IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 12

Civil Appeal No 94 of 2018

Between

China Machine New Energy Corporation

… *Appellant*

And

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

… *Respondents*

In the matter of High Court Originating Summons No 185 of 2016

In the matter of Section 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and Order 69A Rule 2(1)(d) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)

And

In the matter of an arbitration between Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd as claimants, and China Machine New Energy Corporation as respondent

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] — [Rules of natural justice]

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

[2020] SGCA 12

Court of Appeal — Civil Appeal No 94 of 2018
Sundaresh Menon CJ, Tay Yong Kwang JA and Quentin Loh J
5 July, 10 September 2019

28 February 2020 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The concept of due process encompasses a basic guarantee of procedural fairness in legal proceedings. It requires that each party be given, amongst other things, appropriate notice of the proceedings and of the case it has to meet, as well as a fair opportunity to prepare and present its case before a neutral and unbiased decision-maker. These are basic procedural safeguards which are applied in order to ensure the fairness of the proceedings by which the parties' substantive rights are disposed of. In short, due process is concerned with ensuring fair process, and this is a matter of critical importance because the fairness of the process is integral to its legitimacy in the eyes of the parties who submit themselves to it.

2 These procedural safeguards can assume an enhanced significance in

international arbitration because an alleged violation of a party's due process rights offers one of a limited number of grounds on the basis of which an award may be set aside or denied enforcement. In arbitration, the tribunal is ordinarily the master of its own procedure, but the requirement of due process is an essential limitation on the wide autonomy that the parties and the tribunal otherwise have with respect to procedure.

3 While due process serves to protect the legitimacy of the process, some have warned of the need to scrutinise due process arguments so as to guard against their being wielded cynically and improperly to attack the award (see Lucy Reed, "Ab(use) of Due Process: Sword vs Shield" (2017) 33 Arbitration International 361 at 376). It has been suggested that such misuse of due process complaints can lead to defensive procedural decision-making on the part of the tribunal in an effort to safeguard its award. This can be problematic not only because the parties are exposed to delays and increased costs as a consequence, but, more importantly, because it undermines and cheapens the real importance of due process in international arbitration, and over time, this can erode the legitimacy of arbitration as a whole and its critical role as a mode of binding dispute resolution.

4 Many of the complaints that are presented as due process violations typically concern the management of the particular arbitration, involving questions such as extensions of time, the ability to introduce additional evidence, or even the way in which documents are to be described and disclosed to the other parties. These typically and almost inevitably are matters that fall within the discretion of the tribunal, which, after all, is primarily charged with deciding the matter fairly. When this is subsequently challenged in court, it is essential that the court steers a course which holds two potentially competing

interests in balance: first, the need to robustly uphold what may properly be regarded as the parties' due process rights; and second, the importance of preserving the proper limits of the tribunal's discretion in dealing with the procedural details of the case it must decide. This appeal presents us with the opportunity to clarify this important area of arbitration law, so that tribunals may be guided as to the sorts of concerns that may undermine their awards. In our judgment, this should ultimately reduce the opportunity for those attempting to *abuse* the doctrine of due process.

Background facts

Background to the dispute

5 The present parties went to arbitration over disputes relating to the construction of a power generation plant in Guatemala ("the Plant" and "the Project"). The appellant, China Machine New Energy Corporation ("CMNC"), was the contractor, and the respondents, Jaguar Energy Guatemala LLC ("Jaguar Energy") and AEI Guatemala Jaguar Ltd ("AEI Guatemala") (collectively referred to as "Jaguar"), were the owners of the Plant.

6 The substantive contractual dispute between the parties concerned two key agreements. The first was the Engineering, Procurement and Construction Contract ("the EPC Contract") entered into in March 2008 between CMNC and Jaguar Energy. The EPC Contract provided for the construction of the Plant for an approximate sum of US$450m, to be paid by Jaguar Energy to CMNC in instalments upon the completion of certain milestones. The second was the Deferred Payment Security Agreement ("DPSA"), entered into sometime in November 2009. Under the DPSA, CMNC agreed to finance the Project by allowing Jaguar Energy the option of issuing debit notes in its favour instead of

making the relevant milestone payments. These debit notes were secured by interests in Jaguar Energy's assets, including its rights under the EPC Contract.

7 Work on the Project's two phases commenced in March 2010, and was expected to be completed in March and June 2013 respectively. Sometime in November 2010, Jaguar Energy exercised its option under the DPSA to issue debit notes in lieu of making cash payments. In all, Jaguar Energy issued a total of 61 debit notes with a total value of approximately US$129m.

8 Signs of trouble first appeared in 2013, when CMNC failed to meet the scheduled take-over dates for both phases of the works. In October and November 2013, Jaguar Energy issued notices of breach, and reserved its right to terminate the EPC Contract. In response, on 28 November 2013, CMNC purported to exercise its "step-in rights" as secured lender under the DPSA to take over Jaguar Energy's rights under the EPC Contract. On the next day, 29 November 2013, Jaguar Energy notified CMNC of its intention to terminate the EPC Contract, and requested that CMNC vacate the work site ("the Site") within 15 days.

9 The Site comprised two separate areas: the Construction Area and the Living Quarters. On 11 December 2013, Jaguar Energy fenced off the Construction Area and prevented CMNC's employees from entering CMNC's site office, which contained documents related to the construction of the Plant. At that stage, CMNC retained access to the Living Quarters and therefore to project documents that were stored in laptops and computers that had been kept in the Living Quarters.

10 On 14 December 2013 (upon the expiry of the 15-day notice period),

Jaguar Energy informed CMNC of the termination of the EPC Contract with immediate effect, and asserted that the DPSA was also therefore automatically terminated by its own terms. On the same day, Jaguar Energy terminated CMNC's access to Project Solve, which was a shared online document platform which contained communications and construction documentation relating to the Project.

11 CMNC's staff continued to reside in the Living Quarters until 20 June 2014, when CMNC's employees were, by an order of the Guatemalan courts, 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. CMNC's employees were subsequently released from the immigration shelter on 28 July 2014.

The arbitration

12 On 28 January 2014, Jaguar commenced arbitral proceedings ("the Arbitration") against CMNC under cl 20.2 of the EPC Contract. Clause 20.2 provided for disputes to be referred to a Singapore-seated arbitration conducted under the 1998 Rules of Arbitration of the International Chamber of Commerce. Notably, cl 20.2 provided for an *expedited* arbitration: it required that the award be issued within 90 days of the selection of the third arbitrator; or, if the majority of the arbitrators agreed, within a further 90 days.

13 In gist, Jaguar's case in the Arbitration was that it had validly terminated the EPC Contract for CMNC's breach, and that it was entitled to, amongst other reliefs, the aggregate cost of completing the Project ("the Estimate to Complete Claim", or "the ETC Claim"). CMNC denied Jaguar's claims, and made counterclaims asserting Jaguar's breach of the DPSA. The ETC Claim, which

was allowed, almost in its entirety, by the arbitral tribunal ("the Tribunal"), is central to these proceedings because the nub of CMNC's complaint is that it was not allowed a full opportunity to respond to that claim.

14 According to CMNC, its response to the ETC claim required it to undertake two strands of analyses:

(a) The Interrogation Analysis: This involved interrogating the quantum of the ETC Claim by reference to Jaguar's supporting documents. This entailed checking whether Jaguar's post-termination contractors (being those engaged to complete the remaining works after CMNC's termination) had been procured competitively; whether invoices issued were adequately supported by contracts or purchase orders, and were consistent with Jaguar's construction records; and assessing whether the work done and equipment purchased were within the scope of the EPC Contract. On the last aspect, CMNC's point was that the cost of any work done that was over and above the contractual specification would constitute betterment and would not be claimable.

(b) The Comparison Analysis: This involved ascertaining the quantities of work that CMNC left incomplete by reference to the quantities of work that CMNC did complete ("the Completed Work Quantities"), and comparing that against the quantities of work procured by Jaguar from the post-termination contractors. According to CMNC, the Comparison Analysis was critical because the reasonableness of the quantum of Jaguar's ETC Claim was inherently suspect given that it exceeded the remaining value under the EPC Contract by more than 300%. In other words, according to CMNC, Jaguar spent more than

three times what it would have cost had CMNC been allowed to complete the remaining works.

15 To carry out the Interrogation and Comparison Analyses, CMNC claimed that it needed access to the following categories of documents:

(a) The Construction Documents: This comprised pre-termination documentary records of the works that were necessary for the determination of the Completed Work Quantities (and were therefore essential to the Comparison Analysis). According to CMNC, it was deprived of the Construction Documents by Jaguar's seizure of the Site before the EPC Contract was terminated (see [9] above).

(b) The Bid Documents: This comprised documents related to the bid and tender process leading to the engagement of the post-termination contractors by Jaguar to complete the Project after CMNC's departure, and these were required in order to assess whether Jaguar's ETC Claim was unreasonable and excessive as a result of its failure to conduct a competitive bid process. This was a part of the Interrogation Analysis.

(c) The Costs Documents: This comprised invoices, contracts and purchase orders relating to Jaguar's post-termination construction expenditure. The Costs Documents were necessary for CMNC's assessment of the costs incurred by Jaguar (both actual and committed) in completing the works, and were therefore essential to the Comparison Analysis. The production of the Costs Documents was complicated by the fact that the Project completion works and the Arbitration were running in parallel. This meant that new Costs Documents were being generated (and produced to the Tribunal) on a rolling basis, and that

accordingly, the quantum of the ETC Claim (which comprised both estimated and actual costs of completion) had to be continually updated as previously "estimated" costs became "actual" costs upon their being incurred in the course of the works. Ultimately, work on the Project was only completed *after* the conclusion of the main evidentiary hearing (see [72] below).

16 We return to the procedural history of the arbitral proceedings. The last member of the three-man Tribunal was appointed on 27 March 2014. This meant that the 90-day period prescribed under cl 20.2 of the EPC Contract for the completion of the arbitration would have expired on 25 June 2014, or, if extended a further 90 days, on 23 September 2014.

17 On 1 May 2014, the parties agreed to amend this timeline. The agreed timelines were set out in Procedural Order No 2 ("PO 2") dated 7 May 2014. PO 2 provided for the exchange of the parties' experts' reports on 19 December 2014, and fixed the main evidentiary hearing for January and February 2015. We note that these hearing dates fell well after even the extended 180-day deadline for the issue of the Tribunal's award stipulated in cl 20.2.

18 Notably, notwithstanding that parties had agreed on the timelines in PO 2 on 1 May 2014, CMNC requested, on 6 May 2014, that the main evidentiary hearing be *brought forward* to October 2014. Jaguar opposed CMNC's request on the basis that the proposed revised timelines were not realistic given the state of the parties' preparations. On 14 May 2014, the Tribunal rejected CMNC's request to bring forward the main evidentiary hearing, reasoning that the extended timelines already represented the most

expeditious process having regard to the demands of due process and the need to ensure a fair hearing.

The AEO Regime

19 Thereafter, the parties continued with the process of document disclosure. In its Statement of Case filed on 13 August 2014, Jaguar stated that it was withholding production of 13 of the 375 documentary exhibits referenced in its Statement of Case ("the 13 Exhibits"). According to Jaguar, there were real concerns that CMNC would misuse the information contained therein (in particular, information identifying Jaguar's post-termination contractors) to interfere with the Project. In this regard, Jaguar alleged that CMNC had already engaged in a series of "threatening actions" against it and its contractors, including bribing contractors away from working with Jaguar and physically intimidating contractors, suppliers and employees. For this reason, Jaguar indicated that it would only be willing to disclose the 13 Exhibits to CMNC on an Attorneys' Eyes Only ("AEO") basis, so that the documents would only be made available to CMNC's external counsel and expert witnesses but not to CMNC's employees. Jaguar took the same position in respect of certain documents (other than the 13 Exhibits) in response to several of CMNC's requests to produce, on the basis that these too implicated similar confidentiality concerns.

20 CMNC denied the allegations, and insisted that Jaguar produce, without restriction, the 13 Exhibits, which comprised contracts and purchase orders issued to post-termination contractors, post-termination completion schedules and daily reports. According to CMNC, these documents were necessary for it to evaluate the reasonableness of the ETC Claim, and prohibiting disclosure of these documents to CMNC's employees by imposing an AEO regime would

handicap CMNC's ability to assess and instruct counsel on those documents. Further correspondence was exchanged by the parties in an attempt to agree upon a disclosure regime that would meet Jaguar's concerns over confidentiality, but to no avail.

21 On 22 September 2014, Jaguar applied to the Tribunal for an order permitting it to produce the 13 Exhibits (as well as certain other documents requested by CMNC) on an AEO basis ("AEO Order"). These documents fell within three broad categories: (i) post-termination contracts, project schedules and reports containing information identifying Jaguar's post-termination contractors; (ii) high-level corporate information pertaining to Jaguar Energy's parent company, AEI Ltd; and (iii) bid documents containing information about the corporate structure of AEI Ltd. Jaguar submitted that there were real concerns that this information might be misused by CMNC to "interfere in the Project or otherwise interfere with [AEI Ltd] and its shareholders".

22 CMNC objected to Jaguar's request for the AEO Order on four grounds. First, an AEO Order that prohibited CMNC's employees from accessing the documents in question would be procedurally unfair because CMNC's employees would be best placed to comment and give instructions on them, and if the order was made, these employees would not be able properly to instruct counsel. Second, CMNC would not in fact misuse the information. Third, Jaguar's request was tantamount to an invitation to the Tribunal to pre-judge fiercely disputed matters concerning CMNC's conduct. Fourth, the concept of AEO disclosure was a feature of domestic dispute resolution in the US and should not be imported into international arbitration.

23 On 25 September 2014, the Tribunal ruled in favour of Jaguar, and permitted its disclosure of the 13 Exhibits and the other documents on an AEO basis. On CMNC's point that the use of AEO orders was a peculiarity of domestic dispute resolution in the US, the Tribunal noted that such orders have in fact been employed in international arbitrations to preserve the confidentiality of disclosed documents. The real question was whether such an order was required in the present, and in determining that issue the Tribunal weighed and balanced the competing interests of both parties as follows:

> 17. The Tribunal views with serious concern the possibility that disclosed documents could be used for the ulterior and quite improper purposes which [Jaguar] assert[s] may be undertaken by [CMNC]. On an application such as this it is not possible to reach any concluded view of the risk that [CMNC] 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. …
>
> 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]

24 While the Tribunal did not reach any concluded view on Jaguar's allegations that CMNC would misuse the relevant documents, it nevertheless considered the *possibility* of misuse to be a "serious concern" which needed to be addressed. Having regard to both CMNC's interest in access for the purpose of preparing its case, and Jaguar's concerns over confidentiality, the Tribunal

crafted an AEO regime ("the AEO Regime") which in its view struck an appropriate balance between these competing considerations.

25 This balance was achieved by the establishment of a two-stage process by which documents subject to the AEO Regime would be disclosed. At the first stage, and as a default position, any material designated "AEO" would be disclosed to CMNC's external counsel (and, as was subsequently clarified, to expert witnesses as well), but not to CMNC's employees. This addressed Jaguar's concern for confidentiality. However, at the second stage, CMNC was expressly entitled to apply to the Tribunal for its employees to be given access to AEO-designated documents for the purposes of giving instructions to counsel, on the basis that the specified individuals to whom access was to be granted be identified, the necessity of their having access established, and an undertaking as to confidentiality be furnished.

