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Two steps forward, one step back? An attempt to cure due process paranoia

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TWO STEPS FORWARD, ONE STEP BACK?
AN ATTEMPT TO CURE DUE PROCESS PARANOIA

Case Comment: China Machine New Energy Corp v Jaguar Energy

[2020] 1 SLR 695 / [2020] SGCA 12
Court of Appeal of Singapore
Sundaresh Menon CJ, Tay Yong Kwang JA, Quentin Loh J
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I. Introduction

1 Time, cost and quality. These are the qualities that an efficient arbitration must have.[1] In recent times, however, the arbitral process has struggled to maintain this balance, with the efficiency of the arbitral process rated among the top five worst characteristics of international arbitration.[2] The fact that parties may resort to a curial review of arbitral awards in an annulment or refusal of enforcement action[3] merely adds on to this delay.

2 Notably, while strict adherence to the "rules of natural justice"[4] is crucial for limiting absolute party autonomy[5] and preserving the

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1 Jennifer Kirby, "Efficiency in International Arbitration: Whose Duty Is It?" (2015) 32(6) J.I.A. 689, 689.

2 Queen Mary University, White & Case, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed 30 March 2020), 8, Chart 5.

3 See Articles 34 of the UNCITRAL Model Law ("**ML**") and Article V of the New York Convention (1959) 330 U.N.T.S. 38. See also s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("**IAA**"). See generally Andrew Tuck, "The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas" (2008) 14 *Law and Business Review of the Americas* 569, 569.

4 See *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [43]. The two rules of natural justice are: *nemo judex in causa sua* (no one shall be judge in his own cause) and *audi alteram partem* (each party is to have an opportunity to be heard).

5 Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in

legitimacy of arbitral proceedings,[6] such rules are often misused in challenging an award, as parties frequently (and often frivolously) take a "creative" approach towards repackaging routine procedural decisions as a breach of their due process rights.[7] No wonder then, that the due process/natural justice ground[8] is most commonly invoked,[9] notwithstanding the supposedly narrow grounds of review. Nevertheless, it may be observed that tribunals have succumbed to "due process paranoia",[10] as they are increasingly willing to grant procedural requests to "bullet-proof" their awards against being annulled or refused enforcement on due process grounds, thereby transforming international commercial arbitration into an inefficient, "highly legalistic, litigious, and … costly affair".[11]

3 In restating the applicable legal principles and threshold for finding a breach of natural justice, the Court of Appeal's ("**CA**") decision in *China Machine New Energy Corp v Jaguar Energy* ("***CMNC***

Penang, Malaysia (24 August 2013), 15; see also Michael Pryles, "Limits to Party Autonomy in Arbitral Procedure" (2007) 24(3) J.I.A. 327, 337.

6 Austin Ignatius Pulle, "Securing natural justice in arbitration proceedings" (2012) 20(1) A.P.L.R. 63, 64; Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International 415, 422.

7 *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154, [3]; see also Lucy Reed, "Ab(use) of due process: sword vs shield", speech delivered at the 2016 Queen Mary School of International Arbitration-Freshfields Lecture (27 October 2016) in 33(3) Arbitration International 361, 365, 375 <https://academic.oup.com/arbitration/article-abstract/33/3/361/4344824> (accessed 23 March 2020); Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013), [3].

8 See Frederick Shauer, "English Natural Justice and American Due Process: An Analytical Comparison" (1976) 18(1) W.M.L.R. 47, 47. The terms "due process" and "natural justice" will be used interchangeably in this article because they are different labels used to describe what are essentially procedural rights.

9 See Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013), [1]; Simon Sloane, Daniel Hayward and Rebecca McKee, "Due Process and Procedural Irregularities: Challenges" (2019) *Global Arbitration Review* <https://globalarbitrationreview.com/chapter/1178537/due-process-and-procedural-irregularities-challenges> (accessed 20 March 2020).

10 Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International 415, 420. See below at [24] for definition.

11 Steven Chong, "The Singapore International Commercial Court: A New Opening In A Forked Path", Speech delivered at British Maritime Law Association Lecture and Dinner in London (21 October 2015), [22(b)], <https://www.supremecourt.gov.sg/Data/Editor/Documents/J%20Steven%20Chong%20Speeches/The%20SICC%20-%20A%20New%20Opening%20in%20a%20Forked%20Parth%20-%20London%20(21.10.15).pdf> (accessed 22 March 2020).

v Jaguar")[12] attempts to alleviate this due process paranoia and restore the efficiency of arbitral processes. It does so by clarifying a common misconception underlining due process paranoia, and also by re-emphasising the high threshold for the review of awards rendered allegedly in breach of the fair-hearing rule. Nevertheless, the CA's decision is not without its difficulties. In particular, there is the question of whether the notice requirement imposed by the CA leads to additional conceptual and practical difficulties. To that end, this article proposes subsuming the notice requirement within the inquiry of prejudice.

4 We will begin the analysis with a summary of the facts and holdings in *CMNC v Jaguar*, including China Machine New Energy Corp ("**CMNC**")'s concerns with the hearing tribunal's management of the case, which allegedly prevented it from receiving a fair hearing, before discussing the above matters.

