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THE SINGAPOREAN RESPONSE TO ABUSE OF DUE PROCESS IN INTERNATIONAL ARBITRATION

China Machine New Energy Corp v Jaguar Energy Guatemala LLC

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The promise of international arbitration as an efficient dispute resolution mechanism has been plagued by the unsavoury practice of parties abusing their due process rights to attack arbitral awards that turn out unfavourably. The Court of Appeal in *CMNC v Jaguar Energy* sends a clear message that parties themselves must be accountable for raising their procedural objections contemporaneously to the tribunal, rather than reserving them for a second bite at the proverbial cherry.

I. INTRODUCTION

International arbitration tribunals have broad discretion to conduct the proceedings, subject to any agreement between the parties on the arbitral procedure.[1] Naturally, this is circumscribed by mandatory minimum requirements of procedural fairness expected in adjudicative proceedings.[2] Awards can thus be set aside or refused enforcement for violating the parties' fundamental procedural rights,[3] including that of a "full opportunity" to present one's case.[4] However, the industry has witnessed a worrying trend of parties attempting to *abuse* their due process rights to advance their interests in delaying or frustrating the arbitration.[5] This has led to a phenomenon dubbed "due process paranoia", where arbitrators feel compelled to accommodate procedural demands—even if onerous or unreasonable—at the expense of time and

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1 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Netherlands: Kluwer Law International, 2012) at 54 [Waincymer].

2 Gary Born, *International Commercial Arbitration*, 2d ed (Netherlands: Kluwer Law International, 2014) at 2175-2180 [Born].

3 Johannes Trappe, "The Arbitration Proceedings: Fundamental Principles and Rights of the Parties" (1998) 15 J Int'l Arb 93 [Trappe].

4 Stephen Schwebel & Susan Lahne, "Report on Public Policy and Arbitral Procedure" in Pieter Sanders, gen ed, *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series No. 3 (Netherlands: Kluwer Law International, 1986) at 216.

5 Lucy Reed, "Ab(use) of due process: sword vs shield" (2017) 33 Arb Int'l 361.

cost, as the award might otherwise be attacked on due process grounds before the courts.[6]

In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC*,[7] the Singapore Court of Appeal stressed that the Singapore courts will not tolerate these counterproductive tactics. Parties are expected to raise any procedural concerns for the tribunal's consideration contemporaneously during the arbitration, rather than reserve their grievances for the post-award stage.

II. Facts

In March 2008, China Machine New Energy Corporation ("CMNC") entered into a construction contract to build a power plant in Guatemala for Jaguar Energy Guatemala LLC, who co-owned the power plant with its parent company (collectively "Jaguar"). A separate deferred payment agreement granted Jaguar Energy the option of issuing, in lieu of making milestone payments, debit notes secured against its assets in CMNC's favour. The option was indeed exercised eventually to the amount of US$129m.

In 2013, the parties' relationship deteriorated rapidly over CMNC's failure to complete certain milestone works on time, and its subsequent omission to cure that alleged breach of contract. Pursuant to the construction contract which included an agreement for expedited arbitration under the ICC Arbitration Rules 1998,[8] Jaguar commenced arbitration seated in Singapore in January 2014. The award rendered in November 2015 affirmed that Jaguar Energy had validly terminated the construction contract and Jaguar was entitled to recover the estimated costs of completion from CMNC. CMNC then applied to the Singapore courts for setting-aside on the grounds of due process, defective arbitral procedure, and public policy, all of which were dismissed by the High Court.[9]

On appeal, CMNC narrowed its case to focus exclusively on due process—whether it had been denied a full opportunity to respond to the quantum of damages claimed by Jaguar over post-termination costs of completion. It contended that the tribunal's case management decisions had cumulatively prejudiced CMNC's ability to meaningfully interrogate the evidence and prepare its response in time for the evidentiary hearing, namely the tribunal's: (a) management of Jaguar's disclosure of sensitive documents, particularly the imposition of and subsequent modifications to an "attorney's eyes only" ("AEO") regime; (b) failure to address CMNC's lack of access to its own documents recording the works already completed before termination ("Construction Documents"), which were allegedly seized by Jaguar when it fenced off the construction area in December 2013; and (c) inadequate efforts

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6 Klaus Berger & Ole Jensen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 Arb Int'l 415 [Berger & Jensen]. For a more nuanced assessment, see Robin Oldenstam, "Due Process Paranoia or Prudence?" in Axel Calissendorff & Patrik Schöldström, eds, *Stockholm Arbitration Yearbook 2019* (Netherlands: Kluwer Law International, 2019), chapter 8.

