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## Follow the Rules and Hear Me Out

Can arbitrators refuse to hear oral witness evidence which they consider to be of little or no relevance (also known as “**witness gating**”)?

Earlier this year, in *CBS v CBP*,<sup>1</sup> the Singapore Court of Appeal (SGCA) confirmed that an arbitrator’s decision to entirely exclude oral witness evidence, in cases where the applicable rules do not confer such power on the arbitrator, would constitute a breach of natural justice. Parties may set aside an arbitral award, if arbitrators act outside of their powers and fail to give parties a “*full opportunity*” to present their case.

This decision concerns an arbitration under the Rules of the Singapore Chamber of Maritime Arbitration (SCMA Rules). The arbitrator refused to hear oral witness evidence from the respondent and convened a hearing for “*oral submissions only*”, after finding that there was no “*substantive value*” in holding a hearing with witnesses.<sup>2</sup> Applying Rule 28.1 of the SCMA Rules, the SGCA observed that:

- a. A parties’ right to be heard in legal proceedings is a fundamental rule of natural justice;
- b. The arbitrator must hold a hearing, unless the parties have agreed to a documents-only arbitration or that no hearing shall be held;
- c. The exclusion of the respondent’s oral witness evidence would affect the outcome of the award. Applying the four-stage test under *Soh Beng Tee*,<sup>3</sup> the SGCA set aside the award.

<sup>1</sup> *CBS v CBP* [2021] SGCA 4

<sup>2</sup> It is crucial to note that, during the course of the proceedings, the arbitrator asked the parties to explain the necessity of an oral hearing for witness evidence. The claimant did not intend to call any witness. The respondent intended to call witnesses to the hearing, but advanced no “*witness statements or any evidence of the substantive value of presenting witnesses*”, as requested by the arbitrator. The arbitrator directed that there would be no witnesses presented at the hearing.

<sup>3</sup> *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (*Soh Beng Tee*). For an applicant to set aside an arbitral award in Singapore, the following must be established: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected with the making of the award; and (d) how the breach prejudiced its rights, see *Soh Beng Tee* at [29]. The relevant rule of natural justice here is the right of a party to be given a full opportunity of presenting its case, and, in particular, the opportunity of responding to the case against it: see *Soh Beng Tee* at [42].

This case is significant because it clarified the limits of an arbitrator’s procedural powers on witness gating. It serves as a useful reminder that while an arbitral tribunal is the master of its own procedures, its case management powers are not unfettered and without limits.

Below, we outline the practical implications of this case for arbitrators and parties to an arbitration:

**(i) Arbitrators**

- If the arbitration rules require arbitrators to hold oral hearings for the presentation of witness evidence, it is mandatory for arbitrators to conduct such hearings, unless the parties agree otherwise;
- While due latitude must be given to arbitrators to manage proceedings, arbitrators must weigh the laudable desire for efficient and effectual conduct of proceedings against considerations of natural justice (i.e. the need to hear witnesses out); and
- The failure to comply with the applicable rules and give parties a “*full opportunity*” to present their case would open the risks of the arbitral award being set aside. While reiterating its decision in *China Machine*<sup>4</sup> that a “*full opportunity*” does not mean an unlimited hearing, the arbitrator must provide what would be a reasonable opportunity in the circumstances of the case.

**(ii) Parties**

- Parties are not required to show evidence of “*substantive value*” before they are entitled to request for an oral hearing to present witness evidence; and
- Parties can be assured that arbitrators have a duty to afford parties with a fair opportunity to present their case.

Even though this was an arbitration under the SCMA Rules, the decision is likely to be equally relevant to arbitrations conducted under other institutional rules, such as the AIAC and SIAC rules. Critically, there are similarities in the wordings of **Rule 28.1 of the SCMA Rules**, **Article 17.3 of the AIAC Rules**, and **Rule 24.1 of the SIAC Rules**:

Institutional rules	Relevant provision	Mandatory for arbitrators to hold hearings for witness evidence?
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<sup>4</sup> *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] SGCA 12

<p><b>SCMA, Rule 28.1</b></p>	<p><i>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.</i></p>	<p>Yes, unless parties agree otherwise.</p>
<p><b>AIAC, Article 17.3</b></p>	<p><i>If at an appropriate stage of the proceedings any Party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.</i></p>	<p>Yes, if parties request.</p>
<p><b>SIAC, Rule 24.1</b></p>	<p><i>Unless the parties have agreed on a documents-only arbitration or as otherwise provided in these Rules, the Tribunal shall, if either party so requests or the Tribunal so decides, hold a hearing for the presentation of evidence and/or for oral submissions on the merits of the dispute, including any issue as to jurisdiction.</i></p>	<p>Yes, if parties request, and unless parties agree otherwise or as otherwise provided in the rules.</p>

The full grounds of judgment can be accessed [here](#).

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