II. Background Facts

5 The appellant, CMNC, entered into an Engineering, Procurement and Construction Contract (the "**EPC Contract**") with one of the respondents, Jaguar Energy Guatemala LLC ("**Jaguar**"), to construct a power plant (the "**Plant**" and the "**Project**"). However, following CMNC's delay in construction, Jaguar decided to bar CMNC's employees from accessing the construction site office. It also denied CMNC access to documents relating to the Project (the "**Construction Documents**")[13] and terminated the EPC Contract.[14] Jaguar then engaged other contractors to complete the Plant's construction.

A. Arbitral Proceedings and the High Court's Decision

6 While construction of the Plant was ongoing, Jaguar commenced arbitration against CMNC, claiming, *inter alia*, the actual and estimated cost of completing construction of the Plant (the "**ETC Claim**").[15] Notably, cl 20.2 of the EPC Contract provided for disputes to be referred to an *expedited* Singapore-seated arbitration, thus requiring an award to be issued within, at most, 180 days from the

[12] [2020] 1 SLR 695.
[13] [2020] 1 SLR 695, [10], [11].
[14] [2020] 1 SLR 695, [9], [10].
[15] [2020] 1 SLR 695, [15(c)], [41].

appointment of the third arbitrator.[16] Upon constitution of the arbitral Tribunal, the evidentiary hearing date was scheduled for early 2015 to meet the deadline for issuing the award.[17] Parties subsequently agreed to reschedule this to July 2015.[18]

7 The Tribunal then ordered several documentary disclosures which CMNC claimed it needed for assessment of the ETC Claim.[19] Jaguar was concerned, however, that CMNC would misuse sensitive information – which identified its post-termination contractors – to interfere with the ongoing construction of the Plant.[20] It therefore applied for an Attorneys' Eyes-Only Order (the "**AEO Order**").

8 The order was granted on the following terms. First, any AEO-designated documents would be disclosed to CMNC's external counsel and expert witnesses, but not to CMNC's employees. Second, CMNC could apply to the Tribunal for its employees to access the AEO-designated documents.[21]

9 Thereafter, the AEO Order was substituted with a regime where documents containing sensitive information were redacted before disclosure to CMNC (the "**Redaction Ruling**").[22] The Redaction Ruling was then modified to exclude Jaguar from redacting and disclosing documents with claims less than US$100,000, with the AEO Order applying instead.[23] At the same time the Redaction Ruling was modified, the Tribunal approved the rolling production of documents evidencing the costs incurred by Jaguar in hiring post-termination contractors (the "**Cost Documents**").[24]

10 CMNC subsequently filed its expert evidence reports belatedly and the Tribunal formally excluded one of them while giving Jaguar the

16 [2020] 1 SLR 695, [5], [12].
17 [2020] 1 SLR 695, [17].
18 [2020] 1 SLR 695, [35], [40].
19 [2020] 1 SLR 695, [14], [15].
20 [2020] 1 SLR 695, [19], [21].
21 [2020] 1 SLR 695, [19], [25].
22 [2020] 1 SLR 695, [29], [32]. Further explanation was not provided on this point.
23 [2020] 1 SLR 695, [38(c)]. Further explanation was not provided on this point.
24 [2020] 1 SLR 695, [38(b)], [41]. This was due to the simultaneous occurrence of both the post-termination construction works and the arbitration.

option not to respond to the other two.[25] The Tribunal subsequently rendered an award (the "**Award**") allowing Jaguar's ETC Claim.[26]

11 CMNC applied to the High Court ("**HC**") to set aside the Award under Article 34 of the UNCITRAL Model Law ("**ML**") and s 24 of the International Arbitration Act ("**IAA**"). It claimed, *inter alia*, that the AEO Order and Redaction Ruling denied CMNC an opportunity to present its case (the "**fair-hearing rule**")[27] and, further, that the failure to investigate Jaguar's alleged "guerrilla tactics" (such as its seizure of the Construction Documents) was induced or affected by corruption in breach of public policy.[28] The HC dismissed CMNC's application as it found no breaches of the fair-hearing rule nor any breaches of public policy in rendering the Award.[29] CMNC then filed an appeal to the CA.

B. The Court of Appeal's Decision

12 On appeal, CMNC confined its challenge to its claim of breach of natural justice, specifically the fair-hearing rule, under Article 34(2)(a)(ii) ML and s 24 IAA.[30] CMNC stated that three issues evinced the "real difficulties" it faced in dealing with Jaguar's ETC Claim, thus explaining its belated filing of expert evidence reports which were then excluded by the Tribunal, all three of which constituted a breach of the fair-hearing rule.[31] These were that the Tribunal's management of the disclosure of sensitive documents had affected CMNC's review of the documents produced by Jaguar; the Tribunal had failed to appreciate CMNC's handicap arising from its lack of access to the Construction Documents; and the Tribunal had failed also in managing Jaguar's

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25 [2020] 1 SLR 695, [70], [71].

26 [2020] 1 SLR 695, [73].

27 See *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278, [18], [25]. A party may apply to set aside an award on the ground that it is unable to present its case. This is derived from the rule of natural justice, *i.e.*, that parties are given a fair opportunity to be heard.

