

# IMPORTANCE OF ORAL EVIDENCE IN ARBITRATION PROCEEDINGS: TRIBUNALS WITNESS GATING POWERS UNDER THE ARBITRATION & CONCILIATION ACT, 1996

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## I. Introduction:

Arbitration proceedings are usually of two kinds, i.e., 'documents only' and proceedings involving fact and/or expert witness testimony. As per the most fundamental principle of Arbitration, the Parties while exercising party autonomy may decide to conduct a 'documents only' arbitration in the event the Parties agree that the dispute is mainly on the issue of contractual interpretation, or the Parties want an economical conduct of proceedings. However, in the event the facts and circumstances pertaining to the dispute are such that a party wishes to lead oral evidence in support of its case then a 'documents only' arbitration is not preferred by the Parties.

As per the usual practise, Parties seldom agree beforehand on the type of proceedings that they wish to conduct. Therefore, the question with respect to the possibility of leading oral evidence is left open at the time of passing of the 'Procedural Order No. 1'. It is a settled position of law that in arbitration proceedings, the principles of natural justice have to be followed and in this regard, Article 18 of the Model Law provides that each party must be provided with equal opportunity to present its case<sup>1</sup>. However, under the Arbitration and Conciliation Act, 1996 ("the Act"), the Tribunal under Section 24(1), the Tribunal

has certain witness gating powers that the Tribunal may exercise to bar or refuse the leading of 'oral evidence' in any arbitration proceedings.

The present Article shall examine the extent of witness-gating power that a Tribunal has under the Act and the importance of oral evidence in arbitration proceedings.

## II. Importance of Oral Evidence:

Oral testimony by fact witness is a standard feature of arbitrations as the testimony of the witness is crucial in supplementing and clarifying written documents; it can also provide necessary insights into the dispute<sup>2</sup>. Since each party is tasked with obtaining and demonstrating the evidence, therefore, calling of a witness to give oral evidence is a strategic decision.<sup>3</sup>

In her Commentary *Malhotra, Commentary on the Law of Arbitration, 4th Edition Vol. 1*, Indu Malhotra J., has stated that:

*"Oral testimony of the witnesses in cases involving complex facts is not only useful but also invaluable. It is usual for the arbitral tri-*

1 Rational Intellectual Holdings Ltd. v. Sunny Karira, (2018) SCC OnLine Del 8341

2 ALAN JS DE ROCHEFORT-REYNOLDS, WITNESS-GATING IN INTERNATIONAL COMMERCIAL ARBITRATION, IN SINGAPORE ACADEMY OF LAW JOURNAL § 229, 229-250 (2022)

3 See id.

## IMPORTANCE OF ORAL EVIDENCE IN ARBITRATION PROCEEDINGS: TRIBUNALS WITNESS GATING POWERS UNDER THE ARBITRATION & CONCILIATION ACT, 1996

*bunal to hear the evidence of witnesses at a formal hearing of the case. The tribunal may put questions to witnesses during the course of evidence, or after the parties have completed their cross-examination. If the tribunal adopts inquisitorial approach, it will take the lead in conducting the cross-examination of the witness.”*

Therefore, it may be said that rather than attaching a prima-facie, cost, and delay component to the leading of oral evidence, the Tribunal may consider the oral evidence to be led by a witness to be a key factor in understanding the nature of complex factual disputes and thereafter, rightfully determine the liabilities of a party. The Tribunal is also tasked with the function of fact finding, which it has to perform with utmost seriousness, by determining the relevant facts through evidence which may also be lead orally.<sup>4</sup>

Whilst it is uncontroverted that the Tribunal may decide the procedure for conduct of the arbitration proceedings, much depends upon the sufficiency of the material that is before the Tribunal post the completion of the written stages. In the event the written stages have not provided sufficient material and the documentary evidence is scarce, then the Tribunal would probably be benefitted through leading of oral evidence before the Tribunal decides whether a party has discharged its burden of proof.<sup>5</sup>

Cross-Examination, which is the most crucial facet of oral evidence, if efficiently and properly done and confined to the material issues, may be seen as the best procedure for arriving at the truth.<sup>6</sup>

### III. Full Opportunity & Breach of Natural Justice:

As stated above under Article 18 of the Model Law and Section 18 of the Act, parties have the right to an equal opportunity to present its case before the

Tribunal. The text of Article 18 of the Model Law is reproduced below:

#### **“Article 18. Equal treatment of parties**

*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”*

The text of Section 18 of the Act is *pari-materia* to that of Article 18 of the Model Law. The operative part of this provision is that the Parties must be given ‘full opportunity’ to present their case. However, the “full opportunity” that has to be provided to a party cannot be detached from reasonableness, efficacy, and fairness.<sup>7</sup> In the facts and circumstances of a case, if the Tribunal is of the opinion that the leading of oral evidence is necessary as the proper adjudication of the dispute may not be possible on the basis of ‘documents only’. Therefore, the extent of full opportunity depends on the facts and circumstances of each case.<sup>8</sup> The term full opportunity may be defined as “full opportunity to be given to both the parties before the Tribunal, which includes the parties’ opportunity to lead evidence.<sup>9</sup> Further, “what constitutes a “full opportunity” is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.”<sup>10</sup>

When the question of full opportunity is raised, it is often subsumed in the larger question which is whether the arbitration proceedings were conducted in a fair and reasonable manner. This question is commonly raised as a ground for challenge to arbitral awards under Section 34(2)(A)(iii) of the Act. The Courts have recognised the inability of a party

4 NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 6.76 (6TH ed. 2015)

5 See id. § 6.198

6 JOHN TACKABERRY & ARTHUR MARRIOTT, BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE § 304, 2-799 (4TH ed. 2003).

