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# DUE PROCESS PHOBIA IN INTERNATIONAL ARBITRATION - CHINA MACHINE NEW ENERGY CORP. v. JAGUAR ENERGY GUATEMALA LLC

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#### Abstract

"Due Process Phobia" is a perceived hesitation of arbitral tribunals to move decisively in particular circumstances out of concern that the award would be set aside. on the grounds that a party did not have an adequate opportunity to state its case. As a consequence, arbitrators, particularly those with less familiarity with the limitations of their procedural autonomy, may be less inclined to use their procedural autonomy, instead yielding to the tactical whims of counsel. Due to the transition from 'in-person' to 'online' hearings, concerns about due process have surfaced. The judgment in China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC highlights the parties' rights to a complete chance to present their case, shedding light on the meaning of due process under Singaporean law and international commercial arbitration. This paper delves into the Singapore Court of Appeal's effort to fix this anomaly to rectify this incongruous state of affairs.

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#### **INTRODUCTION**

The Singapore Court of Appeal's decision in China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC, issued on February 24, 2020, could not be timelier.<sup>1</sup> As hearings have switched from 'in person' to 'online,' concerns of due process have arisen as a result of the change in modalities.<sup>2</sup> Providing valuable clarity about due process under Singapore law and in international commercial arbitration, this decision underlines the parties' rights to a full opportunity to make their case. Indeed, identifying the particular criteria of due process may be challenging. This is sometimes linked to the latitude afforded to adjudicators charged with determining what constitutes a breach of due process. However, the lack of a number of anchoring principles may imply a breach of due process. Article 18 of the 2006 Model Law of the United Nations Commission on International Trade Law ("UNCITRAL") outlines these fundamental principles, one of which is the "full opportunity" for each party to submit its case.<sup>3</sup> On its alone, the word "full" might be interpreted as exhaustive or unlimited.<sup>4</sup> However, a review of the legislative history reveals that the drafters of Article 18 intended for the "whole" opportunity for a party to submit its argument to be limited to

<sup>&</sup>lt;sup>1</sup> China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC, [2020] S.G.C.A. 12.

<sup>&</sup>lt;sup>2</sup> Alison Ross, What If Parties Don't Agree on a Virtual Hearing? A Pandemic Pathway, Global Arbitration Review available at https://globalarbitrationreview.com/article/what-if-parties-dont-agree-virtual-hearing-pandemic-pathway, last seen on 28/07/2022; Yvonne Mak, Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore, Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/, last seen on 28/07/2022. <sup>3</sup> UNCITRAL Model Law 2006, Art. 18, See Soh Beng Tee & Co. Pte. Ltd. v. Fairmount

Development Pte. Ltd. [2007] 3 S.L.R.(R.) 86, para. 65. <sup>4</sup> Supra 1.

what is practical.<sup>5</sup> This is further reinforced by the many arbitration rules that offer a "reasonable" chance for a party to state their position.<sup>6</sup>

Obviously, reasonableness is often seen to be a restriction on several areas of the legal process and argumentation. This seeming conflict between "full" and "reasonable" may be defended without too much effort in the absence of a problematic context. However, as is well-known, attorneys have a proclivity for arguing about semantics as a matter of routine. And there seems to be a special propensity among conflict attorneys to engage in combat over this subject.

The Singapore Court of Appeal's decision in *China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC* critically analyzes the various acts falling short of the procedural fairness standard and the respondent's failure to object within time. The Court recognized the discretion of arbitral tribunals to balance the interests of procedural fairness and procedural efficiency.

#### **BACKGROUND OF THE CASE**

The facts of this instance are characteristic of many deteriorating corporate partnerships. Jaguar Energy Guatemala LLC ("Jaguar Energy") and China Machine New Energy Corporation ("CMNC") were in disagreement over an Engineering, Procurement, and Construction Contract ("EPC Contract") and a Deferred Payment Security Agreement ("DPSA"). CMNC planned to build a USD 450 million power production facility ("Project") for Jaguar Energy in two stages, with completion dates of March and June 2013, respectively.<sup>7</sup> As a result

<sup>&</sup>lt;sup>5</sup> Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, 46 (25 Mar. 1985); see also Ibid, at 94–96.