28 [2020] 1 SLR 695, [74]. See also *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2018] SGHC 101, [110].

29 [2020] 1 SLR 695, [76] – [78]; see also *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2018] SGHC 101, [169], [230].

30 [2020] 1 SLR 695, [81], [105]. Both Art 34(2)(a)(ii) ML and s 24(*b*) IAA involve an inquiry as to whether the party was denied a reasonable opportunity to be heard. There is no distinction between either provision insofar as the fair-hearing rule is concerned.

31 [2020] 1 SLR 695, [82], [83].

rolling production of large quantities of documents.[32] CMNC argued that by failing to cumulatively assess the impact of the Tribunal's alleged mismanagement, the HC had underestimated the "irreparable prejudice" CMNC had suffered.[33]

(1) Disclosure of sensitive documents

13 With respect to the first issue, CMNC argued that the Tribunal's management of the disclosure of sensitive documents resulted in a breach of natural justice, as the AEO Order was made without any basis. The AEO Order also operated asymmetrically against CMNC, since Jaguar could withhold documents whereas CMNC would unfairly bear the burden of applying for disclosure.[34] Moreover, any relief afforded to CMNC (with the lifting of the AEO Regime by the modified Reduction Ruling) was short-lived, as Jaguar's production and over-redaction of documents still impeded CMNC's preparations.[35]

14 The CA, however, rejected both arguments. First, the CA held that the Tribunal had considered both Jaguar's and CMNC's arguments and reasonably satisfied itself that the possibility of misuse of the sensitive documents gave rise to "serious concern", which formed a sufficient basis for the Tribunal to grant the AEO Order.[36] Additionally, the Tribunal was clearly aware of the need to balance the parties' competing interests,[37] and therefore crafted the AEO Order appropriately to safeguard both Jaguar's confidentiality concerns and CMNC's interest in accessing the relevant documents to prepare its case. In any event, CMNC failed to show that its burden of applying for disclosure was improper since CMNC had never made such applications.[38]

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32 Given the simultaneous occurrence of the post-termination construction works and the arbitration, the Tribunal directed the Costs Documents to be produced on a rolling basis (see [2020] 1 SLR 695, [38(b)]).
33 [2020] 1 SLR 695, [83].
34 [2020] 1 SLR 695, [109].
35 [2020] 1 SLR 695, [117], [118].
36 [2020] 1 SLR 695, [111].
37 [2020] 1 SLR 695, [23] – [25], [113].
38 [2020] 1 SLR 695, [27], [114(b)].

15 Second, as regards the modification of the Redaction Ruling, CMNC had initially agreed to the relevant modifications. Thus, its subsequent retraction of the agreement was unjustified.[39] Moreover, CMNC did not immediately raise its complaints regarding Jaguar's alleged unsatisfactory document production methods to the Tribunal, and only did so four months after the modified Redaction Ruling.[40] It was therefore precluded from complaining that the modified Redaction Ruling was unfair.[41]

16 The CA thus held that the AEO Order and modified Redaction Ruling were not made in breach of the rules of natural justice. Even if they had been, the CA held that CMNC had failed to show that the Tribunal's orders had prejudiced its preparation of the expert evidence dealing with the ETC Claim.[42] The CA therefore concluded that a reasonable and fair-minded tribunal would have made the AEO Order.[43]

(2) The Construction Documents Claim

17 CMNC's second argument was that it suffered prejudice due to the Tribunal's failure to order Jaguar to disclose the Construction Documents (which CMNC deemed necessary in calculating the ETC Claim),[44] thereby affecting its evaluation of the ETC Claim.[45] The CA also rejected this argument.

18 The CA held that since CMNC had failed to highlight the relevance of the Construction Documents to the Tribunal and never once requested the Tribunal to order Jaguar to produce these documents, it could not be prejudiced by something that it had never sought from the Tribunal.[46] Furthermore, CMNC was able to assess the value of its pre-termination work with reasonable accuracy without those documents.[47]

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39 [2020] 1 SLR 695, [117(a)].
40 [2020] 1 SLR 695, [118(b)].
41 See also [2020] 1 SLR 695, [116], [120].
42 [2020] 1 SLR 695, [120], [121].
43 [2020] 1 SLR 695, [115].
44 [2020] 1 SLR 695, [14(a)], [15(a)]. CMNC claimed that the documents would assist CMNC by comparing its pre-termination work value against the post-termination work value charged by the post-termination contractors.
45 [2020] 1 SLR 695, [122].
46 [2020] 1 SLR 695, [123], [124], [126].
47 [2020] 1 SLR 695, [125].