26 On 26 September 2014, CMNC requested that the Tribunal reconsider its decision to allow Jaguar to disclose documents under the AEO Regime, relying on, amongst other things, the concern that such disclosure would hinder the preparation of its defence. On 30 September 2014, in Tribunal Communication ("TC") No 51, the Tribunal upheld its decision, noting that CMNC's concerns relating to the preparation of its defence were adequately addressed by its right to apply for employee access to the documents under the second stage of the AEO Regime:

> 35. In adopting the [AEO Regime], 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. …
>
> 36. *The Tribunal is confident that once [CMNC'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 [CMNC] for those documents to be disclosed to employees of [CMNC]. Once such an assessment is made, it will be open to [CMNC] to make application to the Tribunal for disclosure of those documents to its employees, as provided for by the Tribunal. …*
>
> [emphasis added]

27 Despite the Tribunal's express reference to CMNC's right to apply for disclosure under the second stage, it is undisputed that CMNC *never* made any such application to the Tribunal.

28 On 2 October 2014, pursuant to the AEO Order, Jaguar disclosed the 13 Exhibits to CMNC's external counsel and expert witnesses. This was seven days after the AEO Order had been made.

The Redaction Ruling and reset of procedural timelines

29 Just ten days after the creation of the AEO Regime, CMNC sought, by Respondent's Communication ("RC") No 43 dated 5 October 2014, to have the AEO Regime lifted and replaced by a disclosure regime under which documents would be produced to CMNC's employees, albeit with sensitive information pertaining to Jaguar's contractors' names redacted. The parties subsequently managed to reach an agreement regarding the production of one of the 13 Exhibits, and CMNC requested that the Tribunal lift the AEO Regime in respect of the remaining 12 exhibits which the parties could not agree on.

30 Besides the disclosure of documents, a second procedural issue which required resolution concerned the timelines leading to the main evidentiary hearing. By RC No 48 dated 15 October 2014, CMNC sought a reset of the timelines previously agreed and recorded in PO 2 on the basis that its preparations had been delayed by the dispute over the AEO Regime, which had

"imposed severe practical limitations on effective defence preparation". Jaguar objected to CMNC's request.

31 On 17 October 2014, a teleconference involving the Tribunal and the parties was convened to address both the redaction issue raised in RC No 43 and the timelines issue raised in RC No 48.

(a) On the redaction issue, CMNC submitted that redaction of the names and identifying information of Jaguar's post-termination contractors would adequately address Jaguar's concern as to maintaining the confidentiality of that information, and that the AEO Regime was therefore no longer necessary and should be lifted. Jaguar did not contest CMNC's point that redaction was in principle an adequate substitute for AEO-designation, but sought permission to redact an additional category of information – information relating to the dates of key construction activities and dates of deliveries – on the basis that that information might also be misused by CMNC to interfere with the Project works.

(b) On the issue of timelines, CMNC informed the Tribunal that its preparations were behind schedule; in particular, its experts would not be able to file their reports as planned in December 2014, and would instead require an additional two or three months, thus necessitating an adjournment of the main evidentiary hearing previously fixed for January and February 2015. For the same reasons, it was submitted that a hearing which had been fixed on 6–7 November 2014 in Toronto ("the Toronto Hearing") for the experts to discuss draft outlines of their opinions would likely be unfruitful. The Tribunal requested that CMNC provide it a written update on the status of its experts' preparation, and

indicated that it was minded to proceed with the Toronto Hearing for the parties to discuss case management, amongst other things.

32 On 19 October 2014, the Tribunal ruled in favour of CMNC on the redaction issue and lifted the AEO Regime. The 12 disputed exhibits (see [29] above) were to be disclosed to CMNC (including to its employees) albeit with information identifying Jaguar's contractors redacted ("the Redaction Ruling"). As regards Jaguar's request that information pertaining to the dates of key construction activities also be redacted, the Tribunal rejected this and concluded that "the redactions which [CMNC] … proposed adequately represents an appropriate balance of the interests of the Parties".

33 It bears noting that the Redaction Ruling came less than a month after the AEO Order was made (in other words, the AEO Regime was lifted after less than a month of operation) and more than eight months before the main evidentiary hearing (which was eventually postponed to July 2015).

34 On 25 October 2014, six days after the Redaction Ruling, Jaguar began to disclose the relevant redacted documents to CMNC. This involved two parallel tracks of disclosure: redacted copies of the documents were furnished to CMNC's employees, and sister sets of unredacted documents were furnished to CMNC's external counsel and experts. According to CMNC, the way in which the sister sets were produced made them difficult to review. In particular, the sets were not indexed or numbered uniformly, making it difficult to correlate documents in the redacted and unredacted sets. It was also undisputed that there were discrepancies in the redacted and unredacted sets initially produced, in that Jaguar did not provide redacted versions of every document initially. Redacted

versions of these documents were eventually provided to CMNC by 15 November 2014.

35 On 6–7 November 2014, at the Toronto Hearing, the Tribunal addressed CMNC's request for an adjournment of the dates for the main evidentiary hearing. The following transpired at the hearing:

(a) It was decided that it was no longer possible to hold the main evidentiary hearing in January and February 2015 given the state of CMNC's preparations. CMNC claimed that the delay in its preparations was caused by its lack of access to the Construction Documents (following its eviction from the Site) as well as the imposition of the AEO Regime.

(b) It was also decided that the main evidentiary hearing would be postponed to July 2015. Adjusted timelines based on the new hearing dates were to be discussed and agreed between the parties, and subsequently recorded in a new procedural order to be issued by the Tribunal.

(c) It was agreed that a virtual data room would be set up to facilitate the sharing of documents amongst the parties' experts.

36 Pursuant to what had been discussed at the Toronto Hearing, the parties subsequently worked together on drafting a new procedural order. Three aspects of the draft procedural order are pertinent. The first relates to the procedural timelines leading to the main evidentiary hearing (including, for example, timelines for the filing of the parties' cases and expert reports). The second pertains to the provision made for the rolling production of Jaguar's Costs

Documents due to the ongoing completion of the Project works (see [15(c)] above). Both of these points were *agreed between the parties*.

37 The third point, which the parties were *unable* to agree on, pertained to Jaguar's request that it be relieved of its obligation to provide redacted copies of contracts and purchase orders with a value of less than US$100,000, leaving such documents to be produced on an AEO basis (meaning that they would be produced only to CMNC's external counsel and experts). It appeared that CMNC was initially amenable to this arrangement; it had, by way of an email dated 28 October 2014 (just nine days after the Redaction Ruling), indicated that it was agreeable "for now" to relieve Jaguar of its obligation to produce redacted copies of contracts and purchase orders involving sums of $100,000 or less. In fact, when this matter was first raised in initial discussions on the draft PO 3, CMNC's counsel agreed to a similar concession. It was only subsequently, after Jaguar proposed the insertion of language formalising the concession in the draft procedural order, that CMNC resiled from its position, stating that, after "further consideration", CMNC "did not see any reason for inclusion of this language" and concluded that it "does need access to such documents" to be afforded to its employees for the purposes of preparing its defence against the ETC Claim.

38 These three points were then addressed by the Tribunal in Procedural Order No 3 dated 18 December 2014 ("PO 3").

(a) A new procedural timetable was set pursuant to CMNC's request for an adjournment of the main evidentiary hearing to July 2015. As mentioned, these timelines had been agreed between the parties.

(b) Provision was made for Jaguar to "continue to supplement their production of documents… (to the extent such documents exist or come into existence) due to the ongoing nature of the Project completion effort". This too had been agreed between the parties.

(c) On Jaguar's obligations under the Redaction Ruling, which the parties had been *unable* to agree, the Tribunal granted Jaguar's request for the modification of the Redaction Ruling. Under this modified regime, the status quo under the Redaction Ruling was to remain in relation to documents already redacted and disclosed. However, in relation to any *further* documents to be disclosed by Jaguar (whether in response to CMNC's requests to produce, or as part of the material which its experts would seek to rely on), only contracts, purchase orders or invoices with a value of US$100,000 or more needed to be redacted and disclosed; documents with a value *below* that threshold could simply be produced on an AEO basis (meaning only to CMNC's external counsel and experts), albeit subject to CMNC's right to apply for production of such documents.

39 The effect of PO 3 on the parties' preparation of their respective cases was significant in three respects. First, PO 3 modified the application of the Redaction Ruling to any further contracts, purchase orders and invoices to be disclosed by reinstating the AEO Regime in relation to documents pertaining to claims with a value of less than US$100,000. The practical effect that this modification had on the parties' preparation may be assessed both in terms of the absolute *number* of documents affected as well as the monetary *value* they represented. On CMNC's estimate, there were 143 documents each concerned with a value exceeding US$100,000 (worth a total of US$188,790,048.92),

against about 2,900 documents each concerned with a value at or below that threshold (worth a total of US$14,521,839.56). Therefore, while the majority of documents (by number) were now no longer subject to the Redaction Ruling, the total *value* of the claim represented by documents still subject to the Redaction Ruling was far higher than the total value represented by those which were not.

40 Second, PO 3 postponed the date of the main evidentiary hearing and reset all ancillary procedural timelines to take into account the concerns and considerations of the parties. It must be emphasised that these new timelines were agreed between the parties, and, critically, *agreed in the context of all that had transpired up to then*, such as the imposition of the AEO Regime and its subsequent lifting by the Redaction Ruling, and all the difficulties which CMNC claims it suffered as a result of these orders. While the Tribunal did modify the Redaction Ruling by PO 3 (see [38(c)] and [39] above), CMNC did not, at the time PO 3 was issued, request a further adjustment of the agreed procedural timelines on account of that.

41 Third, PO 3 recorded the parties' agreement that Jaguar be permitted to produce contracts, purchase orders and invoices pertaining to the completion of the Project on a rolling basis as the works progressed. These documents evidenced Jaguar's costs of completion, which, as mentioned, formed the basis of its ETC Claim, and therefore enabled Jaguar to continually update the quantum of its ETC Claim (see [15(c)] above). Over the course of the Arbitration, Jaguar produced a total of four updates to the initial ETC Claim quantum first stated in Jaguar's Statement of Case. The ETC Claim quantum included both (i) costs actually incurred, and (ii) estimates of costs expected to be incurred. Primarily, the updates to the ETC Claim reflected complementary

changes in (i) and (ii), as estimated costs were actually incurred in the course of the Project works. Notably, however, the updates also reflected overall *increases* in the total sum claimed. Each tranche of the documents supporting each update was accompanied by a "transaction log", which was a list of transactions corresponding to the documents uploaded. For convenience, we refer to each tranche of documents by the exhibit number of the transaction log accompanying it, as follows:

S/N	Transaction log exhibit number	Date of transaction log	Date of invoice uploads	Quantum of ETC Claim (US$)
1	C-295 (Statement of Case)	13 August 2014	-	279,923,290
2	C-699	22 December 2014	10–11 February 2015	288,160,259
3	C-773	27 February 2015	27 March; 2 April 2015	287,290,399
4	C-840	24 April 2015	22 May 2015	308,850,719
5	C-900	5 June 2015	5 June 2015	317,235,142

Changes in CMNC's legal team of external counsel and experts

42 Even as PO 3 was an attempt to resolve a number of the key case management issues, other developments were taking place. In January and February 2015, some six months or so prior to the main evidentiary hearing, CMNC made extensive changes to its team of external counsel and expert

witnesses. On 15 January 2015, CMNC informed the Tribunal that its counsel for the expert issues of design, scheduling and quantum, Reed Smith LLP, would be replaced by MinterEllison. Three days later, CMNC announced that its counsel for all remaining matters, Herbert Smith Freehills LLP, would be replaced by King & Wood Mallesons ("KWM"). On 27 May 2015, at the doorstep of the main evidentiary hearing, CMNC replaced MinterEllison with counsel from State Chambers.

43 Over the course of January and February 2015, CMNC also replaced its experts on quantum, scheduling and Guatemala law. The most significant change, for present purposes, concerns the replacement of CMNC's quantum expert, Mr Iain Wishart, with Mr Charles Gurnham ("Mr Gurnham") on 24 January 2015. The expert evidence on quantum lies at the heart of the present proceedings because the main thrust of CMNC's case is that it was not given a full opportunity to respond to Jaguar's case on the quantum of the ETC Claim. We return to this at [127] below.

Jaguar's rolling production of Costs Documents

44 Another developing issue concerned the rolling production of Costs Documents. Over the course of the Arbitration, Jaguar produced a total of four tranches of Costs Documents supporting four corresponding updates to the quantum of its ETC Claim (see [41] above). The first tranche of documents was uploaded on 10 February 2015 upon the establishment of the experts' shared data room (see [35(c)] above). This was followed by a protracted exchange of correspondence (beginning in February 2015 and ending only in June 2015) between the parties' counsel in relation to alleged irregularities and discrepancies in the documents uploaded by Jaguar's counsel, Varela, Lee, Metz & Guarino LLP ("VLMG").

45 KWM's chief complaint pertained to VLMG's failure to provide an index to the documents uploaded in the data room, which, KWM said, had significantly slowed its review because the documents had not been classified or grouped according to their nature, and their file names were non-descript and not in the least illuminative. This was compounded by the fact that there were discrepancies between the entries in the transaction logs and the supporting invoices uploaded to the data room, and that Jaguar, in uploading each new batch of invoices, had simply replaced the existing invoice folder rather than placing new invoices in a separate folder, with the result that CMNC had to go through every invoice in the replacement folder to determine whether or not it had been provided before.

46 In relation to KWM's request for an index, VLMG explained that the transaction logs accompanying each upload themselves served as indices to the documents uploaded. Over the course of several e-mail exchanges, VLMG (i) provided step-by-step instructions to KWM as to how specific documents in the data room could be located by reference to the entries listed in the transaction logs, (ii) offered to walk KWM through the documents uploaded through teleconferences between counsel and/or the parties' quantum experts, and (iii) uploaded documents listed in the transaction logs which it had omitted to upload.

47 Ultimately, the parties remained unable to resolve the matter; KWM's final email to VLMG on this subject (dated 28 May 2015) noted that there remained discrepancies between the invoices listed in the C-699 transaction logs and the invoices uploaded to the data room. Notably, CMNC did not raise these concerns to the Tribunal over the course of the entire four-month exchange, despite Jaguar's position (repeated over the course of that exchange) that it

would proceed as directed by the Tribunal should CMNC decide to bring its complaints to the Tribunal's attention.

The Supplemental Order

48 Separately, on 17 February 2015, CMNC applied to the Tribunal for the AEO Regime to be lifted altogether on the basis that the Project was due to be completed by May 2015, and further that the names of Jaguar's contractors were, by then, public knowledge. It was submitted that in these circumstances, there could be no real risk of impropriety by CMNC that could affect the completion of the Project.

49 The parties then entered into discussions, and, on 17 March 2015, informed the Tribunal that they had agreed that Jaguar would disclose all material (both that previously disclosed, as well as any further material to be disclosed) in unredacted form to 28 specified CMNC employees. This agreement was then recorded in a Supplemental Order issued by the Tribunal dated 18 March 2015.

50 In other words, on 18 March 2015, some three and a half months before the main evidentiary hearing in July 2015, the AEO Regime was completely lifted; *all* documents was thenceforth to be produced in unredacted form to CMNC's (specified) employees.

