EXPLORING THE CONTOURS AND EVOLUTION OF THE FAIR HEARING RULE IN SINGAPORE

This paper seeks to explore the evolution and contours of the fair hearing rule given the recent renewed interest in the arbitration community over the precise contours of the rule as a result of the widespread use of videoconferencing technology for remote hearings. It explores the scope of the rule in Singapore and briefly considers relevant developments in other jurisdictions.

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I. Introduction

1 Due process is a fundamental tenet in international commercial arbitration which manifests itself in various rules, including the rules of natural justice.[1] The rules of natural justice in turn comprise two distinct but related pillars: no one shall be a judge in his own cause and each party must be given a reasonable opportunity to be heard.[2] A denial of natural justice can result in an arbitral award being set aside or refused enforcement in Singapore.[3] The second of these pillars is the fair hearing rule or the right to be heard. This second pillar has recently been under the spotlight since the COVID-19 pandemic precipitated a shift

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1 Franco Ferrari *et al*, *Due Process as a Limit to Discretion in International Commercial Arbitration* (Wolters Kluwer, 2020) at p 19.

2 Sundaresh Menon, *Arbitration in Singapore, A Practical Guide* (Sweet & Maxwell, 2nd Ed, 2018) at p 490.

3 Sections 24(*b*) and 31(2)(*c*) International Arbitration Act; s 48(1)(a)(vii) Arbitration Act 1996 (c 23) (UK); Art 36(1)(a)(ii) UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc/A/40/17.

of in-person arbitral proceedings into the virtual domain.[4] In light of these developments, there has been renewed interest in the arbitration community over the precise contours of the fair hearing rule. This paper therefore seeks to explore the evolution and contours of the fair hearing rule in Singapore. Where appropriate, this paper will make references to developments in the fair hearing rule in other jurisdictions.

II. The fair hearing rule

2 The fair hearing rule has its origins in administrative law and is not unique to international commercial arbitration.[5] Often referred to as the "Magna Carta of arbitration", the fair hearing rule is an indispensable and universal requirement in all arbitral proceedings.[6] It is embodied in Art 18 of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"),[7] and also reflected in the rules of major arbitral institutions.[8] While the contents of the fair hearing rule might vary from case to case,[9] the essence of the rule can be distilled to the key idea that a party to an arbitration must be given the "full opportunity" to present its case.[10] This "full opportunity" is not an unfettered right, but is tempered by considerations of reasonableness and fairness.[11]

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4 See generally, Maxi Scherer *et al*, *International Arbitration and the COVID-19 Revolution* (Wolters Kluwer, 2020) at pp 95–100.

5 Austin Ignatius Pulle, "Securing Natural Justice in Arbitration Proceedings" (2012) 20(1) *Asia Pacific Law Review* 63 at 64, citing Lord Woolf, Jeffrey Jowell and Andre Le Sueur, *De Smith's Judicial Review* (6th Ed, Sweet & Maxwell, 2007).

6 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [42].

7 UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc/A/40/17, Art 18.

8 See *eg*, Art 22.4 of the International Chamber of Commerce Rules 2021; Art 7 of Sch 1 of the Singapore International Arbitration Centre Rules 2016; Art 13.1 of the Hong Kong International Arbitration Centre Rules 2018.

9 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [125].

10 *ADG v ADI* [2014] SGHC 73 at [103].

11 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [96]–[97].

3 As explained by the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*[12] ("*Soh Beng Tee*"):[13]

> Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The best rule of thumb to adopt is to treat the parties equally and *allow them reasonable opportunities to present their cases as well as respond*. An arbitrator should not base his decision(s) on matters not submitted or argued before him. In other words, an arbitrator should not make bricks without straw. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges. [emphasis added]

4 In the same vein, the High Court in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd*[14] ("*Triulzi*") observed:[15]

> The exercise of case management powers is subject to the rules of natural justice which includes the right to be heard. However, *this right only encompasses a reasonable opportunity to present one's case, the fair hearing rule, which must be considered in light of other competing factors*. For instance, the Tribunal is also obligated under Art 22(1) of the ICC Rules 2012 to 'make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute'. *Weight must be accorded to 'the practical realities of the arbitral ecosystem such as promptness and price'* (see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [103]). [emphasis added]

5 While the essence of the fair hearing rule is clear, the precise contours of what is a "reasonable opportunity to present one's case" defies easy definition and is undergirded by both legal and policy considerations. Chief amongst these considerations is the policy of minimal curial intervention.

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12 [2007] 3 SLR(R) 86.

13 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65].

14 [2015] 1 SLR 114.

15 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [131].

A. The policy of minimal curial intervention and its interactions with the fair hearing rule

6 To recognise and respect the autonomy of the arbitral process, the Singapore courts adopt the policy of minimal curial intervention and generally accord a margin of deference to an arbitral tribunal in the exercise of its procedural discretion.[16] Such deference is accorded in recognition of the fact that the tribunal is a master of its own procedure and exercises its procedural discretion "within a highly specific and fact-intensive contextual milieu, the finer points of which the court may not be privy to".[17]

7 In other words, the Court will intervene in an arbitrator's decision only in narrowly circumscribed situations. This is to ensure that a successful party will not be deprived of the fruits of an arbitration due to technical challenges presented by the other party to frustrate the finality of the arbitral process.[18] The Singapore courts' policy of minimal curial intervention is illustrated by the fact that only 20% of setting-aside applications in the past 20 years have been allowed, demonstrating that the courts will only allow arbitral awards to be set aside in exceptional cases where there are clear grounds for doing so.[19]

8 The policy of minimal curial intervention provides an important guiding principle for the court where a tribunal is alleged to breach the fair hearing rule.[20] The threshold for curial intervention is a high one: "there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously"[21] or that the arbitrator's conduct of the proceedings is "so far removed from what could reasonably be expected of the arbitral process that it must be rectified".[22] Relatedly, the High Court in *Triulzi* also emphasised that

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16 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [103].

17 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [103].

18 *ASG v ASH* [2016] SGHC 130 at [55].

19 *CAJ v CAI* [2022] 1 SLR 505 at [2].

20 *ADG v ADI* [2014] SGHC 73 at [114].

21 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65].

22 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [103].

the supervisory role of the Court should only be "exercised with a light hand" where there is a challenge to an arbitral award on the basis of the fair hearing rule.[23]

9 It is apparent that the policy of minimal curial intervention undergirds how the courts interpret the scope of the fair hearing rule. In this regard, the courts have cautioned against importing aspects of the fair hearing rule from other branches of law due to the unique nature of arbitration:[24]

> The courts should be slow to harden the concept of a parties' right to be heard in arbitration by importing wholesale into the law of arbitration all aspects of the right to be heard as it has developed in administrative law. The core concept of natural justice as it has developed in administrative law no doubt applies to a tribunal. But one must remember that an arbitral tribunal's powers over the parties spring from their consent and not from the coercive powers of the state or of a public body. The right to be heard as it is applied in arbitration is much less concerned with protecting the vulnerable against arbitrary governmental or quasi-governmental action and much more concerned with achieving practical results which fulfil the parties' expectations of arbitration as a dispute resolution process. A further reason in international commercial arbitration is that one of its goals is for business to achieve precisely the expeditious, economical and final determination that the SIAC Rules mandate. It is for that reason that the parties consciously agree to the Tribunal's procedural flexibility and consciously accept the limited rights of recourse under the IAA.