<sup>&</sup>lt;sup>6</sup> UNCITRAL Arbitration Rules, art. 17(1), now only requires that 'each party is given a reasonable opportunity of presenting its case' (emphasis added). Other arbitration rules are to the same effect: Hong Kong International Arbitration Centre Rules 2018, Art. 13.1; International Chamber of Commerce Rules 2017, Art. 22(4); London Court of International Arbitration Rules 2020, art. 14.1(i); Stockholm Chamber of Commerce Rules 2017, Art. 23(2); China International Economic and Trade Arbitration Commission Rules 2015, Art. 35(1).

<sup>&</sup>lt;sup>7</sup> China Machine v. Jaguar Energy, supra n. 1, para. 5-7.

of CMNC's failure to complete the two phases of the Project on time, Jaguar Energy issued breach notifications and terminated the EPC Contract and DPSA in accordance with the provisions of the two agreements.<sup>8</sup> Jaguar Energy then initiated arbitration proceedings against CMNC on the basis that, having legally terminated the EPC Contract, it was entitled to pay for the expenses of completing the Project ("ETC Claim"). CMNC rejected Jaguar Energy's assertions.<sup>9</sup>

During the document disclosure phase of the arbitration, CMNC requested access to particular categories of documents that it said were essential to its defence. Jaguar Energy withheld the documents on the grounds that the information contained therein could be misused, claiming that the information identifying the post-termination contractors and other such information could be used to threaten or otherwise intimidate the contractors or their other on-site employees. Jaguar Energy sought an Attorney's Eyes Only ("AEO") order so that evidence would be given only to external lawyers and expert witnesses, and not to CMNC's employees. CMNC objected on the grounds that its capacity to evaluate the papers and advise counsel would be damaged if its employees were unable to examine them.<sup>10</sup>

The arbitral tribunal struck a compromise between the parties' interests and concerns and developed a two-phase AEO framework that took into consideration the need for both parties to have an appropriate chance to submit their case.<sup>11</sup> In the first phase, the records would only be provided to external counsel and CMNC's specialists; in the second phase, CMNC might request that its employees be granted access to the documents for the purpose of providing counsel with

<sup>&</sup>lt;sup>8</sup> Ibid. para. 10.

<sup>&</sup>lt;sup>9</sup> Ibid. para. 12-13.

<sup>&</sup>lt;sup>10</sup> Ibid. para. 19-22.

<sup>&</sup>lt;sup>11</sup> Ibid. para. 23.

instructions.<sup>12</sup> CMNC has never requested that its workers be seen the records as part of the second phase of the AEO regime.<sup>13</sup>

Within two weeks of the AEO regime's adoption, CMNC sought that the tribunal revoke the AEO regime and require that the papers covered by the AEO regime be redacted to conceal the identity of Jaguar Energy's contractors. After hearing the parties' arguments about the request to remove the AEO regime and adopt a redaction rule, the arbitral panel approved CMNC's request and issued an order in accordance with its terms.<sup>14</sup>

Jaguar Energy later sought a revision of the redaction order on the grounds that, although the status quo should be maintained for documents previously redacted, the AEO system should be resumed for records pertaining to claims valued at less than \$100,000. Due to the amount of these papers compared to their worth (less than \$100,000), the arbitral panel restored the AEO regime for these materials.<sup>15</sup> In addition to issuing these orders to address this 'sensitive' material, the arbitral tribunal postponed the date of the main evidentiary hearing and rescheduled all preceding deadlines based on the schedules agreed upon by the parties.<sup>16</sup>

Three months before to the hearing, CMNC asked the arbitral tribunal to completely suspend the AEO regime on the grounds that the identities of the contractors were now public information, and the Project was scheduled to be finished within a few months. The parties agreed that Jaguar Energy would release all information without redactions, and the arbitral tribunal memorialized this agreement in the form of an order.<sup>17</sup>

<sup>&</sup>lt;sup>12</sup> Ibid. para. 25.

<sup>&</sup>lt;sup>13</sup> Ibid. para. 27.

<sup>&</sup>lt;sup>14</sup> Ibid. para. 30-32.

