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## Case Note

# WITNESS-GATING IN INTERNATIONAL COMMERCIAL ARBITRATION

## Can I Get a Witness?

*CBS v CBP*
**[2021] 1 SLR 935**

In *CBS v CBP* [2021] 1 SLR 935, the Singapore Court of Appeal considered whether an arbitrator could prohibit a party from calling oral evidence from any fact witnesses. The bounds of tribunal power to exclude or limit witness testimony is largely unexplored. Taking the case as a starting point, this case note identifies a diversity of witness-gating powers which can be exercised in several ways. Crucially, in Singapore, the existence and permissible exercise of a witness-gating power depends on the specific arbitral rules, national legislation and, potentially, party agreement. Understanding a tribunal's precise power to gate witness testimony is needed to reduce inefficiencies arising from due process paranoia while upholding natural justice and to prevent misinformed challenges to awards.

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1 Challenging an arbitral award on the basis that the tribunal refused to hear fact witness evidence is "rarely, if ever, successful".[2] Parties have a fundamental right to be heard,[3] but national legislation and arbitration rules generally give tribunals wide discretion over evidence,

1 All views and errors are the author's own.
2 Maxi Scherer, "Article V" in *New York Convention: Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) at p 313; see also Philippe Fouchard & Berthold Goldman, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International BV, 1999) at p 698.
3 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2020) at p 2,399.

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including witness testimony.[4] At the same time, courts are reluctant to second-guess a tribunal's procedural decisions.[5] In *CBS v CBP*[6] ("*CBS*"), however, the Singapore Court of Appeal upheld such a challenge, finding that an arbitrator's decision under the Rules of the Singapore Chamber of Maritime Arbitration[7] ("SCMA Rules") to prohibit a party from adducing *any* oral evidence was a breach of natural justice because the party did not have a "full opportunity" to present its case.[8] While the court accepted that an arbitrator could limit *some* witness testimony in certain circumstances, it held that the arbitrator was not entitled to bar *all* fact witness testimony, and accordingly, the resulting award was set aside.

2 The case highlights the tension between a tribunal's power to control proceedings,[9] including hearings, and a party's right to natural justice. Both are core principles of international arbitration and *CBS* is a useful exposition of recent Court of Appeal jurisprudence on their interplay. Ultimately, the exact boundary between the two principles will "turn on … precise facts and circumstances".[10]

3 This leads to a second point. One of the "facts and circumstances" in balancing between a tribunal's power to control proceedings and a party's right to natural justice is a tribunal's power to restrict a factual witness's oral testimony, known as "witness-gating". Witness-gating has received little prior discussion in Singapore. The International

4 See, *eg*, Arbitration Rules of the Singapore International Arbitration Centre 2016 rr 19.2 and 25.2; Arbitration Rules of the United Nations Commission on International Trade Law (2013) Arts 17(1), 27 and 28(2); International Arbitration Act (Cap 143A, 2002 Rev Ed) s 3(1) and First Schedule, Art 19; International Arbitration Act 1974 (No 136) (Australia) s 18(1) and Second Schedule, Art 19; Arbitration Act 1996 (c 23) (UK) s 34(2)(h). See also Jean-François Poudret & Sebastien Besson, *Comparative Law of International Arbitration* (Stephen V Berti & Annette Ponti trans) (Sweet & Maxwell, 2nd Ed, 2007) at p 558; Julian D M Lew, Loukas A Mistelis & Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at p 573.

5 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [103], *per* Sundaresh Menon CJ; *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221 at [28], *per* Steyn LJ.

6 [2021] 1 SLR 935.

7 3rd Ed, 2015.

8 *CBS v CBP* [2021] 1 SLR 935 at [79], *per* Quentin Loh JAD. The Singapore Chamber of Maritime Arbitration Rules (3rd Ed, 2015) is currently in the process of revision: see Singapore Chamber of Maritime Arbitration Procedure Committee Report on Rule Revision 2020.

9 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [156]. There, Sundaresh Menon CJ stated that "it is trite that the tribunal is, subject to the parties' agreement, master of its own procedure".

10 *CBS v CBP* [2021] 1 SLR 935 at [68], *per* Quentin Loh JAD.

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Arbitration Act[11] ("IAA") likewise gives little guidance on the power's existence and exercise.

4 This case note considers the Court of Appeal's treatment of witness-gating and suggests that, properly understood, witness-gating is not a one-size-fits-all solution. Rather, as will be discussed later in the article, leading arbitral rules variously provide for three types of witness-gating: (a) power to exclude all witnesses; (b) power to exclude a witness; and (c) power to limit witness testimony. Some rules expressly permit one or more of these types of witness gating. In other rules, the power is implied. The specific type of witness-gating permitted by the applicable rules and how it manifests itself affects the evidence available in the arbitration. This is already a common source of conflict.[12] As the type of witness-gating power allowed is central to natural justice and to the parameters of a party's opportunity to be heard, clarifying the operation of witness-gating under various rules helps reduce inefficiencies created by "due process paranoia"[13] and, more generally, enhances the dispute resolution process.

## I. Facts

5 The dispute in *CBS* originated from a sale of Australian coal. An Indian buyer ("Buyer") entered into two sale and purchase agreements with a seller for two shipments of coal. Pursuant to the second agreement, the seller executed an accounts receivable purchase facility with a Singapore bank ("Bank"). Under this facility, the seller assigned its trade debts to the Buyer and its rights under the second agreement which provided for disputes to be resolved by way of the arbitration under the SCMA Rules.[14]

11 Cap 143A, 2002 Rev Ed.

12 Roland Ziade & Charles-Henri De Taffin, "Les Témoins dans L'Arbitrage International" (2010) 2 *International Business Law Journal* 115 at 115: "Comme toute procédure contentieuse, l'arbitrage devient trop souvent un véritable « combat ». Les preuves en sont les armes" ("As with any adversarial proceeding, arbitration too often becomes a true 'combat' where evidence is a weapon").

13 For discussion of "due process paranoia", see Klaus Peter Berger & J Ole Jensen, "Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators" (2016) 32(3) *Arbitration International* 415; Lucy Reed, "Ab(use) of Due Process: Sword vs Shield" (2017) 33(3) *Arbitration International* 361; but see *2018 International Arbitration Survey: The Evolution of International Arbitration* (Queen Mary University of London/ White & Case, 2018) at p 27.