(3) Rolling production of the Cost Documents

19 Finally, CMNC argued that the Tribunal's management of the arbitration had resulted in CMNC's delayed preparation and belated filing of, *inter alia*, its quantum expert witness' report (the "**Gurnham Report**") and supporting evidence (the "**Aspinall Report**"). This was apparently because of the Tribunal's failure to (a) set a cut-off date for production of the Cost Documents; (b) grant CMNC time extensions in filing its evidence; and (c) consider Jaguar's "disorganized and haphazard" rolling production of the Costs Documents.[48] CMNC also argued that the Tribunal's purported exclusion of both reports compromised CMNC's ability to respond to Jaguar's ETC Claim.[49]

20 These arguments were also rejected by the CA. First, in granting CMNC's time extension to 18 June 2015 and revising the cut-off date to 5 June 2015 (over CMNC's *alternative* pleaded relief of excluding Cost Documents produced after 3 April 2015), the Tribunal had reasonably balanced both CMNC's and Jaguar's interests.[50] Furthermore, the fact that CMNC had suggested other alternatives meant that it had deemed either choice to be fair.[51] Hence, the Tribunal's failure to grant CMNC its alternative choice was held to be not so unfair as to amount to a breach of the rules of natural justice.[52]

21 Second, the Tribunal's rejection of CMNC's request for further time extension one day before the 18 June deadline[53] was neither unfair nor unreasonable. The volume of documents disclosed on 5 June 2015 was not unusually large such that CMNC's quantum expert needed additional time to review them.[54] Furthermore, the Tribunal's denial of CMNC's request for the time extension was justified given the short timeline leading up to the main hearing and CMNC's repeated disregard of the Tribunal's countless reminders to promptly apply for time

48 [2020] 1 SLR 695, [127], [128].
49 [2020] 1 SLR 695, [127].
50 [2020] 1 SLR 695, [59], [60], [132], [133]. Specifically, Jaguar's interest in presenting evidence for its claim and CMNC's interest in having a reasonable opportunity to meet Jaguar's case.
51 [2020] 1 SLR 695, [133].
52 [2020] 1 SLR 695, [131]. The court also found it significant that CMNC did not then object to the Tribunal's decision to set the cut-off date of 5 June 2015.
53 [2020] 1 SLR 695, [64].
54 [2020] 1 SLR 695, [63], [141].

extensions (in this case, immediately after the documents were produced on 5 June 2015).[55]

22 Third, CMNC's failure to raise Jaguar's allegedly disorganized and haphazard rolling production of the Costs Documents to the Tribunal meant that it was precluded from advancing any complaints on this ground.[56] Finally, the Tribunal's exercise of direction in relation to the Gurnham Report and Aspinall Report was reasonable and fair on the facts.[57] The Tribunal had not excluded the Gurnham Report as it allowed Jaguar the option to deal with it and if so, to then ascribe an appropriate weight.[58] Even if the Tribunal did, such exclusion was fair since CMNC was given a *reasonable* opportunity to present its case.[59] The Aspinall Report was also justifiably excluded as CMNC's decision to file it without seeking leave from the Tribunal was made in disregard of the Tribunal's authority and mandate to ensure fair proceedings.[60]

(4) Cumulative Effect

23 CMNC's final argument was that the cumulative effect of the above issues vis-à-vis the Tribunal's management of the arbitration resulted in the arbitration becoming a "thoroughly defective … procedure". It argued that by the time of the main evidentiary hearing by the Tribunal, the prospects of a fair arbitration hearing had been "irretrievably" lost.[61] This was also rejected by the HC. Since CMNC chose to proceed with the arbitration without taking remedial steps, such as requesting the Tribunal to vacate the main evidentiary hearing dates or notifying them that it deemed the arbitration as irretrievably lost,[62] it could not argue *ex post facto* that the arbitration was tainted with a breach of natural justice.[63] It therefore dismissed CMNC's appeal.[64]

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55 [2020] 1 SLR 695, [142], [144].
56 [2020] 1 SLR 695, [159].
57 [2020] 1 SLR 695, [150] – [151], [156].
58 [2020] 1 SLR 695, [148].
59 [2020] 1 SLR 695, [149].
60 [2020] 1 SLR 695, [155], [156].
61 [2020] 1 SLR 695, [161] – [163].
62 [2020] 1 SLR 695, [165], [166], [168], [170] – [171].
63 [2020] 1 SLR 695, [165].
64 [2020] 1 SLR 695, [173].

III. Commentary

A. Mitigating Due Process Paranoia

24 The decision in *CMNC v Jaguar* is to be welcomed for one main reason – it mitigates what some may term as "due process paranoia. "Due process paranoia" refers to an arbitrator's belief that granting parties every opportunity to present their case, even if it results in delay or increased costs, is *still* preferable to running the risk of the ultimate award being successfully challenged.[65] This is a common, and real problem that hinders the efficiency of arbitration.[66]

25 Of course, one can understand why arbitrators would take such a position. After all, besides time and costs, the quality of arbitration is often measured by the correctness and enforceability of an award.[67] Ultimately, this may result in needlessly cautious procedural decisions and the lack of "effective" sanctions during the arbitral process,[68] which also indirectly encourages dilatory tactics. This may unduly lengthen the duration and increase the costs of arbitration.[69]

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65 Remy Gerbay, "Due Process Paranoia" (2016) *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/> (accessed 30 March 2020); see also Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International 415, 420, citing Queen Mary University, White & Case, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" (2015), 10 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015 International Arbitration Survey.pdf> (accessed 30 March 2020).