10 In this sense, the fair hearing rule in international commercial arbitration has evolved and taken on a different complexion compared to its counterparts in other domains of the law. This rule is of particular importance in international commercial arbitration because it serves as an "essential check on the wide powers of the tribunal in managing the arbitral process".[25]

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23 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [132].

24 *ADG v ADI* [2014] SGHC 73 at [113].

25 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [92].

B. Denial of the fair hearing rule and its implications

11 Despite the high threshold for curial intervention, the Singapore courts have indeed set aside arbitral awards on the basis of a breach of the fair hearing rule. However, a breach of the fair hearing rule does not *ipso facto* result in an award being set aside. The alleged breach must: (a) have a causal nexus with the award made; and (b) prejudice the rights of a party.[26]

12 A causal nexus exists between a breach of the fair hearing rule and the award made if the breach influenced or affected the tribunal's ultimate decision.[27] In other words, if the breach made an "appreciable difference" or had an "appreciable impact" on the outcome of the arbitration,[28] the causal nexus requirement will be satisfied.

13 Closely related to the causal nexus requirement is the need for a complainant to demonstrate that his rights have been prejudiced because of the breach of his right to be heard. Prior to the decision by the Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*[29] ("*Lim Chin San*"), the Court in *Soh Beng Tee* articulated the degree of prejudice a complainant had to show as follows:[30]

> It appears to us that in Singapore, an applicant will have to persuade the court that there has been some actual or real prejudice caused by the alleged breach. While this is obviously a lower hurdle than substantial prejudice, it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis. There must be more than technical unfairness. It is neither desirable nor possible to predict the infinite range of factual permutations or imponderables that may confront the courts in the future. What we can say is that to attract curial intervention it must be established that *the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way*. [emphasis added]

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26 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [73] and [82].

27 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [81].

28 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [77] and [94].

29 [2013] 1 SLR 125.

30 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [91].

14 The Court of Appeal in *Lim Chin San* subsequently clarified the degree of prejudice required.[31] The Court unequivocally stated:

> 51 These passages [in *Soh Beng Tee*] should not be understood as requiring the applicant for relief to demonstrate affirmatively that a different outcome would have ensued but for the breach of natural justice. Nor conversely do they mean that the application for relief is bound to fail if there is a possibility that the same result might have been arrived at even if the breach of natural justice had not occurred.
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> …
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> 54 … [T]he real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, *the issue is whether the material could reasonably have made a difference to the arbitrator; rather than whether it would necessarily have done so*. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator (*cf Soh Beng Tee* at [86]).
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> [emphasis added]

15 The Court of Appeal has stated in no uncertain terms that a complainant does not need to show that the breach of the fair hearing rule resulted in an actual alteration in the arbitrator's decision. A complainant merely needs to show that the breach could reasonably have made a difference to the arbitrator's decision.[32]

16 An application of the principles in *Lim Chin San* can be found in the High Court's decision in *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd*.[33] There, the High Court found that the tribunal was in breach of the fair hearing rule as it made a finding on the

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31 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [51] and [54].

32 Koo Zhi Xuan & Joshua Lim Yong En, "The Intricacies Involved In the Pursuit of Natural Justice in Arbitration" (2013) 25 SAcLJ 595 at 598–599.

33 [2018] 4 SLR 27.

effects of a contractual clause without giving notice to the parties.[34] The High Court observed that the tribunal's failure to accord the respondent with the right to be heard resulted in actual or real prejudice to the respondent because the tribunal's interpretation of the contractual clause was contrary to the parties' own interpretation of the same clause.[35] The tribunal could have reasonably arrived at a different result if the parties' were given the full opportunity to make their arguments on the construction of that clause.[36]

17 The UK position is ostensibly different from Singapore's position in so far as the prejudice requirement is concerned. In the UK, an award could be set aside under s 68 of the Arbitration Act 1996[37] ("Arbitration Act") if there was a serious irregularity affecting the tribunal, the proceedings or the award.[38] In this regard, a serious irregularity includes a failure by the tribunal to comply with s 33 of the Arbitration Act, which is the general duty of the tribunal to act fairly and impartially as between the parties, and giving each party a reasonable opportunity of presenting their case.[39]

18 The party seeking to set aside an arbitral award must show that the serious irregularity led to "substantial injustice".[40] The Court of Appeal in *Soh Beng Tee* noted that "Parliament, in steering away from the 'substantial injustice' formula adopted in the UK Arbitration Act 1986, had intended to set a lower bar to establish a remediable 'prejudice'".[41]

19 It appears, however, that any difference in the "substantial injustice" requirement in the UK and the "prejudice" requirement in Singapore is more apparent than real. Ultimately, a party can demonstrate "substantial

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34 *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2018] 4 SLR 27 at [64].

35 *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2018] 4 SLR 27 at [69]–[70].

36 *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2018] 4 SLR 27 at [69]–[70].

37 Arbitration Act 1996 (c 23) (UK).

38 Arbitration Act 1996 (c 23) (UK) s 68.

39 Arbitration Act 1996 (c 23) (UK) s 33.

40 Arbitration Act 1996 (c 23) (UK) s 68.

41 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [91].

injustice" if he can show that the tribunal would have reasonably adopted a different course had there been no irregularity.[42] As recognised by Robert Merkin when interpreting s 68(2) of the Arbitration Act, "if it is possible that the arbitrator could have reached the opposite conclusion had he acted properly, there is potentially substantial injustice".[43] In other words, a complainant merely needs to show that a breach of the fair hearing rule could have reasonably made a difference to the arbitrator's decision. In substance, this is the same as the Singapore position on prejudice.

III. Examining specific factual scenarios where the fair hearing rule has been applied

20 As explained above, the general principles relating to the fair hearing rule and when a breach of the fair hearing rule may lead to a setting aside of an arbitral award is clear. However, what is a "reasonable opportunity to present one's case" defies easy definition. It is apposite at this juncture to examine the myriad factual situations in which the fair hearing rule was alleged to be breached and the courts' treatment of such allegations. There is perhaps no better way to observe the contours of the fair hearing rule and how it has evolved other than to scrutinise how the Singapore courts have dealt with the rule in ever-changing factual matrices.