<sup>&</sup>lt;sup>15</sup> Ibid. para. 37-39.

<sup>&</sup>lt;sup>16</sup> Ibid. para. 40.

<sup>&</sup>lt;sup>17</sup> Ibid. para. 48-50.

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After disclosing all pertinent papers, CMNC sought to change its case and, in doing so, convinced the arbitral panel that any amendments would not affect the main evidentiary hearing.<sup>18</sup> Less than two weeks prior to the deadline for submitting its expert report and within six weeks of the main evidentiary hearing, CMNC requested an extension of the deadline for the filing of its expert report as well as a cut-off date for the production of documents relating to Jaguar Energy's costs to complete the Project.<sup>19</sup> CMNC did not seek that the hearing be postponed.<sup>20</sup>

The arbitral tribunal granted CMNC the extension for the expert report submission deadline but rejected CMNC's sought cut-off date and instead set the cut-off date nearly two months after the requested date.<sup>21</sup> In doing so, the tribunal recognized that it was using its authority to reach a conclusion that would provide both parties a fair chance to present their case. Simultaneously, the tribunal emphasized the parties' commitment to arbitrate this difficult matter within a short period of time.<sup>22</sup>

The day before CMNC was to submit its expert report, it sought an extension, which was refused by the tribunal.<sup>23</sup> However, CMNC filed its expert report and all supporting materials beyond the deadline.<sup>24</sup> CMNC also laid the groundwork for a due process claim, citing Article 18 of the UNCITRAL Model Law, and argued that its documents should be admitted because Jaguar, despite its objections, have sufficient opportunity to review this.<sup>25</sup> Despite these ongoing

<sup>24</sup> Ibid. para. 65.

<sup>&</sup>lt;sup>18</sup> Ibid. para. 51.

<sup>&</sup>lt;sup>19</sup> Ibid. para. 57.

<sup>&</sup>lt;sup>20</sup> Ibid. para. 58.

<sup>&</sup>lt;sup>21</sup> Ibid. para. 59.

<sup>&</sup>lt;sup>22</sup> Ibid. para. 60.

<sup>&</sup>lt;sup>23</sup> Ibid. para. 63-64.

<sup>&</sup>lt;sup>25</sup> Ibid. para. 67.

procedural issues, CMNC did not request a postponement of the evidentiary hearing.

The hearing occurred as planned.<sup>26</sup> Four months later, the tribunal gave its decision, ruling in favour of Jaguar Energy and concluding that the EPC Contract had been properly cancelled.<sup>27</sup>

CMNC then tried to set aside the award on the following reasons<sup>28</sup>:

- The Due Process Ground: (a) the AEO Regime denied CMNC a proper chance to submit its case, and (b) the tribunal failed to examine CMNC's concerns about the DPSA.
- ii. Defective Arbitral Procedure Ground: (a) the tribunal violated Article18 of the Model Law; and (b) Jaguar failed in its obligation to arbitratein good faith, and the tribunal did not prevent Jaguar from doing so.
- Public Policy and Corruption Ground: (a) Jaguar employed 'guerrilla tactics' in the arbitration by seizing CMNC's documents and securing the removal of the employees of CMNC; and (b) the tribunal failed to investigate allegations of corruption and fraud and its effect on the award.

These three grounds were all rejected by the Singapore High Court, which ultimately decided against CMNC's plea to set aside the award. CMNC appealed to the Court of Appeal on the sole basis of the Due Process Ground, arguing that it was denied reasonable and equal due process as a result of the following three operative factors: (i) the AEO Order (and others); (ii) CMNC's inability to access

<sup>&</sup>lt;sup>26</sup> Ibid. para. 72.

<sup>&</sup>lt;sup>27</sup> Ibid. para. 73.

<sup>&</sup>lt;sup>28</sup> Ibid. para. 74.

its own documents after seizure of them by Jaguar; and (iii) the tribunal's failure to apply a cut-off date to Jaguar's continuous and voluminous supply of documents.<sup>29</sup>

#### THE JUDGEMENT

The Court of Appeal determined there was no violation of CMNC's right to due process and refused CMNC's appeal to set aside. In doing so, however, the Court of Appeal revealed the High Court's faults in neglecting to address important areas of the analysis and performed a comprehensive evaluation of the rights to due process under Singapore law.