14 That the arbitration rights were assigned was determined as a preliminary point by the arbitrator in a partial award on jurisdiction: *CBP v CBS* [2020] SGHC 23 at [21]–[23], *per* Ang Cheng Hock J. That there was no arbitration agreement

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6 The first shipment of coal was delivered without difficulty. When the second shipment was made, the Buyer accepted a bill of exchange drawn by the seller but did not make payment to the Bank citing short delivery and a declining market. Eventually, in December 2015, representatives of the Buyer and the seller met to discuss the owed moneys ("December Meeting") where, the Buyer said, they orally agreed to a global settlement of the dispute in exchange for a lower price per tonne of coal. That the meeting occurred was not disputed but the seller denied that any agreement was reached.[15]

7 Payment was still not made, and the Bank commenced arbitration proceedings against the Buyer in Singapore before a sole arbitrator under the SCMA Rules. Shortly before the Buyer filed its defence,[16] the arbitrator asked the parties to agree on the necessity of an oral hearing in light of r 28.1 of the SCMA Rules which provides:

> 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. [emphasis added]

8 The Bank said that the dispute concerned "contractual interpretation" alone and that the arbitration should be documents-only or, alternatively, a hearing should be held for oral *submissions* alone.[17] In contrast, the Buyer said a hearing for taking oral *evidence* was necessary because the cornerstone of its defence was the *oral* agreement purportedly made at the December Meeting. Witnesses had "to be examined" on this point.[18] The Buyer did not file any witness statements with its defence but did list seven witnesses whom it intended to call, six of whom were present at the meeting. Just three of the witnesses were under its employ or control.[19]

9 The arbitrator directed the Buyer to provide detailed statements from the witnesses it intended to call before he decided whether an oral hearing was necessary.[20] The Buyer refused. It said that r 28.1 of the SCMA Rules entitled it to call witnesses because the parties had not agreed to

between the Bank and the Buyer was "not seriously pursued" before the Court of Appeal: *CBS v CBP* [2021] 1 SLR 935 at [48], *per* Quentin Loh JAD.

15 *CBP v CBS* [2020] SGHC 23 at [17], *per* Ang Cheng Hock J.

16 The Buyer also raised a counterclaim which ultimately did not proceed.

17 *CBP v CBS* [2020] SGHC 23 at [29], *per* Ang Cheng Hock J.

18 *CBP v CBS* [2020] SGHC 23 at [32], *per* Ang Cheng Hock J.

19 *CBP v CBS* [2020] SGHC 23 at [79], *per* Ang Cheng Hock J.

20 The arbitrator based the direction on r 33.1.c. of the SCMA Rules which empowers a tribunal to "conduct such enquires as may appear to the [t]ribunal to be necessary or expedient".

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documents-only arbitration. The arbitrator repeated the request some weeks later, adding that if the witness statements were not provided, the Buyer would be taken to have waived "any right to submit witness" testimony at an oral hearing.[21] The Buyer repeated its position.

10 The arbitrator then ordered a hearing for oral submissions only pursuant to r 28.1 of the SMCA Rules. Pursuant to the same rule, no witnesses would be called because the Buyer "had 'failed to provide witness statements or any evidence of the substantive value of presenting witnesses'".[22] Central to the arbitrator's order was a reading of r 28.1 in which a hearing for the presentation of witness evidence was an *alternative* to a hearing for oral submissions.

11 The Buyer did not participate in the hearing.[23] The arbitrator then rendered a final award in favour of the Bank, including finding that an agreement for a lower price had not been made at the December Meeting.

## II. Decision below: *CBP v CBS* [2020] SGHC 23

12 Seeking to set aside the award, the Buyer's primary claim before the Singapore High Court was that the arbitrator's prohibition on oral testimony breached the rules of natural justice under s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the UNCITRAL Model Law ("Model Law") as enacted in Singapore.[24] This encompassed its claim that it had been denied the right to be heard.[25] It was uncontroversial that an award could be set aside where an identified rule of natural justice was breached, the breach affected the award and the breach prejudiced a party's rights.[26] According to the Buyer, the arbitrator lacked discretion to limit the hearing to oral submissions and the prohibition on fact witness testimony breached the rules of natural justice. In turn, the breach had prejudiced the Buyer's rights.

13 Ang Cheng Hock J agreed. Turning first to r 28.1 of the SCMA Rules, a plain reading of the provision made clear that without the parties'

21 *CBS v CBP* [2021] 1 SLR 935 at [25], *per* Quentin Loh JAD.
22 *CBS v CBP* [2021] 1 SLR 935 at [27], *per* Quentin Loh JAD.
23 *CBS v CBP* [2021] 1 SLR 935 at [28], *per* Quentin Loh JAD.
24 *CBP v CBS* [2020] SGHC 23 at [48] and [50], *per* Ang Cheng Hock J. The Buyer also said that there was not a valid arbitration agreement but neither the High Court nor Court of Appeal found it necessary to consider this submission.
25 *CBP v CBS* [2020] SGHC 23 at [50], *per* Ang Cheng Hock J; see also *ADG v ADI* [2014] 3 SLR 481 at [118], *per* Vinodh Coomaraswamy J.
26 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [29], *per* Chan Sek Keong CJ.

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agreement to documents-only arbitration, an oral hearing must be held.[27] It was not disputed that there was no such agreement.[28] Therefore, the central dispute was whether, as the Bank said, the arbitrator could direct that an oral hearing be held for oral submissions *or* for taking witness testimony, or if the Buyer was correct that a hearing was to be for making submissions *and* taking evidence. In Ang J's view, reading r 28.1 disjunctively was inconsistent with the provision's purpose, commentary accompanying the SCMA Rules,[29] and surrounding provisions.[30] In particular, r 30.5 of the SCMA Rules allows witnesses to submit written witness statements and specifically envisions those witnesses leading oral evidence or being cross-examined at a hearing. Thus, a submissions-only hearing could only occur where the parties had decided not to lead oral evidence and forgo cross-examination. As such, r 28.1 did not grant "express" witness-gating powers; any power to limit or exclude witness testimony must come from another source.[31]

14 To this point, the Bank submitted that rr 25.1 and 25.2 of the SCMA Rules – which give the tribunal the "widest discretion … allowed by the [IAA]" in conducting the proceedings "to ensure the just, expeditious, economical and final determination of the dispute" – empowered the arbitrator to gate all the Buyer's witnesses.[32] While his Honour did not finally decide whether the rule empowered the arbitrator to gate witnesses,[33] he had "significant doubt" that this rule allowed an arbitrator to "deny the calling of any, let alone all, of the witnesses".[34] In Ang J's view, the "fundamental utility" of witness-gating "is to prevent unnecessary delay".[35] However, any such power was subject to requirements of natural justice; efficiency on its own did not trump the need to ensure a just determination of the dispute.[36] This meant that while a tribunal could impose reasonable limits on witness testimony, "witnesses ought not to be rejected on the basis of efficiency or savings of costs" *unless* a tribunal has "a substantive basis to conclude that all the witnesses sought to be presented are irrelevant or superfluous".[37]