A. Lack of opportunity to respond to newly introduced issues

21 The lack of an opportunity to respond to newly introduced issues in an arbitration is perhaps the most glaringly obvious breach of the fair hearing rule. In *CAI v CAJ*[44] ("*CAI*"), which was affirmed on appeal, the High Court was confronted with allegations that the tribunal failed to provide the arbitration claimants with a fair and reasonable opportunity to respond to a newly introduced defence ("Primary Breach") and had

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42 Hattie R Middleditch, "Chapter 19: Country Report: United Kingdom" in *Due Process as a Limit to Discretion in International Commercial Arbitration* (Franco Ferrari *et al* eds) (Wolters Kluwer, 2020) at pp 414–415.

43 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [87], citing Robert Merkin, *Arbitration Law* (Informa UK Limited, Looseleaf Ed, 1991) at [20.8].

44 [2021] SGHC 21.

substantially relied on its purported experience (as opposed to the available evidence) to ground its decision to grant an extension of time to the defendants ("Secondary Breach").[45]

22 The Court reasoned that the tribunal had indeed committed both the Primary Breach and the Secondary Breach as the arbitration claimants did not have the opportunity to adduce evidence or submissions to respond to the defence raised at the tail end of the arbitration,[46] and further, that the tribunal failed to give the arbitration claimants an opportunity to address their purported experience, which it relied upon to grant the extension of time to the defendants.[47]

23 In *CAI*, the dispute between the arbitration claimants and defendants arose from two related contracts (the "Agreements").[48] It was undisputed by the parties that the defendants' pleadings in the arbitration did not contain anything to the effect that they were contractually entitled to an extension of time under "General Condition 40" of the Agreements ("GC 40") so as to reduce the amount of liquidated damages payable (the "EOT Defence").[49]

24 Nearing the tail end of the arbitration, the EOT Defence was included in the defendants' written submissions.[50] Amongst other reasons, the High Court found that the Primary Breach was committed because of two reasons: (a) the EOT Defence was undoubtedly a completely new defence sprung on the arbitration claimants; and (b) the arbitration claimants could not have predicted the appearance of the EOT Defence.[51]

25 In its reasoning, the Court also observed that the Secondary Breach had occurred because the tribunal failed to give the parties notice of its thinking and invited submissions on it.[52] As the tribunal was relying

45 *CAI v CAJ* [2021] SGHC 21 at [60].
46 *CAI v CAJ* [2021] SGHC 21 at [70].
47 *CAI v CAJ* [2021] SGHC 21 at [175]–[176].
48 *CAI v CAJ* [2021] SGHC 21 at [7]–[9].
49 *CAI v CAJ* [2021] SGHC 21 at [41].
50 *CAI v CAJ* [2021] SGHC 21 at [70].
51 *CAI v CAJ* [2021] SGHC 21 at [70].
52 *CAI v CAJ* [2021] SGHC 21 at [175].

substantially on its experience, it could have invited the parties to make submissions targeted at the tribunal's experience, which it failed to do.[53]

26 The decision in *CAI* raises a noteworthy point about the potential overlap between a tribunal's breach of the fair hearing rule and a tribunal acting in excess of jurisdiction (which is reflected in Art 34(2)(a)(ii) of the Model Law). In *CAI*, the tribunal's decision to allow the EOT Defence and to rule on it not only exceeded the parties' scope of submissions, but also contravened the parties' right to be heard.

27 In this regard, the learned authors of *The Law and Theory of International Commercial Arbitration in Singapore* have noted that there is "sometimes no material distinction between a challenge under Article 34(2)(a)(iii) and the breach of the rules of natural justice under Article 24(*b*) of the IAA".[54] A similar observation was made by the High Court in *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc*[55] ("*Philippine International*"), where the court noted that a complaint that a tribunal's decision went beyond the scope of the submission to arbitrate could be a "mirror image" of its complaint on a breach of the fair hearing rule.[56]

28 The reasons for the potential overlap between a tribunal's excess of jurisdiction and a tribunal's breach of the fair hearing rule is explicable on the basis that a party is unlikely to have reasonable notice of a tribunal's chain of reasoning if it exceeded the scope of submission to arbitration.

29 In *BZW v BZV*,[57] the Court of Appeal explained that a party would have reasonable notice of a particular chain of reasoning if:[58]

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53 *CAI v CAJ* [2021] SGHC 21 at [175].

54 Darius Chan, Paul Tan & Nicholas Poon, *The Law and Theory of International Commercial Arbitration in Singapore* (Singapore Academy of Law, 2022) at [8.118].

55 [2007] 1 SLR(R) 278

56 *Government of the Republic of Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278 at [25].

57 [2022] 1 SLR 1080

58 *BZW v BZV* [2022] 1 SLR 1080 at [60(b)].

(a) it arose from the parties' pleadings;

(b) it arose by reasonable implication from their pleadings;

(c) it was unpleaded but arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or

(d) it flowed reasonably from the arguments actually advanced by either party or was related to those arguments.

30 It is conceivable that a tribunal which exceeded the scope of submission to arbitration would similarly breach the fair hearing rule because a party is unlikely to have reasonable notice of the tribunal's particular chain of reasoning. The tribunal's chain of reasoning would not have arisen from the parties' pleadings (expressly or by reasonable implication) nor flow from the arguments advanced by the parties. It is also unlikely that an issue beyond the scope of submission to arbitration would have been reasonably brought to a party's actual notice. For these reasons, there is a conceivable overlap between a tribunal's breach of the fair hearing rule and a tribunal exceeding the scope of submission to arbitration.

B. Lack of opportunity to have an oral hearing or cross-examination

31 Parties sometimes allege a breach of the fair hearing rule because they were not given an opportunity to have an oral hearing to present their arguments or cross-examine the witnesses of the counterparty. These challenges have failed on numerous occasions because a "reasonable opportunity to present one's case" does not, without more, entail a right to an oral hearing and/or the opportunity to cross-examine the witnesses of the counterparty.

32 In *Philippine International*, the Government of the Republic of the Philippines ("GOP") applied to set aside an arbitral award on the basis that the fair hearing rule was breached. Amongst other complaints, the GOP argued that the tribunal did not ask the parties to make presentations at an oral hearing.[59]

[59] *Government of the Republic of Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278 at [33].

33 As the arbitration proceeded in accordance with the International Chamber of Commerce Rules of Arbitration (the "ICC Rules"), the High Court held that an oral hearing was not mandated by r 20(2) of the ICC Rules, and further, that Art 24(1) of the Model Law also did not require an oral hearing unless either the parties or the tribunal required one.[60]

34 As alluded to above, the fair hearing rule simply requires parties to be given a reasonable opportunity to be heard. A party may well be able to put forth his case through written submissions, without the need to orally address the tribunal. That being said, it remains open to the parties to request for an oral hearing.

