Do Virtual Hearings Without Parties’ Agreement Contravene Due Process? The View from Singapore

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Introduction

The use of virtual hearings is not new in international arbitration. However, the COVID-19 pandemic has necessitated, and accelerated, a shift from in-person hearings to virtual hearings. With travel bans in place and no visibility of when countries will open their borders again, in-person hearings will likely be the exception rather than the norm for the next 12 to 18 months.

One important issue is how parties and arbitrators can ensure that virtual hearings, especially of the main evidential hearing or an application that may be dispositive of the entire case, comply with due process. This will be crucial to avoid a subsequent successful setting aside application, especially by parties who may be strategically resisting meaningful participation in virtual hearings.

Protocols and Guidance Notes on Virtual Hearings

Various protocols and guidance notes, which parties may elect to apply, have been issued to assist parties. These include:

- The ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic ("**ICC Guidance Note**"), which provides a checklist for a virtual hearing protocol that will ensure each party is treated equally and given a full opportunity to present its case. The ICC Guidance Note, as well as other relevant ICC tools, have been discussed in another post.
- The CIArb Guidance Note on Remote Dispute Resolution Proceedings , which provides guidance on technology and logistical, legal, and procedural matters relating to virtual hearings.
- The Seoul Protocol of Video Conferencing in International Arbitration ("**Seoul Protocol**"), which provides best practices for a virtual hearing. The Seoul Protocol has been discussed in another blog post.
- The HKIAC Guidelines for Virtual Hearings, which provide practical guidelines on matters such as confidentiality, the preparation of electronic bundles, and transcription and interpretation services.

However, while helpful, these guides are not without their shortcomings. Importantly, they do not address the situation where one or both parties object to a virtual hearing.

Delay versus Due Process

Even if one or more parties object to a virtual hearing, a tribunal may nonetheless direct a virtual hearing against the wishes of the objecting parties. The tribunal, in deciding this, should consider factors such as delay and due process.

A tribunal may hold off convening a virtual hearing in the hope that an in-person hearing may be possible soon. However, an indefinite adjournment of the hearing, or even multiple adjournments in the face of an evolving pandemic, may contravene a tribunal's duty to conduct the arbitration efficiently and with reasonable expedition.[fn]For example: (i) Article 14.4 of the LCIA Rules (2014) provides that the Arbitral Tribunal has a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense; (ii) Rule 19.3 of the SIAC Rules (2016) provides that the Tribunal shall discuss the

procedures that will be most appropriate and efficient for the case; and (iii) Article 22 of the ICC Rules (2017) states that the arbitral tribunal and parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner.[/fn] Delay in arbitration may also give rise to due process arguments by a party, where expedient resolution of the matter is contractually provided for or if the delay prejudices a party. The tribunal's alternatives would be to persuade parties to agree to a virtual hearing or direct a virtual hearing against the wishes of the objecting parties.

Risk of Setting Aside?

The risk, of course, is that the party who had objected to a virtual hearing may later apply to set aside the award.

As a preliminary step, parties should ensure that the arbitration agreement does not specifically rule out virtual hearings. Once the tribunal is constituted, it will have a broad discretion in the procedure of the arbitration, so long as parties have not agreed to the contrary.[fn]Born, 2014, *International Commercial Arbitration* (2nd Edition), at [15.03], pp. 2144-2148.[/fn] In the absence of specific language precluding a virtual hearing, it may be difficult to argue that the meaning of "*hearing*" in an arbitration agreement or the institutional rules refers strictly to an in-person hearing.

In Singapore, a party may set aside an award on the grounds listed in Article 34(2) of the Model Law (incorporated into Singapore law under the International Arbitration Act (Cap. 143A) ("**IAA**")). Article 34(2)(a)(ii) may be relevant, as it applies where a party against whom the award was made was *"unable to present his case*".

Additionally, section 24(b) of the IAA provides that an 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*". This ground requires the applicant to establish:

- which rule of natural justice was breached;
- how it was breached;
- in what way the breach was connected to the making of the award; and

- how the breach did or could prejudice its rights.[fn]*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 ("***L W Infrastructure***").[/fn]

A party's right to present its case and respond to the case against it has been held to be a fundamental rule of natural justice.[fn]*Soh Beng Tee* at [42].[/fn] In this regard, a party's right to be heard stems from that party's right to be treated with equality and be given a full opportunity to present its case.[fn]Article 18 of the Model Law.[/fn]

A party made to participate in a virtual hearing despite its objections may argue that it had not been afforded a full opportunity to present its case for a myriad of different reasons, from disadvantages of arbitrating across different time zones to the lack of a stable internet connection.

