Kluwer Arbitration Blog

CBS v CBP: Appeal Mechanism For Procedural Rulings Infringing Natural Justice?

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It is trite that an award may be set aside if there has been a breach of the rules of natural justice. This may arise from, among others, a tribunal's procedural ruling. However, during the arbitration, there is no recourse for parties to challenge such procedural rulings.

This was the situation in *CBS v CBP* [2021] SGCA 4 ("***CBS v CBP***") where the arbitrator (mis)interpreted the Singapore Chamber of Maritime Arbitration ("**SCMA**") Rules, and did not allow the respondent to call its witnesses. The respondent disagreed with the arbitrator's decision and boycotted the arbitration, but subsequently applied to set aside the award pursuant to s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("**IAA**"). The Singapore Court of Appeal set aside the award (a detailed summary is accessible here).

Existing Avenues for Parties

Generally, procedural rulings by tribunals are not appealable or cannot be set aside. In *K v S* [2019] EWHC 2386 (Comm), the English High Court held that the tribunal's decision to disallow the expert's report did not lead to a final determination on a substantive point in issue and was consequently not appealable (as compared to an award). The Singapore courts have reiterated the same in *Republic of India v Vendanta Resources pls* [2021] SGCA 50.

That said, there are existing provisions in Singapore arbitration legislation which may aid parties in addressing certain procedural rulings. For example, where appropriate, parties could consider the use of s 13 of the IAA or s 30 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("**AA**"). In *BVU v BVX* [2019] SGHC 69, parties faced a situation where one party's wishes to call certain witnesses were denied by the tribunal. There, the Supplier applied to the tribunal to procure the attendance of 3 other witnesses under the Purchaser's employment. The Supplier's application to the tribunal was unsuccessful (twice). Upon issuance of the award, the Supplier applied to set aside the award on the basis that the Purchaser "*deliberately put forward a false case in the [a]rbitration by concealing the true facts and withholding and suppressing crucial evidence*" including the testimony of a particular witness. In conjunction with the above, the Supplier applied for a subpoena for the said witness to give evidence during the setting aside hearing.

In setting aside the Supplier's subpoena, the Court noted that there was "*no explanation as to why*

the Supplier had not sought curial assistance for the production of documents under s 13 of the IAA from [the witness]" while the arbitration was ongoing, as "*[i]f that had happened, the issue of relevance of the documents might well have been thrashed out and determined at that stage, either in court or before the Tribunal, instead of after an unsuccessful outcome in the arbitration by way of a setting aside application.*"

Any such application should first be made to the tribunal. In *ALC v ALF* [2010] SGHC 231, when considering whether a party may elect between applying to court or the tribunal under s 30 of the AA, the Court noted that "*the proper course of action would be to apply to the Arbitrator in the first instance, before knocking on the doors of the court.*"

Possible Reform: An Appeal Mechanism for Procedural Rulings Infringing Natural Justice

The issue of completing an arbitration only to have the award set aside and then having to recommence proceedings could be avoided if parties had recourse to the courts where a tribunal makes a procedural ruling which infringes the rules of natural justice.

Where the tribunal's procedural ruling infringes the rules of natural justice, the court would not hesitate to set aside the award (and the tribunal's procedural ruling). This is because while the tribunal is the master of its own procedure, it is still subject to the rules of natural justice (*CBS v CBP* at paragraphs 62 and 67). The only remaining issue is whether the wastage of resources may be avoided.

While s 24(b) of the IAA serves to safeguard natural justice, it can be amended to provide for recourse even before the award is rendered. The proposed change to s 24(b) of the IAA can take the form of an appellate mechanism for only procedural rulings which infringe the rules of natural justice.

Implementing an appellate mechanism for this limited scope of procedural rulings brings forward recourse before the substantive hearing (where substantial costs are incurred) and the rendering of the award. This is elaborated as below:

First, this saves time and costs as courts can prospectively decide on whether certain conduct is in breach of the rules of natural justice, rather than do so retrospectively. It must be noted that the court's prospective decision under s 24(b) of the IAA should not differ significantly from a retrospective decision. Under the retrospective analysis, the court considers: (*i*) whether there is a breach of natural justice and (*ii*) whether that breach resulted in any prejudice. The second stage of the analysis is not engaged in the prospective analysis, simply because no prejudice has crystallised. This does not render the proposal unprincipled, as the main purpose of the second stage is to justify the setting aside of the award and the safeguards of the second stage can be incorporated into the prospective approach, by requiring the applicant to show that the breach of natural justice is not merely technical and inconsequential.

Second, this reduces the possibility of the award being set aside, enhancing the finality of the award.

Third, possible breaches of the rules of natural justice would be ventilated in the course of the proceedings, avoiding any duplicitous work at the setting aside stage. This is because parties may

raise *res judicata* arguments during the setting aside application and the resisting party may be justified in applying for indemnity costs, which have been explored by the courts in the setting aside context (*CDM v CDP* [2021] SGCA 45).

This proposal is also accompanied by mechanisms to prevent abuse of process. The availability of an appeal mechanism for procedural rulings may lead to unmeritorious objections to every procedural ruling and dressing up such objections as plausible breaches of natural justice to delay proceedings. Three safeguards could be implemented to minimise this, as set out below:

First, leave of court must be obtained before an appeal is heard and leave will only be granted on a stringent criterion (for example, requirement to prove a *prima facie* breach of the rules of natural justice).

Second, indemnity costs shall generally be awarded to the successful respondent to ensure that the appellant carefully considers any appeal. Where the appellant is unsuccessful, indemnity costs will serve to compensate the respondent. This proposed safeguard should be read together with the current position at Singapore law that indemnity costs are not awarded as a general rule for unsuccessful challenges against an award.

Third, to minimise court interference, the tribunal shall have the discretion to continue with or stay the proceedings.

The proposal (which allows the court to make a prospective decision) may be more appropriate than the option of remitting the decision to the tribunal. This is because, if remitted, as noted in *CBS v CBP*, "*there is a real likelihood that [the arbitrator] will not be able to fairly determine the issues given the conduct and development of the case thus far*".

Overall, the proposal seeks to ensure that resources are not wasted whilst preserving the principle of "minimal curial intervention" by restricting such applications only to procedural rulings that infringe the rules of natural justice, especially since these same objections would have arisen if a party seeks to set aside the award under the existing regime.

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