35 Where cross-examination is concerned, the Court of Appeal's decision in *PT Prima International Development v Kempinksi Hotels SA*[61] ("*PT Prima*") demonstrates that a party's lack of opportunity to conduct cross-examination does not *ipso facto* breach the fair hearing rule.

36 In *PT Prima*, the complainant submitted that the arbitrator's failure to allow it to cross-examine the counterparty's expert witness on the legal effects of a contract had violated the fair hearing rule.[62] The Court of Appeal reasoned that both parties' expert witnesses had submitted their written opinion evidence on the legal effect of the aforementioned contract, and there was no evidence on record which showed that the complainant had requested the arbitrator to allow it to cross-examine the counterparty's expert witness. For these reasons, the Court of Appeal held that there was no violation of the fair hearing rule.[63]

37 It bears emphasis that a "reasonable opportunity to present one's case" varies according to the circumstances of each case. A tribunal's refusal to accede to a parties' request for an oral hearing or the right to cross-examine witnesses may amount to a violation of the fair hearing rule in an appropriate situation. There is no blanket rule that a lack of opportunity to present one's case via an oral hearing or the lack of

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60 *Government of the Republic of Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278 at [33].

61 [2012] 4 SLR 98.

62 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [62].

63 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [63].

chance to cross-examine witnesses will *never* amount to a violation of the fair hearing rule.

C. Lack of opportunity to choose representatives in an arbitration

38 It is uncontroversial that a party has the right to choose its representatives in an arbitration,[64] which falls under the broader ambit of the fair hearing rule. The High Court has made it unequivocally clear that this right is not absolute.[65] In *CGS v CGT*,[66] the claimant argued that it was not allowed to have its general manager act as co-counsel alongside its external legal counsel, and its general manager (acting as party representative) was omitted from several e-mail correspondences between the respondent's counsel and the tribunal.[67] Based on these reasons, the claimant argued that it was unable to present its case.

39 In dismissing the application, the High Court considered that the claimant did not take issue with the tribunal's procedural orders which stated that communications with the tribunal would be with counsel instead of the party's representatives.[68] Further, the claimant failed to raise its complaints after its rights had been allegedly infringed, but only raised its complaints *after* the arbitral award was issued.[69]

40 The High Court also reasoned that the claimant's complaint was ironic, since its own notice of arbitration effectively stated that the Claimant was represented in the arbitration by its legal counsel, to whom all communications in the arbitration should be made.[70]

41 More importantly, the claimant's complaint that its general manager was not allowed to function fully as co-counsel alongside its legal counsel was unmeritorious since the claimant had conveyed to the tribunal that its general manager would only participate in the claimant's

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64 Lawrence Boo & Marcus Liew, "Arbitration" (2020) 21 SAL Ann Rev 101, at [4.58].

65 *CGS v CGT* [2021] 3 SLR 672 at [22].

66 [2021] 3 SLR 672.

67 *CGS v CGT* [2021] 3 SLR 672 at [34].

68 *CGS v CGT* [2021] 3 SLR 672 at [35].

69 *CGS v CGT* [2021] 3 SLR 672 at [35].

70 *CGS v CGT* [2021] 3 SLR 672 at [37].

opening statement, and the tribunal had acceded to such a request.[71] For the above reasons, there was no breach of the claimant's rights to choose its representatives in the arbitration.

D. Tribunal's failure to consider a legal authority

42 Another common ground which parties rely on to allege a breach of the fair hearing rule is a tribunal's failure to consider a legal authority raised by a party.[72] This was the case in *BSM v BSN*[73] ("*BSM*"), where the applicant alleged that the tribunal had breached the fair hearing rule by failing to consider a House of Lords decision which it cited in its submissions.[74]

43 The application was squarely dismissed by the High Court, which found that the applicant's arguments were nothing more than a thinly veiled attempt to get the Court to reconsider the merits of the tribunal's decision. Even though the tribunal did not cite the applicant's legal authority in his final award, it does not follow that the tribunal did not consider this legal authority.[75]

44 In many cases, it is difficult for parties to show whether or not a tribunal had dealt with or omitted to deal with issues within the scope of arbitration.[76] In this regard, the courts will not infer that a tribunal had failed to consider an important pleaded issue unless such an inference is clear and virtually inescapable.[77] By parity of reasoning, the courts will similarly decline to draw an inference that a tribunal had failed to consider a legal authority unless such an inference is virtually inescapable. This is demonstrated by *BSM*.

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71 *CGS v CGT* [2021] 3 SLR 672 at [65].

72 Darius Chan, Paul Tan & Nicholas Poon, *The Law and Theory of International Commercial Arbitration in Singapore* (Singapore Academy of Law, 2022) at [8.100].

73 [2019] SGHC 185.

74 *BSM v BSN* [2019] SGHC 185 at [33] and [46].

75 *BSM v BSN* [2019] SGHC 185 at [46].

76 Darius Chan, Paul Tan & Nicholas Poon, *The Law and Theory of International Commercial Arbitration in Singapore* (Singapore Academy of Law, 2022) at [8.150].

77 *AKN v ALC* [2015] 3 SLR 488 at [46].

45 In any event, an arbitral tribunal is not obliged to deal with every single argument as it is neither realistic nor practical to require otherwise.[78] All that is required is for the tribunal to address the essential issues raised by the parties.[79] In light of this, a tribunal's omission to deal with authorities that are deployed by parties to address a non-essential issue will similarly not violate the fair hearing rule.

E. Tribunal's refusal to order document production

46 A party may seek to challenge an arbitral award on the basis that the tribunal refused to order document production in its favour, and therefore deprived it of a fair opportunity to be heard. This was the case in *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH*,[80] where the respondent ("Dongwoo") requested for certain classes of documents from the claimant ("M+H").[81] M+H refused to provide the documents on the grounds of confidentiality.[82] The tribunal ordered M+H to provide the requested documents on condition that Dongwoo provide an undertaking to safeguard the confidentiality of the documents produced.[83]

47 In a subsequent letter to the tribunal, M+H asked the tribunal to reconsider its decision on the grounds of confidentiality. Dongwoo objected to such a request and asked for an adverse inference to be drawn against M+H for refusing to disclose the documents. The tribunal did not draw an adverse inference at that time but left it open to Dongwoo to make such a submission in the event of M+H's non-disclosure. Dongwoo alleged that the tribunal had breached the fair hearing rule since it was deprived of the opportunity to present its case on the issue of whether

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78 *TMM Division Maritama SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [72].

79 *TMM Division Maritama SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [73].

80 [2008] 3 SLR(R) 871.

81 *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 at [22] and [25].

82 *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 at [26].

83 *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 at [27].

an adverse inference should be drawn against M+H for its refusal to produce the documents.