51 CMNC did not make any application at this stage to postpone the main evidentiary hearing. On the contrary, CMNC had, in the weeks before the AEO Regime was lifted, applied (successfully) to amend its case, and in doing so contended that acceptance of its proposed amendments "would not impact the

July 2015 Main Evidentiary Hearing dates", stating "expressly that its intention is to proceed with the hearing dates as they stand".

CMNC's late filing of the Gurnham Responsive Report

52 By Procedural Order No 4 ("PO 4") dated 18 March 2015, the Tribunal issued timelines for the remainder of the Arbitration. Most pertinently for present purposes, this included the timeline for the submission of Mr Gurnham's report ("the Gurnham Responsive Report") in response to the report prepared by Jaguar's quantum expert, Mr Patrick McGeehin ("Mr McGeehin"), which was due for submission on 15 May 2015, and was eventually filed late by CMNC (see [65] below). We set out the key timelines that were stipulated in PO 4 in the table below:

Submission deadlines	Date
Submission of Mr McGeehin's finalised outline opinion	3 April 2015
Submission of Mr Gurnham's finalised expert report	1 May 2015
Submission of the Gurnham Responsive Report	15 May 2015
Submission of Mr McGeehin's report responsive to Mr Gurnham's finalised expert report	5 June 2015
Submission of the parties' pre-hearing submissions	26 June 2015
Main evidentiary hearing	6–21 July 2015

53 As late as 14 April 2015, Mr Gurnham confirmed in a teleconference with the Tribunal that he would be able to meet the 15 May 2015 deadline for the Gurnham Responsive Report:

> Mr Gurnham: … that will lead me in an obvious way to my main report which is due on the 1st of May, and then two weeks after the responses report which is due 15th of May. Now, all in all I've been quite a busy bee and I continue to be so until the 15th of May.
>
> Chairman: So, the dates which have been specified for your reports and the uploading of the database are likely to be met?
>
> Mr Gurnham: It will be met.

54 Mr Gurnham's assurances notwithstanding, on 8 May 2015, the parties agreed an extension of time for CMNC's submission of the Gurnham Responsive Report to 5 June 2015 (instead of 15 May 2015).

55 On 22 May 2015, Jaguar uploaded a third tranche of supporting documents corresponding to the C-840 update (see [41] above).

56 On 29 May 2015, CMNC sought by RC No 217 a short extension of time for the submission of the Gurnham Responsive Report to 10 June 2015 (from 5 June 2015) on the basis that it was "not possible or reasonable for Mr Gurnham to have had a proper opportunity to analyse the large number of documents relied upon by [Mr McGeehin]" which had been uploaded to the data room since February 2015, including the aforementioned 22 May 2015 disclosure corresponding to the C-840 update (see [55] above).

57 Before the Tribunal could rule on CMNC's request dated 29 May 2015 for an extension of time for the filing of the Gurnham Responsive Report to 10 June 2015, CMNC requested (by RC No 219) on the very next day, 30 May

2015, that (a) a cut-off date of 3 April 2015 be imposed on documents to be relied upon by Mr McGeehin; or, (b) *in the event the Tribunal was minded to allow Jaguar to rely on documents produced after 3 April 2015*, that, in the alternative, Mr Gurnham be granted an extension of time for the filing of the Gurnham Responsive Report, to 18 June 2015. RC No 219 stated, in material part, as follows:

> **Relief Sought:**
>
> 12. Therefore, we submit that:
>
> > a) there should be a deadline imposed on documents to be relied upon by [Jaguar's] quantum expert and that date should be 3 April 2015 as committed to by both Mr McGeehin and Mr Sieracki at the Hong Kong Hearing.
> >
> > b) If the Tribunal is minded to allow any documents produced by [Jaguar] after 3 April 2015, Mr Gurnham should be granted an extension to submit his responsive report… We submit to 18 June.
>
> Failing to impose such deadline or to grant such requested extension will cause severe unfairness to [CMNC] and Mr Gurnham. It is entirely not possible for Mr Gurnham to complete his responsive report even with the 5 days extension sought in [RC No 217] without any cut off date.

58 Notably, CMNC still did not request a postponement of the July 2015 main evidentiary hearing. Nor was any explanation given as to what had transpired overnight such that the request made the previous day was no longer sufficient.

59 In TC No 208 dated 2 June 2015, the Tribunal ordered as follows: (i) a cut-off date was to be imposed for the production of documents and particulars relating to Jaguar's costs to complete, though not of 3 April 2015, but of 5 June 2015 instead; and (ii) CMNC's request for an extension of the deadline for the filing of the Gurnham Responsive Report to 18 June 2015 was granted. In other

words, the Tribunal granted CMNC the relief it sought in terms of para 12(b) of its request dated 30 May 2015.

60 In deciding not to impose a cut-off date of 3 April 2015 (and thereby exclude from its consideration documents produced after that date), the Tribunal was clearly conscious of the need to allow each party an opportunity to present its case, and to respond to the case against it, a task complicated by the very short timelines remaining available in the lead-up to the main evidentiary hearing in July 2015:

> There is a difficult balance to be struck between allowing each Party to present material in support of each of their cases and affording the other Party a reasonable opportunity to meet those cases.
>
> …
>
> … The circumstances under 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.

61 We note that CMNC did not thereafter object to or challenge the Tribunal's decision to allow Jaguar's continued production of documents up till 5 June 2015.

62 On 5 June 2015, the last day for the production of documents pertaining to Jaguar's costs to complete, Jaguar uploaded the final tranche of Costs Documents to the data room (see [41] above).

63 On 17 June 2015, one day before the Gurnham Responsive Report was due for submission, CMNC sought yet another extension to 25 June 2015. According to CMNC, the volume of material disclosed on 5 June 2015 was of "extraordinary size", and this, coupled with Jaguar's recent production of

documents relating to Exhibits C-699, C-773 and C-840, meant that Mr Gurnham required more time to properly review the material in preparing his responsive report. Jaguar opposed CMNC's request, noting that it would have to consider Mr Gurnham's report in the submission of its pre-hearing brief, which was due to the Tribunal on 26 June 2015.

64 On 18 June 2015, the Tribunal rejected CMNC's request for an extension. In its reasons for that decision, the Tribunal noted the following:

(a) the material to be provided by Jaguar to CMNC on 5 June 2015 had already been taken into account in the Tribunal's extension of the deadline to 18 June 2015;

(b) the Tribunal's repeated reminders to the parties that applications for extensions of time should be made adequately in advance of, and not on the eve of the expiry of the deadline; and

(c) the "very close proximity to the Main Evidentiary Hearing".

Given these circumstances, the Tribunal held that CMNC had not "made out a case for disturbing the balance which the Tribunal struck in [TC No 208]".

65 On 22 June 2015, CMNC filed the Gurnham Responsive Report out of time. Upon reviewing that document, Jaguar discovered that it referred to a further report by CMNC's design expert, Mr Adam Aspinall ("Mr Aspinall" and "the Aspinall Report"). The Aspinall Report had not hitherto been mentioned by CMNC, and no leave had been sought for its submission. Nor had it been filed at that stage. On the same day, Jaguar objected to any belated filing of the Gurnham Responsive Report, and drew the Tribunal's attention to the references therein to the Aspinall Report.

66 On 25 June 2015, one day before the parties' pre-hearing submissions were due for filing, CMNC filed the Aspinall Report, along with six witness statements which it said were responsive to the material produced by Jaguar on 5 June 2015 (and for the submission of which too, no leave had been granted). As to how Jaguar could be expected to respond to these new filings given the short notice, CMNC's position was simply that "[s]hould [Jaguar] wish to respond or make further submissions, they can either raise them now or respond at the main hearing". Again, CMNC did not suggest that the evidentiary hearing could not proceed as scheduled.

67 On 27 June 2015, by RC No 245, CMNC formally applied to admit the Gurnham Responsive Report, the Aspinall Report, as well as the six witness statements. CMNC submitted that these reports and statements were necessary in order that CMNC might "properly present its case". In support of its application, CMNC submitted that the Tribunal's imposition of the AEO Regime and its decision to allow Jaguar to produce copious documents on an ongoing basis and to update its ETC Claim significantly impacted CMNC's ability to properly respond to the factual issues raised by Jaguar's expert and lay witnesses. CMNC referred to the Tribunal's duty under Art 18 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") to treat the parties equally and ensure that each is given a full opportunity to present its case, and submitted that its reports and statements should be admitted, as "[Jaguar], despite [its] strident protestations, have sufficient opportunity to review this supplemental evidence, and deal with it [at the main evidentiary hearing] in Dublin".

68 On 29 June 2015, the Tribunal reserved the issue of whether to exclude the evidence referred to in RC No 245 for consideration at the "appropriate

time". The Tribunal clarified shortly thereafter that "[n]o rulings have been made as to the capacity of [CMNC] to rely, or the extent of any reliance, upon the objected material".

69 On the same day, Jaguar formally filed its objection to CMNC's application. Jaguar noted that CMNC had not given it or the Tribunal any forewarning of its intention to file the witness statements, notwithstanding that the filing of those statements was purportedly done in response to Jaguar's 5 June 2015 disclosure, and therefore would have been within CMNC's contemplation shortly after that date. Jaguar noted the "extreme and irreparable" prejudice it would suffer if CMNC were permitted to introduce this "voluminous" new evidence on the eve of the main evidentiary hearing.

70 By TC No 230 dated 3 July 2015, the Tribunal declined to grant CMNC leave to rely upon the Aspinall Report:

> … [T]he 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.

71 In TC No 230, the Tribunal did not make any ruling in relation to the admissibility of the witness statements and the Gurnham Responsive Report. The Tribunal considered it premature to make any ruling in relation to the admissibility of the witness statements and the Gurnham Responsive Report. However, in respect of the latter two categories of evidence, the Tribunal's stance should be set out in full:

> The Tribunal has previously observed that one of the criteria to be taken into account in considering whether to place any reliance upon the materials provided, to which objection is taken, is that a judgement needs to be made as to whether a party has the capacity to respond to the material. It must be noted that the later in time and closer to the hearing that material is provided, the less realistic the possibility there is for a response. For this reason, the Tribunal wishes to make it clear that it does not require [Jaguar] to attempt to respond to material, which on any view has been provided too late for any meaningful response to be formulated. Accordingly, the Parties should be aware that the Tribunal does not expect [Jaguar] to undertake what can be fairly regarded as a futile exercise, and that judgements as to the reliance if any to which the Tribunal will have on such material will be made by the Tribunal in this context. No assumptions can be made at this stage as to whether any of the Disputed Material (other than the expert statement of Mr Adam Aspinall) will be admitted.

72 The main evidentiary hearing of the Arbitration was held in Dublin from 6 July 2015 to 21 July 2015. Meanwhile, the Project works were completed on 26 July 2015.

73 On 25 November 2015, the Tribunal rendered its award ("the Award"), in which it unanimously found that Jaguar Energy had validly terminated the EPC Contract for default by CMNC. The Tribunal substantially allowed Jaguar's claims, pertinently, the ETC Claim.

74 On 25 February 2016, CMNC commenced Originating Summons No 185 of 2016, seeking to set aside the Award on three grounds:

(a) The Due Process Ground: The Award was obtained in breach of Art 34(2)(*a*)(ii) of the Model Law and s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), because (i) the AEO Regime deprived CMNC of a reasonable opportunity to present its

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

(b) Defective Arbitral Procedure Ground: The Award was obtained in breach of Art 34(2)(*a*)(iv) of the Model Law and the parties' agreement to arbitrate, because (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) Public Policy and Corruption Ground: The Award was liable to be set aside as being contrary to public policy under (i) Art 34(2)(*b*)(ii) of the Model Law on the basis that Jaguar had engaged in "guerrilla tactics" in the Arbitration, such as, for example, Jaguar's seizure of CMNC's documents by securing the eviction of CMNC's employees from the site (see [11] above), and/or (ii) Art 34(2)(*b*)(ii) of the Model Law and s 24(*a*) of the IAA, because the Tribunal failed to investigate allegations of corruption and fraud, and/or the Award was induced or affected by corruption.

Decision below

75 The judge below ("the Judge") dismissed CMNC's application to set aside the Award, rejecting all three grounds put forward by CMNC. We set out the Judge's reasons to the extent that they are relevant to the issues raised on appeal.

76 We begin with the Due Process Ground, which, as we shall shortly explain, is the only ground pursued in the appeal. The Judge rejected CMNC's submission that the imposition of the AEO Regime had deprived it of a reasonable opportunity to present its case. It was undisputed that the Tribunal had the power to grant the AEO order; the only question was whether the order was made in an inappropriate and indiscriminate way (GD at [133]). The Judge held that it was not, for three reasons:

(a) First, the Tribunal *did* make a determination that there were compelling grounds to impose the AEO Regime, and there was no reason to disturb that determination (GD at [139]–[147]).

(b) Second, the Judge rejected CMNC's submission that the AEO Regime had unjustifiably shifted the burden of proof onto CMNC to justify its request for disclosure of each AEO-designated document. He held that the burden of proof was never moved to CMNC – it remained on Jaguar to establish that for each document or class of documents, an AEO order was warranted (GD at [150]–[152]).

(c) Third, the Tribunal *did* carefully weigh the potential prejudice to CMNC in making the AEO Order. First, CMNC retained the option of applying for access under the second stage of the AEO Regime, but never availed itself of this avenue of access. There was no basis for thinking that the application process would be "onerous and impractical"; the Judge thought the process would likely have entailed "a relatively straightforward exercise" (GD at [156]–[157]). Second, the Redaction Ruling (which was made less than a month after the imposition of the AEO Regime) would have cured any prejudice caused by the application of the AEO Regime (GD at [158]). Third, the Tribunal

reset the procedural timetable for the Arbitration pursuant to CMNC's request by issuing PO 3, which reflected timelines that CMNC itself had agreed to in the context of the AEO Regime and the Redaction Ruling (GD at [159]). Fourth, after the timelines were agreed, CMNC's counsel gave multiple assurances that they (and CMNC's experts) were aware of the compressed timelines and that they would be able to meet them (GD at [160]).

77 The Judge also rejected CMNC's contentions that the AEO Regime had significantly undermined its opportunity to present its case. In particular:

(a) The Judge rejected CMNC's submission that its counsel and experts could not effectively analyse the Costs Documents due to the AEO Regime, noting that CMNC could have but chose not to apply for access to the documents for its employees (GD at [163]).

(b) The Judge rejected CMNC's submission that the Redaction Ruling did little to mitigate the prejudice caused to it by the AEO Regime. While the Tribunal subsequently ordered that the AEO Regime be reinstated in relation to documents with a value of less than US$100,000 (see [39] above), the Judge noted that the total value of claims affected by documents subject to the AEO Regime (approximately US$14.5m) was far less than the total value of claims affected by documents that Jaguar had to disclose under the Redaction Ruling (approximately US$188.7m). Moreover, CMNC could have applied for production of the documents withheld from its employees (albeit with information identifying Jaguar's contractors redacted), but no such application was made (see [38(c)] above) (GD at [164(a)–(b)]). As for CMNC's complaints that Jaguar's disclosures of the redacted and

unredacted sets without an index caused it difficulties, the Judge thought these were largely over-stated, as were its complaints about certain documents with unauthorised redactions (GD at [164(c)–(d)]).

