



Singapore Court Affirms Power of Arbitral Tribunals to Order Attorneys' Eyes Only Disclosure

IN SHORT

The Situation: In a recent application to set aside a Singapore arbitral award, the Singapore High Court considered whether a tribunal could order one of the parties to disclose certain documents only to the other party's counsel. This arrangement is known as an Attorneys' Eyes Only ("AEO") disclosure.

The Result: The Singapore High Court held that the tribunal was empowered to issue an AEO order. While AEO orders are not entrenched in Singapore jurisprudence, such an order was consistent with the tribunal's broad case management powers under the rules and Singapore arbitration law.

Looking Ahead: The decision highlights the broad discretion tribunals have when making procedural decisions under Singapore law.

The Confidentiality Regime in Singapore and AEO Orders

Arbitration proceedings in Singapore are confidential in nature, even where no provision has been made for confidentiality in the arbitration agreement or the applicable procedural rules. *AAZ and others v AAZ* [2009] SGHC 142. The duty of confidentiality extends to, amongst other things, documents and evidence disclosed by the parties in the course of proceedings, subject to some limitations and exceptions. AEO orders are most commonly used in this context to protect sensitive commercial information or trade secrets in disputes, such as engineering and construction, manufacturing, technology and licensing, and for certain types of information where special circumstances warrant additional safeguards. Such orders provide a further layer of protection by restricting the disclosure of sensitive information to opposing counsel and, in some instances, experts.

Confidentiality in Singapore arbitration proceedings is not sacrosanct, however, and must be weighed against other foundational principles, including the right of a party to be afforded a reasonable opportunity to present its case. It was on this basis that China Machine New Energy Corporation ("CMNC") applied to set aside an arbitration award against it in the recent case of *China Machine New Energy Corporation v Jaguar Energy Guatemala LLC* [2018] SGHC 101 ("*China Machine*").

The Dispute and the Arbitration

The backdrop of *China Machine* was a complex dispute arising out of an engineering and construction agreement between the parties pursuant to which CMNC was required to design and construct a coal-fired power plant in Guatemala. The dispute was subject to arbitration in Singapore under the 1998 Rules of Arbitration of the International Chamber of Commerce and was to be conducted on an expedited basis. During the arbitration proceedings, it was requested that Jaguar disclose certain documents that it agreed to disclose to CMNC's counsel and experts on the basis that they would not be disclosed to CMNC. The agreement between the parties had been terminated and Jaguar contended that the materials could be used by CMNC to frustrate its completion of the project with other contractors, pointing to the breakdown in relations between the parties and the conduct of CMNC prior to the commencement of arbitration proceedings.

The tribunal ordered the disclosure on an AEO basis in the first instance, noting the serious concerns raised by Jaguar about the potential improper use of the documents. However, the tribunal left the door open for CMNC to subsequently apply for limited disclosure of the sensitive documents. Ultimately, CMNC did not submit a further application and the tribunal found for Jaguar on a majority of issues in dispute.

CMNC's Application to Set Aside

CMNC subsequently sought to have the award set aside in Singapore on the basis, in part, that the AEO order deprived it of a reasonable opportunity to present its case and constituted a breach of the natural justice enshrined in Article 34(2)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration and section 24(a) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

While noting that AEO disclosure orders are not entrenched in Singapore jurisprudence, the court held that the tribunal was empowered to issue such an order by the 1998 ICC Rules and that, in any event, such an order was consistent with the tribunal's broad case management powers under Article 19(2) of



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the Model Law. The court also declined to set aside the award on the basis that the tribunal had not appropriately exercised such powers, noting that it is settled law in Singapore that a supervisory court should adopt a light touch approach to reviewing case management or procedural decisions in arbitration proceedings and only intervene in limited circumstances.

TWO KEY TAKEAWAYS

1. Arbitration proceedings in Singapore are confidential in nature.
2. Tribunals have broad discretion when making procedural decisions provided the parties are afforded a reasonable opportunity to present their case.



Matthew J. Skinner
Singapore / London



Zachary Sharpe
Singapore



Jeffrey Jeng
Singapore

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