind this sequence of events, CMNC's complaint that it did not have adequate time to respond to the ETC Claim once the AEO Regime was lifted rings hollow.

(b) Second, although Jaguar continued to disclose new material until 5 June 2015, this was in accordance with Procedural Order No 3 and due to the fact that the completion of the Plant was ongoing. I reiterate that CMNC did not apply for the procedural timelines to be postponed upon the making of the Supplemental Order. Further, the Tribunal recognised CMNC's concerns regarding the evolving nature of the ETC Claim by imposing the cut-off date of 5 June 2015 (see [134(g)] above).

166 For all of these reasons, I do not accept CMNC's contentions that the AEO Regime significantly undermined its opportunity to present its case.

(E) WHETHER CMNC SUFFERED PREJUDICE

167 Additionally, several of the points I have raised above also indicate that even if there was a breach of natural justice, CMNC did not suffer prejudice that justifies setting aside the Award. The thrust of CMNC's complaint is that it did not have sufficient time to review the documents supporting the ETC Claim (see [125] above). However, it appears that this was at least partly due to CMNC's

own choices and failings (see [118(b)] above) for the reasons given in [160] and [165(a)] above.

168 Furthermore, as I have noted, CMNC's case on prejudice stems from the allegation that it did not have enough time to review the documents supporting the ETC Claim (see [125] above). But in considering this, it must be borne in mind that CMNC had agreed to an expedited arbitration for this complex and complicated dispute – an arbitration in which timelines would necessarily have to be compressed with concomitant implications for due process.

(5) Conclusion

169 For all of these reasons, I find that the imposition of the AEO Regime does not amount to a material breach of natural justice which justifies setting aside the Award.

CMNC's case regarding the DPSA

CMNC's submissions

170 CMNC submits that the Tribunal did not consider its arguments relating to the DPSA. The relevant portion of the Award was thus issued in breach of natural justice and should therefore be set aside.

171 In its written submissions, CMNC contended that the Tribunal did not consider its arguments that Jaguar had breached s 20(a) of the DPSA and ss 7 and 8 of the DPSA. However, Mr Landau clarified at the hearing that CMNC was not maintaining that the Tribunal did not consider its arguments that Jaguar had breached ss 7 and 8 of the DPSA. The sole issue before me was thus whether the Tribunal had failed to consider CMNC's arguments that Jaguar had breached

s 20(a) of the DPSA, as a consequence of which the relevant part of the Award should be set aside for breach of natural justice.

172 As I have noted, the DPSA enabled Jaguar Energy to defer certain cash payments due under the EPC Contract, by providing for Jaguar Energy to issue notes secured by security interests over Jaguar's assets (see [10] above). Section 20(a) of the DPSA provides as follows:

> *The Parties agree* to take all necessary steps and enter into all necessary documentation to *evidence and perfect* the Security Interests on the Effective Date of this Agreement and, as and requested or as previously agreed, take all necessary steps to release the Security Interests. [emphasis added]

173 According to CMNC, it contended in the Arbitration that s 20(a) of the DPSA imposed two distinct obligations on Jaguar: an obligation to *evidence* the Security Interests, and an obligation to *perfect* the Security Interests. The former required Jaguar to provide information about the Security Interests, which would have enabled CMNC to identify and assess the Security Interests. The latter required Jaguar to take the necessary steps to ensure that the Security Interests were readily enforceable by CMNC.

174 CMNC accepts that the Tribunal considered (and rejected) its case that Jaguar did not *perfect* the Security Interests. However, CMNC submits that the Tribunal did not consider whether Jaguar had breached its distinct obligation to evidence the Security Interests. If the Tribunal had considered this argument, it would have found that Jaguar had breached s 20(a) of the DPSA. The Tribunal would have then concluded that CMNC had validly exercised the Step-In Rights (see [22] above), as a result of which Jaguar would not have been entitled to terminate the EPC Contract. Moreover, the Tribunal would have granted CMNC relief in respect of Jaguar's breach of s 20(a) of the DPSA.

The law

175 In *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488, Sundaresh Menon CJ, delivering the judgment of the Court of Appeal, held at [46] that an arbitral tribunal's failure to consider an important pleaded issue would constitute a breach of natural justice. However, Menon CJ observed that it would usually be a matter of inference that the tribunal had failed to consider an issue, and that this inference, if it is to be drawn at all, "must be shown to be *clear and virtually inescapable*" [emphasis added].

The Tribunal's reasoning and analysis

176 The Tribunal's reasoning in relation to CMNC's arguments that Jaguar breached s 20(a) of the DPSA is contained in [682]–[700] of the Award. The critical paragraphs of the Tribunal's reasoning are as follows:

> 682 *The Tribunal accepts [Jaguar's] submissions that the* ***obligations*** *regarding evidencing and perfecting the Security Interests in Section 20(a) of the DPSA are joint* ***obligations****. This is clear from the face of the provision,"[t]he Parties agree",* which is set in contradistinction to Section 20(b) whereunder "CMNC agrees" to undertake specific obligations regarding the subordination of the Security Interests to the security interests of the Lenders and other secured parties under the Financing Deed.
>
> …
>
> 684 Clearly the fact that the ***obligations*** are joint does not mean that each Party does not have ***obligations*** to do those things necessary to evidence and perfect the security, but it was clearly intended that the Parties cooperate in devising what needed to be done, as would normally be the case. The difference however between a joint obligation and a unilateral obligation is that *there cannot be a requirement that one Party (in this case on [CMNC]'s argument [Jaguar]) has the obligation itself to* ***evidence and perfect*** *the security and be regarded as being in breach of the provision if it did not get it right in doing so.*
>
> …

