Witness-Gating In International Commercial Arbitration: Guidelines For The Gatekeepers

JAMES M. HOSKING*

I INTRODUCTION

More than twenty years ago, I had the good fortune to work with Sir David AR Williams KNZM, QC on some of the earliest cases in the New Zealand courts applying the then freshly enacted Arbitration Act 1996. As part of that work, Sir David insisted that I become familiar with the case law from other jurisdictions that had enacted the United Nations Commission on International Trade Law (UNCITRAL) Model Law, including Singapore. A few years later, I had the pleasure — with no little help from Sir David — of being appointed New Zealand's delegate to the UNCITRAL Working Group considering amendments to the Model Law, and again I was schooled to coordinate closely with the Singapore delegation. In other words, as Singapore goes, so goes New Zealand — and today, Singapore's influence on international arbitration is truly global.

So, on the occasion of this symposium honouring Sir David's contribution to international arbitration, it is fitting to embrace his advice and look to Singapore for inspiration. In doing so, we come across the 2021 case of *CBS v CBP*,[1] a rare instance in which the steadfastly arbitration-friendly Singapore courts set aside an international arbitration award. The decision addresses what is often called "witness-gating": the arbitrator's power to exclude witness testimony. Sometimes this may occur because the arbitrator deems the evidence irrelevant or cumulative, or if the witness is called belatedly. Witness-gating may also encompass various gradations, such as allowing a witness to submit a written statement but not to testify orally. In *CBS*, however, the arbitrator excluded *all* witness evidence in *any* form and despite the fact that the evidence was critical to a party's case. According to the Singaporean courts, that was a bridge too far.

---

* LLM (Harvard), BA/LLB (Hons) (Auckland). James is a Founding Partner of New York-based dispute resolution boutique Chaffetz Lindsey and was previously a barrister in Auckland. Thanks to Rebecca Meyer and Thomas Hildebrand for their assistance with this article.

1 *CBS v CBP* [2021] SCGA 4 [*CBS* Court of Appeal].

As will be discussed below, the facts in *CBS* are unusual. Yet, the underlying procedural dilemma faced by the arbitrator is not uncommon. One party demands a multi-day hearing with several fact witnesses (in this case including adverse and third-party witnesses) while the other party disputes the need for any need for witness testimony (and here supported a documents-only arbitration). The arbitrator is asked to balance these competing positions, while also remaining attentive to achieving efficiency and expedition. Indeed, most institutional rules now encourage employing case management techniques intended to save time and costs, many of which are directed at fast-tracking the hearing and limiting oral evidence. Some initiatives, such as expedited arbitration, even contain presumptions against holding any oral hearing. Meanwhile, this trend towards minimising reliance on oral witness testimony has been exacerbated by the more "curated" remote hearings that have become commonplace in response to the COVID-19 pandemic.

With that background, this article describes the *CBS* case (Part II) before turning to an analysis of two key considerations in witness-gating cases: the arbitrator's authority to exclude witness evidence (Part III) and cases in which reviewing courts have been asked to treat witness-gating as a breach of natural justice that demands setting aside or refusing enforcement (Part IV). Finally, based on the preceding survey, the article offers some practical guidance on where, when and how witness-gating might be appropriate (Part V).[2]

II *CBS V CBP*

In *CBS v CBP*, the Singapore Court of Appeal upheld the Singapore High Court's decision to set aside an international arbitration award due to the arbitrator's refusal to allow a party's witnesses to give oral testimony unless they first submitted witness statements.[3] The arbitrator made this decision even though the testimony sought to be obtained from the witnesses was clearly central to the buyer's defence.

2 For a general discussion of the tribunal's discretion to exclude witness testimony, an analysis of "witness-gating" and due process issues, see: Franco Ferrari, Friedrich Rosenfeld and Dietmar Czernich *Due Process as a Limit to Discretion in International Commercial Arbitration* (Kluwer, Netherlands, 2020); Michael Hwang *CBP v. CBS [2020] SGHC 23, Supreme Court of Singapore, High Court, Originating Summons No. 215 of 2019, 31 January 2020* (Kluwer, 2020); Judith Levine "Can Arbitrators Choose Who to Call as Witnesses? (And What Can Be Done If They Don't Show Up?)" in Van den Berg (ed) *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series (Vol 18)* (ICCA, 2015) at 337; and Jeffrey Waincymer *Procedure and Evidence in International Arbitration* (Kluwer, the Netherlands, 2012) at [12.3].

3 *CBS* Court of Appeal, above n 1; and *CBS v CBP* [2020] SGHC 23 [*CBS* High Court] at [6], [78] and [79].

Facts

A Singaporean company (the Seller) entered into two contracts for shipments of coal to an Indian company (the Buyer),[4] and subsequently assigned the receivables due under the second contract to a bank (the Bank).[5] Following the second delivery, the Buyer refused to pay the Bank as requested, eventually claiming a discrepancy in the delivery and offering only a reduced price.[6] The Buyer's primary defence, which the Bank denied, was that the parties had orally agreed to a reduced price for both shipments.[7]

The Bank commenced arbitration for the contract price plus interest, pursuant to an arbitration clause in the contract providing for arbitration by a sole arbitrator under the Singapore Chamber of Maritime Arbitration Rules (SCMA Rules).[8]

The Buyer filed both defences and counterclaims, along with a list of seven witnesses, six of whom Buyer claimed were present at the meeting where the parties allegedly agreed to the disputed price reduction.[9] The Seller objected to the witness list, claiming the witnesses were unnecessary.[10] The arbitrator requested a witness statement from each of the Buyer's seven witnesses before he would decide on whether to allow a hearing with witness testimony or to proceed based on documents only.[11] The Buyer refused to provide witness statements, arguing that it was not required to do so, and stating that it was a "breach of the rules of natural justice" not to allow it to call witnesses.[12]

The arbitrator denied the Buyer's request not to provide witness statements, stating that if the Buyer did not comply, then "it would be taken to have 'waived' its right to present witness evidence in the event of an oral hearing".[13] The Buyer still did not submit any witness statements. The arbitrator proceeded with a hearing for oral argument only, at which the Buyer refused to appear.[14] The arbitrator

4 *CBS* High Court, above n 3, at [3]–[4].

5 At [9]–[11].

6 At [16].

7 At [19].

8 At [6]. In accordance with Singapore Chamber of Maritime Arbitration Rules [SCMA Rules], r 22.1, the arbitration was seated in Singapore.

9 At [28]. The Buyer was late in submitting both its response on the merits and its witness list: at [24]–[28].

10 At [29].

11 At [33].

12 At [34]–[36].

13 At [38].

14 At [41]–[42]. The Bank appeared at the telephonic hearing, at which its submissions lasted some 10 minutes and introduced no new documents, evidence or argument.

ultimately granted the Bank's claim plus interest, finding that the Seller's second shipment was not deficient and that, although there was a meeting between the parties, there was no agreement to amend the contract price.[15]

High Court

The Buyer commenced proceedings in the High Court to have the award set aside pursuant to s 24(b) of the Singapore International Arbitration Act 2002 (SIAA) on the ground that the refusal to allow witness testimony was a breach of natural justice.[16] Section 24(b) states that if a "breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced", the arbitral award may be set aside.[17] In Singapore, there are four requirements to establish a breach of natural justice:

> (1) demonstrating which rule of natural justice was breached;
> (2) demonstrating how it was breached;
> (3) demonstrating how the breach connected to the making of the award; and
> (4) demonstrating how the breach prejudiced the party's rights.[18]

Rule 28.1 of the SCMA Rules states that "the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions". The High Court found that, because of the disjunctive "or", the provision "must be read *holistically*, such that oral submissions cannot be utilised as an *alternativ*e to the presentation of evidence by witnesses".[19] Thus, the High Court found that, in applying r 28.1:[20]

> [I]f a party wishes to present witness testimony, an oral hearing must be held, whether for the leading of oral evidence or for the other party to cross-examine the witnesses on their witness statements.

15 At [44]–[46].

16 At [48]; and International Arbitration Act 2002 (Singapore), s 24(b). The Buyer separately asserted that set aside was warranted because it was unable to present its case, but the Court explained that this was a facet of a breach of natural justice, and thus treated the two separate claims as one: at [49]–[50].