7 [2020] 1 SLR 695 (CA) [*CMNC (CA)*].

8 ICC Arbitration Rules 1998.

9 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101 [*CMNC (HC)*].

to manage Jaguar's rolling production of documents regarding its post-termination construction expenditure ("Costs Documents").

III. The Court of Appeal's Decision

Delivering the judgment of the court (which also comprised Tay Yong Kwang JA and Quentin Loh J), Sundaresh Menon CJ reiterated the elements of breach, causation and prejudice required to set aside an award under section 24(b) of the *International Arbitration Act*[10] for breach of natural justice.[11] Although Article 18 of the Model Law encapsulates the right to be heard by stating that "each party shall be given a full opportunity of presenting his case", the phrase "full opportunity" cannot logically be construed literally as an *unqualified* right to be heard—it must instead be impliedly constrained by "considerations of reasonableness and fairness".[12] This construction echoes the sentiments expressed in earlier High Court decisions,[13] as well as in other jurisdictions and institutional rules on due process standards in international arbitration.[14] Importantly, it affirms the view that Singapore's retention of Article 18 as originally formulated was not intended to set higher due process standards than other jurisdictions and arbitral institutions that prefer terms like "reasonable opportunity".[15]

Instead, the court determines whether the tribunal's conduct "fell into the range of what a reasonable and fair-minded tribunal in those circumstances might have done".[16] As tribunals ordinarily have a broad, fact-sensitive discretion over matters of arbitral procedure, the courts must accord a margin of deference towards a tribunal's case management decisions. Furthermore, a tribunal's decisions can only be fairly assessed against its knowledge at the material time. This underscores the need for parties to raise their procedural objections contemporaneously during the arbitration for the tribunal's consideration.

Applying these principles, the Court of Appeal concluded that the evidence failed to establish how the arbitral procedure had been conducted in breach of CMNC's right to be heard. In its view, the tribunal had handled all three impugned aspects of the case management process in a fair and reasonable manner which balanced all relevant interests. First, the imposition of and subsequent modifications to the AEO regime was justifiably founded upon a "possibility of misuse [of the sensitive documents which was]. . . of 'serious concern' [and] needed to be addressed prophylactically", whilst delicately balanced against CMNC's interest in having full disclosure in order

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10 Cap 143A, 2002 Rev Ed Sing.

11 *CMNC (CA)*, *supra* note 7 at para 86: "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".

12 *Ibid* at 97.

13 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at para 124 (HC) [*Triulzi*]; *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at para 145 (HC); *ADG v ADI* [2014] 3 SLR 481 at para 105 (HC) [*ADG*].

14 See *CMNC (CA)*, *supra* note 7 at para 97.

15 Born, *supra* note 2 at paras 2175-2180. *Cf.* Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Arbitration Law* (Netherlands: Kluwer Law International, 2003) at 21.17.

16 *CMNC (CA)*, *supra* note 7 at para 98.

to prepare its case.[17] Second, it was disingenuous for CMNC to complain about its lack of access to the Construction Documents because it had never actually sought relief from the tribunal on that issue.[18] This meant that CMNC could not have been denied due process by the tribunal, nor could its ability to prepare its case have been prejudiced.

Finally, the tribunal's case management decisions concerning Jaguar's rolling production of the Costs Documents—like granting CMNC one time extension to submit its expert report but not a second, and directing Jaguar that it need not respond to the expert evidence which CMNC eventually filed out of time—weighed the need to afford the parties an opportunity to present their cases against the broader objective of completing the arbitration expediently. The fact that the parties had agreed on expedited arbitration made this balancing act even more critical. Although they had waived strict compliance with the expedited timelines in the arbitration on 1 May 2014, they likely still "intended that the arbitration was nonetheless to be expedited."[19] CMNC had in fact requested, on 6 May 2014, to *bring forward* the evidentiary hearing based on "the parties' strong original intention and desire that the matter should be completed at the earliest possible moment and under the shortest possible timetable."[20]

The final message was clear: parties must give the tribunal an opportunity to address any due process concerns during the arbitration, rather than reserve their objections to attack the award before the courts.[21] Insofar as CMNC was now alleging, *ex post facto*, indiscretion and mismanagement of the arbitral process by the tribunal, the Court of Appeal intimated that CMNC was attempting a second bite at the proverbial cherry, despite having conducted itself in a manner which consistently displayed its preparedness to proceed with the scheduled evidentiary hearing.[22]