> 688 *The Tribunal is satisfied that [Jaguar was] at all relevant times willing to do whatever was necessary to* ***evidence*** *and perfect the Security Interests.* ***In this regard the Tribunal accepts the evidence of Mr Ron Haddock that [Jaguar was] at all material times desirous of perfection of the Security Interests.***
>
> …
>
> 697 It is possible in the Tribunal's view for there to be a breach by [Jaguar] of the joint obligation to perfect the Security Interests if there was a clear refusal by them to execute security documentation submitted by [CMNC] which was clearly required for the purposes of perfection.
>
> 698 As can be seen from the factual history set out above, this never occurred because there was ongoing, albeit sporadic, negotiation about the nature of the documentation which [CMNC] was demanding be provided by [Jaguar].
>
> 699 [CMNC]'s case is not assisted by its insistence that [Jaguar Energy] relinquish a portion of its set-off rights under Section 19 of the DPSA. The Tribunal is of the view that [Jaguar was] well within [its] rights during negotiations to refuse to accede to such a term. However, the misconceived insistence of this term by [CMNC] clearly prevented agreement on the perfection of the security and it is not appropriate for [CMNC] now to complain. The Tribunal also finds that [CMNC]'s conduct in acquiring the services of local Guatemalan legal counsel and putting said counsel in contact with [Jaguar] was less than satisfactory.
>
> 700 In the Tribunal's view *there cannot be taken from the evidence a clear failure by [Jaguar] to comply with their joint obligation for perfection of the Security Interests*. The Tribunal has no doubt that had [CMNC] not insisted on inserting this new term there would have been no problem with the perfection of the Security Interests.
>
> [emphasis added in italics and bold italics]

177 The following points are plain from the Tribunal's reasoning:

(a) First, the Tribunal recognised that s 20(a) of the DPSA created two distinct obligations regarding the evidencing and perfection of the Security Interests respectively. This is clear from the use of the plural term "obligations" in [682] and [684] of the Award.

(b) Second, the Tribunal held that these two obligations were owed by Jaguar and CMNC jointly: they were not borne by Jaguar alone.

(c) Third, the Tribunal held that although the obligations were jointly owed, it would have been possible for only Jaguar to breach them ([697] of the Award). However, the Tribunal found that Jaguar had not breached *either* of these obligations because Jaguar was "at all relevant times willing to do whatever was necessary to *evidence* and perfect the Security Interests" [emphasis added] ([688] of the Award). In making this finding, the Tribunal relied on the evidence of Jaguar's witness that Jaguar had been willing to *perfect* the Security Interests. In essence, *the Tribunal inferred from the evidence that Jaguar had been willing to perfect the Security Interests that Jaguar had been willing to* ***both*** *evidence and perfect.* The Tribunal seems to have reasoned that if Jaguar had been willing to perfect the Security Interests, it would also have been willing to fulfil the logically prior obligation of evidencing the Security Interests. This explains the Tribunal's focus on Jaguar's willingness to comply with its joint obligation to perfect the Security Interests in [697]–[700] of the Award.

178 Thus, I do not accept that the Tribunal failed to consider CMNC's case that Jaguar had breached its (joint) obligation to evidence the Security Interests. There is no "clear and virtually inescapable" inference (see [175] above) that the Tribunal did so. On the contrary, it is plain that the Tribunal considered and rejected CMNC's case that Jaguar breached s 20(a) of the DPSA by failing to take the necessary steps to evidence the Security Interests, relying on the evidence that Jaguar was willing to perfect the Security Interests. The

correctness of this reasoning, which goes to the merits of the Award, is not and indeed cannot be before me in this application.

The Defective Arbitral Procedure Ground

179 As I have noted (see [110(b)] above), CMNC avers that the Award should be set aside under Art 34(2)(*a*)(iv) of the Model Law on the basis that the arbitral procedure breached the Model Law and the parties' agreement, because:

(a) the Tribunal breached Art 18 of the Model Law ("the Art 18 Ground"); and

(b) Jaguar breached its obligation to arbitrate in good faith, and the Tribunal did not intervene to restrain Jaguar from this breach ("the Good Faith Ground").

180 I now address each of these contentions in turn.

The Art 18 Ground

181 Article 18 of the Model Law provides that the parties to an arbitration "shall be treated with equality and each party shall be given a full opportunity of presenting his case". Article 18 therefore comprises two distinct limbs. First, a requirement of equal treatment. Second, a requirement that each party be given a full opportunity of presenting its case.

CMNC's submissions

182 CMNC submits that both limbs of Art 18 were breached in this case.

183 First, CMNC contends that the Tribunal did not treat the parties equally because it did not apply equal standards in three ways:

(a) First, regarding the imposition of the AEO Regime, the Tribunal "set up an asymmetrical AEO Restriction that empowered Jaguar to withhold and/or redact massive amounts of documents". The AEO Regime also put the burden on CMNC to lift the application of the AEO Regime with respect to each document subject to that regime.

(b) Second, regarding the policing of the AEO Regime, the Tribunal did not intervene when CMNC highlighted the difficulties it experienced in preparing its case and the impracticalities of applying to lift the AEO Regime. Yet when Jaguar complained of the difficulties in redacting documents of less than US$100,000 in value, the Tribunal directed in Procedural Order No 3 that Jaguar was not required to redact those documents.