66 Queen Mary University, White & Case, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> (accessed 30 March 2020), 27.

67 Jennifer Kirby, "Efficiency in International Arbitration: Whose Duty Is It?" (2015) 32(6) J.I.A. 689, 692.

68 Queen Mary University, White & Case, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> (accessed 30 March 2020), 8, 27; see also Remy Gerbay, "Due Process Paranoia" (2016) Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/> (accessed 30 March 2020).

69 Simon Sloane, Daniel Hayward and Rebecca McKee, "Due Process and Procedural Irregularities: Challenges" (2019) Global Arbitration Review <https://globalarbitrationreview.com/chapter/1178537/due-process-and-procedural-irregularities-challenges> (accessed 20 March 2020).

26 More specifically however, the CA's decision is helpful for arbitrators presiding over a Singapore-seated arbitration in two aspects. First, it re-emphasises the high threshold for reviewing awards rendered allegedly in breach of the fair-hearing rule, thereby encouraging arbitrators to "adopt a bolder approach" in conducting proceedings with "the requisite mix of fairness and firmness".[70] Second, it clarifies a common misconception that underlines due process paranoia (which is that giving the parties a full opportunity to present their case necessarily means giving them *all* opportunities).[71] This is elaborated on below.

(1) Affirming the Standard of Review

27 The decision in *CMNC v Jaguar* reiterates the high standard of review for awards allegedly in breach of the rules of natural justice. As noted by the CA, a four-stage test is to be applied in setting aside an arbitral award on grounds of natural justice under s 24(*b*) IAA.[72] The applicable standard of review is whether the tribunal's case management decision could have been contemplated by a reasonable and fair-minded tribunal in all the circumstances.[73] Due deference will be accorded to the tribunal and the courts will not intervene simply because it might have done things differently.[74]

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70 Queen Mary University, White & Case, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> (accessed 30 March 2020), 27; Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International, 435, citing Robert Merkin and Louis Flannery, Arbitration Act 1996 (Informa Law, 5th edn, 2014), 132.

71 Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International, 420.

72 [2020] 1 SLR 695, [86], citing *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [29]; see also *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443, [18]. To successfully set aside an arbitral award for breaching the rules of natural justice, 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 right.

73 [2020] 1 SLR 695, [98], [104(c)].

74 [2020] 1 SLR 695, [103], citing *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [58].

28 This high threshold reflects the policy of minimal curial intervention by respecting and preserving the autonomy of the arbitral process.[75] It is also consistent with the approaches of many national courts in recognising a wide margin of procedural discretion. So long as a "just, expeditious, economical and final determination of the dispute" can be reached, substantial deference will be accorded to the arbitrator's procedural decisions.[76]

29 The high threshold also ensures that parties do not abuse curial review as an opportunity to unduly scrutinise the arbitral process, and is meant to discourage the parties from tactically frustrating and delaying the award's enforcement.[77] Specifically, in endorsing the four-stage test, the CA implicitly affirmed that any breach of natural justice must be so grave to amount to "prejudice" for the court to set aside an award.[78] Indeed, as noted by the CA, the court (or more precisely, the possibility of review) is not "a stage where a dissatisfied party can have a second bite of the cherry" by raising "a multitude of arid technical challenges".[79]

30 Finally, by directing the legal inquiry from the tribunal's perspective and couching the standard in terms of reasonableness, the test is a nod towards recognising an arbitrator's expertise in managing the arbitration, especially since an arbitrator is seen as a "master of his own procedure".[80] Arbitrators can thus be assured that their management

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75 *AKN v ALC* [2015] 3 SLR 488, [37], [38]; *AJU v AJT* [2011] SGCA 41, [66]; *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [59] – [65]; see also Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014), 162.

76 See, *e.g.*, *On Call Internet Services Ltd v Telus Communications Co* [2013] BCAA 366, [18]; *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1, [68]; *Brandeis (Brokers) Ltd v Black* [2001] 2 All ER (Comm) 980, [56]; *Margulead Ltd v Exide Technologies* [2004] EWHC 1019, [33]; *Killam v Brander-Smith* [1997] BCJ No 456, [29]; *Iran Aircraft Industries v Avco Corp*, 980 F 2d 141, 145 – 146 (2d Cir 1992); *Sermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] EGLR 14, 15; see also William Park, "Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure" (2007) 23(3) Arbitration International, 499, 503; Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International, 425 – 428.

77 Timothy Cooke, *International Arbitration in Singapore: Legislation and Materials* (Sweet & Maxwell, 2018), 124.

78 *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [84]; see also Austin Ignatius Pulle, "Securing natural justice in arbitration proceedings" (2012) 20(1) A.P.L.R. 63, 77.

79 *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [65(b)].

80 *Anwar Siraj v Ting Kang Chung* [2003] 2 SLR(R) 287, [41]; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, [36]; Lucy Reed,

of the arbitral process, insofar as it is within their scope of power, will be fully respected by the Singapore courts.