(c) The Judge rejected CMNC's submission that it had, by the time the AEO Regime was finally lifted by the Supplemental Order, suffered "irreversible prejudice". CMNC had itself agreed to the timelines set out in PO 3, and the timelines had been agreed in the context of the AEO Regime and the Redaction Ruling. Although Jaguar continued to disclose new Costs Documents until 5 June 2015, as the Project works progressed, that was done in accordance with PO 3, and CMNC did not apply for those procedural timelines to be postponed (GD at [165]).

78 The Judge further held that CMNC did not, in any case, suffer prejudice that justified setting aside the Award. The thrust of CMNC's complaint was that it did not have sufficient time to review the documents supporting the ETC Claim, but it appeared that this was at least partly due to CMNC's own choices and failings such as, for example, its decision to change parts of its legal team on multiple occasions (GD at [167]).

79 Turning next to the Defective Arbitral Procedure Ground, the Judge rejected CMNC's submission that the Tribunal had failed to treat the parties equally (in accordance with Art 18 of the Model Law) by applying an "asymmetrical AEO Restriction" and in its (unequal) policing of the AEO Regime (GD at [187]–[189]). The Judge also rejected CMNC's contentions that the Tribunal did not afford CMNC a reasonable opportunity to present its case by insisting that CMNC adhere to the procedural timelines, since these were timelines *agreed* to by CMNC (GD at [190]).

80 The Judge also dealt with the Public Policy and Corruption Ground, but we need not deal with this as CMNC does not pursue this ground on appeal.

The parties' cases

Appellant's case

81 CMNC's case on appeal is much narrower than its case before the Judge, and now focuses exclusively on the Due Process Ground. In essence, CMNC's case is that it was not accorded reasonable and equal due process due to the cumulative effect of three operative factors: (i) the effect of the AEO Order (amongst others) on CMNC's review of the documents produced by Jaguar; (ii) CMNC's lack of access to its own Construction Documents which had been seized by Jaguar; and (iii) the Tribunal's failure to apply a cut-off date to Jaguar's rolling production of large quantities of documents in support of its ETC Claim very close to the main evidentiary hearing.

82 These three factors did not just cause CMNC to lose preparation time for the main evidentiary hearing; they disabled CMNC from being able to meaningfully interrogate the evidence in time, with the result that three key documents were filed out of time: (i) the Aspinall Report; (ii) the Gurnham Responsive Report; and (iii) the 2nd Witness Statement of Chai Jisheng ("Chai's 2nd Witness Statement"), one of CMNC's employees, whose evidence was key to CMNC's response to the material produced by Jaguar on 5 June 2015. Of these, the Tribunal formally excluded the first, and effectively precluded itself from giving any weight to the latter two by its direction that Jaguar was not required to respond to those filings (see [71] above).

83 The Judge, in holding that there was no breach of CMNC's due process rights, erred in the following respects:

(a) The Judge failed to assess the *cumulative* impact of the three factors by analysing each in isolation.

(b) The Judge erred in characterising the Redaction Ruling and the reset of hearing dates following PO 3 as having ameliorated or removed the prejudice caused, and had thereby overstated the efficacy of these orders and underestimated CMNC's handicap.

(c) The Judge proceeded on the erroneous premise that the only prejudice CMNC was complaining of was the lack of time; while time was an issue, the Judge severely underestimated the irreparable prejudice suffered by CMNC, in that he:

(i) wrongly dismissed CMNC's very real difficulties in reviewing Jaguar's documents as mere "logistical difficulties"; and

(ii) failed to appreciate the irremediable consequences that followed when CMNC submitted witness statements and expert reports that could not be prepared earlier due to the dysfunctional arbitration process;

all of which resulted in CMNC's inability to properly investigate and challenge the reasonableness of Jaguar's ETC Claim.

(d) The Judge erred in calibrating the balance between due process and what he wrongly perceived as an agreement for an expedited arbitral

process, when parties had in fact waived strict compliance with the expedited arbitration deadlines in cl 20.2 of the EPC Contract.

(e) The Judge applied the wrong legal standard in analysing CMNC's procedural choices; the question was whether CMNC had waived its due process rights by those choices, and it had not.

Respondents' case

84 Jaguar's position is that neither it nor the Tribunal, whether by their action or inaction, had done anything to compromise CMNC's right to be heard. In response to the three factual bases upon which CMNC's case on natural justice rests (see [81] above), Jaguar submits that: (i) the Tribunal afforded adequate regard to due process in allowing Jaguar to refine its ETC Claim; (ii) the Tribunal adequately considered the parties' competing interests and properly granted the AEO Order; and (iii) CMNC's purported lack of access to the Construction Documents is not corroborated by the arbitration record.

85 In any case, CMNC suffered no prejudice from the points complained of above. CMNC's delayed filing of the Aspinall Report, the Gurnham Responsive Report and Chai's 2nd Witness Statement is solely attributable to its own deficient preparation, and not to any alleged lack of proper disclosure on Jaguar's part. The arbitration record is replete with examples of CMNC's own defective case management (such as in appointing its experts late, and effecting disruptive changes to its team of external counsel and experts) and its failure to comply with the Tribunal's timelines – timelines which, as often was the case, CMNC had itself agreed to. What the record shows is that the Tribunal had treated both parties fairly without any failure of due process, and had in fact indulged many of CMNC's requests for extensions of time.

The applicable legal principles

86 The general principles regarding the setting aside of an arbitral award for breach of natural justice under s 24(*b*) of the IAA are well-established. 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 did or could prejudice its rights: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29]; *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [48].

87 The authorities make clear that the right to be heard – a party's right to present its case and respond to the case against it – is a fundamental rule of natural justice: *Soh Beng Tee* at [42]. They also make clear that the threshold for a finding of breach of natural justice is a high one, and that it is only in exceptional cases that a court will find that threshold crossed: *Soh Beng Tee* at [54].

88 The parties' right to be heard finds expression in Art 18 of the Model Law, which provides:

> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

89 This basic procedural guarantee finds teeth in Art 34(2)(*a*)(ii) of the Model Law and s 24(*b*) of the IAA, which provide, respectively, that the supervisory court may annul an award if the party against whom the award is invoked was "unable to present his case", or where that party's rights are prejudiced because a "breach of the rules of natural justice occurred in connection with the making of the award". These provisions permit, in certain

circumstances, the setting aside of an award where the procedural protections in Art 18 of the Model Law have not been duly accorded to the award-debtor: Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) ("*Born*") at p 2166.

90 Article 18 of the Model Law provides that the parties shall be treated equally and that each shall be given a full opportunity of presenting its case. These requirements are, in essence, an embodiment of basic notions of fairness and fair process which underpin the legitimacy of all forms of binding dispute resolution. Thus, in the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/264, 25 March 1985) ("*Analytical Commentary*") on (what is now) Art 18 of the Model Law, it is stated as follows (Art 19 at para 7):

> *Paragraph (3) [ie, the due process requirements in what is now Art 18 of the Model Law] adopts* ***basic notions of fairness*** in requiring that the parties be treated with equality and each party be given a full opportunity of presenting his case. [emphasis added in italics and bold italics]

91 And, as this court has previously observed in *Soh Beng Tee* (at [42]):

> … At the outset, it must be acknowledged that it is an indispensable, one might even say universal, requirement in every arbitration that the parties should have an opportunity to present their respective cases as well as to respond to the case against them. … It can be confidently stated that all established legal systems require parties to be treated fairly, although different terminology may be employed. Fairness includes the opportunity to be heard and the equality of treatment.

92 While the right to be heard is a fundamental rule of natural justice which can be found in almost every mode of binding adjudication, it is of particular importance in the context of international commercial arbitration, where it serves as an essential check on the wide powers of the tribunal in managing the

arbitral process (*Analytical Commentary*, Art 19 at para 7).

93 Returning to Art 18, that provides that "each party shall be given a full opportunity of presenting his case". The present appeal raises interesting questions as to what exactly that entails and, in particular, how the word "full" should be interpreted. While a plain reading of the word "full" may at first blush appear to suggest an expansive and uncurtailed right, the weight of authority and opinion suggests otherwise.

94 The starting point of the analysis is the *travaux preparatoires* of Art 18 of the Model Law. The *travaux* show that the drafters of Art 18 were, in fact, primarily concerned with placing *limits* on the right to be heard so as to prevent its abuse by unscrupulous parties who might otherwise seek extension after extension of any applicable timeline on the basis that each would be necessary to ensure that party's "full" opportunity of presenting its case.

(a) While initial drafts of the due process provision provided that "*at any stage of the proceedings* each party [should be] given a full opportunity of presenting his case", it was decided that the phrase "at any stage of the proceedings" should be deleted as "[i]t was felt that the words 'at any stage' … might be relied upon by a party who wished to prolong the proceedings or to make unnecessary submissions" (*Report of the Working Group on International Contract Practices on the Work of its Fourth Session* (A/CN.9/232, 10 November 1982) at para 104; *Report of the Working Group on International Contract Practices on the Work of its Sixth Session* (A/CN.9/245, 22 September 1983) at para 73).

(b) In the course of discussions on Art 19 of the draft Model Law (the present Art 18), one member expressed concern that "the provision

may also be a basis for delaying tactics", and proposed that the word "full" be replaced by the word "adequate" (*Analytical Compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration* (A/CN.9/263, 19 March 1985) ("*Analytical Compilation*"), Art 19(3) at para 7).

(c) In a similar vein, the International Bar Association proposed replacing the word "full" with the phrase "full and proper", as the word "full", on its own, was "relatively imprecise" and "might be capable of being interpreted in an unduly restrictive sense" (*Analytical Compilation*, Art 19(3) at para 8).

95 While the latter two proposals were not eventually implemented (and the word "full" was retained), that was only because the Working Group ultimately considered it sufficiently clear that concerns of due process must be balanced against concerns for the efficiency and expediency, and so this would not entitle a party to obstruct or delay the proceedings (*Analytical Commentary*, Art 19 at para 8):

> … Other provisions, such as articles 16(2) [requiring that jurisdictional objections be raised no later than in the statement of defence], 23(2) [permitting a tribunal to refuse requests to amend a claim or defence] and 25(c) [permitting the tribunal to issue an award in default], present certain refinements or restrictions in specific procedural contexts in order to ensure efficient and expedient proceedings. *These latter provisions, which like all other provisions of the model law are in harmony with the principles laid down in article 19(3) [the present Art 18],* ***make it clear that "full opportunity of presenting one's case" does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award.*** [emphasis added in italics and bold italics]

96 The point that the *travaux* make tolerably clear is that the word "full" in Art 18 of the Model Law was not intended to create a right of unlimited scope. On the contrary, and as mentioned, the drafters were clearly conscious of the need to *limit* the scope of Art 18, so that it would not be abused by parties seeking to delay and prolong proceedings.

97 In this regard, it has been suggested – rightly, in our view – that the parties' right to be heard is *impliedly* limited by considerations of reasonableness and fairness. This has especial relevance in cases such as the present one, where the complaint is that the failure to grant some sort of procedural accommodation to a party adversely impacted that party's due process rights.

(a) As was explained by this court in *Soh Beng Tee* (at [65(a)]), while the parties have, in general, a right to be heard effectively on every relevant issue, the "overriding concern… is fairness", and the "best rule of thumb to adopt is to treat the parties equally and allow them *reasonable opportunities* to present their cases as well as to respond" [emphasis added].

(b) In a similar vein, the Singapore High Court in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi Cesare*") observed (at [151]) that "the right of each party to be heard does not mean that the Tribunal must 'sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party'".

(c) The same view holds in non-Model Law jurisdictions. In England, s 33 of the English Arbitration Act 1996 expresses the right to be heard as a requirement that parties be given a "reasonable"

opportunity of presenting their case. In *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm) ("*ASM Shipping*"), one of the bases on which the applicant sought to set aside the arbitral award was the tribunal's refusal of an adjournment of the proceedings requested after the requesting party's lead counsel had become unavailable for personal reasons. In refusing to set aside the award, the English High Court held that the test was whether the decision to refuse an adjournment was "so far removed from what could *reasonably* be expected of the arbitral process that it must be rectified" [emphasis added] (at [38]). The judge noted that although the choice between adjourning the case causing inconvenience and giving the applicant a chance to find another Queen's Counsel was not an easy one, he saw nothing wrong with the tribunal's decision to refuse the adjournment (at [45]).

(d) The tribunal's refusal to grant an adjournment was also a ground for the challenge of the award in *PT Reasuransi Umum Indonesia v Evanston Insurance Company, Utica Mutual Insurance Company and AMP United*, 23 December 1992, [1992] WL 400733 (SDNY, 1992). In assessing whether the arbitrators were guilty of "misconduct", the test applied by the court focused on the reasonableness of the tribunal's decisions (at 2): "[w]here there is a *reasonable* basis for the arbitrator's decision not to grant a postponement, courts are reluctant to interfere with the arbitration award" [emphasis added].

(e) This view has also received the endorsement of leading academic commentators on the law and practice of arbitration. Prof Gary Born too has suggested that a "full" opportunity to be heard is impliedly

limited by considerations of reasonableness and fairness (*Born* at p 2175):

> … a number of statutes provide more specifically that parties shall be given a "reasonable" or "fair" opportunity to be heard. These formulations do not differ materially from guarantees of an "opportunity to be heard," which is impliedly limited by considerations of reasonableness and fairness.

(f) Prof Jeffrey Waincymer has expressed a similar view in *Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012) ("*Waincymer*") at p 751:

> While some commentators have raised concerns as to the difference in terminology between a 'full' opportunity to present a case and expressions such as a 'reasonable opportunity', nothing should turn on this as the key word is 'opportunity'. A full opportunity is not an open-ended one.

(g) In a similar vein, the learned authors of *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) observe as follows (at para 6.14):

> At first sight, the word 'full' can be misleading: it conjures visions of a party having an entitlement to present as much argument and evidence as it sees fit. But, in this context, the word 'full' must be given a sensible meaning, and in practice it seems unlikely that a national court would set aside an award where the tribunal took a clearly reasonable and proportionate approach to limiting the scope of the evidence that a party wished to present. Confirming this, most sets of modern arbitration rules now expressly provide that a party need be given only a '*reasonable* opportunity to present its case', which should encourage arbitral tribunals to balance opportunity with efficiency in determining appropriate arbitral procedures. [emphasis in original]

98 In our judgment, in determining whether a party had been denied his right to a fair hearing by the tribunal's conduct of the proceedings, the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. This inquiry will necessarily be a fact-sensitive one, and much will depend on the precise circumstances of each case (*Triulzi Cesare* at [65]). This has two consequences.

99 First, the tribunal's conduct and decisions should only be assessed *by reference to what was known to the tribunal at the material time*. A tribunal cannot be criticised as having acted unfairly for failing to consider or address considerations or concerns which the parties never brought to its attention.