48 The Court held that Dongwoo had already been given an opportunity to make submissions and arguments on whether an adverse inference could be drawn. In fact, Dongwoo had made "very extensive arguments" for the tribunal's consideration.[84]

49 The Court also reasoned that if the tribunal decided wrongly that it was not appropriate to draw any adverse inference, that would be a mere error of fact finding and/or of law, which is not a ground for setting aside an order. Further, the fact that the tribunal had ruled against Dongwoo on that question did not mean that it was not able to present its case. If this was not the case, the losing party would always be able to set aside an award because it must have been unable to present its case, and that could not be right.[85]

F. Tribunal's refusal to admit evidence submitted in breach of timelines

50 As part of its case management powers, a tribunal may refuse to admit evidence submitted in breach of timelines. Oftentimes, parties may seek to challenge the tribunal's decision, arguing that the tribunal's exclusion of evidence deprived them of the right to a fair hearing. The majority of these challenges have invariably failed as the court has consistently upheld the position that a tribunal is entitled to enforce the timelines it had set.[86]

51 In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC*[87] ("*China Machine*"), the challenging party claimed, amongst others, that

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84 *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 at [69].

85 *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 at [70].

86 Jonathan W Lim, "Chapter 17: Country Report: Singapore" in *Due Process as a Limit to Discretion in International Commercial Arbitration* (Franco Ferrari *et al* eds) (Wolters Kluwer, 2020) at p 365.

87 [2020] 1 SLR 695.

the tribunal had acted in breach of the fair hearing rule by refusing to grant it additional time extensions for the admission of expert reports.[88]

52 The Court of Appeal considered that it would not be unreasonable for a tribunal to hold parties to timelines previously set, especially in situations where parties had agreed to the timelines.[89] The tribunal in this case saw no basis for a further extension and provided its reasons for dismissing the extension application.

53 In *Triulzi*, the plaintiff complained that a ten-day time extension for it to file an expert report was too short,[90] and asserted that it was not afforded a reasonable opportunity to be heard in respect of its expert evidence.[91] The plaintiff's arguments were squarely rejected by the High Court. The High Court observed that the tribunal's duty was to proceed with the conduct of the arbitration fairly and expeditiously, and the tribunal had properly balanced this duty of expediency and ensuring that the plaintiff was given an opportunity to ventilate its case.[92] The plaintiff's lack of time was created by its own doing.[93]

54 For completeness, there are situations where a tribunal refuses to admit evidence that is not in breach of timelines. To determine whether the fair hearing rule is breached in those situations, it is important to look at the tribunal's reasons for refusing to admit the evidence. A tribunal might breach the fair hearing rule if it excludes evidence in contravention of the rules governing that arbitration. This was the case in *CBS v CPB*,[94] where the tribunal wrongly interpreted the Rules of the Singapore Chamber of Maritime Arbitration, and wrongfully imposed a condition that parties had to show that their evidence had "substantive

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88 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [128].

89 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [137].

90 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [17] and [142].

91 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [17] and [142].

92 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [136].

93 *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [137].

94 [2021] 1 SLR 935.

value" before deciding whether to allow it through an oral hearing.[95] The tribunal's decision to exclude witness evidence in this case constituted a breach of the fair hearing rule.

IV. Waiver of the fair hearing rule

55 Having explored the myriad factual situations where the fair hearing rule has been considered by the Singapore courts, we turn to the issue of whether a breach of the fair hearing rule could be waived by a party to an arbitration.

56 While the Singapore courts have generally accepted that breaches of natural justice can be waived in the context of administrative law,[96] the waiver of the fair hearing rule in the context of international commercial arbitration has not received much attention. However, the reasoning of the Court of Appeal in *PT Prima* shows that the Singapore courts are willing to accept that a breach of the fair hearing rule can be waived.[97]

57 In *PT Prima*, PT Prima International Development ("Prima") entered into an operating and management contract (the "Management Contract") with Kempinski Hotels SA ("Kempinski").[98] The Management Contract contained an arbitration agreement which stated that any dispute arising out of or in connection with the Management Contract would be referred to and determined by arbitration under the Singapore International Arbitration Centre ("SIAC") Rules.[99]

58 The relationship between Prima and Kempinski soured, and Prima terminated the Management Contract. Kempinski commenced arbitral proceedings to seek, amongst others, declarations that Prima had

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95 *CBS v CPB* [2021] 1 SLR 935 at [71].

96 *Kok Seng Cheong v Bukit Turf Club* [1992] 3 SLR(R) 772 at [101]; *Metropole Pte Ltd v Designshop Pte Ltd* [2017] SGHC 45 at [53].

97 Jonathan W Lim, "Chapter 17: Country Report: Singapore" in *Due Process as a Limit to Discretion in International Commercial Arbitration* (Franco Ferrari *et al* eds) (Wolters Kluwer, 2020) at p 371.

98 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [3].

99 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [4].

wrongfully terminated the Management Contract.[100] The sole arbitrator published four awards with respect to the claims made in the arbitration. Kempinski claimed that it was denied the right to be heard before the third award was made because it had been deprived of the opportunity to cross-examine Prima's expert witness.[101]

59 The Court of Appeal considered that it would have been too late for Kempinski to complain about the tribunal's failure to allow cross-examination even if Kempinski had requested to cross-examine Prima's expert witness. This was because Kempinski did not raise any objection when its request was turned down.[102] In this regard, r 34.1 of the SIAC Rules (1997 Ed) provided that:[103]

> … a party is deemed to have waived its right to object to any non-compliance with these Rules if it knows that any provision of or requirement under these Rules had not been complied with, and yet proceeds with the arbitration without promptly stating its objection.

Due to Kempinski's failure to raise any objections, any argument that it had been denied the right to be heard "[was] nothing more than a veiled attempt to introduce by the backdoor an objection which it has been deemed to have waived". From the Court of Appeal's reasoning, it can be gleaned that a breach of the fair hearing rule can be impliedly waived by a party's conduct.

60 The High Court in *ADG v ADI*[104] ("*ADG*") adopted a similar reasoning. In *ADG*, the plaintiffs alleged that the tribunal denied them the right to be heard by declaring proceedings closed and refusing to re-open proceedings. Amongst others, the High Court reasoned that the plaintiffs took no objection to that procedure at that time, and it could

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100 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [6].

101 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [61].

102 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [63].

103 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [63].