#### **A. DUE PROCESS**

As one of the few Model Law countries to depart from and add to the grounds set forth in accordance with Article 34(2) of the UNCITRAL Model Law 2006,<sup>30</sup> section 24(b) of the Singapore International Arbitration Act ("IAA") provides that an arbitral award may be set aside if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced."<sup>31</sup> To meet this criterion, the applicant must demonstrate:

- i. which natural justice norm was violated;
- ii. how it was compromised;
- iii. how the violation was related to the making of the award; and
- iv. how the violation affected or might affect its rights.<sup>32</sup>

<sup>&</sup>lt;sup>29</sup> Ibid. para. 81.

<sup>&</sup>lt;sup>30</sup> Pursuant to Art. V of the New York Convention, a party alleging a violation of due process can seek to set aside an arbitral award produced without granting a party the right to be heard or putting the party on notice (Art. V(1)(b)), without an arbitral procedure aligned with the parties' agreement (Art. V(1)(d)), or contrary to the public policy of that state (Art. V(1)(e)). <sup>31</sup> International Arbitration Act (Cap. 143A, 2002 rev. ed.).

<sup>&</sup>lt;sup>32</sup> China Machine v. Jaguar Energy, supra n. 1, para. 86 citing Soh Beng Tee v. Fairmount Development, supra n. 3, para. 29 and L.W. Infrastructure Pte. Ltd. v. Lim Chin San Contractors Pte. Ltd. & another appeal [2013] 1 S.L.R. 125, para. 48; See John Holland Pty. Ltd. v. Toyo Engineering Corp. (Japan) [2001] 2 S.L.R. 262.

As with the majority of reviewing courts, Chief Justice Menon used a contextual approach and said that although a simple reading of the term 'full' may seem to imply an expansive right, the weight of precedents suggests to the contrary.<sup>33</sup> In reducing these concepts to their essence, the Singapore Court of Appeal concluded:

- Each party should have a "full opportunity" to present its case throughout arbitration processes, as stated in Article 18 of the Model Law. Awards acquired via methods that violate Article 18 may be nullified under Model Law Article 34(2)(a)(ii) and/or IAA Section 24(b).
- ii. The right to a 'full opportunity' to submit one's case under Article 18 is not unlimited but is implicitly constrained by principles of rationality and equity.
- iii. What constitutes a 'full opportunity' is determined by the specific context of facts and circumstances of each instance. The main issue is whether the proceedings were conducted in a fair manner by determining whether what the tribunal proceedings fit within the range of what a reasonable and fair-minded tribunal would have done under given circumstances.
- iv. The court must put itself in the shoes of the tribunal throughout the process by evaluating the decisions of the tribunal on the basis of whether the alleged breach of natural justice brought to the attention of the tribunal at the given point in time.. In procedural issues, courts will defer to the decision of the arbitral tribunal.<sup>34</sup>

<sup>&</sup>lt;sup>33</sup> China Machine v. Jaguar Energy, supra n. 1, para. 93.

<sup>&</sup>lt;sup>34</sup> *Ibid.* para. 104; see also Gary Born, International Commercial Arbitration 2175 (Kluwer 2014); Prof Jeffrey Waincymer, Procedure and Evidence in International Arbitration 751 (Kluwer 2012); Nigel Blackaby et al., Redfern and Hunter on International Arbitration (Oxford University Press 2015), para. 6.14.

These principles clarify that, in Singapore, the interpretation of the reference to 'full' opportunity in Article 18 of the Model Law indicates that a party's chance to state its argument must be 'fair.'