100 Thus, in *Triulzi Cesare*, the applicant, Triulzi Cesare SRL ("Triulzi") sought to set aside an arbitral award on grounds of a breach of natural justice. Triulzi alleged that it had been denied the opportunity to present its case arising from, amongst other things, the tribunal's refusal to adjourn to enable it to file an expert's report. Triulzi contended that it was not given the opportunity to present crucial expert evidence because the tribunal failed to grant it a meaningful extension of time that would have enabled its experts to inspect and report on certain aspects of the respondent's facility. Crucially, however, Triulzi had not informed the tribunal that it wanted its expert to inspect *the facility*; all it had said was that its expert needed to inspect *two machines*. In dismissing Triulzi's contention that the tribunal had acted unfairly in granting only a short extension, the High Court held that Triulzi could not criticise the tribunal for failing to consider something that Triulzi itself had not put before the tribunal for its consideration (*Triulzi Cesare* at [148]):

> Again, Triulzi's complaint that the Tribunal's time extension was not meaningful and it was not given an opportunity to present its own expert evidence that covered other matters is again symptomatic of Triulzi's approach throughout the entire Arbitration. ***Triulzi seeks to criticise the Tribunal's conduct for something that Triulzi itself had not seen fit to put before the Tribunal for consideration***. *There is no explanation as to why the Tribunal was not told on 16 April 2013 that Triulzi wanted its expert to inspect the environmental conditions of Xinyi's facility, Xinyi's maintenance regime, or for the expert report to deal with the interpretation of technical terms.* Triulzi's stated position in April 2013 was that it wanted its expert to inspect the two machines only and to file an expert statement on this, a position that is very different from the one it is taking in OS 1114/2013. It plainly now wants to have a "second bite at the cherry" having seen the Tribunal's findings and reasoning in the Award. [emphasis added in italics and bold italics]

101 This is a material point because it guards against the danger of the court conducting an analysis after the fact without due appreciation of just what the tribunal was confronted with. The nature of the arbitral process is inevitably a dynamic one. Timelines may be short; arrangements may need to be made well ahead of time to accommodate multiple schedules; and each party has an interest in a reasonably expeditious process. In these circumstances, the contours of what constitutes fair and proper procedure cannot be found in any one rulebook, but will be shaped by the grunts of assent and the cries of protestation from the parties during the course of the proceedings. The fairness of that procedure can only be judged against what the parties themselves may be taken as having agreed to and expected, *by what they contemporaneously communicated to the tribunal*.

102 In practical terms, what this means is that the alleged unfairness upon which the complaining party seeks to found its claim of breach of natural justice must have been brought to the attention of the tribunal. While this analysis might appear at first blush to shade into the doctrine of waiver under Art 4 of

the Model Law, the two are, in our judgment, analytically and conceptually distinct. The doctrine of waiver only becomes relevant *after* the relevant non-compliance has been established; the question then is whether the complainant has waived its right to complain about the non-compliance. The point being made here, however, goes to the anterior question of breach. The fundamental point is that, in the context of a challenge directed at the exercise of a tribunal's procedural discretion, there can be no non-compliance to speak of if the complaining party had not informed the tribunal of what, in its view, such compliance required.

103 Second, the court should accord a margin of deference to the tribunal in its exercise of procedural discretion. Deference is accorded in recognition of the fact that (i) the tribunal possesses a wide discretion to determine the arbitral procedure, and (ii) that discretion is exercised within a highly specific and fact-intensive contextual milieu, the finer points of which the court may not be privy to. It has therefore been said that the court ought not to micromanage the tribunal's procedural decision-making, and will instead give "substantial deference" to procedural decisions of the tribunal (*On Call Internet Services Ltd v Telus Communications Co* [2013] BCAA 366 at [18]). This means that the court will not intervene simply because it might have done things differently (*Soh Beng Tee* at [58], citing *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 at [67]). Overall, the threshold for intervention is a relatively high one: there must be a real basis for alleging that the tribunal has conducted the arbitral process "either irrationally or capriciously" (*Soh Beng Tee* at [65(d)]), or where the tribunal's conduct of the proceedings is "so far removed from what could *reasonably* be expected of the arbitral process that it must be rectified" (*ASM Shipping* at [38]).

104 The foregoing discussion of the applicable principles may be summarised as follows:

(a) The parties' right to be heard in arbitral proceedings finds expression in Art 18 of the Model Law, which provides that each party shall have a "full opportunity" of presenting its case. An award obtained in proceedings conducted in breach of Art 18 is susceptible to annulment under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA.

(b) The Art 18 right to a "full opportunity" of presenting one's case is not an unlimited one. It is impliedly limited by considerations of reasonableness and fairness.

(c) What constitutes a "full opportunity" is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.

(d) In undertaking this exercise, the court must put itself in the shoes of the tribunal. This means that: (i) the tribunal's decisions can only be assessed by reference to what was known to the tribunal at the time, and it follows from this that the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time; and (ii) the court will accord a margin of deference to the tribunal in matters of

procedure and will not intervene simply because it might have done things differently.

Breach of the rules of natural justice

105 CMNC's case is that it was deprived of a full opportunity of responding to Jaguar's ETC Claim by the Tribunal's procedural mismanagement of the proceedings in three respects:

(a) the Tribunal's management of the disclosure of sensitive documents (including its imposition of the AEO Order);

(b) the Tribunal's failure to account for the handicap faced by CMNC due to its lack of access to its own Construction Documents; and

(c) the Tribunal's failure to properly manage and restrict Jaguar's haphazard and rolling production of the Costs Documents.

106 Bearing the legal principles summarised at [104] above in mind, we discuss each in turn, and then in the round.

Disclosure of sensitive documents

107 As outlined at [23], [32], [38(c)] and [50] above, there are four key watersheds in the Tribunal's management of the disclosure process for sensitive documents.

(a) On 25 September 2014, the AEO Regime was instituted. AEO-designated documents could only be disclosed to CMNC's external counsel and experts, but not its employees (subject to CMNC's right to apply for disclosure to its employees).

(b) *Less than a month later*, on 19 October 2014, the Redaction Ruling was made. Pursuant to the Redaction Ruling, AEO-designated documents were to be disclosed to CMNC's employees, albeit in redacted form.

(c) On 18 December 2014, by PO 3, the AEO Regime was reinstated for documents relating to claims with a value below US$100,000. However, the documents affected by this partial reinstatement of the AEO Regime account for only a fraction of the value of the ETC Claim.

(d) Finally, by 18 March 2015, the AEO Regime was lifted entirely. From this point onwards, documents were disclosed to 28 of CMNC's employees even without redaction.

108 CMNC's case proceeds in two steps.

(a) First, the Tribunal's management of the disclosure process for sensitive documents was unfair, and amounted to a breach of natural justice. In particular, CMNC submits that (i) the imposition of the AEO Order was unjustified and operated unfairly against CMNC, and (ii) that the subsequent modifications to the AEO Regime (*ie*, the Redaction Ruling and PO 3; see [107(b)]–[107(c)] above) did little to ameliorate the unfairness.

(b) Second, CMNC suffered prejudice in that its ability to prepare its response to Jaguar's ETC Claim was severely hindered.

We address each step in turn.

Breach of natural justice

109 We begin with CMNC's contentions in relation to the imposition of the AEO Order, which was, by all accounts, the most restrictive form of disclosure (in that CMNC's employees were, at least presumptively, denied access to the documents altogether). In this regard, CMNC does not dispute that the Tribunal had the *power* to make AEO orders, generally. Its case is that the AEO Order in this case was improperly made for the following reasons:

(a) First, the AEO Order was not made on any justifiable basis, because it rested on a preliminary and inconclusive assessment of the risk that CMNC would use those documents to interfere with the completion of the Project.

(b) Second, the AEO Order operated unfairly against CMNC because it was unlimited in scope:

(i) the AEO Order conferred blanket authority on Jaguar to withhold documents at will; and

(ii) the effect of the second stage of the AEO Regime was to improperly shift the burden of applying for discovery onto CMNC by forcing CMNC to apply for access to individual documents.

110 CMNC's first point – that there was no justifiable basis for the Tribunal to have made the AEO Order because it did not come to any conclusive view on Jaguar's allegations that CMNC would misuse the documents – ignores the fact that the proceedings were, at that time, still at an early stage. In those circumstances, the Tribunal could not have been expected to make a conclusive

finding as to Jaguar's allegations. Indeed, had the Tribunal done so, that might have exposed it to accusations that it had pre-judged issues that ought to be reserved to the main evidentiary hearing – a point *CMNC itself* made when resisting the imposition of the AEO Order (see [22] above).

111 For the purposes of determining Jaguar's application for an AEO Order, the Tribunal had to be satisfied that there was a sufficient basis for the making of such an order. In this regard, Jaguar had provided sworn testimony that, both immediately prior to and subsequent to the termination of the EPC Contract, CMNC had engaged in conduct calculated to interfere with Jaguar's completion of the Project, such as (a) offering payments to contractors and suppliers in exchange for their refusing to work with Jaguar; (b) physical intimidation of Jaguar's contractors and suppliers and their employees; and (c) vexatious litigation and threats of litigation against Jaguar's contractors and suppliers should they continue to work on the Project. CMNC denied these allegations, stating that "CMNC's actions post-termination were lawfully taken to protect CMNC's own legitimate interests following the unlawful termination". Having considered the parties' respective positions, the Tribunal explained, in fairly detailed written grounds, that while it had not reached any concluded view on the allegations of misuse, it nevertheless considered the *possibility* of misuse to be of "serious concern" which needed to be addressed prophylactically (see [23]–[24] above). In our judgment, this was a reasonable view for the Tribunal to have taken. In some respects, the Tribunal's approach could be analogised to how a court or other forum would approach an application for an interim injunction made on the basis of contested facts, at a time when final findings on those contested facts simply cannot be made, and where the overarching focus is to minimise injustice by balancing the competing interests as best it can. It seems to us that this, in essence, was what the Tribunal did and we are therefore

unable to accept CMNC's submission that the AEO Order had been made without any basis.

112 CMNC's second point pertains to the effect of the AEO Regime on its preparations; in particular, that it operated asymmetrically and unfairly by shifting the burden of obtaining disclosure of documents on to CMNC. With respect, this submission misses the point. The question is *not* whether the AEO Order had adversely impacted CMNC's preparation of its case – it almost certainly did, to some extent. The question is whether the balance struck by the Tribunal in making the AEO Order as a whole – between Jaguar's interest in safeguarding the confidentiality of the documents in order to prevent harm, and CMNC's interest in being able to prepare its case unhindered in any way – is one which was so unfair or unreasonable as to fall outside the range of what a reasonable and fair-minded tribunal might have done in the circumstances.

113 In respect of the latter question, and having reviewed the AEO Order and the circumstances under which it was made, we do not see any basis on which to impeach the Tribunal's decision. In establishing the AEO Regime, the Tribunal was clearly conscious of the need to strike a *balance* between the competing interests of the parties. The Tribunal's chosen approach was to craft a two-stage process, with the first stage satisfying Jaguar's concern for confidentiality by restricting CMNC's access to these documents by confining such access to CMNC's counsel and experts; and the second acting as a safeguard of CMNC's interest in direct access by expressly providing that CMNC could apply to the Tribunal for this (see [25] above). That the AEO Order would, to some extent, adversely affect CMNC is not fatal to its legality, because the AEO Order necessarily represented a *compromise* between Jaguar's and CMNC's interests. The point is that the Tribunal had, in imposing the AEO

Order, weighed the adverse effect that such an Order would have on CMNC's ability to prepare its case against (i) Jaguar's "serious concern" as to the risk of CMNC misusing the documents, and (ii) the fact that at the second stage, CMNC could seek and get unrestricted access once their experts and counsel had seen the documents and assessed that this was necessary. That approach, in our judgment, fell well within the bounds of what a reasonable and fair-minded tribunal might have done for the reasons we have outlined at [111] above.

114 In any case, we do not accept CMNC's specific submissions summarised at [109(b)] above.

(a) We do not accept CMNC's submission that the AEO Order was unlimited in scope. In our judgment, the AEO Order must be read as having been limited to the three categories of documents stated in Jaguar's request for the AEO Order (see [21] above). While we appreciate that this might have formed a rather wide category of documents, the precise scope of the Order is a matter for the Tribunal in the exercise of its broad powers over the procedure of the Arbitration.

(b) We also do not accept CMNC's submission that the AEO Regime improperly shifted the burden of applying for disclosure onto CMNC. A key plank of CMNC's submission is that the mechanism for application under the second stage was onerous and impractical because it required applications for disclosure to be made on a document-by-document basis. That view is not borne out on the evidence. Paragraph 36 of TC No 51, which we have reproduced at [26] above, is material because it gives a clear insight into what was contemplated. In short, it was anticipated that CMNC's counsel and experts would have initial access and they would then be able to assess

> whether access had to be given to CMNC for proper instructions to be taken. It is most unfortunate that CMNC, for whatever reason, chose not to avail itself of this option. In this regard, we are inclined to agree with the Judge that the second stage would likely have entailed a "relatively straightforward exercise". There is nothing to suggest that this exercise could not have been done in relation to categories of documents, instead of individual documents. For these reasons, we do not think it can be said that CMNC's burden under the second stage of the AEO Regime was so imbalanced as to amount to a *de facto* shift of the burden of disclosure. To so conclude would require us to find that disclosure to CMNC's experts and counsel on terms that they could then apply for unrestricted access was pointless. We are unable to so conclude when CMNC never made any such application.

115 We therefore reject CMNC's submission that the AEO Order was unfairly imposed in breach of Art 18 of the Model Law. On the contrary, given the risk or threat of prejudice raised by Jaguar, we are satisfied that the Order fell within the boundaries of what a reasonable and fair-minded tribunal might have done in the circumstances.

116 In any case, and as was noted by the Judge, any unfairness occasioned by the AEO Regime was substantially mitigated following the Redaction Ruling, which was made just four weeks after the imposition of the AEO Regime (see [76(c)] above). Against this, CMNC submits that the Redaction Ruling did little to ameliorate the unfairness caused by the AEO Regime, for two reasons.

117 First, CMNC submits that the little relief CMNC enjoyed by the lifting of the AEO Regime by the Redaction Ruling was short-lived, because PO 3 effectively reinstated the AEO Regime in respect of documents pertaining to the smaller claims (see [39] above). We make two points.

(a) First, this complaint seemed to us to be disingenuous given that CMNC had itself initially *agreed* to relieve Jaguar of any obligation to produce redacted copies of such documents from as early as 28 October 2014, nine days after the Redaction Ruling) (see [37] above). Admittedly, CMNC later resiled from this position but this is to be seen in the light of the fact that no explanation has been advanced that satisfactorily explains this change of position and the inference to be drawn is that CMNC really would not have initially agreed to the change if, in fact, it had been as prejudicial to it as CMNC now contends.

(b) Second, CMNC's submission overstates the impact of the partial reinstatement of the AEO Regime for these documents. As earlier mentioned, disclosure of the post-termination contract documentation was sought for the purpose of challenging the *value* or quantum of *Jaguar's ETC Claim*. The fact of the matter is that CMNC's employees did have direct access to the overwhelming majority of documents *by value* (covering claims worth approximately US$188.7m). In comparison, the restricted documents were in respect of claims worth only US$14.5m (see [39] above).

118 Second, CMNC says that manner in which the redacted documents were produced further impeded CMNC's preparations, and that therefore the Redaction Ruling, instead of mitigating the difficulties caused by the AEO

Regime, in fact exacerbated them. CMNC raised two complaints, both of which we find to be without merit.

(a) First, CMNC's complaint that the redaction of contractors' names was unfair is completely undermined by the fact that CMNC itself had *agreed* that contractors' names and identifying information could be redacted (see [31(a)] above). CMNC only challenged Jaguar's proposed redaction of construction scheduling information (and this point was resolved by the Tribunal in CMNC's favour) (see [32] above).