27 *CBP v CBS* [2020] SGHC 23 at [56], *per* Ang Cheng Hock J.
28 *CBP v CBS* [2020] SGHC 23 at [56], *per* Ang Cheng Hock J.
29 *Commentary on the 3rd Edition of the Rules of SCMA* (Singapore Chamber of Maritime Arbitration, 2015).
30 *CBP v CBS* [2020] SGHC 23 at [65], [67] and [88]–[91], *per* Ang Cheng Hock J.
31 *CBP v CBS* [2020] SGHC 23 at [68], *per* Ang Cheng Hock J.
32 *CBP v CBS* [2020] SGHC 23 at [69], *per* Ang Cheng Hock J.
33 *CBP v CBS* [2020] SGHC 23 at [76], *per* Ang Cheng Hock J.
34 *CPB v CBS* [2020] SGHC 23 at [77], *per* Ang Cheng Hock J.
35 *CBP v CBS* [2020] SGHC 23 at [77], *per* Ang Cheng Hock J.
36 *CBP v CBS* [2020] SGHC 23 at [76], *per* Ang Cheng Hock J.
37 *CBP v CBS* [2020] SGHC 23 at [77], *per* Ang Cheng Hock J.

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15 As oral evidence of the December Meeting was clearly fundamental to the Buyer's defence, shutting out all witness testimony denied the Buyer an adequate opportunity to be heard. This breach of natural justice was directly connected to the final award in which the arbitrator entirely rejected the Buyer's claims regarding the December Meeting.[38] Accordingly, the award was set aside.

## III. Court of Appeal

16 The Bank appealed. The Bank's main argument was that rr 25 and 28.1 of the SCMA Rules gave the arbitrator broad case management powers. In the circumstances, the arbitrator's decision to exclude all witness testimony was not a breach of natural justice because it did not fall outside what a reasonable tribunal might have done.[39]

17 In response, the Buyer contended that the High Court had given the SMCA Rules their proper meaning and there was a breach of natural justice. By prohibiting oral testimony, the arbitrator deprived the Buyer of its right to be heard because it could not lead evidence as to what actually transpired at the December Meeting. This refusal was directly relevant to the final award.[40]

18 Notably, between the High Court's decision in *CBP* and the appeal in *CBS*, the Court of Appeal released its ruling in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC*[41] ("*China Machine*"). That case considered Art 18 of the Model Law which requires that "each party shall be given a full opportunity" to present its case.[42] This provision reflects a "basal norm" of natural justice.[43] The court clarified that in Singapore "full" is not unlimited and must be balanced against considerations of reasonableness and fairness.[44] Not only is this reading consistent with

38 *CBP v CBS* [2020] SGHC 23 at [93], *per* Ang Cheng Hock J.

39 *CBS v CBP* [2021] 1 SLR 935 at [40]–[41], *per* Quentin Loh JAD. The Bank also said that the Buyer's defence on the merits in the arbitration had no merits of success – and, thus, could not be prejudiced – and that there was no causal connection between the purported breach and the making of the final award.

40 *CBS v CBP* [2021] 1 SLR 935 at [44], *per* Quentin Loh JAD.

41 [2020] 1 SLR 695.

42 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 3 and First Schedule, Art 18.

43 James Allsop, "The Authority of the Arbitrator" (2014) 30(4) *Arbitration International* 639 at 649. See also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [42], *per* Chan Sek Keong CJ and *Cameron v Cole* (1944) 68 CLR 571 at 589, *per* Rich J.

44 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [96]–[97], *per* Sundaresh Menon CJ.

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the Model Law's *travaux*[45] but it aligns with the position in Model Law jurisdictions, like Australia,[46] and non-Model Law jurisdictions, like the UK.[47] Its application is not without difficulty, however. Whether a party has had a "full opportunity" still falls to be determined within the specific circumstances of each case.[48] Further, the threshold for interference with a tribunal's procedural decision is a "relatively high one", only done where a tribunal's conduct falls outside the range of what a reasonable tribunal might have done.[49] Thus, a tribunal's procedural decisions are given "substantial deference".[50]

19 With this in mind, the starting point for the court was r 28.1 of the SCMA Rules. The court rightly preferred Ang J's "holistic" interpretation of the provision and viewed the provision as providing for only two scenarios where a hearing was not needed: first, where the parties had agreed to a documents-only arbitration or, secondly, if the parties agreed that no hearing should be held.[51] But where a hearing was required, the provision did not empower a tribunal to dictate the type of hearing to be convened or type of evidence a party may lead.[52] As such, r 28.1 did not grant "express" witness-gating powers.

20 This was said to be in contrast to r 16(a)(ii) of the London Maritime Arbitrators Association Terms 2017 ("LMAA Terms") and Art 8.2 of the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 ("IBA Rules"),[53] which the court characterised as "express witness-gating provisions".[54]

45 See Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law International, 1989) at pp 551 and 559–60.
46 International Arbitration Act 1974 (No 136) (Australia) s 18C.
47 Arbitration Act 1996 (c 23) (UK) s 33; *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm) at [20]–[25], *per* Morison J.
48 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [125], *per* Belinda Ang Saw Ean J (quoted in *CBS v CBP* [2021] 1 SLR 935 at [51], *per* Quentin Loh JAD).
49 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [103]–[104], *per* Sundaresh Menon CJ.
50 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [103], *per* Sundaresh Menon CJ.
51 The Court of Appeal and trial judge viewed "documents-only" arbitrations as potentially including witness statements: *CBP v CBS* [2020] SGHC 23 at [30], *per* Ang Cheng Hock J; *CBS v CBP* [2021] 1 SLR 935 at [56], *per* Quentin Loh JAD. This understanding has some support in Hong Kong: see *Tiago Ltd v China Master Shipping Ltd* [2010] HKEC 952.
52 *CBS v CBP* [2021] 1 SLR 935 at [57], *per* Quentin Loh JAD.
53 The International Bar Association Rules on the Taking of Evidence in International Arbitration ("IBA Rules") 2010 have been revised. Article 8.3 of the revised IBA Rules 2020 reproduces Art 8.2 of the IBA Rules 2010.
54 *CBS v CBP* [2021] 1 SLR 935 at [69], *per* Quentin Loh JAD.