104 [2014] 3 SLR 481.

be said that the effect of their failure to make a timely objection was a waiver of their right to make the objection subsequently.[105]

61 The UK position on waiver is similar to that of Singapore's. A party may similarly lose the right to object to a breach of the fair hearing rule if he fails to make timely objections. This is statutorily enshrined in s 73 of the Arbitration Act, which provides that a party who fails to make timely due process objections may not later raise such objections if he takes part, or continues to take part in the arbitral proceedings unless he is able to show that at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.[106]

62 Section 73 of the Arbitration Act was explored in the case of *Minmetals Germany GmbH v Ferco Steel Ltd*[107] ("*Minmetals*"), where the Commercial Court found it "difficult to envisage a more glaringly obvious waiver of procedural irregularity than that found in this case".[108]

63 In *Minmetals*, an application was taken out by the defendant to set aside an award made by the tribunal (the "sub-sale award"). The defendant alleged that it was not shown the sub-sale award and had not been given the opportunity to make representations on that award.[109] Consequently, the tribunal was in breach of their own procedural rules. The Beijing Court remitted the award for a resumed arbitration, inviting the defendant to explain the basis of its complaint in the revocation proceedings. The defendant failed to explain the basis on which it applied to the Beijing Court for revocation and proceeded without explicitly raising their objection as to the tribunal's non-compliance with their own procedural rules. The English Court held that the defendant's failure to object was a glaringly obvious waiver of procedural irregularity.[110]

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105 *ADG v ADI* [2014] SGHC 73 at [92].

106 Arbitration Act 1996 (c 23) (UK) s 73.

107 [1999] 1 All ER (Comm) 315.

108 *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 328J.

109 *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 318J.

110 *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 328J.

V. The fair hearing rule and remote hearings in the age of COVID-19

64 Having explored the contours of the fair hearing rule, it is now apposite to look at recent developments concerning the use of remote hearings and its interactions with the fair hearing rule. The use of remote hearings in court processes and arbitration proceedings is not new.[111] However, the COVID-19 pandemic has heralded an era of change by abruptly forcing a widespread shift of court processes and other dispute resolution mechanisms to the virtual domain.[112] This shift of dispute resolution to the virtual world has caused disruption on a large scale,[113] and has inevitably impacted the delivery of justice in the courts, and in arbitral proceedings.[114] In Singapore, for instance, all levels of the courts decisively pivoted to the use of remote (as opposed to in-person) hearings before a country-wide lockdown known as the "circuit-breaker".[115] Trials were entirely held on the virtual domain, with court officers, transcribers, witnesses, experts and counsel appearing before the Court via Zoom.[116]

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111 Yvonne Mak, "Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore" *Kluwer Arbitration Blog* (20 June 2020) <https://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/> (accessed 20 June 2023).

112 Dorcas Quek Anderson, "Taking dispute resolution online in a pandemic-stricken world: Do we necessarily lose more than we gain?" in *Law and Covid-19* (Aurelio Gurrea-Martinez, Goh Yihan & Mark Findlay eds) (Singapore Management University, 2020) at p 215.

113 Dorcas Quek Anderson, "Taking dispute resolution online in a pandemic-stricken world: Do we necessarily lose more than we gain?" in *Law and Covid-19* (Aurelio Gurrea-Martinez, Goh Yihan & Mark Findlay eds) (Singapore Management University, 2020) at p 215.

114 Dorcas Quek Anderson, "Taking dispute resolution online in a pandemic-stricken world: Do we necessarily lose more than we gain?" in *Law and Covid-19* (Aurelio Gurrea-Martinez, Goh Yihan & Mark Findlay eds) (Singapore Management University, 2020) at p 216.

115 Aaron Yoong, "Zooming into a New Age of Court Proceedings – Perspectives from the Court, Counsel and Witnesses" [2020] SAL Prac 19 at para 3, citing "Message from Chief Justice Sundaresh Menon: The Singapore Judiciary's Response to COVID-19" *Supreme Court*.

116 Aaron Yoong, "Zooming into a New Age of Court Proceedings – Perspectives from the Court, Counsel and Witnesses" [2020] SAL Prac 19 at para 4.

65 In the context of arbitration, the cardinal question to ask is whether the fair hearing rule is compromised in situations where remote hearings are conducted in place of in-person hearings. Afterall, there are stark differences between the conduct of a remote hearing and an in-person hearing. This question has been explored at length by the courts of various jurisdictions, and this section will examine those decisions. However, before delving into an examination of those decisions, it is apposite to first understand the key differences between an in-person hearing and a remote hearing to fully appreciate whether the fair hearing rule is compromised in a remote setting.

66 The first notable difference between a remote hearing and an in-person hearing is the ability of the tribunal and the parties to properly examine the credibility of witnesses and experts. The ability of parties to conduct cross-examination may be adversely affected by the taking of evidence remotely, particularly in situations where the matter being contested involves significant issues of credibility.[117] Any subtle changes in behaviour and non-verbal cues, such as a witness's body language, may be overlooked by the arbitral tribunal or counsel in a remote hearing.[118] Empirically, studies have shown that child witnesses in criminal trials are viewed to be less credible because their demeanour cannot be fully assessed.[119] These same considerations apply *mutatis mutandis* in the context of arbitration. Cumulatively, remote hearings present far more difficulties in terms of the assessment of witnesses and experts.

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117 *Australian Medical Imaging v Marconi Medical Systems Australia* [2001] NSWSC 651 at [27]; Corina Lefter, "Are We Ready For the Brave New World of Virtual Arbitrations? Insights from the 32nd Annual ITA Workshop" *Kluwer Arbitration Blog* (2020) <https://arbitrationblog.kluwerarbitration.com/2020/08/25/are-we-ready-for-the-brave-new-world-of-virtual-arbitrations-insights-from-the-32nd-annual-ita-workshop/> (accessed 20 June 2023).

118 Jenia Iontcheva Turner, "Remote Criminal Justice" (2021) 53 Tex. Tech L. Rev. 197 at p 217.

119 Dorcas Quek Anderson, "Taking dispute resolution online in a pandemic-stricken world: Do we necessarily lose more than we gain?" in *Law and Covid-19* (Aurelio Gurrea-Martinez, Goh Yihan & Mark Findlay eds) (Singapore Management University, 2020) at p 224, citing Natalie Byrom, "What we know about the impact of remote hearings on access to justice: A rapid evidence review" *Nuffield Family Justice Observatory/The Legal Education Foundation* (2020) at p 4.

67 Secondly, remote proceedings exert a higher cognitive load on participants who concentrate on a screen for prolonged periods of time, in a phenomenon known as "Zoom fatigue".[120] The arbitral tribunal may find it difficult to concentrate for extended periods of time, and this may invariably affect their appreciation of the proceedings.[121]

68 Thirdly, remote cross-examination lacks the gravitas of a formal adjudicatory process and may be less effective overall.[122] There is also the accompanying risk of witness coaching,[123] which may violate a party's right to be treated equally.[124]

69 Finally, even if parties possess the necessary technological equipment for a remote hearing, the risk of technological issues disrupting a remote hearing is a perennial one. Such risks are clearly absent in an in-person hearing. Technological disruptions which occur during the course of a hearing may violate the fair hearing rule if parties are deprived of an opportunity to be heard.[125]

70 Bearing in mind the key differences between an in-person hearing and a remote hearing, we turn to examine how national courts have

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120 Jack Ballantyne, "Virtual hearings: just a stop-gap?" *Global Arbitration Review* (24 September 2020) <https://globalarbitrationreview.com/article/virtual-hearings-just-stop-gap> (accessed 20 June 2023).