17 International Arbitration Act, s 24(b).

18 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28, [2007] 3 SLR(R) 86 at [29] as cited in *CBS* High Court, above n 3, at [53].

19 *CBS* High Court, above n 3, at [65] (emphasis in original).

20 At [66].

In other words, the arbitrator could only hold a hearing for oral submissions alone where all parties agreed to forego oral examination of any witnesses.[21] Similarly, the arbitration could only be documents-only where the parties agreed not to have a hearing at all.[22]

In reaching this conclusion, the High Court explained that the SCMA Rules, unlike other arbitration rules, do not provide the arbitrator with any explicit "witness-gating" powers.[23] The High Court further explained that "while the expeditious disposition of matters is a relevant consideration in arbitration, … this does not grant the arbitrator free reign to reject all witness evidence in the interest of efficiency".[24] Although the High Court noted that the right to be heard is not unlimited, and that a party's request to present witnesses must be reasonable, and not "irrelevant or superfluous", it concluded that where a party has a witness who will testify on a matter that is "plainly relevant to a particular issue", the witness must be permitted to testify.[25] In this case, whatever flaws there may have been in the Buyer's case, the arbitrator must have known that the witnesses were "fundamentally important" to the Buyer's defence premised on an oral agreement.[26]

Having determined that the arbitrator denied the Buyer an opportunity to fully present its case, the High Court further held that the denial related to the making of the award and that it prejudiced the Buyer, such that there had been a breach of natural justice. Accordingly, the award was set aside.[27]

Court of Appeal

In the *CBS* Court of Appeal decision, the appellate court largely reiterated the High Court's opinion. The Court of Appeal concluded that the SCMA Rules neither authorise the arbitrator to impose a documents-only proceeding nor do they provide witness-gating powers, and thus an arbitrator can only dispense with an oral hearing with witness testimony if the parties so agree.[28] Although the Court of Appeal acknowledged the arbitrator's sensitivity to the Buyer's uncooperative behaviour and inartful defence, it ultimately

21 At [66]–[67].

22 At [66]–[67].

23 At [68].

24 At [71].

25 At [74] and [76]–[77].

26 At [78]–[79].

27 At [91]–[93].

28 *CBS* Court of Appeal, above n 1, at [55]–[58].

highlighted the Buyer's "unequivocal" requests for an oral hearing to present witnesses.[29] Relatedly, the Court of Appeal was clearly concerned that the arbitrator's conduct revealed his misunderstanding that he could demand witness statements for the purpose of deciding whether to hold a documents-only arbitration when neither party had agreed to one.[30]

The Court of Appeal suggested that the arbitrator should have ordered the Buyer to produce witness statements and scheduled a hearing with witness testimony, rather than asking for the statements as a prerequisite to deciding whether the Buyer's witnesses could testify.[31] The Court explains that the arbitrator still could have controlled the witness testimony as needed — for example, by shortening the time for testimony.[32] The Court of Appeal thus indicates that the arbitrator can exercise significant *control* over the proceedings, but that complete exclusion of witnesses was beyond the bounds of his authority.[33]

Comment

There are several unique characteristics of *CBS* that may limit its relevance to other cases in which an arbitrator seeks to limit or exclude witness evidence. Most importantly, the SCMA Rules (as interpreted by the courts in *CBS*) are unusual in requiring an arbitrator to allow live witness testimony unless the parties agree otherwise. In this context, it is apparent that the arbitrator proceeded at first under the misapprehension that he had the authority to order a documents-only arbitration. Related to the foregoing, the arbitrator's attempt to condition allowing witness testimony on first producing witness statements was an awkward procedural misstep (particularly where statements from non-party witnesses were sought). Finally, the arbitrator excluded *all* witness testimony and did so in circumstances where — no matter what the merits of the argument might be — the excluded evidence was manifestly essential to the Buyer's defence.

---

29 At [57], [71], [73] and [78].

30 At [76].

31 At [78].

32 At [78].

33 At [61]: "We have little difficulty accepting that tribunals have the power to limit the oral examination of witnesses as part of their general case management powers. This can occur when the evidence from multiple witnesses are repetitive or of little or no relevance to the issues. This much is also envisioned in Art 19(2) of the Model Law. However, [SCMA Rules] r 25.1 [encouraging the just, expeditious and final disposal of the matter] cannot be an unfettered power that overrides the rules of natural justice."

The decision to set aside the award is therefore not surprising.[34] Yet, even in the unique circumstances of the case, *CBS* raises two questions of more general application to witness-gating that will be explored in the next Parts of this article.

First, what is the source and scope of the arbitrator's authority to exclude witness testimony? This in turn may impact what the test is that the arbitrator should apply in exercising the discretion to exclude, whether the power extends to written and oral witness evidence, and whether the arbitrator can order a "documents-only" arbitration (and what that term means).

Second, what factors are relevant to protecting the award from a subsequent challenge? In the *CBS* case, the courts balanced several considerations, including the degree to which the excluded evidence was a necessary part of the Buyer's case, respecting arbitral procedural discretion and promoting efficiency. The courts' test is, of course, premised on Singapore's law on breach of natural justice. But, as will be discussed below, some factors are common across various legal systems.

III SOURCES OF ARBITRAL AUTHORITY TO EXCLUDE WITNESS EVIDENCE

The following survey of common sources of arbitral authority in arbitration rules, soft law, national law and the Model Law reveals little uniformity in the power to exclude witness evidence.

Arbitration Rules

1 International Chamber of Commerce Arbitration Rules 2021 (ICC Rules)

Article 25(2) of the 2021 ICC Rules provides that the "arbitral tribunal *may* decide to hear witnesses, experts appointed by the parties or any other person".[35] Commentators explain this means that an arbitral tribunal is "not necessarily required" to hear any or all of the persons

34 While the set-aside is unsurprising, the result flows largely from the courts' interpretation that SCMA Rules, r 28.1 does not permit a hearing for oral submissions only, which is open to question. See discussion of United Nations Commission on International Trade Law [UNCITRAL] Arbitration Rules, art 17(3) at Part III(A)(7) below.

35 International Chamber of Commerce *Arbitration Rules 2021* [ICC Rules], art 25(2) (emphasis added).

listed in art 25, "even if this is requested by a party".[36] The tribunal may do so but it has no obligation to, although this is subject to "a party's entitlement to the 'reasonable opportunity to present its case'".[37] Agreeing that the tribunal is "under no obligation" to grant requests to hear witnesses, some commentators caution that where the tribunal refuses such requests, it should "normally give reasons … so as to avoid assertions of lack of due process which could affect the validity and enforceability of the award".[38]

In addition, art 26 states that a hearing "shall" be held if any party requests one but that the "arbitral tribunal shall be in full charge of the hearings", which commentators have explained means that:[39]

> [t]he Arbitral Tribunal is not bound by any national legal tradition and may take a proactive approach in order to gather all the facts that it considers relevant, at the lowest cost and in the least time.

The emphasis on efficiency of arbitral proceedings seems to weigh in favour of allowing the arbitrator, in their judgment, to exclude witnesses.

This is further supported by the case management techniques set out in the appendices to the 2021 ICC Rules. Appendix IV on "Case Management Techniques" suggests "[l]imiting the length and scope of … oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues".[40] While art 3 of appendix VI states that:[41]

> The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate [and] … the arbitral tribunal may, after consultation with the parties, decide not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts

Further stating that:[42]

> The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the

36 Yves Derains and Eric A Schwartz *A Guide to the ICC Rules of Arbitration* (2nd ed, Kluwer Law International, The Hague, 2005) at 275.

37 At 276.

38 Herman Verbist, Erik Schäfer and Christoph Imhoos *ICC Arbitration in Practice* (2nd ed, Kluwer Law International, The Netherlands, 2015) at 141.