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21 That was not to say that an arbitrator could not *limit* some oral examination under the general case management powers set out in r 25.1 of the SCMA Rules.[55] Testimony might be limited, for example, where "evidence from multiple witnesses [is] repetitive or of little or no relevance to the issues".[56] But these powers were not unfettered and did not empower the arbitrator to bar all witnesses. As the court explained, a tribunal's procedural powers are subject to fundamental rules of natural justice.[57] More specifically, the discretion in r 25.1 is tethered to the "just, expeditious and final" determination of the dispute. Notably, the court suggested that not all arbitral rules' general case management powers may extend to gating witnesses.[58]

22 In the circumstances of this case, though, excluding the entirety of the witnesses' oral testimony denied the Buyer a full opportunity to present its case. The arbitrator was also aware of the importance of the witnesses and had only limited witness-gating powers. Thus, the arbitrator's conduct did not fall within the range of what a reasonable tribunal might do.[59] As the witnesses were central to the Buyer's case, refusal to hear witness evidence affected the final award. Accordingly, the Court of Appeal dismissed the Bank's appeal.[60]

## IV. Commentary

23 Oral testimony by fact witnesses is now a standard feature of international arbitration.[61] Such witnesses play a crucial role: their testimony can supplement and clarify written documents; it can also make the dispute "vivid".[62] Meanwhile, each party is also usually responsible for obtaining evidence and demonstrating its case.[63] In this context, calling a witness to give oral evidence is a strategic decision.[64] Thus, the ability

55 *CBS v CBP* [2021] 1 SLR 935 at [78], *per* Quentin Loh JAD.
56 *CBS v CBP* [2021] 1 SLR 935 at [61], *per* Quentin Loh JAD.
57 *CBS v CBP* [2021] 1 SLR 935 at [62], *per* Quentin Loh JAD.
58 *CBS v CBP* [2021] 1 SLR 935 at [65], *per* Quentin Loh JAD.
59 *CBS v CBP* [2021] 1 SLR 935 at [78]–[79], *per* Quentin Loh JAD.
60 *CBS v CBP* [2021] 1 SLR 935 at [90], *per* Quentin Loh JAD.
61 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 885.
62 Christian Oetiker, "Witnesses before the International Arbitral Tribunal" (2007) 25(2) ASA Bulletin 253 at 253. Allowing a party's witness to give evidence may also increase that party's "buy-in" to the arbitral process in so far as it feels it is able to present its case in the way it wants.
63 Judith Levine, "Can Arbitrators Choose Who to Call as Witnesses? (And What Can Be Done If They Don't Show Up?)" in *Legitimacy: Myths, Realities, Challenges* (Albert Jan Van den Berg ed) (Kluwer Law International, 2015) at pp 315 and 317.
64 Anne Véronique Schlaepfer & Vanessa Alarcón Duvanel, "Direct and Re-Direct Examination" in *The Guide to Advocacy* (Stephen Jagusch & Philippe Pinsolle
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to adduce witness testimony is directly linked to a party's opportunity to present its case and, by extension, considerations of natural justice.

24 On the other hand, not all witnesses will assist the tribunal. Oral testimony also is a time-consuming and expensive process;[65] witness examination often takes up most of the time allotted for an evidentiary hearing.[66] Even prior to the hearing, the common practices of counsel drafting witness statements and preparing witnesses to give evidence[67] increase costs and time. So too does counsel's preparation for cross-examination.

25 Despite this, it is not unusual for a tribunal to "hear virtually any witnesses whom the parties wish to present" and then decide what, if any, weight to give their evidence.[68] This approach appears, in part, motivated by concern that not doing so may lead an unsuccessful party to allege that it was denied natural justice.[69] Arbitrators have a duty to render an enforceable award[70] and denial of natural justice is one basis for setting aside or not enforcing an award.[71] This may lead to "due process paranoia" where a tribunal is reluctant to take procedural action for fear of an award being challenged.[72] But while hearing any witness perhaps limits complaints of procedural unfairness, the approach sits uncomfortably with a tribunal's obligation to facilitate procedural efficiency. The question, then, is the extent of a tribunal's power to limit or exclude witness testimony.

gen eds) (Law Business Research Ltd, 3rd Ed, 2018) at pp 69 and 73. However, arbitral rules often give a tribunal power to require testimony by a particular witness on its own motion: see, *eg*, Arbitration Rules of the London Court of International Arbitration 2020 r 20.5.

65 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 885.

66 Laurent Lévy & Lucy Ferguson Reed, "Managing Fact Evidence in International Arbitration" in *International Arbitration 2006: Back to Basics?* (Albert Jan Van den Berg ed) (Kluwer Law International, 2008) at pp 633 and 636–637.

67 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at pp 900 and 906.

68 Michael W Bühler & Carrol Dorgan, "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards" (2000) 17(1) *Journal of International Arbitration* 3 at 17–18.

69 Judith Levine, "Can Arbitrators Choose Who to Call as Witnesses? (And What Can Be Done If They Don't Show Up?)" in *Legitimacy: Myths, Realities, Challenges* (Albert Jan Van den Berg ed) (Kluwer Law International, 2015) at pp 315 and 336.

70 Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018) at p 271.

71 New York Convention Art V(1)(b); Model Law Arts 34(2)(*a*)(ii) and 36(1)(*a*)(ii).

72 Peter Berger & J Ole Jensen, "Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators" (2016) 32(3) *Arbitration International* 415 at 420.

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26 In Singapore, the IAA is the starting point for considering the power of tribunals to gate witnesses in an international commercial arbitration. Article 19 of the Model Law provides that the parties are free to agree on the procedure in the arbitration but, absent such agreement, the tribunal may "conduct the arbitration in such manner as it considers appropriate", subject to equal treatment of the parties under Art 18.[73] On its face, this broad provision encompasses fact witness testimony but offers no specific guidance. However, where the parties have not agreed on a procedural matter, the tribunal has broad power to make directions on that point. It is also uncontroversial that party agreement before the arbitration was initiated or tribunal was constituted binds the tribunal.[74] This reflects the core principle of party autonomy.