(c) Third, regarding the admission of expert evidence, the Tribunal excluded the Aspinall Report on the basis that no leave was sought to file the same. However, the Tribunal permitted Jaguar to rely on an expert report filed on 5 June 2015 by Mr Sid Dickerson ("the Dickerson Report") although Jaguar did not seek leave to file this report but simply raised the possibility that it would file the report during a teleconference on 1 June 2015.

184 Second, CMNC also submits that the Tribunal did not afford CMNC a reasonable opportunity to present its case, because the Tribunal "unreasonably insisted that CMNC adhere to existing procedural timelines":

(a) First, the Tribunal allegedly rejected CMNC's request for an extension of time to prepare its Statement of Counterclaims and supporting documents, only granting an extension of time of two weeks.

(b) Second, the Tribunal allegedly rejected CMNC's request on 15 October 2014 to reset the procedural timetable and only granted much shorter extensions of time than CMNC had requested for.

(c) Third, the Tribunal rejected CMNC's request on 17i June 2015 for a further extension of time for Mr Gurnham to file the Gurnham Response Report (see [98] above).

My decision

185 In *Triulzi* at [50], Belinda Ang J held that the requirements of equality of treatment and natural justice in Art 18 are "two of the non-derogable minimum procedural requirements under the Model Law". I agree. I also accept that accordingly, an arbitral award is liable to be set aside under the second limb of Art 34(2)(*a*)(iv) of the Model Law for being "not in accordance with [the Model Law]" if the arbitral procedure was in breach of Art 18. However, I do not accept that the arbitral procedure here was in breach of Art 18.

186 First, I do not agree that the Tribunal breached its duty of equal treatment under Art 18. In *Triulzi*, Ang J held at [112] that *equality* of treatment does not require *identity* of treatment. A similar view is taken in *Born* at p 2174:

> In determining what constitutes "equality of treatment" it is necessary to consider in detail ***the circumstances of the parties' respective positions, claims and evidence, and the arbitral process as a whole***. *"Equal" treatment* ***does not mean the "same" treatment and there are circumstances***

> ***where treating the parties identically will in fact be both unfair and unequal***. [emphasis added in italics and bold italics]

187 I do not accept CMNC's submissions that the Tribunal breached its duty of equal treatment in *imposing* the AEO Regime (see [183(a)] above):

(a) The analysis must start with two points. First, the Tribunal had the power to impose the AEO Regime under Art 20(7) of the 1998 ICC Rules and, in the alternative, in exercise of its broad powers of case management under Art 19(2) of the Model Law (see [133] above). Second, there was sufficient material for the Tribunal to take a provisional or preliminary view on Jaguar's application for the imposition of an AEO Regime. Once that is accepted, it must follow that the contention the Tribunal breached its duty of equal treatment in imposing the AEO Regime is difficult to accept. Furthermore, the AEO Regime operated and indeed had to operate asymmetrically because the risk that that a party might misuse documents, which the AEO Regime sought to address, was asymmetric as well. The Tribunal formed a preliminary view that there was a risk of CMNC misusing documents and imposed the AEO Regime on that basis (see [143] above). CMNC did not contend that there was a similar risk of Jaguar misusing documents. It is therefore unsurprising that the AEO Regime did not apply to documents which CMNC disclosed to Jaguar. The lack of identical treatment does not indicate that the Tribunal failed to treat the parties equally. CMNC and Jaguar were in different positions necessitating different treatment.

(b) CMNC also emphasises that it bore the burden of applying for disclosure of AEO Designated Material under the AEO Regime. With

respect, this submission does not fairly characterise the operation of the AEO Regime. The Tribunal made an AEO order because it considered that there was a risk of CMNC misusing documents. Nevertheless, the Tribunal safeguarded CMNC's interest by ordering the second stage of the AEO Regime which empowered CMNC to apply for its employees to access AEO Designated Material (see [134(a)] above). While CMNC would have been required to show the necessity of disclosure, this should have been straightforward (see [156(d)] above). In this light, I struggle to see how placing the burden on CMNC to show the necessity of disclosure, under the second stage of the AEO Regime, amounted to a breach of the Tribunal's duty of equal treatment.

188 I also do not accept that the Tribunal breached its duty of equal treatment in *policing* the AEO Regime (see [183(b)] above). The key facts concerning the AEO Regime (see [134] above) reveal that the Tribunal was concerned with safeguarding both Jaguar's and CMNC's interests. Thus, the Tribunal favoured CMNC's position over Jaguar's in making the Redaction Ruling (see [134(b)] above) and in issuing the revised timelines for the Arbitration reflected in Procedural Order No 3, which stemmed from CMNC's request in RC No 48 for the timetable for the Arbitration to be reset (see [134(c)] above). The picture which emerges is that of a tribunal which, notwithstanding the strictures imposed upon it by the parties' agreement to an expedited arbitration, did its utmost to treat the parties fairly and equally.

189 Further, I do not accept that the Tribunal treated the parties unequally in excluding the Aspinall Report (while admitting the Dickerson Report). The Aspinall Report was submitted on 25 June 2015, barely more than a week before the Main Hearing began on 6 July 2015 (see [100] above). It seems that the

parties and the Tribunal only learnt that CMNC wished to rely on the Aspinall Report when CMNC submitted the Gurnham Response Report on 22 June 2015 (see [99] above). By contrast, the Dickerson Report was filed earlier on 5 June 2015; Jaguar stated even earlier, during the teleconference on 1 June 2015, that it would be filing the Dickerson Report; and it does not seem that CMNC objected to the introduction of the Dickerson Report. As noted at [186] above, equal treatment does not require identical treatment. Given these different circumstances surrounding the submission of the Aspinall Report and the Dickerson Report, I find the Tribunal's decision to exclude the former and allow the admission of the latter explicable. Further, bearing in mind the wide discretion given to arbitral tribunals in case management (see [117(c)] above), I do not accept that the Tribunal breached its duty of equal treatment under Art 18 of the Model Law in excluding the Aspinall Report.