IV. Balancing Efficiency and Fairness in Arbitral Procedure

CMNC v Jaguar Energy is best understood as the Singapore courts' response towards the maladies of procedural inefficiency and dilatory tactics which have for some time plagued arbitration and its promise as a quick, fair and effective method of private dispute resolution.[23] It has thus been strenuously recommended that national courts must be (and indeed they generally are) willing to defer to the arbitrator's exercise of procedural judgment as long as "his decision is grounded in a *bona fide* assessment of the case and is reasonable under the circumstances".[24] In that spirit, the Singapore courts have consistently emphasised the tribunal's broad and flexible

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17 *Ibid* at paras 111-119.

18 *Ibid* at para 124.

19 *Ibid* at para 143.

20 *Ibid*.

21 *Ibid* at para 170.

22 *Ibid* at para 166.

23 *Ibid* at para 2. See recently, Sundaresh Menon CJ, "Dispelling due process paranoia: Fairness, efficiency and the rule of law", speech at CIArb Australia Annual Lecture 2020, online: Supreme Court of Singapore <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/ciarb-annual-lecture-speech-by-chief-justice-sundaresh-menon.pdf> [Menon CJ].

24 Berger & Jensen, *supra* note 6.

case management powers, in which the courts will be slow to intervene.[25] *CMNC v Jaguar Energy* now expresses this proposition explicitly as a principle of curial deference. International arbitration tribunals are "masters of [their] own procedure" and must make procedural directions having regard to the particular circumstances of the case.[26] It would be wholly inappropriate and counterproductive for national courts to scrutinise and second-guess each procedural decision made by the tribunal during setting-aside or enforcement proceedings.

Perhaps the more fundamental point in maintaining curial deference is that commercial parties choose arbitration precisely for its procedural flexibility to achieve "the expeditious, economical and final determination" of the dispute.[27] Arbitration is a different system of justice from court litigation with its own objectives of promoting both efficiency and fairness through procedural flexibility.[28]

Efficiency is crucial to ensure that arbitration remains a useful and viable option to iron out the parties' differences in costly disputes through "speedy resolution".[29] In fact, many institutional rules—and even some national arbitration laws[30]—now include express provision for the arbitration to be conducted "in an expeditious and cost-efficient manner".[31] Where appropriate, the tribunal's procedural decisions may be explicitly assessed with reference to that duty, *eg*, the "obligation to conduct the arbitration fairly and expeditiously" under Article 22(2) of the ICC Rules 2012.[32] Though the ICC Rules 1998 which were applicable in *CMNC v Jaguar Energy* lacked such provision, the Court of Appeal observed that the Model Law was intended to balance due process rights against the need for efficiency and expediency in arbitral proceedings.[33] This suggests that, independent of the applicable institutional rules, a duty of efficiency is implied under the Model Law[34] or indeed inherent in all arbitrations.[35]

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25 *ADG*, *supra* note 13 at paras 114-117; *Triulzi*, *supra* note 13 at paras 133-134; *PT Central Investindo v Franciscus Wongso* [2014] SGHC 190 at paras 69-70 (HC) [*PT Central*].

26 *CMNC (CA)*, *supra* note 7 at para 2.

27 *ADG*, *supra* note 13 at para 113.

28 Waincymer, *supra* note 1 at 12-26; Born, *supra* note 2 at 2126-2130.

29 *Soh Beng Tee v & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at para 62 (CA) [*Soh Beng Tee*]; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at para 125 (HC).

30 *Eg*, *Arbitration Act 1996* (UK), c 23, s 33 [*AA 1996*]; French Civil Procedure Code, *Code de procédure civile*, art 1464; *Swedish Arbitration Act*, SFS 1999:116, s 21. See Filip De Ly, "Paradigmatic Changes—Uniformity, Diversity, Due Process and Good Administration of Justice: The Next Thirty Years" in Stavros Brekoulakis *et al*, eds, *The Evolution and Future of International Arbitration* (Netherlands: Kluwer Law International, 2016) at 27-28.