27 It is less clear whether a tribunal is bound by the parties' agreement on the adducing of oral evidence where the agreement was made *after* the tribunal was constituted. On one view, such agreement "should be given primacy".[75] The better view, arguably, is that the parties' ability to determine whether fact witnesses must be heard is reduced after the tribunal's constitution.[76] First, Art 19 of the Model Law is not a mandatory provision.[77] Further, Art 24 gives the tribunal discretion to convene an oral hearing for the presentation of "evidence" – which does not solely refer to oral testimony.[78] Additional powers which the IAA confers on a tribunal also do not deal with the tribunal's power to exclude or limit oral testimony.[79] Moreover, exclusion of fact witnesses is closely linked with a tribunal's power over hearings and evidence, including "the power to determine the admissibility, relevance, materiality and weight of any evidence".[80] While this is also subject to party agreement, to allow parties to amend the power after the tribunal had been constituted, for example by precluding the tribunal from determining admissibility, would fundamentally alter the basis upon which the tribunal agreed to

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73 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 3(1) and First Schedule, Art 19.

74 Subject to natural justice being observed: see *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2009] 5 HKC 1 at [84]–[89], *per* Lam J.

75 Thomas H Webster, *Handbook of UNCITRAL Arbitration* (Sweet & Maxwell Ltd, 3rd Ed, 2019) at p 299.

76 For general discussion of the shift in control during an arbitration, see Thomas H Webster, "Party Control in International Arbitration" (2003) 19(2) *Arbitration International* 119.

77 Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law International, 1989) at p 583.

78 International Arbitration Act (Cap 143A, 2002 Rev Ed) First Schedule, Art 24(1); see also Art 20(2).

79 See, *eg*, International Arbitration Act (Cap 143A, 2002 Rev Ed) ss 12 and 13.

80 International Arbitration Act (Cap 143A, 2002 Rev Ed) First Schedule, Art 19(2).

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arbitrate the dispute. In practice, though, tribunals generally defer to parties' agreements made during the arbitration.

28 Still, as *CBS* demonstrates, parties often disagree during an arbitration on the inclusion or extent of witness testimony. Beyond Arts 18, 19 and 24 of the Model Law, though, the IAA gives little guidance to tribunals regarding their power over witness testimony.

29 A corollary of *China Machine*, however, is that the precise bounds of natural justice in an arbitration depend on the matrix of facts and circumstances surrounding that proceeding. One such fact or circumstance is the set of arbitration rules chosen to govern the parties' dispute. Absent a mandatory requirement of the IAA or the parties' arbitration agreement, these rules, alongside applicable legislation at the seat of arbitration, set out the parameters within which natural justice operates. The result is that what constitutes a breach of natural justice in an arbitration under one set of rules may not be a breach of natural justice under another. Thus, close consideration of the relevant arbitral rules is required.

30 To this point, commentators rarely distinguish between the witness-gating powers granted to tribunals under different sets of rules.[81] Similarly, in *CBS*, the Court of Appeal concluded that the SCMA Rules did not provide an express witness-gating power but that the LMAA Terms and the IBA Rules did.[82] The broad characterisation deserves further examination.

### *A. London Maritime Arbitrators Association Terms*

31 The LMAA Terms empower a tribunal to decide all procedural and evidentiary matters, having regard to party agreement where appropriate.[83] This includes the power to decide "whether … there should be oral *or* written evidence *or* submissions in arbitration" [emphasis added].[84] Unlike the SMCA Rules, the natural reading of the provision is disjunctive. A tribunal has the power to direct that there be oral evidence,

81 See, *eg*, Jean-François Poudret & Sebastien Besson, *Comparative Law of International Arbitration* (Stephen V Berti & Annette Ponti trans) (Sweet & Maxwell, 2nd Ed, 2007) at p 558; Julian D M Lew, Loukas A Mistelis & Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at p 573; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at p 888.

82 *CBS v CBP* [2021] 1 SLR 935 at [69], *per* Quentin Loh JAD.

83 London Maritime Arbitrators Association Terms 2017 r 14(a).

84 London Maritime Arbitrators Association Terms 2017 r 14(b).

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oral submissions, written evidence or written submissions, or some combination of them.

32 Rule 16 of the LMAA Terms further sets out "specific powers", including to "(i) direct either that no expert evidence be called on any issue(s) or … (ii) limit the number of expert witnesses to be called by any party".[85] The power is to be exercised "in a suitable case so as to avoid unnecessary delay or expense, and so as to provide a fair means for the resolution of the matters falling to be determined". Thus, while the power cannot be exercised open-endedly, the LMAA Terms clearly empower a tribunal to exclude expert witnesses.

33 The LMAA Terms do not expressly refer to fact witnesses. This may reflect that the majority of maritime arbitrations proceed on a documents-only basis and witness evidence, if any, is provided by experts.[86] The LMAA Terms do, however, envision the presentation of fact witnesses, and even oral examination, in the Questionnaire which the parties must complete if the parties do not agree to documents-only arbitration.[87] Read in this light, the tribunal's further power to "decide *whether* and to what *extent* there should be oral or written evidence or submissions in the arbitration" [emphasis added] implicitly extends to fact witness testimony.[88]

34 As such, the LMAA Terms include three distinct, express witness-gating powers. Subject to the rules of natural justice and any agreement to the contrary, a tribunal is able to exclude a single witness, exclude all witnesses and/or limit witness testimony.

### *B. International Bar Association Rules on the Taking of Evidence in International Arbitration*

35 Article 8.2 of the IBA Rules similarly gives the tribunal "complete control" over the evidentiary hearing and reads, in pertinent part, "[t]he 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,

85 London Maritime Arbitrators Association Terms 2017 r 16(a). These powers are expressed to be in addition to those provided by the Arbitration Act 1996 (c 23) (UK).

86 Ian Gaunt, "Maritime Arbitration in London: Publication of Awards, Appeals, and the Development of English Commercial Law" in *The Role of Arbitration in Shipping Law* (Miriam Goldby & Loukas Mistelis eds) (Oxford University Press, 2016) at pp 149 and 153.

87 London Maritime Arbitrators Association Terms 2017 Third Schedule.

88 London Maritime Arbitrators Association Terms 2017 r 14(b).

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duplicative" [emphasis added].[89] The provision gives the tribunal two express powers: a power to limit testimony at the evidentiary hearing and a power to exclude a witness from giving oral evidence. While these powers may overlap, they are distinct. When the tribunal limits the appearance of a witness, the witness may still provide evidence on other matters.[90] Excluding a witness, in contrast, precludes the witness from giving evidence at all.

36 Notably, the article is expressed more narrowly (may exclude "*a* witness" [emphasis added]) than the LMAA Terms ("whether there should be oral … evidence"; "no expert evidence be called"). This suggests that the IBA Rules allow a tribunal to exclude a particular witness but that the power is not aimed at a blanket exclusion of all a party's witnesses (unless only one witness was proposed to be called). A narrow reading of the express power to exclude witnesses also aligns with the requirement in Art 8.2 of the IBA Rules that the exercise of the powers is explicitly contingent on the witness's appearance being irrelevant, immaterial, burdensome or duplicative. It also accords with Arts 8.1 and 8.7 which envision a party relying on oral testimony at the hearing.