190 I now turn to CMNC's argument that the Tribunal did not allow CMNC a reasonable opportunity of presenting its case by "unreasonably [insisting] that CMNC adhere to existing procedural timelines" (see [184] above). I do not accept this argument. As I have noted, CMNC agreed to the timelines set out in Procedural Order No 3, confirmed on several occasions thereafter through its counsel that it would be able to meet them, and did not apply at various pertinent stages for timelines to be extended (see [160] and [165(a)] above). I also note the following in relation to the requests for extensions of time raised by CMNC (see [184] above).

(a) CMNC's request for an extension of time to file its Statement of Counterclaim and supporting evidence (see [184(a)] above): the Tribunal granted an extension of time of two weeks, *notwithstanding that Jaguar objected to CMNC's application* (see [45]–[47] above).

(b) CMNC's request on 18 June 2015 for an extension of time for Mr Gurnham to file the Gurnham Response Report (see [184(c)] above): the Tribunal acceded to CMNC's prior request for an extension of time for the filing of this report (see [97] above). Furthermore, the Tribunal did not exclude the Gurnham Response Report even though it was filed out of time (see [98] above). Hence, CMNC did not suffer prejudice from the Tribunal's refusal to grant its request for a further extension of time.

191 For the above reasons, I do not agree that the Tribunal breached Art 18 of the Model Law in its conduct of the Arbitration. I accordingly do not accept that the Award should be set aside on the Art 18 Ground.

The Good Faith Ground

The parties' submissions

192 CMNC submits as follows:

(a) First, the parties to an arbitration agreement both bear an implied duty to arbitrate in good faith. This duty forms part of the agreed arbitral procedure between the parties.

(b) Second, Jaguar employed guerrilla tactics in the Arbitration that amount to a breach of its duty to arbitrate in good faith and accordingly, a breach of the agreed arbitral procedure. These guerrilla tactics include:

(i) seizing the Construction Area and terminating CMNC's access to Project Solve (see [26] and [28] above);

(ii) seizing documents by securing the eviction of CMNC's employees from the Site and detaining them elsewhere, by bribing government officials (see [32]–[33] above);

(iii) harassing and interfering with CMNC's potential witnesses before the Arbitration (see [31] above); and

(iv) disclosing documents in a disordered and delayed way (see [90] above).

(c) Third, the Tribunal failed to restrain Jaguar's bad faith conduct. Thus, the Tribunal acted in breach of the agreed arbitral procedure.

(d) Fourth, CMNC suffered prejudice due to breach of the agreed arbitral procedure. The Award should therefore be set aside.

193 Jaguar submits as follows:

(a) First, neither the IAA nor the Model Law provide that an award may be set aside for breach of an implied duty of good faith.

(b) Second, Jaguar did not act in bad faith.

(c) Third, CMNC failed to seek relief from the Tribunal for Jaguar's alleged breach of its duty to arbitrate in good faith.

My decision

(1) Good faith and cooperation in the arbitral process

194 The issue of whether an arbitration agreement includes an implied duty to arbitrate in good faith, as CMNC argues, does not seem to have been decided

in Singapore before. *Born* claims at pp 1257–1259 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*.
>
> As noted above, an arbitration agreement is not merely a negative undertaking not to litigate, but a *positive obligation to take part in a sui generis process which requires a substantial degree of cooperation* (e.g., in constituting a tribunal, paying the arbitrators, agreeing upon an arbitral procedure, obeying the arbitral procedure (notwithstanding the absence of direct coercive powers of the arbitral tribunal) and complying with the award.) When a party agrees to arbitrate, it impliedly, but necessarily, agrees to participate cooperatively in all of these aspects of the arbitral process.
>
> … *an agreement to arbitrate necessarily entails a commitment to cooperate in good faith in the arbitral process* …
>
> These positive obligations are buttressed by *the obligation to perform contractual obligations in good faith* – crystallized in the *pacta sunt servanda* doctrine – which is recognised *both internationally and in all developed national legal systems*. …
>
> [emphasis added]

195 In this passage, *Born* identifies two sources of a single duty to cooperate in good faith in the arbitral process. First, the nature of an agreement to arbitrate ("the specific ground"). Second, the general duty to perform contractual duties in good faith based on the doctrine of *pacta sunt servanda* ("the general ground").

196 In my judgment, the specific ground is strong basis for holding that an arbitration agreement includes a duty to cooperate in the arbitral process. As *Born* notes, an agreement to arbitrate is an agreement to participate in a process that requires the mutual cooperation of the parties. A duty to cooperate in the arbitral process is therefore not so much implied as inherent in the very nature

of an arbitration agreement. I would observe, however, that it is not clear to me whether this duty to cooperate can be assimilated to or falls under a more general duty of good faith. The issue may turn on the relationship between a duty to cooperate and the doctrine of good faith more broadly. Different legal systems may approach this issue differently. The matter is unsettled under Singapore law: see *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 ("*The One Suites*") at [44]. In my view, it is relevant that municipal legal systems take different approaches to this issue, because the core question here is what an arbitration agreement means. It therefore seems 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.