(b) Second, in relation to CMNC's complaints regarding Jaguar's alleged haphazard production and over-redaction of documents (see [34] above), CMNC did not immediately surface these complaints to the Tribunal. Instead, CMNC took the matter up directly with Jaguar in correspondence. At the Toronto Hearing (see [35] above), which was held barely a month after the Redaction Ruling, CMNC advanced a whole raft of *other* complaints (such as that pertaining to the redaction of contractors' names) but never informed the Tribunal about its difficulties with the production of the redacted documents. This complaint was first brought to the Tribunal's attention only on 17 February 2015 (in its application to lift the AEO Regime) (see [48] above), some four months after the Redaction Ruling. After the issue was raised to the Tribunal, it was resolved soon thereafter when the AEO Regime was completely lifted by the Supplemental Order.

119 In the circumstances, we do not accept that CMNC has shown that the Tribunal's management of the disclosure of the documents in question was unacceptable or amounted to a breach of natural justice. On the contrary, on our assessment of the procedural history of the arbitration, the Tribunal was simply

doing the best it could in the circumstances to strike a fair balance between the parties' interests.

(a) The imposition of the AEO Regime rested on balancing between Jaguar's interest in confidentiality and CMNC's interest in unrestricted access; the order was specifically designed so that *both* interests could be given effect to (see [110]–[113] above).

(b) The subsequent Redaction Ruling was a recalibration of the original balance *in CMNC's favour* as CMNC's employees gained access to the documents, and Jaguar's confidentiality concerns were preserved by its having the right to redact the documents (see [32] above).

(c) While PO 3 recalibrated the balance, this time in favour of Jaguar, the entire AEO Regime was lifted soon thereafter on 18 March 2015 – a full four months ahead of the main evidentiary hearing.

Prejudice

120 In any case, we do not see how CMNC could have been prejudiced by any alleged breach. The AEO Regime, in its most restrictive form (meaning when these documents were presumptively not subject to disclosure to CMNC's employees at all), lasted less than a month. Thereafter, CMNC's employees received access to redacted documents, and although the AEO Regime was later reinstated for the smaller claim documents, this was an arrangement that CMNC, as we have noted, had initially agreed to. In any case, all restrictions were lifted by 18 March 2015 – almost four months before the main evidentiary hearing in July 2015. While CMNC now argues that Mr Gurnham's preparations had been seriously affected by the AEO Regime (amongst other

factors), we note that Mr Gurnham, in the course of a teleconference held on 14 April 2015, had informed the Tribunal that the deadlines set for the filing of his expert reports would be met (see [53] above). It must also be noted that the parties had *agreed* to certain timelines in PO 3 on 18 December 2014 (see [36] above). In other words, these timelines were agreed in the context of the AEO Regime, and therefore must be taken as having accounted for whatever adverse impact the AEO Regime would have had on CMNC's ability to meet those timelines.

121 In sum, CMNC has not shown that the restrictions on document production imposed as a result of the AEO Regime (and its successors) had any direct impact on CMNC's preparations in the critical period leading to the submission of the Gurnham Responsive Report and the other quantum evidence.

The Construction Documents

122 CMNC's second plank is that the AEO Regime had a disproportionate and compounding impact on its preparation efforts because it was already lacking access to the Construction Documents that were necessary to identify the Completed Work Quantities and engage in the Comparison Analysis of the ETC Claim (see [14(b)] above). According to CMNC:

(a) the Tribunal had acted unfairly in that it had ignored CMNC's multiple complaints (beginning in April 2014) that it had been deprived of the Construction Documents, and never ordered Jaguar to produce the seized Construction Documents; and

(b) the lack of timely access to the Construction Documents prejudiced CMNC's ability to complete the Comparison Analysis, with

the result that the Completed Work Quantities were only fully ascertained on 14 March 2015. As such, CMNC could only begin evaluating the ETC Claim with reference to the Completed Work Quantities from that date.

123 CMNC's first submission – that the Tribunal had "ignored" its complaints (which had purportedly been brought to the Tribunal as early as April 2014) in failing to order the production of the seized Construction Documents – is simply unsupported by the record.

(a) On 4 April 2014, in CMNC's Answer, Challenge to Jurisdiction, and Outline of Defence and Counterclaim, CMNC narrated the facts relating to its eviction from the Site, and Jaguar's subsequent takeover the Construction Area, including CMNC's drawings and documents kept therein. CMNC gave no indication as to what these documents were and how they were relevant to the suit; made no allegation that CMNC's preparation of its case would be prejudiced by the lack of access to the documents; and made no request that the Tribunal order that the Construction Documents be returned.

(b) No such request for the Construction Documents was made until 2 October 2014 (by way of RC No 42), some six months after the Tribunal was constituted in late-March 2014 (see [16] above). Even so, RC No 42 was not a request for production made on CMNC's own initiative, but was itself responsive to a request *from Jaguar* for production of the Construction Documents in CMNC's possession. It was in that context that CMNC filed RC No 42 as a request that Jaguar produce the documents it had allegedly confiscated from the Living Quarters, from which CMNC would then extract the documents relevant

to Jaguar's request. When Jaguar responded that it did not have possession of or access to CMNC's documents left at the site, CMNC did not thereafter pursue its request for the Construction Documents.

124 In these circumstances, we find CMNC's submission that the Tribunal "ignored" its complaints to be without basis. In truth, CMNC had never sought any such relief from the Tribunal. If indeed the documents allegedly seized by Jaguar were as critical to CMNC as it now claims, one would have expected CMNC to have sought production of the Construction Documents immediately after the constitution of the Tribunal (in March 2014). Instead, CMNC did nothing. What CMNC now claims – that these documents were essential, and that its lack of access to them dealt a mortal blow to its ability to prepare – just does not comport with how it conducted its case at the material time.

125 CMNC's second submission – that it was unable to ascertain the Completed Work Quantities until 14 March 2015 as it had no access to the Construction Documents – is contradicted by its own filings in the arbitral proceedings, which suggest that CMNC did in fact manage to value the Completed Work Quantities fairly early on in the arbitration.

(a) As early as 13 August 2014, CMNC was able to file its Statement of Case in Relation to Counterclaims, which detailed CMNC's counterclaims for outstanding milestone payments without any mention or qualification that it had been unable to properly quantify the value of the completed work it was claiming for.

(b) On 22 December 2014, CMNC was able, in its Statement of Reply, to state in percentage terms the work completed, as well as to state that the costs incurred by CMNC exceeded US$600m.

(c) In CMNC's Amended Statement of Case in Relation to Counterclaims dated 27 March 2015, CMNC stood by the figures stated in its Statement of Reply (meaning, "nearly 90%" of the value of the EPC Contract was completed, totalling about US$600m in costs incurred). This also appears to be the figure that Mr Gurnham eventually adopted at the main evidentiary hearing in Dublin, as recorded in the Award. What this suggests is that by 22 December 2014, CMNC had been able to calculate the Completed Work Quantities with reasonable accuracy.

126 We therefore do not accept CMNC's complaints as to the effect that its alleged lack of access to the Construction Documents had on its ability to prepare its case. We note that CMNC's case does not seem to be that its lack of access to the Construction Documents was a default of the Tribunal that amounted to a breach of natural justice; rather, its point appears to be that its lack of access to the Construction Document was part of the circumstances which the Tribunal ought to have taken into account in the overall management of the arbitral process. We address this point at [161] below.

Jaguar's rolling production of the Costs Documents

127 The third plank of CMNC's case is that its ability to respond to Jaguar's ETC Claim was compromised by the Tribunal's treatment of three key pieces of evidence: its indirect exclusion of the Gurnham Responsive Report and Chai's 2nd Witness Statement (which were crucial expert and lay evidence responsive to the evidence produced by Jaguar on 5 June 2015) when it indicated that Jaguar need not respond to these parts of CMNC's evidence, and its formal exclusion of the Aspinall Report (a report of CMNC's design expert, on which the Gurnham Responsive Report relied). CMNC contends that in so

far as the Tribunal's decisions in relation to the three filings above were made on the basis that these were submitted late, the delay in their preparation was itself due to the Tribunal's failure to put a stop to Jaguar's rolling production of the Costs Documents.

128 In sum, the following are alleged as the factual bases for CMNC's claim that the Tribunal had acted in breach of natural justice:

(a) the Tribunal's failure to put a stop to the rolling production of Costs Documents until 5 June 2015, which meant that CMNC did not have sufficient time to prepare its response to Jaguar's ETC Claim (in the form of the lay and expert witness statement and reports);

(b) the Tribunal's refusal to grant CMNC's second request for an extension of the filing deadline for the Gurnham Responsive Report;

(c) the Tribunal's refusal to admit the Aspinall Report into evidence; and

(d) the Tribunal's failure to account for the fact that Jaguar's disorganised and haphazard production of Costs Documents compounded CMNC's difficulty in reviewing them for the purposes of preparing its response to Jaguar's ETC Claim.

We deal with each in turn.

Failure to impose a cut-off date for Jaguar's rolling production of documents

129 We begin by noting that Jaguar's rolling production of Costs Documents was a provision *agreed* between the parties in PO 3. As mentioned at [41] above, there were a total of four updates to Jaguar's ETC Claim between the

Statement of Case filed on 13 August 2014 and the final update on 5 June 2015. At the time PO 3 was issued, no cut-off date was set for the continued production of documents. It was not until 30 May 2015 (in RC No 219) that CMNC requested, for the first time, that the Tribunal exclude from consideration all documents produced after 3 April 2015, that being the date that Mr McGeehin filed his report setting out Jaguar's positive case on the ETC Claim. CMNC argued that it must follow that documents produced after that date would not be admitted.

130 Before us, CMNC submits that it was "highly irregular" for the Tribunal to have permitted Jaguar's continual amendments of its ETC Claim with no consideration of whether CMNC would have adequate time to respond to the amended claim and the new evidence in support of the amendments. The Tribunal, CMNC says, should have considered whether CMNC would have the opportunity to respond to the amended claim before allowing Jaguar to amend its claim. This the Tribunal failed to do, by refusing to impose a cut-off date of 3 April 2015 for Jaguar to amend its ETC Claim in the terms CMNC had requested in RC No 219 (see [57] above).

131 However, what CMNC omits to mention is that its request for relief in RC No 219 presented the Tribunal with two *alternatives*: *either* a cut-off of 3 April 2015 should be imposed, *or, "[i]f the Tribunal [was] minded to allow [the production of documents] after 3 April 2015"*, that an extension of the deadline for the Gurnham Responsive Report should be granted to 18 June 2015 (see [57] above). When the Tribunal allowed Jaguar to produce documents beyond 3 April 2015 (setting the cut-off date as 5 June 2015 instead), it allowed CMNC's request for an extension to 18 June 2015 for the filing of the Gurnham Responsive Report. In other words, the Tribunal had given CMNC the very

relief it had sought, albeit in the form of the alternative option that CMNC itself had presented. That being the case, we do not see how CMNC can conceivably argue that the Tribunal's failure to cut off document production on 3 April 2015 was unfair, let alone so unfair as to constitute a breach of natural justice.

132 Further, having read the Tribunal's reasons (see [60] above) for its decision to grant the extension and impose a later cut-off date, it is clear to us that the Tribunal was balancing Jaguar's interest in presenting material relevant to its claim, and CMNC's interest in having a reasonable opportunity to meet Jaguar's case. In our view, the course which the Tribunal chose was an entirely reasonable one in the circumstances.

133 It is also significant that CMNC did not then object to the Tribunal's decision to set the cut-off date of 5 June 2015 (see [61] above). Instead, CMNC simply got on with its preparations. It was not until 27 June 2015, when CMNC was already in breach of the extended deadlines it had itself requested that it then asserted that it was never in a position to meet those deadlines due to, amongst other things, the Tribunal's failure to stop the rolling production of Costs Documents earlier (see [67] above). As we have emphasised at [99] above, the Tribunal can only operate on the basis of what the parties tell it. Since CMNC told the Tribunal that it would be able to proceed either if a cut-off date were imposed *or* if an extension were granted, that must mean that CMNC considered *either* of those courses of action to be fair. If intervening events or circumstances subsequently changed that calculus, then it was incumbent on CMNC to promptly seek further relief on that basis. On the facts, CMNC did not subsequently request that the Tribunal change its decision on the 5 June 2015 cut-off date – instead, it asked for further extensions for the filing of the Gurnham Responsive Report, which we address at [137] below.

134 For these reasons, we see no basis to impeach the Tribunal's decision to grant CMNC the extension it sought in lieu of the imposition of a 3 April 2015 cut-off date for the rolling production of documents.

Refusal to grant further extension for filing of the Gurnham Responsive Report

135 As set out above at [52]–[72], the key events leading to the belated filing of the Gurnham Responsive Report are as follows.

S/N	Date	Event
1	18 March 2015	Original deadline: Deadline for filing of the Gurnham Responsive Report is set as 15 May 2015 in PO 4. CMNC did not object to or challenge the timelines.
2	8 May 2015	Extension (by consent): Deadline is extended to 5 June 2015 *by consent*.
3	30 May 2015	1st Extension: The Tribunal fixed 5 June 2015 as the last date for Jaguar's rolling production of documents, and extended the deadline for the filing of the Gurnham Responsive Report to 18 June 2015, in the terms CMNC had requested.
4	5 June 2015	Jaguar uploaded the last tranche of documents supporting its final update to its ETC Claim.
5	17 June 2015	Request for 2nd extension: CMNC requested an extension of the report deadline to 25 June 2015 (from 18 June 2015). The Tribunal rejected this request.
6	18 June 2015	CMNC failed to file the Gurnham Responsive Report.

7	22 June 2015	CMNC filed the Gurnham Responsive Report out of time.
8	26 June 2015	Deadline for filing of pre-hearing submissions.
9	3 July 2015	The Tribunal made no order as to the admissibility of the Gurnham Responsive Report, but stated that Jaguar need not respond to the matters raised in the report.
10	6–21 July 2015	Dates of the main evidentiary hearing.

136 CMNC submits that (i) the Tribunal's decision not to extend the time for the filing of the Gurnham Responsive Report to 25 June 2015 (at s/n 5 of the table above), and (ii) its subsequent refusal to formally admit the Gurnham Responsive Report after it had been belatedly filed meant that crucial responsive expert evidence on quantum was shut out from the proceedings, which amounted to a denial of CMNC's right to an opportunity to respond to Jaguar's ETC Claim.

(1) The Tribunal's refusal to grant a second extension of time

137 Having had regard to the Tribunal's reasons for its denial of CMNC's request for the further extension (set out at [64] above), we see no basis on which the Tribunal's decision may be impeached as being unfair or unreasonable. As a general proposition, it would not be unreasonable for a tribunal to hold parties to timelines previously set, particularly where those timelines had been agreed. It is for the party seeking an extension of the timeline to show that it was reasonably unable to comply with the existing timeline.

138 In seeking the *second* extension of the deadline, CMNC submitted that this was necessary because Mr Gurnham required more time to review the "voluminous quantum material (over 2000 documents)" produced on 5 June 2015. The Tribunal rejected this submission, noting that its earlier decision to grant CMNC the first extension of the deadline to 18 June 2015 (see s/n 3 of the table above) had been made *in contemplation of the fact that documents would be produced on 5 June 2015*. In other words, the 5 June 2015 disclosure had already been accounted for in the *earlier* extension of time, and there was therefore no basis for a *further* extension.

139 At the hearings before us, CMNC argued that while the *fact* that documents would be disclosed on 5 June 2015 was known, the sheer *volume* of documents disclosed was not foreseeable when the first extension was granted. However, we have difficulty accepting this submission for two reasons.