(2) Clarifying the Scope of the Fair-Hearing Rule

31 The decision in *CMNC v Jaguar* also helped to clarify the scope of the fair-hearing rule. The CA stressed that the "full opportunity" for parties to present their case as mandated by the fair-hearing rule is not an absolute one,[81] and must be balanced against factors like ensuring the arbitration's efficiency and expediency. Any opportunity is therefore inherently *limited* by considerations of reasonableness and fairness.[82]

32 This is important because the fair-hearing rule is enshrined in multiple rules: under Article 18 ML;[83] various national legislation;[84] numerous institutional rules;[85] and also expressed under Article 34(2)(a)(ii) ML.[86]

33 The CA's interpretation of Article 18 ML is also consistent with both precedent authorities[87] and other Model Law jurisdictions.[88] Although Article 18 ML limits the broad autonomy provided to arbitrators to decide on the arbitral process by mandating the parties' right to be heard,[89] this right "must be seen in the context of the entire

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"Ab(use) of due process: sword vs shield", speech delivered at the 2016 Queen Mary School of International Arbitration-Freshfields Lecture (27 October 2016) in 33(3) Arbitration International, 372 <https://academic.oup.com/arbitration/article-abstract/33/3/361/4344824> (accessed 23 March 2020).

81 [2020] 1 SLR 695, [94] – [97].

82 [2020] 1 SLR 695, [88] – [90], [104(b)].

83 UNCITRAL Model Law, Article 18.

84 See, *e.g.*, UK Arbitration Act 1996, s 33; Australian International Arbitration Act 1974 (Cth), s 8(7A); New Zealand Arbitration Act 1996, s 34(6) and Schedule 1, Article 18.

85 See, *e.g.*, International Chamber of Commerce Rules 2012, Article 22(4); UNCITRAL Arbitration Rules 2010, Art. 17(1); The London Court of International Arbitration Rules, Article 14; International Centre for Disputer Resolution Rules, Article 16; Singapore International Arbitration Centre, Rule 11.1.

86 Timothy Cooke, *International Arbitration in Singapore: Legislation and Materials* (Sweet & Maxwell, 2018), 124.

87 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768, [145]; *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, [112], [152]; *ADG v ADI* [2014] 3 SLR 481, [103] – [104]; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [42].

88 See, *e.g.*, *Sino Dragon Trading v Noble Resources International* [2016] FCA 1131, [157]; *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1, [95], [96], [105]; *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, 463.

89 "UNCITRAL Model Law, Chapter V, Article 18 [Equal treatment of parties]" in Howard Holtzmann and Joseph Neuhaus (ed), *A Guide to the UNCITRAL Model Law*

arbitral process and should be exercised by the parties in the spirit of efficiency" so as to not render the arbitrator's broad and flexible case management powers as "an empty shell".[90]

34 Insofar as the arbitrator's procedural decisions are guided by a balance between safeguarding the efficiency of proceedings and the parties' rights to present their case, and absent strong and unambiguous evidence of the tribunal's unreasonableness, aspersions should not be cast on the tribunal's procedural decisions which do not breach the fair-hearing rule.[91] This is *a fortiori* when the requests are unreasonable and amount to dilatory tactics. The tribunal's procedural decisions as a matter of case management must therefore be distinguished from those amounting to a breach of the fair-hearing rule.[92]

B. The Problems with Establishing a Breach of the Fair-Hearing Rule

35 Nevertheless, the decision leaves some room for improvement. In particular, as held by the CA, in considering whether the tribunal's management decisions amount to a breach of the fair-hearing rule, regard must be had to what it was informed about at the material time.[93] This means that where a breach of the fair-hearing rule is alleged, the aggrieved party must alert the tribunal to the breach and seek to suspend the proceedings to give the tribunal an opportunity to consider and possibly remedy the breach (the "**Notice Requirement**").[94]

36 The Notice Requirement, as held by the CA, is distinct from the doctrine of waiver which, simply put, is the rule that a party who (a) knows (or ought to have known) of the non-compliance but (b) does not state his objection without delay and instead proceeds with the

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on International Commercial Arbitration: Legislative History and Commentary (Kluwer Law International, 1989) 550-563, 551.

90 Klaus Peter Berger, Ole Jansen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arbitration International 415, 422; *Sino Dragon Trading v Noble Resources International* [2016] FCA 1131, [73]; c.f. *Gold Reserve Inc v Bolivarian Republic of Venezuela* 146 F Supp 3d 112, 128 – 129 (DDC, 2015). The US District Court of Columbia also observed that the right to fair hearing was enshrined under Article V(1)(b) of the New York Convention, and such a right must be construed narrowly.

91 *Luzo Hydro Corp v Transfield Philippines Inc* [2004] 4 SLR(R) 705, [18].

92 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, [126].

93 [2020] 1 SLR 695, [101].

94 [2020] 1 SLR 695, [102], [159], [170].

arbitration is deemed to have (c) waived his right to object.[95] Rather, the Notice Requirement goes to the anterior question of breach.[96] Hence, a breach of the fair-hearing rule is established only when the tribunal fails to remedy the breach despite it being brought to its attention. Conversely, a party that fails to notify the tribunal and instead proceeds with the arbitration will not be able to make out a breach of the fair-hearing rule.[97]

37 With respect, this requirement is problematic for three reasons. First, the requirement for notice has never been considered by precedent authorities when checking for compliance with the fair-hearing rule. Second, as a matter of conceptual coherence, it is also difficult to differentiate between the Notice Requirement and the requirements for establishing waiver laid out under Article 4 ML. Third, a strict approach to compliance with the Notice Requirement may also hinder the efficient conduct of arbitration. This is elaborated on below.