37 An additional consideration regarding Art 8.2 is the status of the IBA Rules in the particular arbitration. The IBA Rules are not arbitral rules or independently binding. Unless they are expressly incorporated into the arbitration agreement, which rarely happens, they must be brought into the arbitration.[91] One way is for the IBA Rules to be adopted to "govern the taking of evidence", often in the form of Procedural Order No 1. When this is done, the IBA Rules and Art 8.2 clearly give the tribunal witness-gating powers.[92] Alternatively, tribunals commonly choose not to adopt the IBA Rules outright but, rather, simply to "be guided by"

89 The International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) have been revised since *CBS v CBP* [2021] 1 SLR 935 was argued but the relevant provisions are expressed in near-identical terms: see International Bar Association Rules on the Taking of Evidence in International Arbitration (2020) Art 8.3. The tribunal may also exclude witness evidence on one of the grounds set out in Art 9.2. These grounds are not relevant to the present discussion.

90 Unless the witness has been called to give evidence on only the particular topic which the tribunal has limited.

91 Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013) at p 29.

92 International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) Art 1.1; International Bar Association Rules on the Taking of Evidence in International Arbitration (2020) Art 1.1; *ALC v ALF* [2010] SGHC 231 at [28], *per* Crystal Tan Huiling AR.

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them.[93] Whether the tribunal receives any witness-gating powers from the IBA Rules in such a case is an open question.

### *C. Arbitration Rules of the Singapore International Arbitration Centre*

38 The Arbitration Rules of the Singapore International Arbitration Centre[94] ("SIAC Rules") allow a tribunal to conduct the arbitration "as it considers appropriate" and provides three express powers over fact and expert witness testimony.[95] One is the general power to exercise its discretion to "exclude cumulative or irrelevant *testimony*" in the conduct of proceedings [emphasis added].[96] This power is one of limitation and allows the tribunal to exclude *some* oral or written testimony that it considers to be irrelevant. A tribunal also "may allow, refuse or limit the *appearance* of witnesses to give oral evidence at any hearing" [emphasis added].[97] The second power, which is a broader exclusion power, enables a tribunal to prohibit *witnesses* from giving any or particular oral evidence at a *hearing*. Both powers are tied to "ensur[ing] the fair, expeditious, economical and final resolution of the dispute".[98]

39 Unlike the LMAA Terms or IBA Rules, though, these powers may only be used "after consulting with the parties". As such, there is a procedural condition on the tribunal's ability to constrain witness testimony. While this does not mean that a tribunal, after consulting the parties, is bound to follow the parties' agreement on witnesses,[99] tribunals are generally hesitant to ignore party consensus.

40 A third power emerges from the tribunal's power to direct that a hearing be held "for the presentation of evidence and/or for oral submissions".[100] A hearing must be held on the request of a party unless the

93 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2020) at p 2,377.
94 6th Ed, 2016.
95 Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 2016) Art 19.1.
96 Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 2016) Art 19.4.
97 Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 2016) Art 25.2.
98 Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 2016) Art 19.1.
99 John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* (Oxford University Press, 2nd Ed, 2018) at p 162.
100 Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 2016) Art 24.1.

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parties have agreed to a documents-only arbitration.[101] The tribunal may also require a hearing *sua sponte*. But unlike the SCMA Rules, the term "and/or" clearly envisions disjunctive application, allowing a tribunal to convene a hearing for oral submissions only. Thus, where the parties have agreed for there to be no oral evidence or disagree on the inclusion of oral evidence at the hearing, the tribunal may direct that the hearing be for oral submissions only. A trickier issue is whether this power to exclude witnesses by convening a hearing for submissions only can be exercised despite party agreement that witnesses be called. Article 19.1 of the SIAC Rules gives the tribunal power to conduct the proceedings and merely requires "consultation" with the parties. Where the parties and tribunal disagree, the tribunal arguably "has the final say".[102]

41 In any event, the SIAC Rules provide more permutations of an express power to exclude or limit fact witnesses' oral testimony than the LMAA Terms or IBA Rules do, but the exercise of the powers is bounded by the requirement of consultation with the parties.

### *D. Rules of Arbitration of the International Chamber of Commerce*

42 In contrast, the Rules of Arbitration of the International Chamber of Commerce (2021) ("ICC Rules 2021") do not expressly empower a tribunal to limit or exclude fact witness testimony. Article 22.2 of the ICC Rules 2021 states that "after consulting with the parties the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties". Appendix IV of the ICC Rules 2021 clarifies that possible procedural matters may include "limiting the length and scope of … written and oral witness evidence … so as to avoid repetition and maintain a focus on key issues".[103] Two points arise here. First, measures to limit witness testimony must be adopted by the tribunal. Secondly, any ability to limit witness testimony pursuant to its case management powers is subordinate to the parties' agreement.

43 The ICC Rules 2021 also put the tribunal "in full charge of the hearings".[104] At the same time, the tribunal is required to establish the facts

101 Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 2016) Art 24.1.
102 John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* (Oxford University Press, 2nd Ed, 2018) at p 162.
103 Rules of Arbitration of the International Chamber of Commerce (2021) Appendix IV(e).
104 Rules of Arbitration of the International Chamber of Commerce (2021) Art 26.3.

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of the case in as short a time as possible "by all appropriate means"[105] and "conduct the arbitration in an expeditious and cost-effective manner".[106] Limiting overlapping or immaterial testimony would achieve these goals. So too would excluding a witness whose evidence would not contribute to resolution of the dispute. Alongside Art 22.2 of the ICC Rules 2021, this suggests that ICC tribunals have an implied power to limit witness testimony subject to contrary party agreement.

44 An implied power to exclude witness testimony can also be seen in the ICC Rules 2021. In establishing the facts of the case, Art 25.2 of the ICC Rules 2021 proves that the tribunal "may decide to hear witnesses … in the presence of the parties, or in their absence provided they have been duly summoned". This provision, which has been included in each edition of the ICC Rules since 1998,[107] lends itself to two different readings. On the one hand, the discretion ("may decide") could refer to the tribunal's ability to hear witnesses in the presence or absence of a party. On the other, the discretion might go to the power of a tribunal to decide whether to hear a witness. The ICC Secretariat's Guide to the 2012 edition of the ICC Rules gives support to the latter reading – the provision is explained as "empowering the tribunal to hear any witness".[108] The implication, then, of this positive power to hear a witness is that the tribunal could also decide not to hear a witness.