121 Jenia Iontcheva Turner, "Remote Criminal Justice" (2021) 53 Tex. Tech L. Rev. 197 at p 219.

122 María Solana Beserman Balco, "COVID-19 and new ways of doing arbitration: are they here to stay?" in *Revista Brasileira de Abitragem* (João Bosco Lee & Flavia Mange eds) (Kluwer Law International 2020, Vol XVII Issue 67) at p 132.

123 Saniya Mirani, "Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective" *Kluwer Arbitration Blog* (17 November 2020) <https://arbitrationblog.kluwerarbitration.com/2020/11/17/due-process-concerns-in-virtual-witness-testimonies-an-indian-perspective/> (accessed 20 June 2023).

124 Ryce Lee & Allison Goh, "Boom and bust? Users' views on the post-pandemic potential of remote hearings in international arbitration" [2021] SAL Prac 23 at para 20, citing Maxi Scherer, "Remote Hearings in International Arbitration: An Analytical Framework" (2020) 37 *Journal of International Arbitration* 407 at p 441.

125 Alex Lo, "Virtual Hearings and Alternative Arbitral Procedures in the COVID-19 Era: Efficiency, Due Process, and Other Considerations" (2020) 13(1) *Contemporary Asia Arbitration Journal* 85 at pp 87 and 95.

dealt with the issue of remote hearings in the context of international commercial arbitration.

A. The Singapore position

71 In Singapore, the parameters of the fair hearing rule were neatly set out by the Court of Appeal in *China Machine*. The overarching inquiry is whether a remote hearing allows the parties to have a full opportunity to ventilate their case.[126] It ought to be borne in mind that a party's right to be heard is "*impliedly* limited by reasonableness and fairness" [emphasis in original][127] and this has special relevance where the complaint concerns a tribunal's failure to grant some form of "procedural accommodation" to a party.[128]

72 It also bears emphasis that an arbitrator is, subject to any procedure otherwise agreed between the parties, a master of his own procedure.[129] While acknowledging that remote hearings will not be able to fully replicate in-person hearing, the Singapore courts have nevertheless explained why the concerns about a remote hearing should not be overstated. In *Wang Xiaopu v Koh Mui Lee*,[130] the High Court stated in no uncertain terms that a court's assessment of a witness's credibility seldom hinges solely on their demeanour on the witness stand, whether the witness testifies remotely or in-person.[131] In particular, the Court cited with approval the following exposition from *Anil Singh Gurm v J S Yeh & Co*:[132]

> … ***a court's assessment of a witness's credibility would, and should, seldom hinge on that witness's demeanour on the stand*** (*ie*, behavioural patterns that are not reflected on the transcript, see Thomas Bingham, *The Business of Judging* (Oxford University Press, 2000) at p 8). As such, ***we were not***

[126] *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [104(a)].

[127] *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [97].

[128] *China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695 at [97].

[129] *Anwar Siraj v Ting Kang Chung* [2003] 2 SLR(R) 287 at [41].

[130] [2022] 5 SLR 324.

[131] *Wang Xiaopu v Koh Mui Lee* [2022] 5 SLR 324 at [27].

[132] *Anil Singh Gurm v J S Yeh & Co* [2020] 1 SLR 555 at [71].

> ***persuaded that a trial judge's assessment of a witness's credibility would be hindered if that witness was not some 'ten feet away in the witness box'*** (see, *eg*, *Asia-Pac Infrastructure Development Ltd v Ing Yim Leung, Alexander and others* [2011] 1 HKLRD 587 ('*Asia-Pac Infrastructure*') at [62]; *Polanski* (CA) ([51] *supra*), *per* Simon Brown LJ at [29]; *Bachmeer Capital* ([47] *supra*) at [18]). In any case, trial judges can take into account any particular deficiencies arising from the use of video link testimony when deciding on the weight to be assigned to a witness's evidence (*McGlinn v Waltham Contractors Ltd and others (No 2)* [2006] EWHC 2322 (TCC) at [11]). We noted that it has been observed that 'the solemnity of the court atmosphere and the threat of immediate sanction' was conducive to obtaining truthful testimony from a witness (*Re Chow Kam Fai ex parte Rambas Marketing Co LLC* [2004] 1 HKLRD 161 ('*Re Chow Kam Fai (CFI)*') at [28]; *Erceg v Erceg* ([66] *supra*) at [14]). In our view, however, questions about a *particular* witness's truthfulness would be a matter for a trial judge to determine based on all the evidence before the court. It is, therefore, unhelpful for us to speculate as to whether, generally speaking, testifying in court necessarily encourages witnesses to be more truthful than when testifying via video link. [emphasis in original in italics; emphasis added in bold italics]

73 To ameliorate other concerns associated with remote hearings, and to ensure that remote hearings can run smoothly, the SIAC has also provided guidelines in relation to remote arbitration proceedings.[133] All things considered, a remote hearing in and of itself does not prevent a party from having a full opportunity to present their case. As the Singapore courts have noted, concerns associated with remote hearings can be sufficiently addressed with the appropriate measures in place.

B. The Australian position

74 The Australian courts have comprehensively considered the issue of whether the fair hearing rule will be contravened in situations involving videoconferencing or remote hearings in the decision of *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd*[134] ("*Sino*"). In *Sino*, the plaintiff sought to set aside an arbitral award on the basis that it

[133] Singapore International Arbitration Centre Secretariat, *SIAC Guides: Taking Your Arbitration Remote* (August 2020).

[134] [2016] FCA 1131.

was unable to present its case because of technical faults which occurred during a hearing heard via video-link.[135]

75 The Federal Court of Australia observed that remote hearings via videoconferencing were less ideal compared to an in-person hearing, but do not, in and of themselves, produce "real unfairness" or "real practical injustice".[136]

76 The Federal Court went on to explain how the difficulties with evidence by videoconference could have been sufficiently mitigated if:[137]

> (a) the plaintiff made the video-link arrangements through an experienced provider and could have tested their videoconferencing equipment in advance to ensure that they were functional;
>
> (b) the plaintiff made arrangements for the witnesses to travel to Australia;
>
> (c) the plaintiff sought a short adjournment to engage a different videoconference provider in advance of the evidence being adduced; or
>
> (d) the plaintiff sought to relist the arbitration and recall its witnesses.

Instead, the plaintiff raised no objections with the remote hearing until *after* the Final Award was delivered.

77 All things considered, if there were technical difficulties in the mode used to take evidence, that was due to the plaintiff's own acts and omissions.[138] For the abovementioned reasons, the Federal Court dismissed the plaintiff's setting aside application.