# **B. ARGUMENT BASED ON CUMULATIVE ACTS**

In their appeal, CMNC also asserted that separate procedural judgments, although not individually violative of due process, might together create a legally actionable claim based on due process violations. Specifically, CMNC contended that the impact of the AEO Regime, CMNC's lack of access to documents, and Jaguar's release of documents should be evaluated on a cumulative basis.<sup>35</sup> CMNC argued that the cumulative impact of the three occurrences made the arbitration 'dysfunctional,' i.e., it was unable to provide a fair hearing on the planned hearing dates.<sup>36</sup>

Chief Justice Menon rejected CMNC's argument due to the fact that CMNC had enough chance to raise these issues with the panel but opted not to do so at any point before the arbitral tribunal. Nevertheless, he ignored CMNC's argument due to the fact that CMNC had enough chance to raise these issues with the panel but opted not to do so at any point before the arbitral tribunal. In contrast, according to the Court of Appeal, CMNC disclosed of its intention of continuing with evidentiary hearing and thereafter till June 2015.<sup>37</sup>

The Singapore court made it clear 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,

<sup>&</sup>lt;sup>35</sup> China Machine v. Jaguar Energy, supra n. 1, para. 161.

<sup>&</sup>lt;sup>36</sup> Ibid. para. 165.

<sup>&</sup>lt;sup>37</sup> Ibid.

following from this, a tribunal cannot be criticized for failing to consider points not put to it."<sup>38</sup>

The argument that the proceedings could not continue as planned in order to be fair to CMNC was never presented before the tribunal. The cumulative effect argument of CMNC was made after the fact, and the court refused to enable CMNC to benefit from its own failure.

### C. GOOD FAITH STANDARD

Also pertinent to any review of due process is the concept that the party requesting review has the burden of demonstrating that the claimed lack of due process was not related to its own behaviour or anything it might have remedied.<sup>39</sup> A party would be in violation of its 'good faith' obligation if it neglected to raise an issue with the tribunal and continued with the arbitration, only to raise it later during the enforcement phase.<sup>40</sup>

In this instance, CMNC's behaviour demonstrated that it was prepared, able, and willing to continue with the July 2015 main evidentiary hearing.<sup>41</sup> CMNC failed to properly raise the question of cumulative effect before the tribunal and request an extension of the evidentiary hearing. Chief Justice Menon articulated a crucial idea that:

"[a]n 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

<sup>&</sup>lt;sup>38</sup> Ibid. para. 167.

<sup>&</sup>lt;sup>39</sup> Kenneth D. Beale & Nelson Goh, *Due Process Challenges in Asia: An Emerging High Bar*, Asian Int'l Arb. J. 1–25, at 20 (Kluwer 2017).

 <sup>&</sup>lt;sup>40</sup> China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd. [1995]
2 H.K.L.R. 215, para. 49.

<sup>&</sup>lt;sup>41</sup> China Machine v. Jaguar Energy, supra n. 1, para. 165-166.

obtain an award, only to then challenge it after realising that the award has been made against it."<sup>42</sup>

Ultimately, as Mr. Justice Kaplan observed, 'all proceedings must have a finite end.'<sup>43</sup>

# ARTICLE 18 OF THE UNCITRAL MODEL LAW AND DUE PROCESS SAFEGUARDS

*China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC* demonstrates that arbitral parties are not always discouraged from using due process arguments in an attempt to challenge an arbitrator or set aside an award despite the fact that the requirements for satisfying a challenge to due process are notoriously difficult. As appeal rights are often lacking in international arbitration, diligent attorneys frequently raise due process concerns in the hopes of obtaining some kind of appellate review. As CMNC discovered, these overzealous endeavours often result in failure.<sup>44</sup>

Indeed, it is noteworthy when a court interferes with the procedural management choices of an arbitral panel. In the end, arbitral tribunals have wide discretion under law to select the method to be employed and to guarantee a fair, quick, inexpensive, and final resolution of the dispute.<sup>45</sup> The procedural management choices made by an arbitral panel are often accorded respect by the courts and are seldom questioned. This deference implies that the court's belief that it might have

<sup>&</sup>lt;sup>42</sup> Ibid. para. 168.

<sup>&</sup>lt;sup>43</sup> Qinghuangdao Tongda Enterprise Development Co. v. Million Basic Co. Ltd. [1993] 1 H.K.L.R. 173; See Nanjing Cereals, Oils & Foodstuff Import & Export Corp. v. Luckmate Commodities Trading Ltd. [1994] H.K.C.F.I. 140.