45 In a decision the Singapore Court of Appeal called "correctly decided",[109] the English High Court held in *Dalmia Dairy Industries Ltd v National Bank of Pakistan* ("*Dalmia*") reached the same conclusion. The High Court held that Art 20 of the ICC Rules 1955 (which reads "the arbitrator … shall have the power to hear witnesses") did not impose an obligation on a tribunal to hear witnesses and, instead, a tribunal could exclude witnesses.[110] The facts of *Dalmia* are somewhat unique: the dispute involved primarily legal questions on which the arbitrator considered that the proposed fact witnesses would be no assistance.[111]

105 Rules of Arbitration of the International Chamber of Commerce (2021) Art 25.1.
106 Rules of Arbitration of the International Chamber of Commerce (2021) Art 22.1.
107 Rules of Arbitration of the International Chamber of Commerce (2021) Art 25.2; Rules of Arbitration of the International Chamber of Commerce (2017) Art 25.3; Rules of Arbitration of the International Chamber of Commerce (2012) Art 25.3; Rules of Arbitration of the International Chamber of Commerce (1998) Art 20.3.
108 Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (International Chamber of Commerce, 2012) at p 273.
109 *CBS v CBP* [2021] 1 SLR 935 at [65], *per* Quentin Loh JAD.
110 *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 at 269–270, *per* Kerr J. This conclusion was not in issue on the subsequent appeal to the English Court of Appeal.
111 *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 at 269, *per* Kerr J.

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The upshot, though, is that the ICC Rules appear to include an implied power to *exclude* all witnesses in appropriate circumstances and subject to party agreement to the contrary.

46 In *CBS*, the Court of Appeal construed the more broadly-worded r 25.1 of the SCMA Rules as not providing an implied basis to entirely exclude a witness's testimony.[112] There is no inconsistency between the decisions, however. *Dalmia* turned on a discretion to forego witness evidence which the SCMA Rules does not include.

47 As with the LMAA Terms and SIAC Rules, these witness-gating powers must be exercised so that each party is treated fairly and has a "reasonable opportunity to put its case".[113] This does not mean, however, that every party request must be allowed or that the tribunal cannot impose some limits on the parties.[114] Rather, the ICC Rules give tribunals implied powers to limit and exclude witness testimony.

### *E. Arbitration Rules of the United Nations Commission on International Trade Law*

48 Unlike the preceding sets of rules, the Arbitration Rules of the United Nations Commission on International Trade Law (2013) ("UNCITRAL Rules") provide only a limited implied power to gate fact witness testimony. There are four provisions relevant to witness evidence. Article 17(1) of the UNCITRAL Rules gives a tribunal broad discretion to "conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality … [and] each party is given a reasonable opportunity of presenting its case". The power is to be exercised so as to avoid delay and expense, and to provide a fair and efficient resolution of the dispute.[115] Notably, the Court of Appeal in *CBS* held that the similarly worded r 25.1 of the SCMA Rules did not enable a tribunal to exclude witnesses. At its highest, rather, the rule allowed for the limiting of some witness testimony.[116] Given the similarity between the UNCITRAL Rules and SCMA Rules, it is suggested that a Singapore court would read Art 17(1) of the UNCITRAL Rules to only grant an implied power to limit the scope of witness testimony but not to exclude any witness testimony in its entirety.

112 *CBS v CBP* [2021] 1 SLR 935 at [61] and [78], *per* Quentin Loh JAD.
113 Rules of Arbitration of the International Chamber of Commerce (2021) Art 22.4.
114 Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (International Chamber of Commerce, 2012) at p 238.
115 Arbitration Rules of the United Nations Commission on International Trade Law (2013) Art 17(1).
116 *CBS v CBP* [2021] 1 SLR 935 at [61] and [78], *per* Quentin Loh JAD.

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49 A tribunal's powers in relation to hearings also do not give the tribunal robust powers to exclude witnesses. Article 17(3) of the UNCITRAL Rules requires a hearing to be held if one is requested by a party and the hearing shall be held "for the presentation of evidence by witnesses … or for oral argument".[117] While on its face the provision appears disjunctive, the better view after *CBS* is that the provision operates holistically. Article 28.2 of the UNCITRAL Rules reinforces this conclusion, specifically envisioning that witnesses will attend the hearing and "may be heard under the conditions and examined in the manner set by the arbitral tribunal".[118] Although similar to Art 25.2 of the ICC Rules, the discretion to hear witnesses is tied to compliance with the tribunal's conditions. This implicitly suggests that witnesses will be heard, subject to conditions like time limits.[119] The result is that a tribunal appears unable to direct that oral evidence not be presented at the hearing without the parties' prior agreement.

50 Thus, while it is for the tribunal to determine the admissibility, relevance and weight of the witness's evidence,[120] the tribunal's witness-gating power under the UNCITRAL Rules only extends to an implied power to limit some oral testimony.

## V. Conclusion: Spectrum of witness-gating powers

51 Witness-gating is not monolithic. Various arbitral rules provide for three different types of witness-gating: (a) exclusion of all witnesses; (b) exclusion of a particular witness; and (c) limitation of a witness's testimony. These are conferred either expressly, as under the LMAA Terms, or implicitly, as in the ICC Rules. However, arbitral rules do not provide the power to gate fact witnesses in the same manner. Rather, witness-gating power can be viewed as existing along a spectrum.

52 At the most robust end, the LMAA Terms expressly allow a tribunal to exclude all witness evidence. The SIAC Rules include similarly robust powers – a tribunal can refuse the appearance of witnesses and may, after consultation with the parties, convene a hearing for submissions only. Further along the spectrum, the ICC Rules appear to contain an implied power for the tribunal to bar witness testimony.

117 Arbitration Rules of the United Nations Commission on International Trade Law (2013) Art 17(3).
118 Arbitration Rules of the United Nations Commission on International Trade Law (2013) Art 28(2).
119 See also *CBS v CBP* [2021] 1 SLR 935 at [78], *per* Quentin Loh JAD.
120 Arbitration Rules of the United Nations Commission on International Trade Law (2013) Art 27(4).