140 First, if indeed CMNC had been caught by surprise by the volume of documents uploaded on 5 June 2015, one would have expected CMNC to have registered its concerns with the Tribunal immediately or soon thereafter. Instead, CMNC only took this point to the Tribunal on 17 June 2015 – some 12 days later, and on the eve of the 18 June 2015 deadline.

141 Second, this was not a case where documents had been held back and sprung on CMNC. As Jaguar pointed out, the bulk of the invoices evidencing Jaguar's actual costs had already been incrementally disclosed prior to 5 June 2015, pursuant to the three previous updates (*ie*, C-669, C-773 and C-840). Whether one looks at the monetary value of the claims evidenced by the documents, or at the raw volume of the documents themselves, there is no basis

to suggest that the volume of documents disclosed on 5 June 2015 was unusually large.

(a) In terms of the monetary value of the claims evidenced by the documents produced, the documents relating to the C-900 update evidenced an increase of US$33m in the actual sum paid by Jaguar in respect of the cost of completion. This is comparable to the increase of US$32m evidenced by the documents relating to the C-840 update before it, and is in fact smaller than the increase of US$58m evidenced by the documents relating to the C-773 update. Overall, and as can be seen from the table below, the increase in the monetary value of the claims evidenced by the documents relating to the C-900 update constituted just 13% of the total sum paid.

Transaction Log Number	**Actual sum paid to-date (completion costs) (US$)**	**% of actual sum paid on C-900**
C-699	138,031,638	44%
C-773	196,501,094	75%
C-840	229,330,606	87%
C-900	262,831,307	100%

(b) In terms of the volume of documents produced, the 11,991 pages of documents related to C-900 constituted about 20% of the 60,000 total pages of documents produced pursuant to the updates. In other words, 80% of the documents had already been previously disclosed over the three previous updates (C-669, C-773 and C-840). Seen in this light there was nothing particularly unusual or unforeseeable about the volume of documents disclosed on 5 June 2015.

142 There are two further points. First, the Gurnham Responsive Report did not stand alone but was subsequently accompanied by the Aspinall Report and Chai's 2nd Witness Statement. Leave had not been sought for those documents at the time CMNC applied for the extension of time on 17 June 2015. The short point is that in focusing attention on the Gurnham Responsive Report, CMNC fails to deal with the critical fact that this by itself was insufficient and incomplete and would not have advanced its case. No explanation has been advanced for why it made no mention at all of the other evidence which by then, it plainly knew it would file. Secondly, it is material in assessing the Tribunal's response to have regard to the extremely late stage at which the application was being made, the threat to the hearing dates that had been fixed many months earlier, the interests of fairness applicable to both parties, and the duty to conduct the arbitration on an expedited basis.

143 In that latter regard, it is trite that what natural justice demands turns in part on the parties' particular agreement to arbitrate: *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 at 463, cited in *Soh Beng Tee* at [55]. Of course, parties do not relinquish their due process rights simply by dint of agreeing to an expedited arbitration. That said, the fact that parties agreed to an expedited arbitration will inevitably have a bearing on the expectations that parties may reasonably and fairly have as to the extent of the procedural accommodation that may be afforded to them. On its part, CMNC submits that limited weight should be given to cl 20.2 (which provided for expedited arbitration) given that the parties had waived strict compliance with cl 20.2 by agreeing to timelines that were well in excess of the 180-day limit stipulated. This submission does not take CMNC very far because while parties had indeed waived strict compliance with the timelines stipulated in cl 20.2, it was clear that both parties intended that the arbitration was nonetheless to be expedited.

This is clear from the fact that *CMNC itself* had, on 6 May 2014, requested that the Tribunal move *forward* the evidentiary hearing to October 2014 on the basis of "the parties' strong original intention and desire that the matter should be completed at the earliest possible moment and under the shortest possible timetable". We note that CMNC held this view notwithstanding that by that time (6 May 2014), strict compliance with cl 20.2 had already been waived as reflected in the timelines set out in PO 2 (see [17] above).

144 Besides the point that there was really no basis for CMNC's request for a further extension of time, the Tribunal noted several of the points we have highlighted above in its response as follows (see [64] above).

(a) First, acceding to CMNC's request for a second extension would have brought the timelines for the admission of evidence perilously close to the main evidentiary hearing. CMNC had asked for an extension of the deadline to 25 June 2015. This was just *one day* before the parties' pre-hearing submissions were due (see s/n 8 in the table above), and just two weeks from the main evidentiary hearing, which was slated to begin on 6 July 2015 (see s/n 10 in the table above).

(b) Second, CMNC's request for a second extension on the eve of the deadline for submission was in disregard of the Tribunal's repeated reminders to the parties that applications for extensions of time should be made adequately in advance of, and not on the eve of the expiry of, the deadline.

145 Taking all these factors into consideration, it was, in our judgment, well within the Tribunal's rights to have refused CMNC's request for the further extension. The Tribunal's decision to grant CMNC's *first* extension request

reflected a balance between the parties' rights, and, for the reasons we have outlined above, especially considering the effect that an extension would have on *Jaguar's* ability to adequately consider and respond to that material, it seems to us entirely fair and reasonable for the Tribunal to have found that CMNC had not "made out a case for disturbing the balance which the Tribunal struck in [TC No 208]".

(2) The Tribunal's decision on admissibility of the Gurnham Responsive Report

146 After the Tribunal's refusal to grant CMNC the extension sought, the Gurnham Responsive Report and Chai's 2nd Witness Statement were nevertheless filed out of time on 22 June 2015 and 26 June 2015 respectively. CMNC formally applied to have both the Gurnham Responsive Report and Chai's 2nd Witness Statement admitted into evidence, and Jaguar objected (see [67] above). On 3 July 2015, the Tribunal gave its decision on the admissibility of CMNC's belatedly-filed evidence. It made no order as to the admissibility of the Gurnham Responsive Report, but stated that Jaguar did not need to respond to the material therein (see [71] above).

147 At the hearings before us, counsel for CMNC, Mr Toby Landau QC ("Mr Landau") argued that the Tribunal's direction to Jaguar that it need not respond to the Gurnham Responsive Report amounted to a *de facto* exclusion of that evidence, because, having told Jaguar that it need not respond, any reliance placed on that evidence by the Tribunal would subject the award to challenge by Jaguar on grounds of breach of *its* right to respond.

148 We think it is necessary first to draw a distinction between an order to the effect that Jaguar *need* not address these materials, and an order that it *must*

not do so. The latter could have amounted to an exclusion and for the reasons outlined in the previous section, had the Tribunal made such an order, in our judgment, it would have been entitled to do so in all the circumstances. The former, however, leaves it open to Jaguar, if it wishes, to deal with the material to the extent it is able and on that basis leaves it open to the Tribunal, in that light, to consider the material and give it such weight as it deems appropriate. That, as we shall see, is what in fact happened.

149 We deal first with the supposed exclusion of the evidence. First, we are satisfied that it would have been well within the competence of the Tribunal to make such an order – see *Waincymer* at pp 822–823:

> A tribunal must always be prepared to consider the reasons why an extension is sought. Many rules require 'exceptional circumstances'. *A tribunal might consider the fault, if any, of the party seeking to submit late evidence.* A party, who for whatever reason has only gathered previously existing evidence after deadlines have passed, might typically seek to rely on its right to an adequate or full opportunity to present its case. *The tribunal is not bound to accede to such requests* as the mandatory obligation is only to give each an 'opportunity'. If the previous procedural deadlines were adequate and a party simply did not comply, it cannot say that it did not have an adequate opportunity. [emphasis added]

150 We turn to consider the reasons the Tribunal gave for its decision to direct that Jaguar need not respond to CMNC's belatedly-filed evidence. In this regard, it is clear from the Tribunal's reasons that the Tribunal was acutely aware of the time pressure that counsel were under in their preparations for the main evidentiary hearing, which was, at that point, just days away:

> The Tribunal appreciates that counsel continue to undertake very significant work leading up to the Main Evidentiary 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 in relation

> to the Disputed Materials [which included the Gurnham Responsive Report].
>
> As the Tribunal has noted on a number of previous occasions on this subject, 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 [Jaguar] 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 [Jaguar] submit[s], is an* ***impossible timeframe***. Some guidance needs to be given to [Jaguar] in this regard.
>
> …
>
> The Tribunal has previously observed [in TC No 208] that one of the criteria to be taken into account in considering whether to place any reliance upon the materials provided, to which objection is taken, is that *a judgement needs to be made as to whether a party has the capacity to respond to the material*. It must be noted that *the later in time and closer to the hearing that material is provided, the less realistic the possibility there is for a response*. For this reason, ***the Tribunal wishes to make it clear that it does not require [Jaguar] to attempt to respond to material, which on any view has been provided too late for any meaningful response to be formulated***. Accordingly, the Parties should be aware that the Tribunal does not expect [Jaguar] to undertake what can be fairly regarded as a futile exercise, and that *judgements as to the reliance if any to which the Tribunal will have on such material will be made by the Tribunal in this context*. No assumptions can be made at this stage as to whether any of the Disputed Material (other than the expert statement of Mr Adam Aspinall) will be admitted.
>
> [emphasis added in italics and bold italics]

151 Therefore, crunched by the timelines, and having to balance between CMNC's interest in putting additional material forward and Jaguar's interest in having a reasonable opportunity of responding to that material, the Tribunal thought that it should, given the close proximity to the main evidentiary hearing, give an indication to the parties that it did not (and indeed could not) expect

Jaguar to respond to the material CMNC sought to file. The test, as mentioned, is whether what the Tribunal did fell outside the realm of what a reasonable and fair-minded tribunal might have done *in the circumstances*. Having considered the reasons given by the Tribunal (especially the fact that the main evidentiary hearing was just days away) as well as the circumstances in which the decision was made, it is clear to us that the Tribunal's direction falls within the boundaries of what a reasonable and fair-minded tribunal might have done in the circumstances.

152 We should add, for completeness, that there does not in any case seem to have been any prejudice caused to CMNC arising from the Tribunal's decision. As noted above, the Tribunal did not exclude the possibility of Jaguar responding and Jaguar did in fact address the Gurnham Responsive Report in its post-hearing written submissions. In its award, the Tribunal undertook a careful analysis of the findings made in the Gurnham Responsive Report. In particular, it considered Mr Gurnham's findings on the Completed Work Quantities as well as his views on the Comparison Analysis, but concluded that Mr Gurnham's proposed method of assessing the ETC Claim was "unhelpful" because (i) there was reason to doubt his calculation of the Completed Work Quantities and (ii) Mr Gurnham had failed to consider some US$96m worth of costs that his method simply assumes were completed by CMNC. The Tribunal also addressed Mr Gurnham's opinion on a list of issues raised in respect of the reasonableness of the ETC Claim; it ultimately rejected Mr Gurnham's views, but explained its doubts on each point made by Mr Gurnham.

153 The supervisory jurisdiction of the courts over arbitral awards does not, of course, extend to a review of the award on the merits. The sole purpose of referring to the Award is to ascertain whether the Tribunal had engaged with

Mr Gurnham's evidence in coming to its decision. Having examined the Tribunal's reasoning in its Award, we reject CMNC's submission that the Tribunal had not properly considered Mr Gurnham's evidence. Though the Tribunal in the event preferred Mr McGeehin's evidence over Mr Gurnham's, it gave detailed reasons for doing so. In sum, we are satisfied that the Tribunal did carefully consider Mr Gurnham's evidence, and that, therefore, no prejudice was caused to CMNC by the Tribunal's direction that Jaguar was not obliged to respond to the Gurnham Responsive Report.

Refusal to admit the Aspinall Report

154 Besides the Gurnham Responsive Report, CMNC submits that the Aspinall Report, which was prepared by CMNC's design expert, was a second key piece of expert evidence which should have been admitted. The Aspinall Report supported Mr Gurnham's conclusions as to the Completed Work Quantities, as well as on the post-termination work procured by Jaguar which was said to fall outside the initial scope of the EPC Contract and therefore constituted betterment (see [14(a)] above).

155 In TC No 230, the Tribunal formally excluded the Aspinall Report from consideration (see [70] above). In deciding to exclude the Aspinall Report, it seems clear to us that the Tribunal's decision was driven by the circumstances under which it was filed, and not just its late timing:

> *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. [emphasis added]

156 In our judgment, it was entirely reasonable for the Tribunal to have come to the view that it was necessary "[i]n the interests of fairness" that the Aspinall

Report be excluded. No provision had been made for the filing of the Aspinall Report, and CMNC had not sought any leave to file it. In fact, CMNC did not give the Tribunal or Jaguar any notice that it intended to file the Aspinall Report. It was not until *Jaguar* realised that the Gurnham Responsive Report made reference to the Aspinall Report that its existence was brought to the Tribunal's attention. The Aspinall Report (along with the Gurnham Responsive Report as well as the lay witness statements) were purportedly responsive to the documentary evidence produced by Jaguar on 5 June 2015. If indeed that were the case, CMNC must have intended to file the Aspinall Report soon after 5 June 2015. We find it troubling that CMNC then chose to hold back on applying for leave to introduce it until 27 June 2015, less than two weeks before the start of the main evidentiary hearing. It is trite that the tribunal is, subject to the parties' agreement, master of its own procedure, and that it may take appropriate action to ensure that its orders are obeyed. CMNC's conduct in relation to the filing of the Aspinall Report was unsatisfactory to say the least and reflected a disregard for the Tribunal's authority and mandate to ensure that the proceedings were conducted in a manner that was fair. In the circumstances, we do not think it unfair or unreasonable for the Tribunal to have decided to exclude the Aspinall Report.

Failure to take Jaguar's disorganised production of documents into account

157 CMNC further argues that, quite apart from the *fact* of the continual updates and additional disclosures, the disorganised and delayed *manner* in which the documents generally were disclosed also exacerbated the time pressure that CMNC was already under, and that the Tribunal should have taken this into account in its case management in the crucial final weeks leading up to the main evidentiary hearing. CMNC's main complaint was that Jaguar had not

provided any index to the uploaded documents, which, according to CMNC, significantly slowed its review of the documents and therefore its ability to present its case responsive to Jaguar's ETC Claim. The parties attempted to resolve this issues between themselves: Jaguar's counsel provided step-by-step instructions on how a transaction log may be used as an index, and also offered teleconferences (with Mr McGeehin) to walk CMNC and/or Mr Gurnham through the production, which CMNC did not take up. However, the parties were ultimately unable to resolve CMNC's concerns (see [44]–[47] above).

158 We note that CMNC's case does not appear to be that the Tribunal should have granted it some sort of relief in respect of the document production, and rightly so, for (as noted at [47] above) CMNC never asked the Tribunal for any such relief. Despite the fact that (i) parties remained unable to resolve CMNC's issues over a substantial period of correspondence and the extension of multiple offers of assistance (by Jaguar's counsel and its quantum expert); (ii) the date of the main evidentiary hearing, which was known to both parties by this time, was looming ever closer; and (iii) Jaguar's counsel had repeatedly stated in their correspondence with CMNC's counsel that Jaguar would proceed as directed *by the Tribunal* should CMNC decide to bring the matter to the Tribunal's attention (see [47] above), CMNC never brought these concerns to the Tribunal's attention in a request for relief.

