Due Process of a Tribunal's Power to 'Gate' Witnesses in Arbitral Proceedings— A Judicious Approach

In CBP v CBS, the High Court of Singapore held that where witness testimony was required for a party to an arbitration to put forward a fundamental aspect of its pleaded case, an arbitral tribunal would be in breach of that party's right to a fair hearing if it did not allow that party to adduce such witness testimony, even if it had the procedural power to do so.



Introduction

Under the International Arbitration Act[1] of Singapore, an arbitration tribunal's case management powers to ensure the 'fair, expeditious and economical' determination of a dispute is not unfettered. These powers are still subject to the rules of natural justice. In CBP v CBS[2] ('CBP'), the High Court of Singapore was concerned with the question of whether Rule 28.1 ('Rule 28.1') of the Arbitration Rules of the Singapore Chamber of Maritime Arbitration[3] ('SCMA Rules') gave an arbitrator the procedural power to 'gate' witnesses (that is, to exclude that witness from presenting oral evidence) even in the event where one of the parties had insisted on the presentation of oral evidence of witnesses. The Court held that on a proper interpretation of Rule 28.1 it did not, but that even if it did, the arbitrator would still have been required to consider whether its rejection of hearing evidence from particular witnesses would amount to a denial of a party's right to a fair hearing, especially when that evidence was fundamental to that party's pleaded case.

Brief Facts

The plaintiff in this case (the 'Buyer') was a company incorporated in India engaged in the business of steel manufacturing and power generation. The defendant was a bank (the 'Bank') incorporated in Singapore. Prior to this dispute, the Buyer had entered into a sale and purchase agreement ('SPA') with a seller of coal (the 'Seller'). The receivables arising out of the SPA were assigned to the Bank, which proceeded to send to the Buyer a bill of exchange requiring payment of monies allegedly due under the SPA to the Bank by a certain due date. The Buyer failed to make payment by that due date. The Buyer later claimed that there had been a short delivery of coal to the Buyer, which the Bank denied (the 'Short Delivery Issue').

It was not disputed that, sometime later, on or around 2 December 2015 (the '2 December 2015 Meeting'), representatives of the Seller met with representatives of the Buyer to discuss the issue of the alleged outstanding payment and also the Short Delivery Issue. What was disputed, however, was whether a new oral agreement had been entered into between the Buyer and the Seller at the 2 December 2015 Meeting, wherein the Buyer and the Seller had agreed to a revised price of coal (that is, from US$74 to US$61 per metric ton (MT)) (the 'Revised Price Issue'). The Buyer insisted that such an oral agreement had been entered into at the meeting, whereas the Bank denied the same.

The Arbitration

In accordance with the SPA, the matter was referred to arbitration under the SCMA Rules and a sole arbitrator was appointed to hear the dispute. The arbitrator found that two of the main issues were the Short Delivery Issue and the Revised Price Issue. On the Short Delivery Issue, the arbitrator found that there was in fact evidence to show that there had been no short delivery of coal to the Buyer. On the Revised Price Issue, the arbitrator found that there was no evidence before him to make a finding that the parties had entered into a new agreement during the 2 December 2015 Meeting. However, the circumstances leading to the arbitrator's finding on the Revised Price Issue bears mentioning. Rule 28.1 of the SCMA states 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.

The Buyer had intended to call seven witnesses, six of whom were present at the 2 December 2015 Meeting and four of whom were representatives of the Seller or were otherwise not the Buyer's representatives. It was intended that these witnesses would prove that the parties did in fact reach an oral agreement on 2 December 2015. However, the Bank argued that under Rule 28.1, where the parties had not 'agreed on a documents-only arbitration or that no hearing should be held', the arbitrator was still at liberty to decide whether or not parties would be entitled to call witnesses to present evidence. This, purportedly, was due to the use of the word 'or' in the second part of Rule 28.1, which appeared to say that the rule was disjunctive and the arbitrator could therefore choose whether to hold a hearing for the presentation of evidence by witnesses or to hold a hearing for oral submissions only. The Bank further argued that there was no necessity to call for witnesses to be called as the dispute turned primarily on the contractual interpretation of the SPA. Therefore, the Bank submitted that arbitration should proceed on a documents-only basis or alternatively that a hearing could be conducted for oral submissions only, without the need for witnesses.

The arbitrator accepted the Bank's arguments and directed that the Buyer was to submit detailed witness statements for the purposes of allowing him (the arbitrator) to rule on whether it would be a 'documents-

only' proceeding or if an oral hearing with the presentation of witness evidence was necessary. On prompting from the Buyer that Rule 28.1 did not appear to give him such a power (that is, to decide whether or not oral evidence may or may not be led), the arbitrator shifted his position and proceeded to state that the Buyer would be considered to have 'waived any right to submit witnesses in the event of an oral hearing should it fail to comply with his directions for [witness] statements'. The Buyer persisted in its objections to the arbitrator's directions as these were 'contrary to [the] interest of justice and law' and refused to provide any such witness statements pursuant to such a direction. Given the Buyer's refusal to comply with his directions, the arbitrator proceeded to hold an oral hearing without permitting the Buyer to adduce oral evidence from its witnesses. Then, in light of the Buyer's purported lack of evidence, the arbitrator subsequently found in favour of the Bank in respect of the Revised Price Issue.

An arbitrator, said to be the master of its own procedure, should not be allowed to sacrifice concerns for due process at the altar of 'efficiency'.