197 All this would admittedly be moot, in relation to the question of whether an arbitration agreement contains an implied duty of good faith, if the general ground was sound foundation for such a duty. Notably, however, not all jurisdictions recognise a general duty to perform contractual obligations in good faith. There does not seem to be such a duty under English law: see *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45]. The position is the same under Singapore law: see *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 at [60] and *The One Suites* at [44]. This is relevant because, as I have noted (see [196] above), the issue here is what the arbitration agreement means and that will turn on the interpretation of the agreement under its governing law. The governing law, however, may not recognise the general ground cited by *Born* in favour of an implied duty to arbitrate in good faith. This point is, with respect, not addressed in *Born*, where it is simply asserted that "the obligation to perform contractual obligations in good faith … is recognised both internationally and in all developed national legal systems" (see [194] above).

198 Nevertheless, it may be that under the governing law, 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. The governing law may also include (a provision equivalent to) Art 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". This provision has not been introduced in Singapore. Such a provision may be relevant to whether the parties to an arbitration agreement bear a duty to arbitrate in good faith.

199 In sum, 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. Nor is it clear if the general ground relied on by *Born* founds a duty of good faith in every arbitration agreement. Still, it may be that most or all arbitration agreements include a duty of good faith or a similar duty given the cooperative nature of the arbitral process (see [198] above). Thus, for present purposes, I will proceed on the basis that Jaguar had an implied duty to arbitrate in good faith. It is not necessary for me to decide the point, however, because even if Jaguar did bear such a duty, I am unable to conclude that Jaguar breached this duty for the reasons given below.

(2) Guerrilla tactics

200 CMNC contends that Jaguar breached its duty to arbitrate in good faith by employing guerrilla tactics. The concept of guerrilla tactics in arbitration has not been explored in our jurisprudence. However, CMNC brought my attention to several academic commentaries on the topic.

201 In Günther J Horvath *et al*, "Introduction to Guerrilla Tactics in International Arbitration"("*Horvath et al*") in *Guerrilla Tactics in International Arbitration* (Kluwer Law International, 2013) (Günther J Horvath and Stephan Wilske eds), the authors describe guerrilla tactics at p 5 as follows:

> - violation or unethical abuse (invoking the law or rules for purposes other than originally foreseen) of the law or (written) procedural rules;
> - *the* ***intended aim*** *is to obstruct, delay, derail and/or sabotage the arbitral proceedings*; ***and***
> - *the execution is* ***deliberate, i.e., a conscious tactical decision.***
>
> [emphasis added in italics and bold italics]

202 This description indicates that guerrilla tactics refer to the use of illegal or unethical means *with the aim of* obstructing, delaying, derailing or sabotaging an arbitration. This is critical. *Horvath et al* do not suggest that *acts that merely have an adverse effect on an arbitration or a party's case in an arbitration amount to guerrilla tactics*. Rather, they emphasise that the *intended aim* of guerrilla tactics is to undermine an arbitration; guerrilla tactics involve a "conscious tactical decision" to employ illegal or unethical means to that end.

203 *Horvath et al* distinguish between three types of practices at p 4:

(a) First, "extreme" guerrilla tactics which involve "severe criminal acts and blatant abuse of state authority". Such tactics include violence or threats of violence or the blatant abuse of state power in, for example, arbitrary detention or malicious prosecution: *Horvath et al* at pp 12–13.

(b) Second, "common" guerrilla tactics "which amount to obvious misconduct". These include bribery, intimidation and harassment of

arbitrators and witnesses, wiretapping and other surveillance methods, fraud, delay tactics and frivolous challenges: *Horvath et al* at pp 5–12.

(c) Third, "rough riding", which are not guerrilla tactics but which "[violate] the very spirit of international arbitration". These tactics include withholding evidence and ambushing the opposing parties in international arbitration with evidence: *Horvath et al* at pp 14–15.

204 I note that certain "common" or "extreme" guerrilla tactics may already amount to grounds upon which an arbitral award may be set aside, under Art 34(2)(*b*)(ii) of the Model Law (for breach of public policy) and s 24(*a*) of the IAA, which applies where the making of the award was induced by fraud or corruption. I return to this point at [213(b)] below.

(3) Analysis of the facts

205 For the following reasons, I am unable to conclude that Jaguar employed guerrilla tactics in breach of an implied duty to arbitrate in good faith.

206 I shall first address CMNC's claims that Jaguar used guerrilla tactics in (1) seizing the Construction Area and terminating CMNC's access to Project Solve, (2) seizing documents by securing the eviction of CMNC's employees from the Site and detention thereafter, and (3) harassing and interfering with CMNC's potential witnesses (see [192(b)(i)]–[192(b)(iii)] above). I do not accept all of these allegations for the following two general reasons:

(a) First, guerrilla tactics must be employed *with the aim of undermining an arbitration* (see [202] above). There is scant evidence, however, that Jaguar performed any of these alleged acts with the aim of undermining the Arbitration. The seizure of the Construction Area

and termination of CMNC's access to Project Solve took place before the Arbitration was commenced (see [26] and [28] above). The alleged acts of harassment and intimidation of CMNC's witnesses also occurred before the Arbitration (see [31] above); there is no evidence that they were performed to affect CMNC's case in the Arbitration. Similarly, even if Jaguar acted illegally and improperly in securing the eviction of CMNC's employees from the Site, there is no evidence that this was done to affect CMNC's case in the Arbitration. Accordingly, none of these three alleged guerrilla tactics constitute breach of a duty to arbitrate in good faith.