39 Derains and Schwartz, above n 36, at 289–290.

40 ICC Rules, appendix IV(e).

41 ICC Rules, art 3(4).

42 ICC Rules, art 3(5).

> parties, with no hearing and no examination of witnesses or experts

2 International Centre for Dispute Resolution's International Arbitration Rules (ICDR Rules)

Although the ICDR Rules do not address witness-gating specifically, the rules provide that the tribunal may "exclude cumulative or irrelevant testimony or other evidence," and that "[t]he tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination."[43] Commentators state, "emphasizing … the arbitrators' duty to conduct the arbitration expeditiously",[44] Article 20(4) confirms that:

> "a party is not entitled, in the guise of its right to be heard, to make factual assertions or produce evidence that is irrelevant or immaterial to the dispute at bar[, t]hus the right to be heard is not violated if the arbitrators, either ex officio or upon the request of a party, exclude or dismiss factual allegations or evidence that fail(s) to make a material contribution to the resolution of the case"

The arbitrators "enjoy broad discretion" under the ICDR Rules, and may "conduct the proceedings as appropriate in the individual circumstances of the case and under applicable law".[45] Nonetheless, arbitrators tend to exercise caution in excluding evidence.[46]

3 London Court of International Arbitration's Arbitration Rules (LCIA Rules)

Most significantly, art 20.4 of the LCIA Rules (effective 1 October 2020) states that the "Arbitral Tribunal … may … refuse or limit the written and oral testimony of witnesses", which commentators affirm means that the arbitrator "has authority over whether or not to allow witness testimony at all – whether that testimony is written or oral, from a fact witness or from an expert witness".[47] As with the ICC Rules, additional provisions in the LCIA Rules lend support to the

---

43 International Centre for Dispute Resolution *International Arbitration Rules* [IAR], arts 22(4) and 26(3).

44 Martin F Gusy and James M Hosking *A Guide to the ICDR International Arbitration Rules* (2nd ed, Oxford University Press, Oxford, 2019) at 210–211.

45 At 211.

46 At 211.

47 London Court of International Arbitration *Arbitration Rules* [LCIA Rules], art 20.4; and Lisa Richman "Hearings, Witnesses and Experts" in Maxi Scherer, Lisa Richman and Rémy Gerbay (eds) *Arbitrating under the 2020 LCIA Rules: A User's Guide* (Kluwer, Netherlands, 2021) at 268.

arbitrator's broad discretion. For example, art 19.1 makes clear that "[a]ny party has the right to a hearing" if requested, but art 19.2 vests broad discretion over the conduct of the proceedings, stating "[t]he Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing".

4 Hong Kong International Arbitration Centre's Administered Arbitration Rules (HKIAC Rules)

Under the 2018 HKIAC Rules, "[t]he arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence."[48] Relevant commentary emphasises that, "[a]s a general rule, all relevant evidence that is material to the outcome of the arbitration is admissible" but notes that the arbitrators do retain discretion to exclude admissible evidence.[49] One particular circumstance where the arbitrators can exclude evidence (presumably including witnesses) is "where the evidence is adduced to establish a fact which the tribunal considers has already been established by other evidence".[50]

5 Singapore International Arbitration Centre's Arbitration Rules (SIAC Rules)

The SIAC Rules (effective 1 August 2016) provide a more explicit provision on the arbitrator's authority to exclude witness testimony. Article 19(4) explicitly provides that:[51]

> The Tribunal may, in its discretion, … exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

While art 25(2) directs that "[t]he Tribunal may allow, refuse or limit the appearance of witnesses to give oral evidence at any hearing."[52] In evaluating these rules, one commentator notes that a "party's right to be heard has its limits [and] consistent with international arbitral practice, a SIAC tribunal has the power to allow, refuse, or limit the appearance of witnesses", which he says allows the tribunal to carry

48 Hong Kong International Arbitration Centre *Administered Arbitration Rules* [HKIAC Rules], art 22.3.

49 Michael J Moser and Chiann Bao *A Guide to the HKIAC Arbitration Rules* (Oxford University Press, Oxford, 2017) at 193.

50 At 193.

51 Singapore International Arbitration Centre *Arbitration Rules* [SIAC Rules], art 19(4).

52 SIAC Rules, art 25(2).

out its "overriding obligation" under the SIAC Rules to "ensure that the procedure is fair, expeditious, and economical".[53]

6 Stockholm Chamber of Commerce's Arbitration Rules (SCC Rules)

The 2017 SCC Rules, and commentaries on the same, do not specifically address the tribunal's authority to exclude witness evidence. However, the SCC Rules do provide that the "admissibility … of evidence shall be for the Arbitral Tribunal to determine".[54] Commentators on the SCC Rules note that "[i]t is relatively unusual for Arbitral Tribunals not to admit a certain piece of evidence" given the possibility of a later challenge and the practical point that it may be difficult to deem evidence irrelevant before having heard each party's full submission.[55] On the other hand, exclusion may be appropriate where the evidence "is submitted after the relevant deadline set out in the procedural timetable … [or is] manifestly irrelevant", for example.[56]

7 United Nations Commission on International Trade Law's Arbitration Rules (UNCITRAL Rules)

Article 17(3) of the UNCITRAL Rules (as revised in 2010) states that:[57]

> "[i]f 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."

As a preliminary point, the language of the provision is remarkably close to that of r 28.1 of the SCMA Rules, which was interpreted "holistically" in *CBS* to require an oral hearing to be held (if requested) for presentation of oral evidence and not just for oral submissions. However, the same result may not apply here as the UNCITRAL Rules provide broader authority to the tribunal. First, art 17(3) goes on to provide that only "absent a request for a hearing"

53 John Choong, Mark Mangan and Nicholas Lingard *A Guide to the SIAC Arbitration Rules* (2nd ed, Oxford University Press, Oxford, 2018) at 183.

54 Stockholm Chamber of Commerce *Arbitration Rules* [SCC Rules], art 31(1).

55 Jakob Ragnwaldh, Fredrik Andersson and Celeste E Salinas Quero *A Guide to the SCC Arbitration Rules* (Kluwer Law International, The Hague, 2019) at 102.

56 At 102. On the other hand, as with several other sets of expedited rules, the SCC's 2017 Rules for Expedited Arbitrations do not even require a hearing. Article 33(1) provides "[a] hearing shall be held only at the request of a party *and* if the Arbitrator considers the reasons for the request to be compelling." (emphasis added).

57 United Nations Commission on International Trade Law *UNCITRAL Arbitration Rules*, art 17(3).

may the tribunal "decide whether to hold such hearings" or whether to proceed on documents only. In other words, if requested, an oral hearing must be held.[58] But with respect to the *content* of that hearing, art 28(2) provides that "witnesses … may be heard under the conditions and examined in the manner set by the arbitral tribunal", and art 27(4) states that "the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered". Indeed, commentators note that art 28 "reflects the view of the 2010 drafters that 'the arbitral tribunal should enjoy wide discretion in organizing hearings'".[59]

Soft Law Instruments

1 International Bar Association's Rules on the Taking of Evidence in International Arbitration (IBA Rules)

The 2020 IBA Rules grant the tribunal broad powers to "control" witness testimony, including explicitly the power to exclude a witness from appearing. Article 8(3) provides that:[60]

> The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Articles 9.2 or 9.3.

The official IBA Rules Commentary from the Task Force for the Revision of the IBA Rules says that art 8(3) "makes clear that the power to manage the evidentiary hearing rests with the arbitral tribunal, not the parties".[61] Nonetheless, commentators have noted that the standard for exclusion or limitation is high, requiring a finding that the testimony would be irrelevant, immaterial, unreasonably

---

58 James Castello "The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules" in Frank-Bernd Weigand and Antje Baumann (eds) *Practitioner's Handbook On International Commercial Arbitration* (3rd ed, Oxford University Press, Oxford, 2019) at 17.260.

59 At 17.259. Castello quotes the *Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session* UN Doc A/CN.9/669 (9 March 2009) at [55].

60 International Bar Association *IBA Rules on the Taking of Evidence in International Arbitration* (17 December 2020), art 8(3).