159 CMNC's case on the allegedly disorganised and haphazard production of the Costs Documents is that the Tribunal should have taken the resulting difficulties into account in its case management decisions leading up to the main evidentiary hearing. Again, in assessing whether the Tribunal had acted unfairly, it is of crucial importance that we examine what exactly the Tribunal had been told about the alleged difficulties that CMNC now relies on. In this

regard, CMNC did not mention Jaguar's allegedly disorganised and haphazard production of documents in its two requests to the Tribunal for an extension of time for the filing of the Gurnham Responsive Report – all it said was that the "extraordinary size" of the incoming material necessitated the extensions sought (see [56] and [63] above). It was not until 27 June 2015, long after its extended deadlines had lapsed, that CMNC informed the Tribunal of its difficulties with the uploaded documents in its application to formally admit the various witness statements and expert reports it had belatedly filed and/or filed without leave.

160 In the circumstances, we see no basis at all for this complaint.

The cumulative effect of all three factors

161 CMNC further argues that the three planks of its case – the AEO Regime, CMNC's lack of access to the Construction Documents and Jaguar's rolling production of the Costs Documents – should not be assessed individually in isolation, but that their *cumulative* effect must be assessed together, as a whole. Before us, Mr Landau explained that the thrust of this submission was that the impact that each event had consisted not just of how that individual event affected CMNC's ability to prepare its case, but also how each event exacerbated the effects of other events, which, as a whole, resulted in a thoroughly defective arbitral procedure which put CMNC on the back foot in the Arbitration and never afforded it a chance to recover.

162 Thus, it was said, CMNC had been forced to start with a "pre-existing handicap" – its lack of access to the Construction Documents. Even if this alone did not found a claim for breach of natural justice, it formed part of the backdrop that any reasonable and fair-minded tribunal would have taken notice of, and taken into consideration in the conduct of the proceedings. Yet, what the

Tribunal did was to "aggravate" this existing handicap by imposing the AEO Regime. In turn, the AEO Regime, although lifted in March 2015, had concertinaed the timelines for CMNC's preparations into the four months before the main evidentiary hearing (whereas Jaguar's ability to prepare had been unhampered since the commencement of the Arbitration). CMNC was not, however, given any chance to recover during this four-month window, as the Tribunal failed to control Jaguar's rolling production of Costs Documents, and thereby allowed the proceedings to descend into a free-for-all under which Jaguar was free to amend its case at will.

163 When looked at in this light, Mr Landau argues, the Judge had erred in finding that the prejudice caused could have been cured by, for example, the lifting of the AEO Regime, or the Tribunal's grant of the first extension for the filing of the Gurnham Responsive Report. According to CMNC, the problems were far more deep-seated, and had begun almost from the start of the Arbitration. Although CMNC attempted, as a cooperative party, to carry on with the Arbitration despite these handicaps by requesting extensions of time, this should not be seen as an acknowledgment that those extensions, if granted, would have cured the prejudice caused to CMNC. When viewed in its proper context, the prejudice caused was irreparable, and the arbitral proceedings were in fact irretrievably lost. In short, it had become impossible to have a fair hearing in July 2015 given the massive influx of new supporting documents, coupled with the disorganised manner of production and the effect of the AEO Order in concertinaing the timelines for preparation. We emphasise the last point because it brings home the real thrust of Mr Landau's submission, which is that by this stage of the proceedings, it was no longer a matter of granting some extension of time or even of allowing some evidence to be admitted late.

164 These points were, Mr Landau submitted, properly and forcefully brought to the Tribunal's attention by CMNC at the material time. In support of his submission, Mr Landau referred to the following communications:

(a) RC No 38 (dated 26 September 2014), which was CMNC's request that the Tribunal reconsider its decision to impose the AEO Order:

> Further, the procedure imposed on [CMNC] with regard to documents that [Jaguar] decide to designate as attorney's eyes only is unfair and severely hinders [CMNC's] defence… The inequality and unfairness that will result if this ruling is maintained is acute given the obvious importance of these documents and the aggressive procedural timetable to which the Parties are committed… The [AEO Regime]… will substantially slow and hinder [CMNC's] review of critical documents, again to the substantial prejudice of effective defence preparation.
>
> … The Tribunal's decision [in TC No 49 to impose the AEO Order]… deprives [CMNC] of an adequate opportunity to prepare its defence…

(b) RC No 48 (dated 15 October 2014), in which CMNC requested a reset of the procedural timelines set in PO 2 on account of its insufficiently advanced preparations:

> The prolonged dispute about "attorney's eyes only" designation has imposed severe practical limitations on effective defence preparation…

(c) RC No 119 (dated 17 February 2015), CMNC's request that the AEO Regime be lifted, which led to negotiations ultimately resulting in the lifting of all restrictions on the disclosure of sensitive documents by consent:

> 4. [CMNC] is gravely prejudiced by the AOE [*sic*] Order…

> …
>
> 6. … by allowing [Jaguar] to subjectively and unilaterally redact documents, [the AEO Order] offends against the rules of natural justice and the fair and efficient conduct of the arbitration proceedings.
>
> 7. It is procedurally unfair for [CMNC] and its employees to be unable to inspect the documents relied upon by [Jaguar]… Their inability to do so is depriving them of the reasonable opportunity to present their case and answer [Jaguar's] case.

165 It is undoubtedly the case that CMNC did raise several of these objections at various times especially in the context of the many exchanges when these issues were being raised to and dealt with by the Tribunal. But as we have emphasised, the inevitable consequence of this final submission that Mr Landau made to us, as to the cumulative effects of these various complaints, is that by the time the Tribunal came to deal in June 2015 with those cumulative effects of all the issues that had been raised earlier, the prospects of a fair arbitration had been irretrievably lost as a result of the Tribunal's mismanagement of its procedure (***or alternatively, and at the very least, that the scheduled evidentiary hearings could not proceed***). In his words, he said the arbitration process had become "dysfunctional". Yet, in *none* of these communications did CMNC make *that point*. On the contrary, CMNC had, by its continued engagement as a party in the arbitration, consistently expressed its intention to forge ahead with the main evidentiary hearing and to see the arbitration through to its conclusion at the scheduled time right up to the end of June 2015, even as matters came to a head:

(a) On 6 March 2015, in the weeks *before* the parties agreed to lift the AEO Regime, CMNC confirmed, in a separate and unrelated application to amend its case, that it wished to proceed with the July 2015 main evidentiary hearing (see [51] above).

(b) On 14 April 2015, about a month after the AEO Regime had been lifted, CMNC's quantum expert, Mr Gurnham, confirmed in a teleconference with the Tribunal that he was on track to meet the deadlines set for the filing of his reports. Mr Gurnham gave no indication that the effects of the AEO Regime during its operation had affected his preparations at all, much less that they had irretrievably compromised his ability to prepare the report (see [53] above).

(c) On 30 May 2015, when CMNC had assessed that it would not be able to submit the Gurnham Responsive Report on time, it requested a cut-off date to be imposed on Jaguar's production, or, in the alternative, for a substantial extension of time. CMNC never requested an adjournment of the July 2015 hearing dates (see [57]–[58] above).

(d) On 17 June 2015, on the eve of the extended deadline for the filing of the Gurnham Responsive Report, all that CMNC requested was a one-week extension of time (see [63] above). But that seems a wholly inadequate remedy for what CMNC claims were proceedings which had by then allegedly fallen into total disarray. If CMNC had truly considered the proceedings irreparably compromised by breach of natural justice, one would have expected CMNC to have said so, instead of simply seeking a one-week extension of time.

(e) On 27 June 2015, CMNC applied to admit the Gurnham Responsive Report (which had been belatedly filed after CMNC's unsuccessful request for an extension) and the Aspinall Report as well as six lay witness statements (for which leave to file had not even been obtained). At this point, CMNC's position was at its most precarious – it was unclear if the Tribunal would admit several pieces of critical

> responsive lay and expert evidence, with less than two weeks to go to the main evidentiary hearing. Despite this, CMNC did not seek a postponement of the July 2015 hearing or suggest this was necessary. On the contrary, *CMNC intimated that it wished to proceed with the main evidentiary hearing*, asserting that its evidence should be admitted as "[Jaguar], despite [its] strident protestations, have sufficient opportunity to review this supplemental evidence, and deal with it [at the main evidentiary hearing] in Dublin" (see [67] above).

166 In short, CMNC's conduct at the material time is entirely at odds with its present contention that the arbitration was irretrievably lost and doomed. Indeed, CMNC's conduct in the proceedings suggested the precise opposite – that it was, at all times, ready, able and willing to proceed with the main evidentiary hearing in July 2015.

167 There are two separate points to be made here. The first is one we have already made at [101], [102] and [104(d)] above. Simply put, it is that a court faced with a challenge after the fact must not conduct the analysis with all the wisdom of hindsight but must, as best it can, put itself in the shoes of the tribunal as events unfolded and following from this, a tribunal cannot be criticised for failing to consider points not put to it. As evident from [164]–[165] above, the contention that the proceedings could not, in fairness to the parties and more pertinently to CMNC, continue as scheduled simply was *not* put to the Tribunal.

168 This is sufficient to dispose of the argument but there is a second point. An assertion that the tribunal has acted in material breach of natural justice is a very serious charge, not just for the imputation that such an allegation makes as to the *bona fides* and professionalism of the tribunal, but also for the grave

consequence it might have for the validity of the award. For this reason, *there can be no room for equivocality in such matters*. An aggrieved party cannot complain after the fact that its hopes for a fair trial had been irretrievably dashed by the acts of the tribunal, and yet conduct itself before that tribunal "in real time" on the footing that it remains content to proceed with the arbitration and obtain an award, only to then challenge it after realising that the award has been made against it. In our judgment, such tactics simply cannot be countenanced.

169 A similar situation confronted the English High Court in *ASM Shipping* ([97(c)] *supra*). The other ground of challenge in that case was arbitrator bias. After a key witness had been examined, one of the arbitrators ("X") disclosed his involvement in an earlier case against that witness. The unsuccessful party (the ship owners in a shipping dispute) objected to X's continuing to sit on the grounds of apparent bias. While it was agreed between the parties that the arbitration could continue if X recused himself, X refused to do so. The parties subsequently exchanged correspondence, in which the ship owners maintained their objections as to X's fitness to act as an arbitrator, but otherwise allowed the proceedings to continue with X sitting as an arbitrator. The tribunal (including X) subsequently determined a number of preliminary issues, and the unsuccessful ship owners then challenged the interim award, alleging bias. Morison J held (at [48]–[49]):

> 48. … *In my judgment, when the case resumed on the third day, after X QC had declined to recuse himself, [the owners' counsel] should have indicated that that decision was not acceptable and that an application would be made to the court to have him removed but that the hearing should be concluded, without prejudice to owners' rights. Following the hearing, an application should have been made to this court under section 24 [of the English Arbitration Act 1996 for the removal of an arbitrator]. …* ***Instead what happened was a continuing objection to X QC conducted in correspondence***. An interim award was made and owners took it up.

> 49. In my judgment, by taking up the award, at the very least, the owners had lost any right they may have had to object to X QC's continued involvement in that part of the arbitral process. It is unacceptable to write making further objections after the hearing was concluded. X QC had made his decision not to recuse himself, rightly or wrongly, at the beginning of the third day. ***Owners were faced with a straight choice: come to the court and complain and seek his removal as a decision maker or let the matter drop.*** *They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A "heads we win and tails you lose" position is not permissible in law … The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure on them.*
>
> [emphasis added in italics and bold italics]

170 In our judgment, there is a principle to be drawn from this and it is this: if a party intends to contend that there has been a fatal failure in the process of the arbitration, then there *must* be fair intimation to the tribunal that the complaining party intends to take that point at the appropriate time if the tribunal insists on proceeding. This would ordinarily require that the complaining party, at the very least, seek to suspend the proceedings until the breach has been satisfactorily remedied (if indeed the breach is capable of remedy) so that the tribunal and the non-complaining party has the opportunity to consider the position. This must be so because if indeed there has been such a fatal failure against a party, then it cannot simply "reserve" its position until after the award and if the result turns out to be palatable to it, not pursue the point, or if it were otherwise to then take the point. After all, the requirement of a fair process avails both parties in the arbitration and to countenance such hedging would be fundamentally unfair to the process itself, to the tribunal and to the other party. In the final analysis, it is a contradiction in terms for a party to claim, as CMNC now does, that the proceedings had been irretrievably tainted by a breach of natural justice, when at the material time it presented itself as a party ready, able

and willing to carry on to the award. If a party chooses to carry on in such circumstances, it does so at its own peril. The courts must not allow parties to hedge against an adverse result in the arbitration in this way.

171 If indeed CMNC believed that proceeding with the hearing in July 2015 in the circumstances it was presented with was impossible, then it was incumbent on CMNC to make that abundantly clear to the Tribunal. Specifically, CMNC had to bring home its concern that proceeding with the main evidentiary hearing at that time would be futile because it would be on terms that denied it a fair and reasonable opportunity of preparing its case and this resulted in a fatally flawed process. However, and as mentioned at [165]–[166] above, not only was this not done, CMNC never requested a vacation of the July 2015 hearing dates. On the contrary, CMNC persisted in maintaining that it wished to press on with the main evidentiary hearing in July 2015.

172 In our judgment, this puts the lie to CMNC's submission that the Tribunal had "lost control" or allowed proceedings to become "dysfunctional" or to descend into a "free-for-all". Instead of seeking an adjournment of the July 2015 hearing, CMNC seemed intent on keeping the hearing dates, obtaining an extension for *itself* to file further evidence on the eve of the hearing, and, if anything, letting the breach of natural justice go the other way.

Conclusion

173 In final analysis, we find that CMNC has not discharged its burden of showing that the Tribunal's conduct of the proceedings fell outside the realm of what a reasonable and fair-minded tribunal might have done. Accordingly, CMNC has not proved that the award was made in breach of the rules of natural

justice. We see no basis upon which to interfere with the Judge's decision to dismiss the application to set aside, and therefore dismiss the appeal.

174 It remains for us to note, for good order, that it was, on 10 October 2019, announced that Prof Douglas Jones ("Prof Jones") (who was the chairman of the Tribunal) would be appointed an International Judge of the Singapore International Commercial Court (a division of the Singapore High Court) with effect from 1 November 2019. We directed that the parties be notified of this by way of a case management conference held on 11 October 2019, and invited parties to convey any concerns they might have arising from this development to us in writing within 14 days of the case management conference. On 17 October 2019, Jaguar responded, stating that they had no concerns. On 25 October 2019, CMNC responded, stating that it had no comment on the appointment of Prof Jones as an International Judge, but that this should not be taken as a waiver of its challenge against the Award, the grounds of which were reiterated in a separate letter annexed to the first. These grounds of challenge, to the extent that they were raised in the appeal, are addressed in this judgment.

175 Unless the parties are able to come to an agreement on costs, they are to furnish written submissions, limited to 10 pages each, within 3 weeks of the date of this judgment on the appropriate costs order they contend should be made.

Sundaresh Menon	Tay Yong Kwang	Quentin Loh
Chief Justice	Judge of Appeal	Judge

Toby Landau QC (Essex Court Chambers Duxton (Singapore Group Practice)) (instructed), Tan Beng Hwee Paul, Pang Yi Ching Alessa, Ching Meng Hang, Koh Wei-Jen Aaron and Rachel Low Tze-Lynn (Rajah & Tann Singapore LLP) for the appellant;
Michael Hwang SC, Rachel Ong Yue Qing and Chong Kin Yeong Ryan (Michael Hwang Chambers LLC) (instructed), Chia Yijuan Germaine, Chong Xiu Bing Denise and Tan Yi Lei (Virtus Law LLP) for the respondents.