31 ICC Arbitration Rules 2017, art 22(1) [ICC Rules 2017]; SIAC Rules 2016, r 19.1 [SIAC Rules 2016]. See also IBA Rules on the Taking of Evidence in International Arbitration 2010, para 1 of Preamble [IBA Rules 2010]; Prague Rules on the Efficient Conduct of Proceedings in International Arbitration 2018, Preamble. Likewise in investment arbitration: see ICSID Secretariat, "Proposals for Amendment of the ICSID Rules—Synopsis" (2 August 2018), online: ICSID <https://icsid-archive.worldbank.org/en/amendments/Pages/Proposals/Synopsis.aspx> at 22.

32 *Triulzi*, *supra* note 13 at para 131; *ADG*, *supra* note 13 at paras 112-113; *PT Central*, *supra* note 25 at para 69.

33 *CMNC (CA)*, *supra* note 7 at para 95.

34 Waincymer, *supra* note 1 at 86-89.

35 *Eg*, *EC Ernst, Inc. v Manhattan Constr Co of Texas*, 551 F (2d) 1026 (5th Cir 1977) at 1033. See De Ly, *supra* note 30 at 27-35. *Cf* Nadia Darwazeh, "Is Efficiency an Arbitrator's Duty or Simply a

Therefore, tribunals cannot be expected to grant concessions for a party to have a "full opportunity" to present its case in a manner that compromises the time and cost efficiency of the proceedings. In practice, most arbitrators grant time extension requests unless clearly dilatory in nature.[36] Even so, the Court of Appeal accepted that it was reasonable for the tribunal to reject CMNC's request for a second time extension to file its expert report since CMNC had no convincing explanation for why a further time extension, which would have taken the admission of evidence "perilously close" to the main hearing, was needed.[37] In turn, CMNC's belated filing of the expert report disentitled it from insisting on due consideration of that evidence, as that would have further prolonged the arbitration.[38] Similarly, a US case held that, after the complainant did not proffer any legitimate reason for failing to meet *both* the initial *and* extended deadlines to submit expert witness statements, it was entirely proper for the tribunal to refuse the complainant's request for a second extension, especially since the complainant had been expressly warned of that prospect at the time its initial request for extension was granted.[39]

On the other side of the coin, tribunals cannot take efficiency as the overriding objective. First, the right to be heard "serves as an essential check" on a tribunal's wide powers to conduct the arbitral procedure.[40] For instance, an arbitrator's decision to reject all of one party's witnesses in the interests of expediency would cross the line and violate that party's right to be heard.[41] Additionally, procedural fairness incorporates not only each party's right to be heard but also equal treatment between the parties. Unlike previous decisions,[42] this point was less explicit in *CMNC v Jaguar Energy* insofar as the Court of Appeal did not refer to a standalone principle of equal treatment and instead preferred a broad reference to fairness. That approach at least has the merit of avoiding any misapprehension that parties are entitled to *absolute* equality rather than equality without arbitrary discrimination[43]—a point that some national legislation[44] and institutional rules[45] have deliberately emphasised. In any event, the equal treatment principle featured significantly in the court's observations regarding the AEO regime, which had always been designed to "strike a fair balance between the parties' interests", namely Jaguar's interest in confidentiality to prevent potential harm and CMNC's interest in accessing the documents to prepare its case.[46] If it was exclusively concerned with one party's interests, the tribunal

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Character Trait?" in Patricia Shaughnessy & Sherlin Tung, eds, *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Netherlands: Kluwer Law International, 2017) at 58-60.

36 Berger & Jensen, *supra* note 6 at 425.

37 *CMNC (CA)*, *supra* note 7 at paras 137-145.

38 *Ibid* at para 148. See also *Judgment of 20 July 2011*, Swiss Federal Tribunal, DFT 4A_162/2011 at 2.3.2.

39 *Landmark Ventures, Inc v InSightec, Ltd*, 63 F Supp (3d) 343 (SDNY 2014) at 352-353.

40 *CMNC (CA)*, *supra* note 7 at para 103.

41 *CBP v CBS* [2020] SGHC 23 at paras 71-77 (HC).

42 *Soh Beng Tee*, *supra* note 29 at para 42; *Triulzi*, *supra* note 13 at pars 112. See also *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387 at para 73 (FCAFC).

43 See *Triulzi*, *supra* note at paras 112-116; Maxi Scherer, Dharshini Prasad & Dina Prokic, "The Principle of Equal Treatment in International Arbitration" in Andrea Björklund, Franco Ferrari & Stefan Kröll, eds, *Cambridge Compendium of International Commercial and Investment Arbitration* (UK: Cambridge University Press, forthcoming), online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3377237> [Scherer, Prasad & Prokic].