61 *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration* (January 2021) at 26. See also Roman Khodykin and Carol Mulcahy *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press, Oxford, 2019) at 377: "At its heart is Article 8.2 which gives the tribunal complete control over the evidentiary hearing at all times, including the right to limit or exclude questions to, or the appearance of, a witness."

burdensome, duplicative or otherwise fall within one of the narrow categories of inadmissibility in art 9(2), such that "some tribunals may be reluctant to shut out the evidence of such a witness tendered in this way".[62] Accordingly, some arbitrators may prefer to admit evidence and then simply accord it little to no weight, although they "may be more inclined to … exclude testimony if a witness' evidence is manifestly irrelevant, immaterial, or repetitious".[63]

2 Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)

In an effort to provide rules for a "more streamlined procedure actively driven by the tribunal," the Prague Rules were released in 2018.[64] Article 5.2 specifically allows witness-gating, stating that "[t]he arbitral tribunal, after having heard the parties, will decide which witnesses are to be called for examination during the hearing", and:[65]

> … may decide that a certain witness should not be called for examination during the hearing, either before or after a witness statement has been submitted, in particular if it considers the testimony of such a witness to be irrelevant, immaterial, unreasonably burdensome, duplicative or for any other reasons not necessary for the resolution of the dispute.

The Prague Rules thus envisage that the tribunal will play an active role in "gatekeeping" the proffered witness testimony.[66] Additionally, the Prague Rules provide a nuanced framework for the tribunal's discretion to allow use of written witness statements. Article 5.6 authorises a party to submit a witness statement but makes clear that the tribunal "may decide that such witness nonetheless should not be called for examination at the hearing". However, according to art 5.7:

---

62 Khodykin and Mulcahy, above n 61, at 381–382: "While the tribunal has the right under Article 8.2 to exclude evidence at the hearing, this right arises only where the tribunal considers such evidence to 'irrelevant', 'immaterial', 'unreasonably burdensome', 'duplicative', or one of the grounds of objection to evidence set out in Article 9.2 applies. Some tribunals may be reluctant to shut out the evidence of such a witness tendered in this way."

63 R Doak Bishop, James Crawford and W Michael Reisman "Procedure and Proof: Developing the Case" in *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International, The Hague, 2014).

64 Rules on the Efficient Conduct of Proceedings in International Arbitration (2018) [Prague Rules]. See also the note from the Working Group: at 2.

65 Article 5.3.

66 Lukas Hoder "Prague Rules vs IBA Rules: Taking Evidence in International Arbitration" in Christian Klausegger and others (eds) *Austrian Yearbook on International Arbitration 2019* (Manz Verlag Wien, Vienna, 2019) at 169.

> If a party insists on calling a witness whose witness statement has been submitted by the other party, as a general rule, the arbitral tribunal should call the witness to testify at the hearing, unless there are good reasons not to do so.

Indeed, even at the hearing, examination of any witness is "conducted under the direction and control of the arbitral tribunal".[67]

UNCITRAL Model Law / National Laws

1 UNCITRAL Model Law

Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration (as modified in 2006) states that the "power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence". However, this power is circumscribed by the parties' agreement on any evidentiary procedures.[68] Moreover, in exercising its discretion, the tribunal must comply with the art 18 mandate that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting [its] case."[69] As one commentary notes "[a]lthough Article 18 is only one sentence long, it is the heart of the law's regulation of arbitral proceedings."[70] Accordingly, the arbitrators' power to exclude evidence is tempered by this fundamental principle.

Further, art 24(1) of the Model Law states that:

> the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials

However, this broad authority is explicitly limited to being "subject to any contrary agreement by the parties" and, further, the tribunal is required to hold a hearing at an appropriate stage "if so requested by a

---

67 Prague Rules, art 5.9. While the Prague Rules encourage a tribunal-driven process and a documents-only procedure, ultimately a hearing must be held if one of the parties so requests: see Prague Rules, art 8.2.

68 Howard M Holtzmann and Joseph Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, The Hague, 1989) at 566–567.

69 United Nations Commission on International Trade Law *UNCITRAL Model Law on International Commercial Arbitration* (1985) [Model Law], art 18.

70 Holtzmann and Neuhaus, above n 68, at 550.

party".[71] Accordingly, the tribunal must hold a hearing if either party requests one.[72]

The combined effect of these provisions is to afford the arbitrator discretion to exclude evidence but subject to the parties' agreement to limit that discretion and either party's right to demand a hearing of some sort. As will be discussed in Part IV, courts in Model Law jurisdictions have generally been willing to recognise that the parties' rights to curtail the arbitrator's discretion are not unlimited.

2 National Laws

Beyond the Model Law, most national laws do not provide anything other than general statements about the arbitrator's powers. However, a few European jurisdictions do address the arbitrator's control over oral hearings, and more specifically over witness testimony.

For example, the Netherlands' Arbitration Act 1986 states that :[73]

> "[t]he arbitral tribunal may, at the request of one of the parties or on its own initiative, order parties to provide evidence by means of hearing witnesses and experts, unless otherwise agreed by the parties",

Granting the tribunal discretion but subject to party agreement otherwise. Where the parties have not agreed that they are guaranteed the right to present witnesses: [74]

> "[g]enerally, a tribunal only needs to accede to a request to hear witnesses if the request is adequate, in other words, relevant, specific, and serious (unless the parties have agreed otherwise)".

While not addressing the issue directly, the Swiss Private International Law Act 1987 has been interpreted by practitioners to allow witness-gating in appropriate circumstances. The relevant provision states that the "arbitral tribunal takes the evidence itself".[75] Swiss commentators concur that this provision allows the arbitrators to "refuse to hear a witness if it considers that their testimony is not relevant or would

71 Model Law, art 24(1).

72 Peter Binder *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (4th ed, Kluwer Law International, The Hague, 2019) at 372: where one party requests a hearing, "the tribunal has no discretion to decide whether or not the party's request is legitimate and must … hold oral proceedings."

73 Arbitration Act 1986 (Netherlands), art 1039(2); and Jacob van de Velden and Abdel Khalek Zirar "Country Report: The Netherlands" in Ferrari, Rosenfeld and Czernich, above n 2, at 300.

74 van de Velden and Zirar, above n 73, at 301.

75 Federal Act on Private International Law 1987 (Switzerland), art 184(1).

appear unreasonably burdensome or involve cost disproportionate to the likely result".[76]

The Swedish Arbitration Act states that:[77]

> "[t]he arbitrators may refuse to admit evidence which is offered where such evidence is manifestly irrelevant to the case or where such refusal is justified having regard to the time at which the evidence is offered."

A commentator suggests, however, that Swedish law would not allow for witness-gating given its "emphasis on party autonomy and the adversarial system, which would mean that 'arbitrators sitting in Sweden would *not* exclude evidence on their own motion'".[78] This does not preclude the arbitrators from making such exclusion following a party's application, but it provides another interesting practical constraint on the tribunal's authority.

Conclusion

In conclusion, there is little uniformity in the exact scope of arbitral authority to exclude witness testimony. Although several instruments grant the arbitrator a general discretion to "manage" the evidence and "control" the hearing, others are silent. Amongst the few sources that explicitly address witness-gating, there are differences: some soft law and national laws provide specific criteria for exclusion, while the Prague Rules simply trust this to the tribunal. As will be discussed below, there are some commonalities, such as the power to exclude cumulative or irrelevant evidence. Further, most instruments include an overarching protection of some formulation of the parties' right to be heard or to have a reasonable opportunity of presenting their cases. Accordingly, whether and to what extent an arbitrator is empowered to refuse to hear witness evidence will require a close case-by-case analysis of the applicable authorities and careful invocation. Similarly, attention must be paid to the issue of whether — as in most instances — a party has a right to request a hearing and whether the arbitrator may determine the scope of that hearing so as to limit, or exclude, oral witness evidence.

---

76 Bernhard Berger and Franz Kellerhals *International and Domestic Arbitration in Switzerland* (2nd ed, Hart, 2010) at 348 as cited in Levine, above n 2, at 337; and Nathalie Voser and Petra Rihar "Right to be heard not violated by arbitrator's refusal to hear witness whose evidence anticipated to be irrelevant" (2 May 2012) Thomson Reuters Practical Law <https://uk.practicallaw.thomsonreuters.com>.

77 Swedish Arbitration Act 1999, s 25.

78 Kaj Hobér *International Commercial Arbitration in Sweden* (Oxford, 2011) at [6.108] (emphasis in original) as cited in Levine, above n 2, at 337.