<sup>&</sup>lt;sup>44</sup> Triulzi Cesare SRL v. Xinyi Group (Glass) Co. Ltd. [2015] 1 S.L.R. 114.

<sup>&</sup>lt;sup>45</sup> Brandeis (Brokers) Ltd. v. Black [2001] 2 All E.R. (Comm) 980, para. 56; see also Margulead Ltd. v. Exide Technologies [2004] EWHC 1019, para. 33; Klaus Peter Berger & J. Ole Jensen, Due Process Paranoia and the Procedural Judgment Rule – a Safe Harbour for Procedural Management Decisions by International Arbitrators, 32 Arb. Int'l 415–435 (2016).

acted differently is not a basis for intervention.<sup>46</sup> The English court system is indicative of the majority of judicial systems. An analysis of over one hundred English court rulings revealed that no award was overturned due to 'overly robust' case management.<sup>47</sup>

In addition to increasing litigation costs, these methods have led to the establishment of a mental health crisis in international arbitration: 'due process phobia.' As the phrase implies, this occurs when arbitrators acquire an irrational fear that their case management choices will result in the judgement being vacated and/or denied enforcement. As a consequence, arbitrators, particularly those with less familiarity with the limitations of their procedural autonomy, may be less inclined to use their procedural autonomy, instead yielding to the tactical whims of counsel.

Putting mental health concerns aside, what motivates such systemic abuse? Although there are multiple perpetrators, the wording of Article 18 of the UNCITRAL Model Law appears in the majority of allegations. Where the descriptor says 'full' instead of 'reasonable,' attorneys would argue, as they always do, that the plain meaning of the word should be accorded complete respect, at least when it benefits their position. And this is what the counsel for CMNC did. CMNC cannot be faulted for bringing this issue; in fact, some would argue that its counsel would have been negligent had they not done so. This is despite the fact that the definition of 'full opportunity' as 'fair opportunity' is

<sup>&</sup>lt;sup>46</sup> ABB A.G. v. Hochtief Airport GmbH & Athens Int'l Airport S.A. [2006] EWHC 388 (Comm).

<sup>&</sup>lt;sup>47</sup> Remy Gerbay, *Due Process Paranoia*, Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/, last seen on 28/07/2022

undisputed and has been reaffirmed by several courts throughout the globe.<sup>48</sup> In fact, the court in *China Machine v. Jaguar Energy* concurs with this view.<sup>49</sup>

Jan Paulsson, despite this broad consensus, warned that "full responsibility" and "reasonable opportunity" may have various meanings to different individuals. He points out that " full opportunity to present one's case" might be construed to mean that the arbitral tribunal must comply with every procedural request made by a party.<sup>50</sup>

In order to strike a balance between the interests of all parties and the requirement for efficiency, each party must be given a meaningful chance to state its case. In fact, while courts have upheld the 'full opportunity' criterion, it has been read in a manner that brought its meaning near to that of the 'reasonable opportunity' threshold set for in the 2010 UNCITRAL Arbitration Rules.<sup>51</sup> This idea implies that there may be a difference in meaning between the two standards.

Paulsson has referenced UNCITRAL's decision to replace 'full' with 'reasonable' in its 2010 modifications to the UNCITRAL Rules in order to further emphasise the possibility for misinterpretation or abuse. The Working Group tasked with drafting the UNCITRAL Model Rules 2020 was concerned that the phraseology could give rise to contention, and replacing it with the word 'reasonable' would help avoid excessive pleadings.<sup>52</sup> Consequently, this modification was predicated on the objective to prevent providing delaying tactics a footing under the excuse that one further chance to file a pleading or evidence is necessary to fulfil the

<sup>&</sup>lt;sup>48</sup> ADG & another v. ADI & another [2014] 3 S.L.R. 481, paras 103–104; JVL Agro Industries Ltd. v. Agritrade Int'l Pte. Ltd. [2016] 4 S.L.R. 768, para. 145; see Howard M. Holtzmann & Joseph E. Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary 551 (Kluwer 1989); Berger & Jensen, supra n. 45.

 <sup>&</sup>lt;sup>49</sup> China Machine v. Jaguar Energy, supra n. 1, para. 96; see Soh Beng Tee v. Fairmount Development, supra n. 3, para. 65(a); Triulzi Cesare v. Xinyi Group, supra n. 44, para. 151.
<sup>50</sup> Ibid.