(b) Second, these alleged guerrilla tactics all occurred before or at a relatively early stage of the Arbitration. If CMNC indeed considered that they involved breach of Jaguar's duty to arbitrate in good faith, it could have brought this to the Tribunal's attention. Yet while CMNC brought the fact that its staff had been detained in Guatemala to the Tribunal's attention (see [44] above), I was not shown any communication in which CMNC submitted to the Tribunal that Jaguar had breached its duty to arbitrate in good faith and sought relief on this basis. This suggests that CMNC did not believe at the time that Jaguar had deliberately sought to undermine its presentation of its case in the Arbitration.

207 In relation to Jaguar's seizure of the Construction Area and termination of CMNC's access to Project Solve, I also note that the Tribunal found that Jaguar "did not illegally seize the Project but instead did so through a valid termination for default" (see [1563] of the Award). The Tribunal also dismissed CMNC's claims for certain costs, including medical fees and compensation for injured workers, on the basis that they were premised on Jaguar's "unlawful

seizure" of the Site, and thus failed "by reason of the Tribunal's finding that Jaguar was entitled to terminate for default" (see [1510]–[1511] of the Award). In sum, the Tribunal's finding was that Jaguar acted lawfully in seizing the Site. Given this finding, it would follow that Jaguar also acted lawfully in terminating access to Project Solve. Project Solve contained the project documents which would have belonged solely to Jaguar upon termination.

208 I now turn to CMNC's claim that Jaguar disclosed documents in a deliberately disordered and delayed manner (see [192(b)(iv)] above). CMNC criticises the way in which Jaguar disclosed a transaction log and the supporting documents for the costs reflected in the log (see [90] above) as follows:

(a) First, Jaguar provided the transaction log itself in a delayed and disorganised manner; the final log was only provided on 5 June 2015.

(b) Second, Jaguar only began to disclose the invoices on or around 11 February 2015 when it started uploading the invoices to the Data Room, even though it could have uploaded the invoices earlier.

(c) Third, when the invoices were uploaded to the Data Room, they were dumped together into folders without an index. There were also discrepancies between the log entries and the invoices. Further, Jaguar did not identify which invoices corresponded to the new entries in the updated versions of the transaction log.

(d) Fourth, certain documents were also poorly scanned, illegible and contained excessive redactions.

209 However, having reviewed the evidence, I have come to the view that there is insufficient basis to infer bad faith on Jaguar's part for these reasons:

(a) First, as I have noted, Jaguar was continuing to disclose material up to a relatively late stage in the Arbitration because the completion of the Plant was ongoing. The documents supporting the ETC Claim were therefore being continually supplemented (see [134(g)] and [165(b)] above). Thus, in my view, it cannot be inferred from the fact that Jaguar only uploaded the final transaction log on 5 June 2015 (see [208(a)] above) that there was bad faith on Jaguar's part. In uploading the final transaction log on 5 June 2015, Jaguar was complying with the order made by the Tribunal in TC No 208 (see [97] above). As the Tribunal noted in TC No 208, counsel and the parties were working under extreme pressure given the expedited nature of the Arbitration. Since disclosure is managed through counsel, to find that Jaguar disclosed documents in bad faith would mean that Jaguar's counsel was complicit in this, which is difficult to accept.

(b) Second, I do not accept that Jaguar acted in bad faith in failing to disclose the invoices before 11 February 2015 (see [208(b)] above). Critically, the parties *agreed* that the relevant documents would be uploaded to the Data Room (see [77(c)] above), and the delay in creating the Data Room was attributable to CMNC (see [134(e)] above). Jaguar began to upload the invoices promptly after CMNC executed the contract for the Data Room (five days later: see [89]–[90] above).

(c) Third, I do not accept that bad faith may be inferred from the way Jaguar uploaded documents to the Data Room (see [208(c)] above). In my view, the points raised by CMNC do not suffice for a finding of bad faith. I note that Jaguar did the following in response to issues

CMNC raised about the documents uploaded to the Data Room, which undercut a finding of bad faith on Jaguar's part:

(i) By a letter dated 24 February 2015, counsel for Jaguar offered to hold a teleconference with CMNC's counsel to "walk through the productions that have already been made".

(ii) By a letter dated 2 April 2015, Jaguar provided step-by-step instructions on how CMNC could locate an invoice for a particular transaction reflected in the transaction log. On the same day, Jaguar also provided transaction logs in the native .xlsx format to CMNC, to assist CMNC's review of the material.

(iii) On or around 8 May 2015, Jaguar provided CMNC with both soft and hard copies of the version of the transaction log that was current at the time, sorted alphabetically by invoice file name, and the invoices in the same order.

(d) Finally, while I accept that some documents disclosed by Jaguar may have been hard to read, and others contained excessive redactions, in my view this is insufficient basis to infer bad faith on Jaguar's part.

210 For all these reasons, I do not accept CMNC's submission that Jaguar employed guerrilla tactics in bad faith. Therefore, even if Jaguar owed CMNC an implied duty to arbitrate in good faith, CMNC has not established that Jaguar breached this duty. The Good Faith Ground accordingly falls away.

(4) Further difficulties with CMNC's submissions

211 Moreover, there are further difficulties with CMNC's submissions here.

212 First, CMNC contends that the Tribunal failed to restrain Jaguar's bad faith conduct (see [192(c)] above). Notably, however, three of the four guerrilla tactics that CMNC alleged against Jaguar (see [192(b)(i)]–[192(b)(iii)] above) *predated the Arbitration, occurring before the Tribunal was even constituted*. Plainly, the Tribunal cannot be criticised for not restraining this conduct.