The Singapore Position

As a starting point, the general judicial position in Singapore dictates that the court should not "*without good reason*" interfere with the arbitral process.[fn]*Soh Beng Tee* at [59].[/fn] The arbitrator is the "*master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in a way he sees fit*", unless the procedure has otherwise been agreed between parties, and so long as what the arbitrator is doing is not manifestly unfair or contrary to natural justice.[fn]*Anwar Siraj v Ting Kang Chung* [2003] 2 SLR(R) 287 at [41]-[42]; *Soh Beng Tee* at [60].[/fn]

The parameters to the right to a full opportunity to present one's case were recently clarified by the Singapore Court of Appeal ("**SGCA**") in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] SGCA 12 ("***Jaguar Energy***").[fn]The principles in *Jaguar Energy* have since been applied in two further cases before the Singapore Courts, *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2020] SGHC 113 and *BBA and others v BAZ and another appeal* [2020] SGCA 53.[/fn] In *Jaguar Energy*, the appellant sought to set aside an arbitral award on the basis that there had been a breach of its due process rights, resulting from the cumulative effect of certain orders made during the arbitration that allegedly caused the appellant to

lose preparation time and the ability to meaningfully interrogate the evidence so as to file key documents in time.[fn]At [81]-[82].[/fn]

The SGCA found that the right to a full opportunity to present one's case, under Article 18 of the Model Law, is not an unlimited one. The parties' right to be heard is *impliedly* limited by considerations of reasonableness and fairness, especially in cases where the complaint is that the failure to grant some sort of "*procedural accommodation*" to a party has adversely impacted that party's due process rights.[fn]*Jaguar Energy* at [96]-[97]. See also *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [151].[/fn]

The overarching inquiry is whether the proceedings were conducted in a manner which was fair. The court will examine whether the tribunal's conduct, in balancing both parties' competing interests, falls within the range of what a "*reasonable and fair-minded*" tribunal in those circumstances might have done.[fn]*Jaguar Energy* at [104], [111] and [112].[/fn] The tribunal's conduct and decisions should be assessed with reference to what the tribunal knew at the material time, and the alleged unfairness which the complaining party relies upon must have therefore been brought to the attention of the tribunal.[fn]*Jaguar Energy* at [102] and [167].[/fn] Further, an aggrieved party cannot complain after the fact that its hopes for a fair trial were dashed if its conduct had evinced that it was content to proceed with the arbitration notwithstanding the alleged unfairness. The complaining party should at the very least seek to suspend proceedings until the breach has been satisfactorily remedied (if it is capable of remedy). It cannot simply "*reserve*" its position until after the award.[fn]*Jaguar Energy* at [168] and [170].[/fn]

The SGCA further observed that the court should accord "*substantial deference*" to the tribunal in the exercise of its wide procedural discretion in the conduct of the arbitration.[fn]*Jaguar Energy* at [103].[/fn] There is a high threshold for judicial intervention, which will only be crossed where the tribunal has conducted the arbitral process "*irrationally or capriciously*" or "*so far removed from what could reasonably be expected of the arbitral process.*"[fn]*Jaguar Energy* at [103].[/fn] This reflects the Singapore courts' general reluctance to interfere with arbitral awards, especially where the challenge is unmeritorious and made under the guise of an alleged breach of natural justice to achieve a rehearing on the merits.[fn]*TMM Division Maritama SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [2].[/fn]

Therefore, it may be reasonable for a tribunal to direct a virtual hearing against the wishes of a party if, for example, it considers that the objecting party has adequate equipment and preparation time. Moreover, a failure to raise potential difficulties with participating in a virtual hearing at the material time may prevent that party from subsequently relying on such difficulties in a setting-aside application.

In the final analysis, a section 24(b) IAA application also requires that the alleged breach of natural justice caused actual or real prejudice to the applicant, which requires some causal connection between the breach of natural justice and the making of the award.[fn]*L W Infrastructure* at [50].[/fn]. It "*does not embrace technical or procedural irregularities that have caused no harm in the final analysis*".[fn]*Soh Beng Tee* at [91].[/fn] A party must therefore go one step further to show how the conduct of a virtual hearing denied the arbitrator of the benefit of arguments or evidence that had a real chance of making a difference to his deliberations, i.e. actually impacting the decision in some meaningful way.[fn]*Soh Beng Tee* at [91]; *L W Infrastructure* at [54].[/fn]

Balanced against the tribunal's duty to conduct hearings efficiently and expediently, proceeding with a virtual hearing will not necessarily constitute a breach of due process so long as parties are provided equal opportunities to present their cases. This may include ensuring that parties have reasonable access to the necessary technology, have had adequate time to prepare for the virtual hearing, and face similar restrictions in their and/or their counsel's respective jurisdictions. Parties may also consider having a neutral third-party in the same room as a witness or the use of a camera with a 360-degree view, to mitigate against possible allegations of witness-coaching during a virtual cross-examination.

Conclusion

Virtual hearings are not without their difficulties and are unlikely to replicate an in-person hearing. However, the world as we know it continues to evolve in the face of COVID-19, and so must the way hearings are conducted. Electing not to participate in virtual hearings in the hopes of challenging an award is unlikely to be a good strategy, at least in Singapore, especially if the parties have been given every opportunity to participate.