IV CASE LAW SURVEY: WITNESS-GATING AS A BASIS FOR CHALLENGING AWARDS

This section outlines some prominent decisions from key jurisdictions in which arbitral awards have been challenged — either seeking to have the award set aside or resisting enforcement — on the basis of the tribunal having excluded witness testimony or refused to hear oral testimony. In all cases, the primary question for the reviewing court has been whether there has been a breach of "natural justice": Did the tribunal's refusal to hear a party's proffered evidence deprive that party of the fundamental right to make its case?[79] This article does not attempt a normative assessment of where the bounds of natural justice ought to be drawn. Rather, it briefly surveys what criteria have been applied in some leading cases on witness-gating to identify common trends that may inform the practical guidance in Part V.[80]

Court Decisions on Witness-Gating

1 Canada

In *CE International Resources Holdings LLC v Yeap*, the award debtor argued that the award should not be enforced under British Columbia's International Commercial Arbitration Act (based on the UNCITRAL Model Law) and the New York Convention as being contrary to Canada's public policy because the respondent's Thai law expert was unable to attend the hearing to give oral testimony.[81] The challenging respondent, an individual, had been found by the arbitrator — under applicable British Virgin Islands law (as the place of incorporation) — to be the *alter ego* of the corporate respondents and therefore subject to the arbitrator's jurisdiction.[82] The challenger argued that Thai law was applicable to the *alter ego* issue and had requested that the arbitrator reschedule the hearing to a day when his

79 See *Cukurova Holding AS v Sonera Holding BV* [2014] UKPC 15, [2015] 2 All ER 1061 at [32]. The terminology — natural justice, due process, fundamental fairness and the right to be heard — may change depending on the jurisdiction, but the bedrock question remains the same.

80 As discussed above, there are multiple forms of "witness-gating" and this survey encompasses a wide range of distinct scenarios. But regardless of the *type* of witness-gating at issue, reviewing courts typically apply some form of natural justice analysis.

81 *CE International Resources Holdings LLC v Yeap* 2013 BCSC 1804, [2013] BCJ 2158 at [14] and [44]–[45]. The claimant sought enforcement in British Columbia, Canada: at [14]. The underlying arbitration arose out of a contract governed by New York law, which called for arbitration under the ICDR Rules seated in the United States: at [1], [33] and [36].

82 At [51].

Thai law expert could attend.[83] The arbitrator refused on the basis that Thai law was irrelevant.[84] The British Columbia Supreme Court agreed that British Virgin Islands law applied, so the testimony of a Thai law expert was unnecessary, and its exclusion did not harm the respondent.[85]

2 France

In *Société Soubaigne v Société Limmereds Skogar*, the respondent in the underlying arbitration petitioned the French courts to set aside an award on the ground that it violated French public policy.[86] The dispute arose from three contracts for the sale of wood, and the arbitrators were appointed to resolve it as *amiables compositeurs*.[87] During the proceedings, the respondent sought to call as a witness a broker who had been involved in the negotiation and performance of the contracts.[88] The arbitrators declined for two reasons. First, the respondent did not call the broker as a witness until the arbitration had already commenced. Secondly, the tribunal already had telex messages authored by the broker, which rendered his oral testimony redundant.[89]

The Paris Court of Appeals held that the arbitrators' decision to exclude the broker's testimony did not violate public policy.[90] Agreeing with the tribunal, the Court noted the lateness with which the witness was called and the redundancy of his testimony.[91] Regarding the first point, it found that the arbitrators' mandate to hear all witnesses involved in the dispute did not require them to "hear persons not mentioned in the submission[s] … and only requested during the course of arbitration".[92] As to the second, the Court equated the tribunal to judges who are only required to "proceed to further investigation" if there is insufficient material to render a decision.[93] The Court agreed with the arbitrators that the telex messages made the

83 At [49].

84 At [49].

85 At [51]–[52].

86 *Société Soubaigne v. Société Limmereds Skogar,* Cour d'appel [CA], Paris, Mar. 15 1984, 1re Ch. Suppl., cited in *Société Soubaigne v. Société Limmereds Skogar, Cour d'appel de Paris (1re Ch. Suppl.)*, 2 J. Int'l Arb. 103 (1985).

87 *Société Soubaigne,* above n 86.

88 *Société Soubaigne,* above n 86.

89 *Société Soubaigne,* above n 86.

90 *Société Soubaigne,* above n 86.

91 *Société Soubaigne,* above n 86.

92 *Société Soubaigne,* above n 86.

93 *Société Soubaigne,* above n 86.

broker's testimony unnecessary. Finally, the decision not to hear the broker's testimony caused no prejudice.[94]

3 Hong Kong

In the Hong Kong-seated arbitration at issue in *P v S*, the respondent sought to introduce evidence that it had not breached its contractual obligations because the parties had negotiated a second, separate agreement that replaced the first.[95] The arbitrator found that the respondent had not adequately identified what issues required a hearing, and ordered the arbitration to proceed on a documents-only basis and without witness statements.[96]

The respondent sought to have the award set aside on the basis that it was unable to present its case, a ground for annulment under the Hong Kong Arbitration Ordinance (which adopts the UNCITRAL Model Law).[97] The Court noted that to set aside an arbitral award in Hong Kong, a party must show that it suffered prejudice due to a "serious or egregious error which undermine[d] due process" during the proceedings.[98] Applied to the arbitrator's decision to exclude evidence, the respondent would have to state with particularity that it could have filed evidence that would have materially affected the outcome of the case, but was prevented from doing so.[99] The Court assessed the evidence that the respondent would have introduced and found that it was either too generalised or irrelevant.[100] The Court held that without specific, material evidence, the respondent could not carry its burden to prove that it had suffered material prejudice.[101]

4 New Zealand

The leading commentary on New Zealand's Arbitration Act 1996 notes that, in accordance with the Model Law, unless the parties agree otherwise, a hearing is required if one party requests it (although there are cases in which an implied agreement has been found).[102] At any hearing, the tribunal "shall at all times have complete control over the

94 *Société Soubaigne,* above n 86.

95 *P v S* [2015] 1 HKEC 1707 at [5]–[6] and [10].

96 At [10]–[11].

97 At [13].

98 At [16].

99 At [18].

100 At [19]–[24].

101 At [27].

102 David AR Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at [11.16.13]. See Arbitration Act 1996, sch 1 art 24(1), which reflects art 24(1) of the Model Law.

questioning process", including to "limit or exclude questions" — such as where the questions are "irrelevant, repetitive or abusive".[103]

There appears to be no case directly considering the impact of a decision by an arbitrator to gate a witness. However, there are several decisions in which the courts have been asked to set aside an award for an alleged serious procedural error, typically arguing that a party was unable to present its case, that the arbitral procedure was not in accordance with the parties' agreement, or that the award is contrary to the public policy of New Zealand.[104] The New Zealand statute expands on the Model Law by specifically clarifying that an award is in conflict with the public policy of New Zealand if "a breach of the rules of natural justice occurred" either "during the arbitral proceedings; or … in connection with the making of the award".[105]

As one commentator notes, "[a] breach of public policy on natural justice grounds is not easy to establish" and "New Zealand courts interpret 'public policy' narrowly".[106] A prominent case on natural justice identifies amongst the principles to be applied that "each party must be given a full opportunity to present its case" and also that "each party be given an opportunity to understand, test and rebut its opponent's case", including at a hearing at which "each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument".[107] The recitation of principles highlights the risk if a party is not given an opportunity to test witness evidence in an oral hearing. Yet, the courts have shown substantial deference to the tribunal's exercise of its procedural discretion, including favourable citation to international precedents to the same effect.[108]

---

103 At [11.16.13].

104 Arbitration Act, sch 1 arts 34(2)(a)(ii), 34(2)(a)(iv) and 34(2)(b)(ii), respectively (each modelling the corresponding articles in the Model Law).

105 Schedule 1 art 34(6).

106 Anna Kirk "Does a Right to a Physical Hearing Exist in International Arbitration?" (International Council for Commercial Arbitration, 2021) at 10.

107 *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 (HC) at 463. Disclosure: The author appeared as counsel.