213 Second, CMNC brought my attention to several academic commentaries suggesting that an arbitral award may be set aside on the basis of guerrilla tactics employed by the successful party. Yet none of these commentaries suggested that guerrilla tactics may justify setting aside an arbitral award *on the ground* that they reflect bad faith, which amounts to a breach of the duty to arbitrate in good faith, which in turn constitutes a breach of the agreed arbitral procedure. I have some reservations regarding this novel analysis advanced by CMNC.

(a) The link between guerrilla tactics demonstrating bad faith and a breach of the agreed arbitral procedure is questionable. This is because guerrilla tactics, on CMNC's case, may occur before an arbitration even commences. As noted above, three of the four guerrilla tactics that CMNC alleged against Jaguar *predated the Arbitration*. I accept that in principle, conduct preceding an arbitration may amount to breach of a duty to arbitrate in good faith if it is targeted at undermining the arbitration. On the other hand, it is not clear to me how such conduct can properly be considered a breach of the *agreed arbitral procedure*, since it occurs even before the arbitration begins and hence before the arbitral procedure comes into effect. The inflection points are different.

(b) As I have noted (see [204] above), an arbitral award may already be set aside on the basis of certain guerrilla tactics under Art 34(2)(*b*)(ii) of the Model Law and s 24(*a*) of the IAA. Yet not all guerrilla tactics

would fall within these two bases for setting aside an award. To accept CMNC's analysis would be to accept that guerrilla tactics which do not render an award in breach of public policy, and which do not involve fraud or corruption afflicting an award, may render an award liable to be set aside. This is perhaps the forensic attraction of CMNC's analysis. Yet it is also its weakness. To accept CMNC's analysis would be to implicitly expand the categories of conduct on the basis of which an arbitral award may be set aside. I have doubts over whether this is consistent with the philosophy of the Model Law and the IAA.

Conclusion

214 For these reasons, I do not accept that the Award may be set aside on the basis of the Art 18 Ground or the Good Faith Ground. I therefore do not accept the Defective Arbitral Procedure Ground for setting aside the Award.

215 I now turn to the Public Policy and Corruption Ground.

The Public Policy and Corruption Ground

CMNC's case

216 CMNC's case is that the Award should be set aside for breach of public policy for two reasons (see [110(c)]–[110(d)] above).

(a) First, Jaguar's guerrilla tactics justify setting aside the Award for breach of public policy ("the Guerrilla Tactics Basis").

(b) Second, the Tribunal breached its duty to investigate the Corruption Allegations which render the Award in conflict with public policy ("the Corruption Basis").

The law on setting aside an award for breach of public policy

217 The threshold for setting aside an award for breach of public policy is high. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*"), the Court of Appeal held at [59] that the threshold would only be crossed if upholding the award would "shock the conscience", or would be "clearly injurious to the public good or … 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".

The Guerrilla Tactics Basis

218 As noted above, I am unable to conclude that Jaguar employed guerrilla tactics (see [210] above). I therefore do not accept that the Award should be set aside on the Guerrilla Tactics Basis.

The Corruption Basis

219 I first set out the Tribunal's reasoning and findings in relation to the Corruption Allegations.

The Tribunal's reasoning and findings

220 The Tribunal dealt with the matter at two parts of the Award. First, the Tribunal stated the following at [1614]–[1616] of the Award:

> 1614 CMNC also seeks to rely on the fact that various people have been charged with corruption in Guatemala, including certain employees of [Jaguar] …
>
> 1615 The first point to note in this regard is that *no one has yet been convicted of anything. The Tribunal cannot possibly take notice of mere contested allegations.* …
>
> 1616 More importantly, *CMNC has not, to the satisfaction of the Tribunal, made any attempt to establish how these*

> *allegations impact upon, or have any relevance to, the issues in the present arbitration.*
>
> [emphasis added]

221 The Tribunal then reviewed the matter at [1850]–[1859] of the Award. Having set out the facts, the Tribunal concluded at [1859] as follows:

> 1859 *The allegations of corruption have not been established in any court. No evidence was submitted to this Tribunal that would enable it to make any judgement or conclusion* ***that can have any bearing on the matters in issue in this case***. The Tribunal ***does not understand how it can be argued that this untested allegation in some way infects the whole cost to complete case***. The Claimant has *quite properly withdrawn a claim for 2.4m being an item that could possibly be so affected.*
> [emphasis added in italics and bold italics]

222 In short, the Tribunal found that there was no evidence submitted before it in relation to the Corruption Allegations that had "any bearing on the matters in issue in [the Arbitration]" (Jaguar having withdrawn the PR Fees Claim). The Tribunal did not accept that the Corruption Allegations infected the ETC Claim.

CMNC's submissions

223 CMNC submits as follows:

(a) First, arbitral tribunals have a duty to investigate allegations of corruption, even on the Tribunal's own motion. CMNC relies on, among other things, an expert opinion by Prof Gabrielle Kaufmann-Kohler ("Prof Kaufmann-Kohler") that arbitral tribunals bear "a duty to raise and enquire, even *sua sponte*, into the issue of corruption".

(b) Second, if a tribunal breaches its duty to investigate allegations of corruption and issues an award thereafter, that award is in conflict with public policy and hence liable to be set aside. This is because there

> is a "real possibility that other parts of Jaguar's claims were tainted by corruption and bribery" which the Tribunal did not account for. A "heavy shadow of doubt" continues to hang over Jaguar's claim exactly because the Tribunal failed to investigate the Corruption Allegations.