(1) Consistency with Previous Decisions

38 First, a notice requirement is inconsistent with the established requirements laid out in previous precedents for demonstrating the tribunal's breach of the fair-hearing rule. For instance, the CA in *LW Infrastructure v Lim Chin San* held that the Tribunal's failure to afford the plaintiff an opportunity to address the Tribunal on whether the defendant's application for awarding pre-award interest was appropriate amounted to a breach of the fair-hearing rule.[98] Notably, this conclusion was reached even though the plaintiff was aware of the defendant's

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95 United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985), 17; see also UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (United Nations Publications, 2012), 19; Nigel Blackaby *et al*., Redfern and Hunter on International Arbitration, (Oxford University Press, 6th edn, 2015), [4.143]-[4.148], [10.28] – [10.30].

96 [2020] 1 SLR 695, [102].

97 [2020] 1 SLR 695, [170].

98 *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [75], [76]. Although this case dealt with challenging an arbitral award under the domestic Arbitration Act (Cap 10, 2002 Rev Ed) ("**AA**"), the court held that the same approach towards natural justice ought to be adopted for both international and domestic arbitrations in Singapore, given that parliament had intended the AA to be aligned with the Model Law to "narrow the differences between the two regimes (see [33] – [34]). Hence, the same line of reasoning pertaining to breach of natural justice under the AA ought to apply to the IAA.

application but failed to object.[99] In its subsequent protests, the plaintiff failed to clearly and unequivocally inform the Tribunal that it was mainly concerned with the lack of opportunity to present its case.[100]

39 In a similar vein, in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*, the CA found that the respondent was not given a reasonable opportunity to present its case, despite the respondent having not voiced its objections as regards the Tribunal's failure to observe the fair-hearing rule.[101] Absent any clear elucidation on its rationale and purpose, the Notice Requirement sits uncomfortably with precedent cases and appears to have set a requirement that is more stringent than what is commonly accepted before a claim for breach of natural justice is successfully established.

(2) An Overlap with the Doctrine of Waiver?

40 Second, despite the distinction drawn between the Notice Requirement and the doctrine of waiver under Article 4 ML, reference to the ML's 1985 *Analytical Commentary* ("***Analytical Commentary***")[102] evinces substantive similarities between these two principles. As noted in the *Analytical Commentary*, waiver is made out when the parties knew or ought to have known of non-compliance with any ML provision(s), and yet proceeds with arbitration without objecting to such non-compliance in a timely fashion. Similarly, by not fulfilling the Notice Requirement, the challenging party is precluded from bringing a claim founded on the tribunal's breach of natural justice.

41 The present position therefore creates uncertainty as to when waiver applies. Crucially, the CA might have effectively introduced the possibility of waiving a breach of natural justice. Given however that

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99 *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [8], [9].

100 *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [11] – [13].

101 See, *e.g.*, *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, [92] – [96]. The court found that the respondent was not given a reasonable opportunity to present its case in a preliminary hearing as it was not able to prepare evidence to address the arbitrators' questions on the merits of the dispute. Notably, the respondent had not voiced its objections as regards the tribunal's failure to observe the fair-hearing rule. Even if it did, the CA had not taken this into consideration.

102 United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985).

Article 18 ML is a mandatory provision,[103] one cannot waive non-compliance of a mandatory provision.[104] This is *a fortiori* when the *Analytical Commentary* noted that the doctrine of wavier cannot apply to mandatory provisions since it "would be too rigid".[105] Hence, a party's failure to object to non-compliance with the fair-hearing rule under Article 18 ML cannot constitute a waiver of its right to raise this ground in subsequently challenging the award.[106]

(3) Practical problems

42 There are also potential practical difficulties with the Notice Requirement. First, to hold that the Notice Requirement goes to the anterior question of breach renders it difficult to establish a breach of the fair-hearing rule. Since determining whether there is a breach involves a context-sensitive and objective inquiry that can only be effectively undertaken by an *ex post facto* analysis of the entire arbitral process,[107] save in clear instances of an egregious breach which are few and far between, it is a judgment call to make as to whether the tribunal's conduct should have been reported at the moment of breach.

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[103] United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985), 44, 46, 47; UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (United Nations Publications, 2012), 97; *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, [46]; *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [56]; *Sino Dragon Trading v Noble Resources International* [2016] FCA 1131, [157], [178]; "UNCITRAL Model Law, Chapter V, Article 18 [Equal treatment of parties]" in Howard Holtzmann and Joseph Neuhaus (ed), *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) 550-563, 563; "Part II: The Process of an Arbitration, Chapter 3: The Procedural Framework for International Arbitration" in Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 127, 183; Michael Pryles, "Limits to Party Autonomy in Arbitral Procedure" (2007) 24(3) J.I.A. 327, 329.