44 *Eg*, *AA 1996*, *supra* note 30, s 33(1).

45 *Eg*, ICC Rules 2017, *supra* note 31, art 15(2).

46 *CMNC (CA)*, *supra* note 7 at paras 112-113.

could well have dismissed or granted CMNC's disclosure request in its entirety. It was similarly careful to grant a two-day extension for Jaguar's rolling production of documents to present material relevant to its claim, *and* a further time extension for CMNC to file its expert report to allow for a response in light of Jaguar's materials.[47] Arbitrators must protect their appearance of impartiality between the parties as a matter of equal treatment to avoid allegations of bias that may arise in the course of ensuring that one party has an adequate opportunity to be heard.[48]

V. Due Process and Procedural Discretion in Expedited Arbitrations

The objective of efficient conduct of arbitral proceedings applies *a fortiori* where parties have agreed to expedited procedures.[49] In *CMNC v Jaguar Energy*, the arbitration clause required the award to be rendered within 90 or an extended maximum of 180 days of the third arbitrator's appointment. Given the growing interest in expedited procedures as an antidote to the inefficiencies of modern arbitrations,[50] it will be useful to consider how an agreement for expedited arbitration affects the tribunal's reconciliation of speed and fairness in the arbitration.

An agreement to expedited procedures certainly constrains the tribunal's exercise of procedural discretion, but it does not sanction the tribunal to sacrifice each party's right to be heard in the interests of meeting the strict expedited timelines.[51] The right to be heard remains a mandatory requirement of natural justice, though parties should expect limitations having specifically consented to the expedited timelines.[52]

However, the parties in *CMNC v Jaguar Energy* subsequently agreed in the ensuing arbitration to their *own* set of timelines, well exceeding those set under the original expedited procedure.[53] Indeed, parties may agree to vary or dispense with their initial agreement on expedited arbitration where the circumstances arising after an actual dispute has crystallised turn out quite differently than originally envisaged at the time of agreement.[54] Interestingly, the Court of Appeal thought that the parties had "waived strict compliance" with the expedited timelines, yet still intended for the arbitration to be expedited.[55] With respect, that reasoning is not entirely clear. Arbitral proceedings may be "expedited" in the general sense of more proactive time management by the tribunal, or in the particular regime of specialised "expedited/fast-track arbitration" rules usually characterised by strict timelines.[56]

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47 *Ibid* at paras 129-134.

48 Scherer, Prasad & Prokic, *supra* note 43. See *eg*, *PT Central*, *supra* note 25.

49 *CMNC (CA)*, *supra* note 7 at paras 142-143.

50 See generally, Dina Prokic, "Mitigating Arbitration's Flaws? The 2017 ICC Expedited Procedure Rules" (2018) 29 Am. Rev. Int'l Arb 47; UNCITRAL Working Group II (Dispute Settlement), *Settlement of commercial disputes—Issues relating to expedited arbitration*, UN Doc A/CN.9/WG.II/WP.207, 16 November 2018.

51 Trappe, *supra* note 3.

52 *CMNC (CA)*, *supra* note 7 at para 143; applied similarly in *CGS v CGT* [2020] SGHC 183 at paras 87-89 (HC). See also Irene Welser & Christian Klausegger, "Fast Track Arbitration: Just fast or something different?" in Christian Klausegger *et al*, *Austrian Arbitration Yearbook 2009* (Wien: C.H. Beck, 2009) at paras 267-269.

53 *CMNC (CA)*, *supra* note 7 at para 17.

54 Waincymer, *supra* note 1 at 422.

55 *CMNC (CA)*, *supra* note 7 at para 143.

56 Waincymer, *supra* note 1 at 422.

The latter was present in *CMNC v Jaguar Energy*. But once the strict timelines under the expedited procedure were set aside, it seems difficult to define with precision how the 'expeditious conduct' of the arbitration should be achieved. On this view, one might interpret the Court of Appeal's statements as reiterating the general principle (now expressed in most institutional rules) that arbitrations should be conducted as swiftly and efficiently as possible.[57] This aligns with the broader clarion call for the industry to restore arbitration's promise as a speedy mode of dispute resolution.[58] Yet, the Court of Appeal clearly opined that the tribunal remained under "a duty to conduct the arbitration on an expedited basis".[59] The parties' waiver of strict compliance seems to have nonetheless kept alive the specific agreement to expedited arbitral procedures in some watered-down form. Although it remains to be seen exactly how this might differ from the general duty or objective of expediency, *CMNC v Jaguar Energy* at least hints that parties will not be easily let off the hook from a prior agreement to expedited procedures.