My decision

224 I accept that in appropriate cases, an arbitral tribunal may come under a duty to investigate allegations of corruption. In *Re Landau, Toby Thomas QC* [2016] SGHC 258, where CMNC applied for Mr Landau to be admitted to argue this application, Steven Chong J (as he then was) observed at [66] that it has been accepted in Singapore that "an arbitral tribunal has the duty and mandate to investigate matters raised which, if proven, would render the award unenforceable for being contrary to public policy". As authority for this proposition, Chong J cited *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*PT Prima*"), where the Court of Appeal held at [72] that "public policy is a question of law which an arbitrator must take cognisance of if he becomes aware of it … during arbitral proceedings". I accept that in certain cases, allegations of corruption might raise issues of public policy that would affect the enforceability of an award: see *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [48]. I therefore accept that in appropriate cases, an arbitral tribunal would be required to investigate allegations of corruption. In reaching this view, I am fortified by Prof Kaufmann-Kohler's opinion that arbitral tribunals may bear a duty to investigate corruption, albeit one which is only triggered under certain circumstances (see [226] below).

225 Nonetheless, I do not accept that the Award may be set aside on the Corruption Basis for two reasons.

226 First, on the basis of Prof Kaufmann-Kohler's opinion, I do not accept that a duty to investigate arose in this case. Prof Kaufmann-Kohler states:

> 67 While the arbitrators' duty to pay attention to matters of corruption is a general one, *their duty to take proactive measures to investigate into the circumstances of possible corruption* ***only arises where certain factors are present.*** *It would vastly diminish the efficiency of arbitration if the arbitrators were obliged to raise and investigate issues of corruption in a vacuum, when there are no indicators triggering a reasonable suspicion of corruption.*
>
> 68 It is also accepted that ***arbitrators have no duty to enquire into the circumstances of possible corruption if the latter has no relevance to the claims in dispute. The arbitrators' mandate is to resolve legal disputes; not to prosecute the parties for illegal conduct. Therefore, if there is no "relevance nexus" between the suspected illegality and the claims in dispute, "the arbitrators ought to avoid exercising their curiosity".***
>
> 69 Thus, to trigger the arbitrator's duty to investigate, he or she must ***become aware of circumstances creating a suspicion of corruption which, if proven, would affect the claims in dispute.***
>
> [emphasis added in italics and bold italics]

The touchstone is therefore whether the allegations of corruption affect the issues under consideration in the Arbitration.

227 Critically, the Tribunal held that the Corruption Allegations, which had not been proven in any court, *did not have any bearing on the issues in the Arbitration (Jaguar having withdrawn the PR Fees Claim)* (see [222] above). Thus, the Tribunal was not "aware of circumstances creating a suspicion of corruption which, if proven, would affect the claims in dispute". Accordingly, on the basis of the opinion of CMNC's own expert, the Tribunal would not have come under a duty to investigate the Corruption Allegations.

228 Second, in my view, a breach of the Tribunal's duty to investigate the Corruption Allegations *per se* does not render the Award liable to be set aside for breach of public policy. CMNC did not cite any authority for the proposition that a tribunal's breach of its duty to investigate allegations of corruption *per se* renders an award liable to be set aside for breach of public policy without more. Notably, while Prof Kaufmann-Kohler unequivocally stated that arbitral tribunals bear a duty to investigate allegations of corruption, she carefully stated that "tribunals in breach of that duty *risks* rendering an award legitimizing corrupt activities *and thus contrary to international public policy*" [emphasis added]. In my view, this is key. The breach of the duty to investigate must carry the risk that upholding the award that is subsequently issued may legitimise the corrupt activities. In my judgment, by analogy to the similar requirement affirmed in *Soh Beng Tee* (see [115] above), such a risk would arise if there is a causal nexus between the corrupt activities and the award. In that situation, the question of public policy becomes a relevant if not key consideration as noted by Chong J (see [224] above). Further, the award would be liable to be set aside not only for breach of public policy but also on the basis that it was induced or affected by corruption under s 24(*a*) of the IAA (see [230] below).

229 However, the Tribunal found that the Corruption Allegations did not have any bearing on Jaguar's claims in the Arbitration (Jaguar having withdrawn the PR Fees Claim) (see [222] above). This is a finding of fact which is not subject to appeal. I am unable to accept CMNC's speculative submission that there is a "real possibility" that other claims by Jaguar were tainted by corruption (see [223(b)] above). Thus, in my view, there is no link between any breach by the Tribunal of a duty to investigate the Corruption Allegations and the Award which would warrant setting aside the Award.

230 For all of these reasons, I do not accept that the Award should be set aside for breach of public policy due to the Tribunal's failure to investigate the Corruption Allegations. Given the Tribunal's findings that those allegations had no bearing on the matters in the Arbitration (see [222] above), I also do not accept that the Award should be set aside under s 24(*a*) of the IAA on the basis that the Award was induced or affected by corruption.

Conclusion

231 In conclusion, for all the above reasons, I dismiss CMNC's application to set aside the Award.

232 Costs should follow the event. I therefore award costs to Jaguar, to be taxed if not agreed.

Kannan Ramesh
Judge

Toby Landau QC (instructed), Paul Tan Beng Hwee, Rachel Low Tze-Lynn, Alessa Pang Yi Ching and Ching Meng Hang (Rajah & Tann Singapore LLP) for the applicant;
Michael Hwang SC and Lim Si Cheng (instructed), Germaine Chia Yijuan and Denise Chong (Virtus Law LLP) for the respondents.