108 See *Parsons & Whittemore Overseas Co v Société Generale de L'Industrie du Papier* 508 F 2d 969 (2d Cir 1974) as cited in *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614 (CA) at [44], in the context of taking a narrow reading of "public policy". See also *Aspec Construction Wellington Ltd v Delta Developments Ltd* [2013] NZHC 5 at [41]: "The Court will not deprive a litigant, or a party to an arbitration, of a proper opportunity to present its case. Natural justice requires such an opportunity. The public policy of New Zealand requires that … Public policy also requires that arbitration agreements must be complied with by the parties, and the courts must assist in ensuring their compliance. … In this case I find that there has been no breach of the principles of natural justice, and that Delta's inability to present its

Indeed, applications to set aside (or to refuse enforcement[109]) are rarely successful and "[p]rocedural issues are unlikely to constitute a ground for setting aside an award unless they are 'fundamental to the procedure which [Schedule 1 of the Act] establishes'."[110] In the context of witness-gating, the closest case is where the arbitrator refused to adjourn a hearing in circumstances in which not only were the respondent's expert witnesses not available but there was also insufficient time to obtain new legal representation. The High Court found that this was a breach of natural justice and refused recognition and enforcement of the award.[111]

5 Sweden

In the arbitration underlying *Ukio Banko Investiciné Grupé UAB v Rual Trade Ltd*,[112] the sole arbitrator declined to hear two of the respondents' witnesses,[113] but permitted them to submit witness statements instead.[114] The dispute arose out of a settlement agreement governed by New York law with arbitration of any disputes in Sweden under the SCC's expedited rules.[115] The arbitrator concluded that the expedited rules gave him the discretion to decide whether to hold an oral hearing.[116] The witness testimony at issue concerned the existence of purported oral agreements beyond the written agreement.[117] The arbitrator concluded that New York's parol evidence rule prohibited reliance on oral representations outside of the final written agreement and the testimony was therefore irrelevant.[118]

The respondents argued in the Svea Court of Appeals that by denying the opportunity to present oral testimony, the arbitrator had either violated the *ordre public* or committed a procedural error.[119] The Court disagreed, emphasising that the parties acceded to a

---

case at the hearing is a direct result of its own failures to meet the obligations under the arbitration process which were imposed on it by the contract which it had made."

109 See *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359, which recognised an international award over the appellant's objection that there had been a breach of natural justice for a failure to postpone the hearing.

110 Kirk, above n 106, at 11. Kirk quotes Law Commission *Arbitration* (NZLC R20, 1991) at 291.

111 *Coromandel Land Trust Ltd v MilkT Investments Ltd* [2009] BCL 460 (HC) at [69] and [72].

112 *Ukio Banko Investiciné Grupé UAB v Rual Trade Ltd* Svea Horväatt [Court of Appeals] 2012-02-24 Case T T 6238-10 at 4-5.

113 At 4-5.

114 At 6.

115 At 3.

116 At 4.

117 At 6–7.

118 At 7.

119 At 7.

contract governed by New York law and calling for expedited procedural rules.[120] The Court agreed with the arbitrator both that the witnesses' evidence was irrelevant[121] and that the expedited rules gave the arbitrator the sole power to decide whether to hold an oral hearing.[122] The proceedings, therefore, had no procedural error and the arbitrator did not erroneously decline to hear evidence.[123]

6 Switzerland

Courts in Switzerland have analysed witness-gating claims under art 190(2)(d) of the Federal Act of Private International Law, which allows an award to be challenged when proceedings violate a party's "right to be heard".[124] The right to be heard is not unlimited, however. Under Swiss law, tribunals may decline to hear evidence that is irrelevant, cumulative or untimely.[125] The Federal Supreme Court applied these principles in two nearly identical judgments to find witness-gating by the arbitrator did not violate the parties' right to be heard.[126]

The underlying arbitrations, which arose from a contract dispute, were seated in Zurich and governed by the Swiss Rules.[127] During the proceedings, the arbitrator declined to consider written or oral testimony from one of the respondents' witnesses.[128] First, the respondents had not timely submitted a witness statement in accordance with the procedural rules.[129] Secondly, the witness had not substantially participated in the contract negotiations, and the respondents had not shown why his testimony would be relevant.[130]

The respondents subsequently challenged the award, arguing that the witness-gating violated their right to be heard.[131] The Supreme Court disagreed, upholding the award and deciding that the

120 At 9.

121 At 10.

122 At 9.

123 At 9–10.

124 See *Bundesgericht [BGer]* [Federal Supreme Court] 23 January 2012, 4A.526/2011 at [2.1]. Unofficial English Translation available at <https://www.swissarbitrationdecisions.com/node/381>. (Art. 190(2)(d) is similar to Article V(1)(b) of the New York Convention.).

125 See, *Bundesgericht*, above n 124.

126 See *Bundesgericht*, above n 124.

127 At [B.a].

128 At [2.2].

129 At [2.2].

130 At [2.2].

131 At [2].

arbitrator's reasons for excluding the witness were valid.[132] The Court found that there was no reason why the respondents had not timely filed a witness statement, and the arbitrator's decision to exclude the witness's testimony was sufficient on this basis alone.[133] The Court also refused to re-examine the arbitrator's finding that the witness's testimony was irrelevant because he did not participate in the negotiations.[134]

7 United Kingdom

(a) *Dalmia Dairy Industries Ltd v National Bank of Pakistan*

The arbitrations at issue in *Dalmia Dairy Industries Ltd v National Bank of Pakistan* concerned a bank guarantee underlying the sale of two cement factories located in Pakistan.[135] Dalmia sold the factories to PPCI, a Pakistani entity,[136] which was obliged in turn to provide cement to Dalmia.[137] In a separate agreement (the Guarantee), the National Bank of Pakistan guaranteed PPCI's performance.[138] When PPCI failed to fulfil Dalmia's requests for cement, Dalmia initiated two separate arbitrations against the Bank. The Guarantee was subject to Indian law with disputes to be resolved by ICC arbitration seated in Geneva.[139]

The Bank's primary defence in both arbitrations was that the ongoing conflicts between Pakistan and India constituted a state of war that rendered the Guarantee and its arbitration clause void under Indian law.[140] The tribunal, however, disagreed and held the Guarantee valid.[141] The arbitrator made this determination without considering *any* oral or written testimony from either party and, despite requests by the Bank for leave to lead witness evidence, it

132 See *Bundesgericht*, above n 124.

133 See *Bundesgericht*, above n 124. See also *Commercial Risk Reinsurance Co Ltd v Security Insurance Co of Hartford* 526 F Supp 424 (SD NY 2007) at 429–430: finding that an arbitrator's refusal to admit witness evidence that violated arbitral procedure did not warrant the set-aside of an award; *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2)* (2018) VSC 741 at [62]: finding that an arbitrator rightly declined to introduce evidence requested by a party, which had not been pleaded, because it would prejudice the other party.

134 *Bundesgericht*, above n 124, at [2.2].

135 *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA) at 226. The reported decision covers the judgment of Kerr J (on the Queen's Bench) as well as the appeal to the Court of Appeal. The witness-gating issue was addressed only by Kerr J and was not appealed.