Parties therefore should not agree to expedited arbitrations lightly. Such procedures will always require the "buy-in" of all parties in adhering to the strict timelines, even if it frequently turns out after an actual dispute arises that one party has some vested interest in delaying any ensuing arbitration.[60] As Ramesh J remarked in the lower court, parties are held responsible for "agree[ing] on an arbitral procedure that would ensure due process" in the context of their particular business relationship.[61] Alternatively, arbitral institutions (or the parties themselves) may look towards having "safety valve" mechanisms for reverting to normal arbitral procedures where expedited arbitration is no longer suitable or practicable.[62]

VI. Parties' Positive Duty to Raise Procedural Objections Contemporaneously to the Tribunal

CMNC v Jaguar Energy makes clear that the integrity of the arbitral procedure does not rest solely upon the arbitrators' shoulders. Parties engaged in an arbitration are themselves accountable for promptly raising any due process concerns to the tribunal for its consideration.[63] According to Menon CJ, an aggrieved party should ordinarily "at the very least, seek to suspend the proceedings until the breach has been satisfactorily remedied".[64] This goes towards both the elements of breach and prejudice. A tribunal cannot be criticised on the basis of matters outside its knowledge at the material time or for specific choices it had made with the benefit of hindsight. Nor can a party fairly complain of prejudice if it had omitted to do anything about the matter at the relevant time. Thus, encouraging parties to be transparent and proactive in *safeguarding their own procedural rights* by communicating openly

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57 For instance: ICC Rules 2017, *supra* note 31, art 22(1); *SIAC Rules 2016*, *supra* note 31, r 19.1; LCIA Arbitration Rules 2014, art 14.4 [LCIA Rules 2014].

58 Peter Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?" (2010) 26 Arb Int'l 103.

59 *CMNC (CA)*, *supra* note 7 at para 142.

60 Morton, *supra* note 58 at 109.

61 *CMNC (HC)*, *supra* note 9 at para 127.

62 Waincymer, *supra* note 1 at 425.

63 *Triulzi*, *supra* note 13 at para 148.

64 *CMNC (CA)*, *supra* note 7 at para 170.

with the tribunal could prove an effective remedy to forestall attempts to abuse due process rights.

It seems eminently fair that parties cannot have their cake and eat it by making a tactical decision to refrain from pursuing a certain procedural course of action or raising a formal objection with the tribunal, and subsequently invoke those procedural matters to impugn an unfavourable award.[65] Such tactics clearly undermine the integrity and finality of the arbitral process.[66] A similar proposition can be found in other common law authorities which state that an inability to present one's case can only be relied upon as a defence to enforcement where the complainant proves that it had been caused by matters *beyond* its control.[67]

What might be unclear is whether the position becomes less compelling where the omission was not deliberate.

On one hand, the requirement of raising procedural objections contemporaneously could be understood as implicitly addressing the relationship between guerrilla tactics and procedural good faith in international arbitration, which had been pursued before the High Court in *CMNC v Jaguar Energy*. If the underlying policy is to stymie attempts at dilatory and other guerrilla tactics, the complainant's *bona fides* appears to be the true object of concern. This has indeed been invoked as the conceptual justification in other courts.[68] For instance, the Swiss courts held that the duty of procedural good faith requires parties to raise any objection immediately.[69] In *Hebei Import & Export Corp v Polytek Engineering Co Ltd*, the Hong Kong Court of Final Appeal found that a party failed to act in good faith when it did not make a prompt objection to procedural irregularities during the arbitration, only to raise it in resisting enforcement.[70] Many institutional rules[71] and the IBA Rules on Evidence[72] already express duties of good faith and cooperation, which should be engaged in appropriate cases. From this good faith perspective, the mischief of abuse of due process might not necessarily operate where a complainant had overlooked or otherwise lacked knowledge of the cause for complaint at the material time for less-than-fortunate reasons.