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The IBA Rules give the tribunal a less expansive power to gate a particular witness. At the opposite end of the spectrum, the UNCITRAL Rules only provide a tribunal with an implied power to limit a witness's testimony. In between the IBA Rules and the UNCITRAL Rules lies the express power (under the LMAA Terms, IBA Rules and SIAC Rules) and implied power under the ICC Rules and SCMA Rules to limit witness testimony. The range of witness-gating powers is set out in the table below:

| **Arbitral Rules/ Institution** | **Applicable Rule** | **Scope of Witness-Gating Power** |
|---|---|---|
| LMAA Terms | r 14(b)<br>r 16 | Tribunal expressly empowered to exclude all witness evidence. Tribunal is also expressly empowered to limit witness evidence. |
| SIAC Rules | Art 19.4<br>Art 24.1<br>Art 25.2 | Tribunal expressly empowered to exclude all witness evidence. Tribunal is also expressly empowered to limit witness evidence. Exercise of these powers requires prior consultation with the parties. |
| ICC Rules | Art 22.2<br>Art 25.2 | Tribunal granted an implied power to exclude any witness evidence. Tribunal also granted an implied power to limit witness evidence. Exercise of these powers is subject to parties' contrary agreement. |
| IBA Rules | Art 8.2 | Tribunal granted an implied power to exclude a witness's evidence. Tribunal also granted an implied power to limit witness evidence. |
| SCMA Rules | r 25.1 | Tribunal granted an implied power to limit witness evidence. |
| UNCITRAL Rules | Art 17(1) | Tribunal granted an implied power to limit witness evidence. |

53 While a typology of witness-gating powers can be identified, several questions remain unresolved which can affect the application of the powers. One such question surrounds the purpose of these powers. Both the High Court in *CBP* and the Court of Appeal in *CBS* rightly framed the question of whether a tribunal's attempt to gate witnesses contravenes natural justice as a case-specific enquiry. However, each court also identified preventing unnecessary delay to be the fundamental utility of witness-gating. While this is certainly one purpose of the powers, it may be an unduly narrow conception. For example, limiting

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or excluding witness testimony may also prevent abuses of natural justice by giving tribunals the ability to bar inappropriate witnesses or testimony and surprise at a hearing. The view taken as to the purpose of these powers informs the circumstances in which their exercise may be appropriate.

54 Both courts' narrow construction of the purpose of witness-gating powers can also be queried. The High Court in *CBP* and Court of Appeal in *CBS* viewed any witness-gating power in the SCMA Rules as restricted by the requirement that it be exercised to "ensure the just, expeditious and economical and final determination of the dispute". This gave the power narrow operation.[121] In practice, the equivalency of justice and expedition in Art 25.1 of the SCMA Rules means that, even assuming a tribunal can exclude a witness, a tribunal cannot exclude a witness "plainly relevant to a particular issue"[122] or bar all witness evidence where it is only of the *preliminary* view that the witnesses will be irrelevant.[123] Thus, this requires witnesses to be heard, even if the tribunal is of the view before the hearing that they may be irrelevant. While a tribunal could then rely on the implied powers to limit a witness's testimony, the Court of Appeal in *CBS* considered these powers to also have a constrained operation. The tribunal could limit the time allowed for giving the evidence,[124] limit the number of witnesses[125] or restrain a witness from answering specific questions provided the party seeking to call the witness was not denied natural justice.

55 Whether *express* powers to exclude witnesses will be read as restrictively is an open question. Both the High Court and the Court of Appeal in *CBS* contrasted the implied powers under the SCMA Rules with "express" witness-gating powers.[126] On their face, though, the express powers under the SIAC Rules and LMAA Terms are subject to equivalent limitations. Article 19.1 of the SIAC Rules also subjects the tribunal's powers to a general obligation to ensure "fair" and "expeditious" dispute resolution. The "purpose of [the LMAA Terms] is to obtain fair resolution" of the dispute "without unnecessary delay or expense" and arbitrators are under a general duty to act fairly.[127] The content of

121 Notably, the implied powers in the UNCITRAL Rules and ICC Rules are subject to similar general requirements.
122 *CBP v CBS* [2020] SGHC 23 at [76], *per* Ang Cheng Hock J. The Court of Appeal did not doubt this point.
123 *CBP v CBS* [2020] SGHC 23 at [77], *per* Ang Cheng Hock J. The Court of Appeal did not doubt this point.
124 *CBS v CBP* [2021] 1 SLR 935 at [78], *per* Quentin Loh JAD.
125 *CBP v CBS* [2020] SGHC 23 at [77], *per* Ang Cheng Hock J.
126 *CBP v CBS* [2020] SGHC 23 at [68], *per* Ang Cheng Hock J; *CBS v CBP* [2021] 1 SLR 935 at [69], *per* Quentin Loh JAD.
127 London Maritime Arbitrators Association Terms 2017 r 1(3).

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natural justice is context-dependent, however, and, in the case of the LMAA Terms and the SIAC Rules, must be considered in light of the parties' decision to endow the tribunal with an express power to exclude witnesses. Accordingly, it is suggested that a somewhat more permissive or deferential view of such a power's exercise may be warranted. While these powers cannot be unlimited[128] and should not be used to bar witnesses on merely preliminary views as to their relevance, this approach would accord deference to the parties' autonomy in selecting rules with express witness-gating powers. In addition to potentially enhancing procedural efficiency, this would also further the policy goal of supervisory courts in exercising their powers with a "light hand".[129]

56 Although these specific questions await resolution, the underlying point is that different witness-gating powers are found in the various arbitral rules. This has wide-ranging practical importance. First, the specific witness-gating power available in the arbitration affects the bounds of natural justice that a party is entitled to in that proceeding. For example, if parties agree to arbitrate under the SIAC Rules, the "natural justice" of the arbitration includes a tribunal being able to exclude a party's witnesses in certain situations. In turn, understanding the nuances of the specific witness-gating powers granted to a tribunal under the relevant set of rules – and the likely reading given to them in Singapore – allows a tribunal to make better procedural decisions regarding the precise extent of witness testimony. Such tailored orders can enhance the efficiency of the arbitration while enabling parties a full opportunity to put their cases. This lends itself to the making of an enforceable award. For parties, understanding witness-gating provides a better awareness of their entitlement to natural justice in the arbitration, reducing unmeritorious challenges to awards. Both outcomes stand to enhance international commercial arbitration.

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128 *CBP v CBS* [2020] SGHC 23 at [76], *per* Ang Cheng Hock J.

129 *Triulzi Cesare SRL v Xinyin Group (Glass) Co Ltd* [2015] 1 SLR 114 at [132], *per* Belinda Ang J; see also *CBS v CBP* [2021] 1 SLR 935 at [51], *per* Quentin Loh JAD.

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