Judicial Review

On judicial review, the High Court found that the arbitrator did not in fact have the remit under Rule 28.1 to decide to exclude witnesses if the parties did not agree to do so. It held that, on a holistic reading, Rule 28.1 was not concerned with the arbitrator's power to 'gate' witnesses. All that it said was simply that if parties did not agree to a 'documents-only' arbitration, then the arbitrator was bound to conduct an oral hearing. What would happen at the oral hearing depended on whether the parties wished to lead oral evidence or simply make oral submissions and the arbitrator did not have a discretion to direct otherwise.

Upon perusal of the relevant authorities, the High Court further went on to say that, in any event, an arbitral tribunal does not have 'free reign to reject witness evidence in the interest of efficiency'. Even if an arbitral tribunal had the procedural power to 'gate' witnesses, as is the case in many other rules of arbitration, this power was not an absolute one that allowed the tribunal to override the rules of natural justice. It could only be utilised if it is apparent that the intended witnesses' evidence were plainly irrelevant or repetitive. On the facts of this case, it was a fundamental aspect of the Buyer's defence that the parties had entered into a separate oral agreement at the 2 December 2015 Meeting. If so, this would have an impact on the Bank's claim under the SPA. Therefore, the arbitrator's failure to allow the Buyer to adduce witnesses to give oral evidence had the prejudicial effect of shutting out the Buyer's defence. The arbitral award was accordingly set aside.

Right To A Fair Hearing

At the heart of this dispute lies a perennial issue in arbitration—the tension between, on the one hand, the principle of procuring a just, expeditious, economical and final determination to a dispute and, on the other, the principles giving parties the right to a fair hearing of their matter. To this end, national courts have often recognised a tribunal's power to 'gate' witnesses and have declined to set aside arbitral awards on the grounds of that tribunal's decision to hear witness testimony (see, for example, the English Court of Appeal case of Dalmia Dairy Industries Ltd v National Bank of Pakistan,[4] cited in CBP).

The courts of Singapore have similarly exercised a policy of minimal curial intervention in their approach to arbitrations by adopting a stringent approach to the question of whether or not an arbitral award should be set aside for breach of the rules of natural justice. In Soh Beng Tee,[5] the Court of Appeal in Singapore held that in order to do so, the party alleging breach must establish the following four requirements:

1. to determine which rule of natural justice was breached;
2. to determine how it was breached;
3. to determine the way in which the breach was connected to the making of the award; and
4. to determine how the breach prejudiced its rights.

Indeed, the Court in that case perused the previous authorities from various jurisdictions and reached the conclusion that, although parties in an arbitration have a right to be heard effectively on every issue that may be relevant to the resolution of a dispute, this principle is circumscribed two principal considerations:

a. the need to recognise autonomy of the arbitral process by encouraging finality so that its advantage

as an efficient alternative dispute resolution process is not undermined; and

b. having opted for arbitration, the parties must have taken and to have acknowledged and accepted the attendant risk of having a very limited right of recourse to the courts.

It is therefore of particular (and welcome) interest in this case that the High Court of Singapore accorded an interpretation of Rule 28.1 favouring considerations of fairness, in the sense of a party's right to be heard, above the need for expedience and economy in arbitration. To give a wider interpretation, as sought by the Bank, was to give the arbitrator a power that was not intended to be available to him. However, the Court went further to say that even if Rule 28.1 did in fact give the arbitrator the power to 'gate' witnesses, whether impliedly or otherwise, the arbitrator's conduct in refusing to allow the Buyer to present crucial evidence on a key aspect of its case was 'sufficiently serious or egregious so that one could say that a party has been denied due process.'[6] This would be to utilise a procedural power to defeat the substantive rights of parties.[7]

The High Court's findings is, in the author's respectful view, one that strikes a proper balance between giving effect to the parties' interest in finality of a dispute and their interest in ensuring that the arbitral process takes place in a just and considered manner. An arbitrator, said to be the master of its own procedure[8], should not be allowed to sacrifice concerns for due process at the altar of 'efficiency'. While a party who has freely chosen arbitration as its means for dispute resolution cannot later ask to take a second bite at the cherry when they fail in their claim, this is an entirely different situation where that same party has been arbitrarily and unjustifiably denied the chance to present their full case by presenting relevant witnesses for examination before the arbitral tribunal.

Moving Forward

As more potential disputants choose to resolve their dispute by arbitration rather than litigation, the courts must continue to be alive to situations where an arbitral tribunal may overstep its intended boundaries, even as the courts continue to adopt a policy of minimal curial intervention. Such disputants do not only choose their mode of resolution (that is, arbitration), they also choose their means of resolution by choosing the system of rules they want to abide by. In doing so, they place their trust in the rules of their system of choice. A court must be allowed to examine if system has been utilised in a manner that defeats the parties' right to a fair hearing.

Where a party takes the position that the tribunal is empowered to 'gate' witnesses, and so exclude such evidence entirely, such a power must be clearly set out in the system of rules under which the tribunal is given jurisdiction to preside. Such a power, even where vested in the tribunal, is not a carte blanche to exclude evidence; the tribunal must exercise it in a manner that gives parties the opportunity to present and prove their case properly.

Notes

[1] Cap 143A, Rev Ed 2002.
[2] [2020] SGHC 23.
[3] 3rd Edn, 2015.
[4] [1978] 2 Lloyd's Rep 223, CA (Eng).
[5] [2007] 3 SLR(R) 86, CA (Sing).
[6] Ibid at [80].
[7] Ibid at [76].
[8] Ibid at [75].



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