However, the Court of Appeal notably preferred a narrower duty to raise procedural objections contemporaneously to curb abuses of due process rights, in contrast to the High Court's approval of a general duty of cooperation (if not a broader duty of good faith) as "inherent in the very nature of an arbitration agreement".[73] It might

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65 *Xerox Canada Ltd v MPI Technologies Inc* [2006] OJ No 4895 at 108-109 (SC Ontario).

66 See generally William Park, "Arbitration's Discontents: On Elephants and Pornography" (2001) 17 Arb Int'l 263 at 269-271; Günther J Horvath & Stephan Wilske, eds, *Guerilla Tactics in International Arbitration* (Netherlands: Kluwer Law International, 2013) at chapter 1.

67 *Minmetals Germany GmbH* [1999] 1 All ER (Comm) 315 at 327 (HC); *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 2713 (Comm) at 88.

68 This is more often associated with the civil law tradition: Michele Taruffo, ed, *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (Netherlands: Kluwer Law International, 1999) at 5-7.

69 *Judgment of 21 November 2003*, Swiss Federal Tribunal, DFT 130 III 66 at 72; *Judgment of 24 May 2013*, Swiss Federal Tribunal, 4A_476/2012. See also *Gouvernement de la République d'Irak v Sociétés ThyssenKrupp et MAN*, Cour d'appel de Paris, n° 13/12002 (8 November 2016).

70 [1999] 2 HKCFAR 111 at 91-92 (*CFA*).

71 *Eg*, LCIA Rules 2014, *supra* note 57, arts 14.5, 32.1.

72 *Eg*, IBA Rules 2010, *supra* note 31, para 3 of Preamble, r 9.3.7.

73 *CMNC (HC)*, *supra* note 9 at para 196 *vis-à-vis* the appellant's claim for defective arbitral procedure which was dropped on appeal.

be tempting to infer that this simply demonstrates the common law's traditional reticence against invoking potentially protean concepts of good faith.[74] But that is likely misconceived. In a case decided after *CMNC v Jaguar Energy*, the award debtors had unwittingly omitted to argue against joint and several liability during the arbitration and the tribunal did eventually find such liability in its award. These facts appear quite different from the kind of subversive tactics displayed in *CMNC v Jaguar Energy*. Yet, the Court of Appeal again emphasised that the award debtors were themselves responsible for the missed opportunity and could not later pin fault on the tribunal by alleging breach of natural justice.[75] Thus, the need to raise procedural objections contemporaneously probably goes beyond one's *bona fides* but also serves the interests of finality and certainty in arbitration. This mirrors the position regarding jurisdictional objections under Article 16(2) of the Model Law—that a party who participates in the arbitration must raise its objections to the tribunal's jurisdiction in a timely manner, rather than reserve that course of action for setting-aside or resisting enforcement if that becomes convenient.[76]

Finally, there remains some uncertainty on an aggrieved party's appropriate course of action *after* having raised its procedural concern to the tribunal, particularly where it honestly believes that the tribunal's response (or lack thereof) had been inadequate. Can it now reserve its objection and continue with the arbitration, availing itself of the option to challenge the award later based on the tribunal's inadequate response? In such situations, the party is not necessarily attempting to "hedge against an adverse result in the arbitration"[77] and may well be interested in reaching an expeditious resolution of the dispute. One might not reckon that *CMNC v Jaguar Energy* goes so far as to expect parties to stall or leave the arbitration in protest as long as the procedural objection has not been "satisfactorily remedied", since that could be abused as another dilatory tactic.

VII. Conclusion

The Court of Appeal has sent a strong signal to commercial parties and arbitrators that the Singapore courts are fully prepared to support arbitrations, as long as *all* participants are committed to the expeditious and fair conduct of the arbitral process.[78] Due process challenges attacking the tribunal's management of the arbitral procedure will be hard-pressed to find success, which hopefully dispels any paranoia perceived by arbitrators. Practically, counsel advising their clients must be extremely vigilant and deliberate in considering the procedural options available during the arbitration, as the courts will be reluctant to grant post-award redress for any tactical oversight made over the course of the arbitration.

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74 VV Veeder, "The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith" (2002) 18 Arb.Int'l 431 at 439-441; Waincymer, *supra* note 1 at 832.

75 *BBA v BAZ* [2020] 2 SLR 453 at paras 86-94 (CA).

76 UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* UN Doc A/CN.9/264, 25 March 1985 at paras 38-40. See *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at paras 50-51 (CA).

77 *CMNC (CA)*, *supra* note 7 at para 170.

78 See Menon CJ, *supra* note 23.