

Kluwer Arbitration Blog

How Sacred is the Right to be Heard in Arbitration?

Sean Hardy, Jeremy Yeap (Clyde & Co Clasis Singapore) · Monday, June 14th, 2021 · Clyde & Co.

In *CBS v CBP* [2021] SGCA 4 the Singapore Court of Appeal upheld the High Court's ruling in *CBP v CBS* [2020] SGHC 23, being a rare example of the Singapore Courts setting aside an award. The arbitrator's decision not to allow a hearing for oral witness evidence was found to be a breach of natural justice in the absence of clear powers to do so (sometimes known as "witness gating" powers) despite the challenging party refusing to submit any written witness statements. Although swinging largely on an interpretation of the applicable [Singapore Chamber of Maritime Arbitration \(SCMA\) Rules](#), the impact of the decision is potentially much further reaching. At first glance it is at odds with common procedural practices in international arbitration generally, and the Singapore Courts' well-established reputation for deferring to tribunals' discretionary procedural powers. But is this the case on closer scrutiny?

Key Facts

The underlying claim concerned non-payment by an Indian company (the buyer) for coal which it had agreed to purchase from a seller who had assigned the debt to a Singapore bank (the bank).

Critically, Rule 28.1 of the SCMA Rules provided that:

*Unless the parties have agreed on a documents-only arbitration **or** that no hearing should be held, the Tribunal **shall** hold a hearing for the presentation of evidence by witnesses, including expert witnesses, **or** for oral submissions.* (emphasis added)

With an eye on Rule 28.1 the bank confirmed that it did not wish to call any witnesses and submitted that the arbitration should proceed on a documents only basis, while the seller confirmed that it wished to call 7 witnesses to give "oral testimony" at a hearing. In response – and which would ultimately prove fatal – the arbitrator directed:

Before I rule on whether the arbitration will be on documents only [sic] or an oral hearing is necessary I require the following: a. Detailed written statements from each of the witnesses [the buyer] plans to call...

The buyer refused to provide any written witness statements. The arbitrator then directed that a hearing would take place pursuant to SCMA Rule 28.1 for oral submissions only, and no witnesses would be presented at the hearing given the buyer had “*failed to provide [written] witness statements or any evidence of the substantive value of presenting witnesses [at a hearing]*”.

The buyer did not attend the hearing and the bank’s claim was allowed in full, including on the basis that the arbitrator rejected the buyer’s case regarding an alleged oral agreement.

The buyer then applied successfully to the High Court for the award to be set aside on the ground that the arbitrator’s decision “*to deny the Buyer its right to call*” witnesses represented a breach of natural justice. The bank appealed.

Court of Appeal

The Court of Appeal identified the applicable rule of natural justice as the “*full opportunity to be heard*” (including [Article 18 of the Model Law](#)) and the key test as being whether the arbitrator’s conduct fell within the range of what a reasonable and fair-minded tribunal in the circumstances might have done.

The first key bone of contention concerned the interpretation of SCMA Rule 28.1. In essence, whether – as argued by the bank – the final “*or*” means the rule should be interpreted “*disjunctively*”, such that in the absence of an agreement between the parties as to a documents-only procedure or there being no hearing, the arbitrator is only obligated to hold a hearing for oral evidence or for oral submissions.

The Court of Appeal agreed with the High Court’s “*holistic*” interpretation, however – in favour of the buyer – that “*...r 28.1 has to be read as a whole and it does not give the tribunal the power to choose what **type** of hearing to hold in the absence of an agreement*” (emphasis added). Thus, in the absence of an agreement for “*a documents-only arbitration or that no hearing should be held*”, the arbitrator did not have the ‘witness gating’ power to disallow the buyer’s request for a hearing for oral witness evidence.

On the second key issue, the Court of Appeal accepted that tribunals do have the power to limit oral witness evidence as part of their broad, discretionary case management powers (and that the arbitrator in this case had this power under SCMA Rule 25) in certain circumstances; for example, where “*evidence from multiple witnesses are repetitive or of little or no relevance to the issues*”. However, this power is not absolute and is subject to the fundamental rules of natural justice.

The Court of Appeal found that on the facts, the arbitrator’s rejection of the buyer’s proposed oral witness evidence and the imposing of a condition to show that this had “*substantive value*” before deciding whether to allow it at a hearing fell outside the range of what a reasonable and fair-minded tribunal might have done, and so represented a breach of natural justice.

Analysis & Impact

The arbitrator’s conduct was not the most obvious breach of natural justice, and this was not a

straightforward decision.

This is highlighted by the very fine distinction the Court of Appeal drew between two, similar scenarios. First, the Court suggested that if the arbitrator had requested written witness statements with a view to further oral witness evidence being presented at a hearing, but had then not allowed oral witness evidence as a result of the buyer's failure to comply and to provide witness statements, this "*might be warranted*" under its broad procedural powers. Yet, in this case, "*Where the arbitrator fell into error was by suggesting that whether a hearing for witness testimony would be convened would be determined based on the Buyer's witness statements, which had to be submitted beforehand. As we have noted above, this was not an option open to the Arbitrator...*"

This distinction is significant because it is common in practice for arbitrators to direct that written witness statements are required and will represent evidence in chief, and that only witnesses who have provided written statements may appear to be examined and to provide oral evidence at a hearing. This approach has significant upsides in terms of procedural efficiency and avoiding any perception that a party is being blindsided by new evidence adduced orally for the first time at a hearing.

Rather than cutting across this practice, the decision emphasises that great care needs to be taken when considering the applicable arbitral rules and factual circumstances, and it is dangerous to make any assumptions based on practices or experiences under different rules or facts. SCMA Rule 28.1 is ostensibly very similar to many other institutional rules – including [Article 24.1 of the 2016 SIAC Rules](#) and [17.3 of the UNCITRAL Rules](#), for example – such that the decision could have some impact on arbitrations under those rules. However, the challenges in this case arose largely from SCMA Rule 28.1's particular idiosyncrasies and the absence of a clear, express "witness gating" power to limit oral witness evidence (unlike under Article 25.2 of the SIAC Rules, for example).

The Singapore Courts might also have been expected to place more emphasis on the buyer's refusal to comply with procedural directions, including the direction to submit written witness statements.

The Court of Appeal held that if the buyer had complied with procedural directions, "*it might be taken to have agreed with the arbitrator that he had the power to decide whether or not to deny their request for a hearing...*". However, regarding the key question of whether any prejudice was actually caused, the Court found that "*...the alleged oral agreement at the December 15 meeting was a critical component of the Buyer's defence...When the witness evidence of the Buyer in relation to that meeting was shut out altogether, it is plain that the Buyer was prejudiced*". This is difficult to follow in circumstances where the buyer was directed and given many opportunities to submit written witness evidence which could have covered the alleged oral agreement, but it refused to do so.

It would be a stretch, however, to suggest that the approach represents a departure for the Singapore Courts. The Court's reasoning flowed from an interpretation of the – problematically drafted, at best – SCMA Rule 28.1, and a robust approach to respecting the fundamental right to be heard when navigating the difficult balancing act between this and arbitrators' broad procedural powers. Ultimately, the decision makes clear that arbitrators who do not allow hearings for oral witness evidence in the absence of very clear powers to do so – even where a party has refused to submit written witness statements – do so at their own peril.

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