[104] United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985), 17; *BAZ v BBA and others and other matters* [2018] SGHC 275, [67], [68]. Though the case dealt with raising the doctrine of waiver to preclude a public policy objection, the same reason applies *mutatis mutuandis*.

[105] United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985), 17.

[106] *Cf Farrelly (M&E) Buildings Services Ltd v Byrne Brothers (Formwork) Ltd* [2013] EWHC 1186, [27]–[29]; *Canada v Taylor* [1990] 3 SCR 892m, [177]. These cases suggest that breaches of natural justice can be waived.

[107] See *Sino Dragon Trading v Noble Resources International* [2016] FCA 1131, [74].

43 Following this ruling however, out of an abundance of caution, parties may simply decide to barrage the tribunal with numerous objections whenever they deem the tribunal's procedural decisions to have breached the fair-hearing rule. Not only would unnecessary time and energy be expended by the tribunal to consider, and if necessary, issue reasoned decisions for each and every objection, dilatory tactics are also indirectly sanctioned as a result. Consequently, the arbitration process is prolonged and costs are driven up.[108] While one may argue that this simply calls for "strong" arbitrators who "firmly" manage their proceedings,[109] this does not solve the issue that parties are potentially encouraged to "blackmail" the tribunal in the name of due process. As a result, the integrity of the arbitral proceedings may be compromised.[110]

IV. Suggested Clarification of the Notice Requirement

44 It would seem that in referring to the Notice Requirement, the CA might have intended to endorse the general principle that a party who is unable to present his case by matters within his control cannot claim that he is then prejudiced by the tribunal's procedural mismanagement.[111] Specifically, the arbitrator is not denied the benefit of submissions that could reasonably have made a difference to his deliberations when a party fails to inform the arbitrator that his (or her) procedural decision has precluded the party from an opportunity to present its case.[112] Hence, the relevant party cannot show that it is prejudiced; the breach has not meaningfully altered the final outcome of

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[108] Lucy Reed, "Ab(use) of due process: sword vs shield", speech delivered at the 2016 Queen Mary School of International Arbitration-Freshfields Lecture (27 October 2016) in 33(3) Arbitration International 361, 375, 376 <https://academic.oup.com/arbitration/article-abstract/33/3/361/4344824> (accessed 23 March 2020).

[109] Leon Kopecky and Victoria Pernt, "A Bid for Strong Arbitrators" (15 April 2016) *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2016/04/15/a-bid-for-strong-arbitrators/> (accessed 3 April 2020).

[110] Lucy Reed, "Ab(use) of due process: sword vs shield", speech delivered at the 2016 Queen Mary School of International Arbitration-Freshfields Lecture (27 October 2016) in 33(3) Arbitration International 361, 376 <https://academic.oup.com/arbitration/article-abstract/33/3/361/4344824> (accessed 23 March 2020).

[111] *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315, 327; *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131, [162]; *Corporacion Transnacional de Inversiones S.A. de C.V. v. Stet International S.p.A.* [1999] OJ No 3573, [73].

[112] *LW Infrastructure v Lim Chin San Contractors* [2013] 1 SLR 125, [54].

the arbitral proceedings.[113] This was seen in *Cukurova v Sonera*,[114] where the Privy Council held that the appellant's lack of an opportunity to present its case was not due to reasons beyond its control, but rather, self-induced, because it failed to avail itself of opportunities granted by the tribunal to present its case.[115] Conversely, if the Notice Requirement is fulfilled and the breach remains un-remedied, actual prejudice that surpasses the boundaries of legitimate expectation and propriety[116] and meaningfully alters the outcome of the proceedings is likely established.

45 Accordingly, it may be more appropriate to subsume the Notice Requirement within the requirement of prejudice, as opposed to an element within establishing a breach of natural justice *per se*. This proposition will have to be revisited in a later case.

V. Conclusion

46 Ultimately, the CA's decision in *CMNC v Jaguar* is to be welcomed, as the deference to arbitrators encourages arbitrators to adopt a more "robust stance" in dissuading parties from needlessly challenging the arbitrator's decisions,[117] thereby tackling the issue of due process paranoia plaguing the arbitral process.

47 Nevertheless, as mentioned, there are several difficulties with the CA's stipulation of the Notice Requirement. Of course, it remains to be seen how arbitrating parties react to this requirement, but one thing is certain – the arbitral process will not fare well. If the notice requirement is strictly adhered to, frivolous objections will be encouraged. The result is only inefficiency.

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[113] *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, [37], affirming *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [65(f)], [91].

[114] *Cukurova Holding AS v Sonera Holding BV* [2015] 2 All ER 1061, [31], [33]. This proposition was cited with approval and applied in *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 2713 (Comm), [87], [93] – [98].

[115] *Cukurova Holding AS v Sonera Holding BV* [2015] 2 All ER 1061, [51] – [54]. It was found that the arbitral tribunal had given the applicant every opportunity, but it chose not to avail itself of this opportunity by, *inter alia*, not seeking an adjournment of the hearing to present oral evidence and providing a further statement from a witness detailing points of fact which the oral evidence would have been decisive of their case.

[116] *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, [98].

[117] Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013), 3.