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135 *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 at [126]–[135].

136 *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 at [154].

137 *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 at [155].

138 *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 at [162].

78 More recently, in *Capic v Ford Motor Company of Australia Limited*,[139] the respondent sought an adjournment for a hearing scheduled for June 2020 until October 2020 due to the COVID-19 pandemic.[140] The Court rejected the respondent's arguments and considered that adjournment of the trial for an indeterminate period of time would not facilitate the administration of justice, and a virtual hearing was a viable (though not ideal) alternative to a physical hearing.[141]

79 The Australian courts clearly accept that remote hearings in and of themselves do not contravene the fair hearing rule. This much is also clear from the decision in *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd*,[142] where the Federal Court endorsed the decision of Finn J in *McDonald v Commissioner of Taxation*,[143] where Finn J rejected the challenge and held:[144]

> As is now well known, the video-link facility is being utilised with greater regularity and acceptance in court proceedings – particularly of this Court – as judges have come to acknowledge that apprehended disadvantages from the use of video-links have not materialised as expected…

80 The Federal Court also explained that there is a "strong current of authority in favour of permitting the relatively new video-link technology to be used, in the absence of some considerable impediment telling against its use in a particular case".[145] In light of the foregoing reasons, the Australian position in respect of remote hearings is substantially the same as Singapore's.

C. The English position

81 The English authorities speak with the same voice – remote hearings are a readily acceptable alternative to physical hearings if there is reason to depart from the general rule that hearings and taking of evidence should

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139 [2020] FCA 486.

140 *Capic v Ford Motor Company of Australia Limited* [2020] FCA 486 at [1].

141 *Capic v Ford Motor Company of Australia Limited* [2020] FCA 486 at [23]–[26].

142 [2000] FCA 1261.

143 [2000] FCA 577.

144 *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [2000] FCA 1261 at [17], citing *McDonald v Commissioner of Taxation* [2000] FCA 577, at [21]–[22].

145 *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [2000] FCA 1261 at [25].

be in-person.[146] In this regard, the Technology and Construction Court in *Municipio de Mariana & Others v BHP Group PLC*[147] agreed to vacate and relist a hearing for one month amidst the COVID-19 pandemic, but accepted that a remote hearing could be conducted to prevent further delay to the proceedings.[148] The Court found that the matter was capable of being fairly determined in a remote hearing although the issues were complex and involved substantial documentations.[149]

82 In *Jiangsu Guoxin Corp Ltd v Precious Shipping Public Co. Ltd*,[150] the Court considered that oral submissions made by way of a telephone link (because of the COVID-19 pandemic) were highly effective and considered that nothing of significance was lost by reason of the fact that parties were not present physically for a hearing.[151]

83 It is clear that the English courts are supportive of remote hearings and do not consider that remote hearings, in and of themselves, will violate the fair hearing rule. The fair hearing rule may be violated in more extreme scenarios where a tribunal decides to continue with a remote hearing despite insurmountable technological problems.[152]

D. The Austrian position

84 The Austrian Supreme Court was notably the first to render a decision on whether a remote hearing conducted by videoconferencing would violate the fair hearing rule.[153] The Supreme Court recognised that videoconferencing was already used in the state courts and is also

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146 *Polanski v Conde Nast Publications Ltd* [2005] EWCA Civ 1573 at [14].

147 [2020] EWHC 928.

148 *Municipio de Mariana v BHP Group PLC* [2020] EWHC 928 at [48].

149 *Municipio de Mariana v BHP Group PLC* [2020] EWHC 928 at [47].

150 [2020] EWHC 1030.

151 *Jiangsu Guoxin Corp Ltd v Precious Shipping Public Co. Ltd* [2020] EWHC 1030 at [16].

152 Jeffrey Maurice Waincymer, "Online Arbitration" (2020) 9 Indian J Arb L 1, at p 8.

153 Maxi Scherer *et al*, "In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings over One Party's Objection and Rejects Due Process Concerns" *Kluwer Arbitration Blog* (24 October 2020) <https://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-

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relevant for arbitral proceedings.[154] In the circumstances of the case, the tribunal's decision not to vacate the in-person hearing in light of COVID-19, and to have a remote hearing instead, did not violate the fair hearing rule.[155]

85 The Austrian Supreme Court went further to explain that remote hearings were not only permissible if agreed by the parties, but also over the objection of one of the parties.[156] This was because Art 6 of the European Convention on Human Rights provides for a party's right to access justice and to be heard, and insisting on an in-person hearing would inevitably lead to a standstill of justice.[157]

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arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/> (accessed 24 June 2023).

154 Maxi Scherer *et al*, "In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings over One Party's Objection and Rejects Due Process Concerns" *Kluwer Arbitration Blog* (24 October 2020) <https://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/> (accessed 24 June 2023).

155 Maxi Scherer *et al*, "In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings over One Party's Objection and Rejects Due Process Concerns" *Kluwer Arbitration Blog* (24 October 2020) <https://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/> (accessed 24 June 2023).

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157 Maxi Scherer *et al*, "In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings over One Party's Objection and Rejects Due Process Concerns" *Kluwer Arbitration Blog* (24 October 2020) <https://arbitrationblog.kluwerarbitration.com/2020/10/24/in-a-first-worldwide-austrian-supreme-court-confirms-arbitral-tribunals-power-to-hold-remote-hearings-over-one-partys-objection-and-rejects-due-process-concerns/> (accessed 24 June 2023).

86 The Austrian Supreme Court's decision is consistent with the world-wide shift towards the use of videoconferencing. Across the jurisdictions, it is clear that remote hearings have become part of the new normal and will not infringe a party's right to be heard save for exceptional circumstances. The increasing need for virtual hearings is also reflected in the updated rules and remote hearing guidelines of major arbitral institutions.[158]

VI. Conclusion

87 At its heart, the fair hearing rule boils down to the simple idea that a party must be given a reasonable opportunity to be heard before a decision is made against them. In evaluating what is a reasonable opportunity in the circumstances, a tribunal must balance the fair hearing rule against other considerations such as the need for efficiency and expediency. After all, as illustrated in the cases concerning remote hearings above, justice delayed is justice denied.

88 While this paper has sought to explore the contours and evolution of the fair hearing rule through an analysis of existing case law, one must be cognisant that there is an infinite range of factual matrices that a court may be confronted with in the future. The principles underlying the fair hearing rule are rooted in tradition, but the application of the fair hearing rule will continue to evolve with the times.

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[158] Darius Chan & Gerome Goh, "Hearing" in *Handbook of Evidence in International Commercial Arbitration: Key Issues and Concepts* (Franco Ferrari & Friedrich Rosenfeld eds) (Wolters Kluwer, 2022) at p 272.