

“Witness gating” – where arbitration tribunals refuse to allow certain witnesses to give evidence – is only permitted where the parties agree or the arbitral rules provide. Refusing to hear witnesses, or demanding witness statements to decide whether to allow witnesses, is not justifiable under an arbitrator’s general power to control proceedings.

So held the Singapore Court of Appeal in *CBS v CBP* [2021] SGCA 4, confirming a single judge’s ruling in *CBP v CBS* [2021] SGHC 23.

An arbitrator had insisted that the respondent provide witness statements to enable the arbitrator to decide whether to hold a hearing and to allow the respondent to call witnesses. When the respondent refused, saying the arbitrator did not have power to require statements or to exclude witnesses, the arbitrator denied the respondent’s request to call its witnesses. He held a short telephone hearing with the claimant in which the respondent did not participate, and made an award in favour of the claimant based on the claimant’s submissions.

The Singapore Chamber of Maritime Arbitration Rules (SCMA Rules) required a hearing unless the parties agreed otherwise, saying in r. 28.1:

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 submission.

The arbitrator justified his demand for witness statements before deciding to hold a hearing by r. 33.1(c) enabling him to “conduct such enquiries as may appear to the Tribunal to be necessary or expedient”.

The Court of Appeal held:

- Whether a hearing must be held depends on the agreement of the parties and the rules applicable to the arbitration.
- Tribunals may limit the oral examination of witnesses as part of their general case management powers when, for example, evidence from multiple witnesses is repetitive or of little relevance.
- Tribunals’ authority to limit witness testimony must be tempered by the duty to afford the parties a fair opportunity to present their case.
- A rule granting tribunals the widest discretion to ensure the just, expeditious, economical and final determination of the dispute is not an unfettered power that overrides the rules of natural justice.
- The broad procedural powers of an arbitral tribunal are subject to the fundamental rules of natural justice.
- Due latitude will be given to an arbitral tribunal to control the proceedings before it, but the tribunal must weigh the laudable desire for efficient and effectual arbitral proceedings against the necessity of affording parties their right to be heard.
- The fundamental nature of the rules of natural justice means that they must not be sacrificed in the name of efficacy and due weight must be afforded to those rules.
- The arbitrator had no power in this case to impose a condition that a party could be required to show that its evidence had “substantive value” before he decided whether to allow it being adduced.
- It would have been permissible for the arbitrator to seek witness statements for the purpose of facilitating the adducing of witness testimony and the presentation of evidence at the oral hearing under r 30.5 of the SCMA Rules.
- Primacy must be given to the express arbitral rules agreed by the parties over any customary practice in international arbitration.

Some arbitral rules contain an express power to gate witnesses, such as London Maritime Arbitrators Association Terms (2017) and the International Bar Association Rules on the Taking of Evidence in International Arbitration (2020). Without that authority, it is safer to fix a hearing for the presentation evidence and, at the same time, ask for the witness statements. At the hearing, the arbitrator can, as they see fit, manage the evidentiary process by, for instance, limiting the amount of time for individual witnesses.

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 respondent's witness statements, which had to be submitted beforehand.

Contacts



Cameron Ford

Partner, Singapore
E cameron.ford@squirepb.com



Rod Bundy

Senior Partner
E rodman.bundy@squirepb.com



Chris Bloch

Senior Associate, Singapore
E christopher.bloch@squirepb.com



Alvin Yap

Associate, Singapore
E alvin.yap@squirepb.com