<sup>&</sup>lt;sup>51</sup> Jan Paulsson & Georgios Petrochilos, UNCITRAL Arbitration Rules, Section III, Article 17 [General provisions] 117–146, at 130 (Kluwer 2017).

<sup>&</sup>lt;sup>52</sup> Ibid. at 129.

facially-unqualified requirement of a 'full' opportunity. Therefore, 'reasonable' implies 'as full as an opportunity as is reasonable under the circumstances' and 'in accordance with the obligations of equality and efficiency.'<sup>53</sup>

In fact, as Lucy Reed cautioned in her 2016 Freshfields Lecture - "Do not promise the parties a "full" opportunity to present their cases, and thereby invite due process- labelled complaints that a hearing was one day too short or that a crossexamination went one hour too long."<sup>54</sup> Reed's finding that due process terminology has actually shrunk over time is a remarkable trend. Certainly, attempts to avoid the misuse that more open language may generate by inciting unjustified procedural demands in the name of due process<sup>55</sup> should be wellreceived by an arbitral community that is always looking to secure cost and save time.

But if "reasonable opportunity" to submit one's case at an opportune point suffices to produce genuine due process,<sup>56</sup> why has the reference to 'full opportunity' been maintained throughout time? The simplest answer seems to be that the legislative bodies of several countries have opted not to stray from the text of the UNCITRAL Model Law. However, even this is changing. Some countries, like Hong Kong,<sup>57</sup> have revised Article 18 of the Model Law to substitute "full" with "reasonable" in its domestic law.<sup>58</sup> Even the Arbitration Act which governs domestic arbitrations in Singapore, has adopted a modified version

<sup>&</sup>lt;sup>53</sup> Ibid. at 125.

<sup>&</sup>lt;sup>54</sup> Ibid. at 370.

<sup>&</sup>lt;sup>55</sup> Ibid. at 360.

<sup>&</sup>lt;sup>56</sup> Lucy Reed, *Ab(use) of Due Process: Sword vs shield*, 33 Arb. Int'l 361–377, at 376 (2017).

<sup>&</sup>lt;sup>57</sup> Arbitration Ordinance (Cap. 609), s. 46, has substituted the word 'reasonable' for 'full' in the requirement that the tribunal give parties a 'reasonable' opportunity to present their cases. <sup>58</sup> Model Law, Art. 18 is reflected in Art. 18C of the Australian International Arbitration Act 1974 except that 'full opportunity' has been replaced with 'reasonable opportunity'; also see British Columbia International Arbitration Act 1996, s. 18; English Arbitration Act 1996, s. 33(1)(a).

of Model Law Article 18 to allow for a party's "reasonable opportunity" to state its case.<sup>59</sup>

# CONCLUSION

Alfred Sidgwick, in his famous "Interpretation of Words" engages in a philosophical discussion about linguistics.<sup>60</sup> Sidgwick raises a point about how certain instruments of interpretation lead to more confusion than clarity, and lead to a meaning other than that intended.<sup>61</sup>As with Sidgwick and with reference to the archives of the UNCITRAL Model Law, "full" has come to signify "reasonable." Over the years, however, the misuse of this criterion has resulted in considerable and wasteful arbitral waste, wasting millions of dollars in meritless claims.

In a jurisdiction where the legislative language describing a party's opportunity to present its case remains 'full,' Chief Justice Menon's coverage of the Singapore court's position on due process in international arbitration dispels any uncertainty regarding Singapore's position on the meaning of 'full opportunity.' Therefore, legal counsel who are contemplating a 'scorched earth' strategy should take note. With this ruling, it is hoped that those who are contemplating abusing the protection afforded by due process will be disappointed.

<sup>&</sup>lt;sup>59</sup> Arbitration Act (Cap. 10, 2002 rev. ed.), s. 22.

<sup>&</sup>lt;sup>60</sup> Alfred Sidgwick, Interpretation of Words, 37 Mind 149-172, at 149-150 (1928).

<sup>&</sup>lt;sup>61</sup> Ibid.