136 At 226.

137 At 226.

138 At 226–227.

139 At 229 and 232–235.

140 At 232–234 and 264.

141 At 229 and 233.

claimed would confirm the existence of the war.[142] The arbitrator ultimately determined such testimony to be irrelevant and unnecessary to be admitted under the ICC rules,[143] because there was sufficient undisputed documentary evidence of the facts, whereas determining whether those facts constituted a *state of war* was a purely legal determination.[144]

Dalmia sought to enforce its awards in the United Kingdom.[145] One of the Bank's contentions in opposing enforcement was that the arbitrator's refusal to hear its witnesses constituted a breach of natural justice and, as such, enforcement would be inconsistent with English public policy.[146] The Court of Appeal disagreed, holding that it is not an "absolute rule" of English public policy that an arbitrator's refusal to hear witness testimony renders an award unenforceable.[147] Further, the Court determined that the ICC rules in force at the time of the arbitration conveyed "a discretion but imposes no obligation" to hear witnesses.[148] Thus, the arbitrator's actions did not violate English public policy.[149]

(b) *Cukurova Holding AS v Sonera Holding BV*

The arbitration underlying *Cukurova Holding AS v Sonera Holding BV* turned primarily on whether a phone conversation created a binding agreement under Turkish law.[150] The claimant sent the respondent a draft agreement to purchase the respondent's shares in a telecoms company.[151] The claimant's CEO then called the respondent's chief negotiator, who — according to the CEO — orally confirmed that the agreement was "totally ready for signing".[152] When the respondent later refused to move forward with the sale, the claimant commenced an ICC arbitration in Geneva.[153]

Due to a surgery, the respondent's chief negotiator was unable to attend the oral hearing.[154] Rather than seek to stay the proceedings,

142 At 229 and 269–270.

143 At 269–270.

144 At 269–270.

145 At 225.

146 At 269.

147 At 270.

148 At 270. See also ICC Rules (1955), art 20: "[The arbitrator] *shall have the power* to hear witnesses." (emphasis added).

149 At 269–270.

150 See *Cukurova Holding AS*, above n 79, at 652–653. (Disclosure: The author appeared as counsel in related litigation.).

151 At [12].

152 At [37].

153 At [22].

154 At [40].

the respondent submitted a witness statement outlining the witness' recollection of the phone conversation, in which he denied saying the contract was ready for signing.[155] Following the first hearing, the tribunal asked the parties to submit post-hearing briefs addressing whether a second hearing with oral testimony from the respondent's negotiator was necessary.[156] However, the respondent included only a general statement that "the tribunal will need to hear" from the witness.[157] The tribunal decided that a second oral hearing was unnecessary because, even assuming the negotiator's written statement was true, he had not affirmatively objected to the draft agreement, and this conduct indicated assent.[158]

The claimant sought to enforce its award in the British Virgin Islands.[159] The respondent argued that the award should not be recognised and enforced under art V(2)(b) of the New York Convention as against public policy because the tribunal had denied the respondent the opportunity to give oral testimony.[160] The British Virgin Islands' High Court and Court of Appeal rejected that argument, granting recognition. The Privy Council dismissed the appeal. The Board unanimously found that there was no breach of natural justice as the respondent "had every opportunity to present its case".[161] In this respect, the respondent had submitted the chief negotiator's detailed witness statement, did not seek a stay when the witness could not attend, gave only a generalised statement in its post-hearing brief of why the witness' oral testimony was necessary, and the tribunal had reached its conclusion accepting the proffered witness statement as true.[162]

8 United States of America

The Court of Appeals for the Second Circuit has issued two decisions touching on the arbitrator's discretion to witness-gate that, at first glance, may seem contradictory. However, upon a closer examination, the two cases — *Parsons & Whittemore Overseas Co Inc v Société Generale de L'Industrie du Papier* and *Tempo Shain Corp v Bertek*

155 At [40].

156 At [42].

157 At [43].

158 At [45].

159 At [1].

160 See *Cukurova Holding AS*, above n 79, at 658-66; and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959), [New York Convention] at art V(2)(b).

161 *Cukurova Holding AS*, above n 79, at [51].

162 *Cukurova Holding AS*, above n 79.

Inc — are readily distinguishable.[163] While both cases concern a tribunal's refusal to reschedule hearings to allow oral testimony, in *Parsons*, the witness had submitted a written witness statement that the tribunal accepted.[164] In contrast, in *Tempo Shain*, not only was there no alternative form for the witness testimony, but the arbitrators premised their decision not to allow the testimony on a misunderstanding that such evidence would be cumulative of documentary evidence, thereby depriving a party of a crucial witness.[165]

(a) *Parsons & Whittemore Overseas Co Inc v Société Generale de L'Industrie du Papier*

The claimant initiated an ICC arbitration when the respondent indicated that it could not complete its contract to construct and manage a paperboard mill in Egypt.[166] The respondent invoked the contract's *force majeure* clause, arguing that the Six Days War made performance impossible.[167] In support, the respondent sought to call the former US *chargé d'affaires* in Egypt; however, the witness was unable to attend the hearing due to a competing speaking engagement.[168] The tribunal refused to reschedule the hearing but did consider the witness's written affidavit.[169]

The respondent argued that the award should not be enforced under art V(1)(b) of the New York Convention because the party had been "unable to present its case" when the tribunal declined to reschedule the hearing.[170] The court disagreed. Although the respondent was entitled to the "full force [of due process rights under American law]," the tribunal's decision did not violate "fundamental fairness."[171] The Court of Appeals for the Second Circuit found that the tribunal had not disregarded critical evidence that only the witness could have provided.[172] The tribunal already had the witness's

163 Compare *Parsons & Whittemore Overseas Co Inc*, above n 108, with *Tempo Shain Corp v Bertek Inc* 120 F 3d 16 (2d Cir 1997).

164 *Parsons & Whittemore Overseas Co Inc*, above n 108, at 975.

165 *Tempo Shain Corp*, above n 163, at 19–20.

166 *Parsons & Whittemore Overseas Co Inc*, above n 108, at 972.

167 At 972.

168 At 975.

169 At 975.

170 At 972 and 975.

171 At 975 and 976.

172 At 976. The Court also noted that the nature of international arbitration makes rescheduling hearings a complicated affair, and that parties run the inherent risk of not being able to subpoena witnesses: at 975.

affidavit and the witness could have submitted a supplemental statement if so desired.[173]

(b) *Tempo Shain Corp v Bertek Inc*

The respondent in the underlying arbitration argued that the award should be set aside because the proceedings were "fundamentally unfair," being the test necessary to vacate an award for arbitrator misconduct under s 10(a)(3) of the Federal Arbitration Act.[174] The respondent had raised a counterclaim of fraud in the inducement by the claimant that was dismissed by the tribunal.[175] To prove the counterclaim, the respondent had intended to call its chief negotiator on the project to testify at the hearing.[176] The witness, however, was unable to testify when his wife fell ill.[177] The tribunal decided that the testimony would not provide any new information and declined to stay the proceedings.[178] The tribunal reasoned that the documentary record, which included letters written by the negotiator, made his intended testimony cumulative.[179] Without that testimony, the respondent was unable to rebut the claimant's defence to the counterclaims.[180]

The Court of Appeals for the Second Circuit overturned a district court decision enforcing the award, finding that the tribunal's decision not to allow the negotiator's testimony was fundamentally unfair.[181] The would-be witness submitted an affidavit to the Court outlining the testimony he would have presented to the tribunal.[182] The appellate court compared the intended testimony to the letters that the tribunal had relied upon and found that they covered an entirely different subject matter; thus, the testimony would not have been duplicative.[183] Accordingly, by denying the negotiator's testimony, the tribunal had deprived the respondent of its sole opportunity to prove its counterclaim,[184] and *vacatur* was warranted.[185]

173 At 975–976.

174 *Tempo Shain Corp*, above n 163, at 20. Note that *Tempo Shain* was a domestic, not international, arbitration; and United States Arbitration Act Pub L 68-401, § 10(a)(3), 43 Stat 883 (1925).

175 At 20.

176 At 17.

177 At 17–18.

178 At 18.

179 At 20.

180 At 20.

181 At 21.

182 At 18.

183 At 19–20.

184 At 20–21.

Conclusions

Several trends emerge from the preceding analysis. Foremost is the strong tendency of reviewing courts to uphold awards based on arbitrators' decisions to exclude witness testimony, and find that such exclusions do not infringe on parties' rights to natural justice. This holds true both in cases where witnesses give written statements, but were not permitted to testify orally,[186] *and* where arbitrators declined to hear a witness's testimony in any form.[187] Indeed, some courts have found that parties must prove to the tribunal's satisfaction that a witnesses' testimony — written or oral — was necessary.[188]

Further, natural justice rights are subject to practical limitations emanating from the arbitrators' power to control the proceeding. Thus, parties may not be permitted to call witnesses whose testimony is cumulative,[189] irrelevant,[190] or violates an arbitration's procedural rules.[191] Courts emphasise that the institutional rules, accepted by the parties, typically give arbitrators broad procedural discretion on evidentiary matters.[192] As a work-around, courts in both common and civil law jurisdictions appear comfortable with arbitral orders that written statements are sufficient, particularly if the non-producing party does not require cross-examination.[193] Thus, natural justice, of itself, does not guarantee the right for a witness to be heard orally.

Finally, for a challenge to succeed, there must have been some manifest prejudice as a direct consequence of the denial of oral testimony. This is starkly demonstrated in *Tempo Shain*, in which the tribunal declined to hear *any* testimony from the *only* witness that

185 At 21. Note that the testimony was also relevant to the respondent's defence to the claimant's claim premised on fraudulent inducement: at 21 .

186 See *Parsons & Whittemore Overseas Co Inc*, above n 108; *Dalmia Dairy Industries*, above n 135; *Cukurova Holding AS*, above n 79, at [45]; and *Svea Hovrätt*, above n 122.

187 See *Bundesgericht*, above n 124; *P v S*, above n 95, at [10]–[11]; *CE International Resources Holdings*, above n 81, at [49]; *Commercial Risk Reinsurance Co Ltd*, above n 133; *Phoenix Aktiengesellschaft v Ecoplas Inc* 391 F 3d 433 (2d Cir 2004) at 438; *Société Soubaigne*, above n 86; *UDP Holdings Pty Ltd*, above n 133, at [62]; and OLG Mar. 27, 2009, 10 Sch 08/08 (Ger.).

188 See *P v S*, above n 95, at [19]–[27]; *Cukurova Holding AS*, above n 79, at 663 and 666; and *Svea Hovrätt*, above n 122, at 4–5 and 9–10.

189 See *Cukurova Holding AS*, above n 79, at 666; and *Société Soubaigne*, above n 86.

190 See *Bundesgericht*, above n 124; *Svea Hovrätt*, above n 122, at 9–10; *P v S*, above n 95, at [19]–[21]; and OLG Mar. 27, 2009, 10 Sch 08/08 (Ger.).

191 See *Bundesgericht*, above n 124, at [2.2]; *UDP Holdings Pty Ltd*, above n 133, at [62]; and *Commercial Risk Reinsurance Co Ltd*, above n 133, at 429–430.

192 See *Svea Hovrätt*, above n 122, at 9–10; and *P v S*, above n 95, at [17].

193 See *Cukurova Holding AS v Sonera Holding BV*, above n 79, at 665–666; and *Parsons & Whittemore Overseas Co Inc*, above n 108; *Svea Hovrätt*, above n 122, at 6.

could support the party's counterclaim.[194] So too in *CBS* Court of Appeal, in which the tribunal heard *no* testimony from the respondent's witnesses[195] and such testimony was indispensable to its defence.[196] If these cases represent the line that a tribunal must cross in order to violate a party's natural justice rights, it is unsurprising that so few challenges have prevailed.

V PRACTICAL GUIDANCE

As noted in the Introduction, while the facts in *CBS* may be at the extreme end of the spectrum, witness-gating of some sort is increasingly common. For the arbitrator, the "safest" option will likely be to permit the witness to testify, perhaps with limitations on time or content; but that will not always be the "right" option. While every case turns on its own particular facts and procedural circumstances, some common elements may help guide the arbitrator in exercising discretion. From counsel's perspective, these observations may focus applications to exclude evidence or, conversely, to preserve objections where evidence is excluded.

***Know the arbitrator's authority*:** As discussed in Part III, the scope of the arbitrator's authority is fundamentally important. In exercising witness-gating powers, the arbitrator should identify those powers and make any findings necessary to support their exercise. As a special sub-category of powers, where no oral testimony is to be heard (or possibly no oral hearing at all is held) one must ensure the arbitrator has such authority to avoid the *CBS* scenario.

***Make explicit findings based on the record*:** The arbitrator should make explicit findings in support of any decision to exclude oral testimony. If, for example, the arbitrator is relying on powers under the IBA Rules of Evidence, then make an explicit finding of irrelevance, immateriality or duplication supported by citations to the record. The absence of specificity — and mistake as to the record — was fatal to the award in *Tempo Shain*. Conversely, reviewing courts will be reticent to disturb an arbitrator's *finding* that particular evidence is unnecessary or duplicative. As in *CBS*, mere reliance on efficiency alone may be inadequate.

***Create a record of what evidence is potentially being excluded*:** Where possible, this can be achieved by having the witness

194 See *Tempo Shain Corp*, above n 163, at 20–21.

195 *CBS* Court of Appeal, above n 1, at [79].

196 At [85].

submit a sworn statement that could stand in lieu of direct oral testimony. If not possible, then there should at least be a record of what the witness intends to say. Not only will this create a better record if leave to testify is denied, but it also informs the other party of the scope of the testimony and, therefore, any prejudice. It may even allow the evidence to be admitted by agreement of the parties.

***Consider the full panoply of case management techniques*:** Carefully consider how else the party whose witness is being gated can put its case. Most obviously, a witness statement may be accepted on the record (and given whatever weight is appropriate) in lieu of oral testimony. As in *Cukurova* and *Parsons*, reviewing courts have found this a suitable alternative. But care must be taken — in *CBS*, the arbitrator's conditioning of oral testimony on first producing witness statements was criticised. Consider also whether there may be options other than outright exclusion, such as narrowing the scope of permitted testimony, allowing the testimony but enforcing total time limitations, or bifurcating the hearing to allow a subsequent focused session only on the issues covered by the witness. In assessing these case management options, ascertain whether remote hearing technology may lessen the burden of allowing additional testimony. Further, when faced with a recalcitrant party — as was the case in many of the decisions above — outright exclusion of evidence should not be used as a penalty when other methods are available to encourage compliance.

***Review "standard" procedural orders and/or adopt a soft law standard that provides a framework for handling witness testimony*:** Particularly if operating under arbitration rules that do not address witness-gating authority, consider adding explicit language to this effect. This might be expressed broadly to affirm the arbitrator's discretion to "determine the admissibility of evidence" or "control the hearing". Alternatively, such powers may be tied to the timetable such as "leave will only be granted to adduce additional evidence in exceptional circumstances upon a showing of good cause". Similarly, in the initial case management conference, discuss adopting or at least being guided by soft law instruments such as the IBA Rules or the Prague Rules.

***Be particularly careful with expedited arbitrations*:** Authority to exclude oral testimony is vital where the arbitration is being conducted on an expedited basis. This may be pursuant to institutional rules that directly address evidence and hearing issues, such as those of the SCC. However, it may also occur where the arbitration agreement or parties themselves call for a fast-track timetable. Reviewing courts, such as in the *Ukio Banko* case above, have been

willing to recognise that the quid pro quo of an expedited arbitration is a reasonable limitation on the right to be heard.

***Address the significance of the excluded evidence in the award*:** If appropriate, the arbitrator may find it prudent to address directly in the award why the excluded evidence would not have affected the outcome. As seen in *CE International*, *Société Soubaigne* and *P v S*, for example, reviewing courts loathe to disturb an award where, even if the challenging party establishes a breach of natural justice, the excluded evidence would not have impacted the final decision.

***Balance the parties' interests*:** Finally, in assessing any request premised on exercising the right to present one's case, this must of course be balanced with the duty to ensure the parties are treated with equality.[197] Allowing a party to adduce oral evidence will typically have consequences for the party's opponent in, for example, preparing cross-examination, adducing rebuttal evidence or opening up new areas for document disclosure. Several reviewing courts have explicitly noted this potential prejudice in upholding awards. Ultimately, the arbitrator will want to ensure that the integrity of the proceedings is maintained.

* * * *

The *CBS* case is a timely reminder of the delicate balancing act required of arbitrators in responding to the laudable goal of increased efficiency. The arbitrator's power to exclude witness testimony — whether excluding such evidence in total or limiting its scope and format — is an important tool at the tribunal's disposal. In wielding that tool, however, careful attention must be paid, on a case-by-case basis, to the relevant sources of arbitral authority and the legal framework for any potential challenge to an award. Arbitrators should not shy away from witness-gating in appropriate cases, but where they exercise that power, it is imperative to tread carefully and ensure the decision is supported by a robust record that will withstand the scrutiny of the courts.

197 See Model Law, art 18.