7 China Machine New Energy Corp v. Jaguar Energy Guatemala LLC, (2020) 1 SLR 695

8 Triulzi Cesare Srl v. Xinyi Group (Glass) Co Ltd, (2015) 1 SLR 114

9 Pradyuman Kumar Sharma v. Jays Agar M. Sancheti, (2013) SCC OnLine Bom 453

10 China Machine New Energy Corp v. Jaguar Energy Guatemala LLC, (2020) 1 SLR 695

## IMPORTANCE OF ORAL EVIDENCE IN ARBITRATION PROCEEDINGS: TRIBUNALS WITNESS GATING POWERS UNDER THE ARBITRATION & CONCILIATION ACT, 1996

to present its case due to the unreasonable conduct of proceedings by a Tribunal as a ground for setting aside of an arbitral award.<sup>11</sup>

### IV. What is witness-gating?

The term witness gating in common legal parlance means that “– where arbitration tribunals refuse to allow certain witnesses to give evidence – is only permitted where the parties agree or the arbitral rules provide. Refusing to hear witnesses, or demanding witness statements to decide whether to allow witnesses, is not justifiable under an arbitrator’s general power to control proceedings.”<sup>12</sup> It must be borne in mind that the powers of witness gating are usually exercised when the Tribunal is of the opinion that the oral evidence of any witness, fact or expert may be irrelevant, repetitive or unreasonably burdensome as it may be time consuming and expensive. Tribunals have various degrees of witness gating powers under different arbitral rules. The degree of witness gating powers may be classified into three categories: - (a) power to exclude all witnesses; (b) power to exclude a witness; and (c) power to limit witness testimony.<sup>13</sup>

### V. Scope of Witness-Gating under the Act:

When a question is raised with respect to the leading oral evidence, then the provision under Section 24(1) becomes relevant. The text is reproduced below:

24. Hearings and written proceedings. - (1) Unless otherwise agreed by the parties, **the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materi-**

**als:**

Provided that the arbitral tribunal shall hold **oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.**

**[Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.]**

The heading of Section 24 of the Act reads as “**Hearings and written proceedings**”, and upon reading the provision under Section 24(1) it can be fairly stated that in the event the parties have not agreed to lead oral evidence in an arbitration proceeding, then the Tribunal has the power to decide whether to exclude oral evidence altogether. Interestingly, upon careful consideration of the text of Section 24(1) of the Act and the Proviso thereto, it may be seen that ‘oral hearings’ include both the presentation of the evidence and oral arguments, and such oral hearing may not be refused by a Tribunal in the event a party has requested for the same at an appropriate stage.<sup>14</sup>

Further, the Tribunal does have the latitude to decide whether oral evidence is necessary in the proceedings, however, the proviso to the Section 24(1) limits this power of the Tribunal and the Proviso should be construed strictly.<sup>15</sup> The Courts have also recognised<sup>16</sup> the practise of leading oral evidence as evinced in the Halsbury’s Laws of England:

**“...Fundamental to notions of justice are the rules that each party has a right to know the case made against him and a right to put his own case, but it does not**

11 Ssangyong Engg. and Construction Co. Ltd. v. National Highways Authority of India, (2019) 15 SCC 131

12 “Witness Gating”: CBS v CBP (2021) SGCA 4, <https://www.squirepattonboggs.com/-/MEDIA/FILES/INSIGHTS/PUBLICATIONS/2021/04/WITNESS-GATING/WITNESS-GATING.PDF?REV=2EB1A2C04F2E4E3BB0FD2298FF-1B0976#:~:TEXT=PAGE%201,1,OR%20THE%20ARBITRAL%20RULES%20PROVIDE>

13 ALAN JS DE ROCHEFORT-REYNOLDS, supra note 2

14 Adv Consultant v. Pioneer Equity Trade (India) Pvt. Ltd. And Anr, (2009) SCC OnLine Mad 1072

15 Anand Viswanathan v. Kotak Mahindra Bak Ltd., (2019) SCC OnLine Mad 12621

16 Mahesh Kumar Agarwal & Anr. v. Suresh Chand Agarwal & Ors., (2015) SCC OnLine All 6246

## IMPORTANCE OF ORAL EVIDENCE IN ARBITRATION PROCEEDINGS: TRIBUNALS WITNESS GATING POWERS UNDER THE ARBITRATION & CONCILIATION ACT, 1996

*follow that a party is entitled to an oral hearing.*

*If the agreement of reference requires the evidence to be taken on oath or affirmation, the arbitrator or umpire has no option but so to take it; and even where the agreement is silent as to whether the evidence shall be given on oath, since it is the ordinary practice that it should be so given, the arbitrator or umpire should not take it otherwise than on oath unless with the parties consent.”*

While, recognising the above principle, the Court held that in the facts and circumstances of the case, if oral evidence is necessary to prove a party's case, then the Tribunal must provide reasonable opportunity to the parties to lead oral evidence, and if the same is not provided then it may amount to misconduct on the part of the Ld. Arbitrator.

The above principles have been comprehensively summarised by the Delhi High Court in a recent decision<sup>17</sup>, while tracing the true purport of Section 24(1) of the Act, through the legislative history of the Model Law. The Court observed that in the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General as published in the United Nations Commission on International Trade Law Yearbook, 1985 (Vol. XVI)], the proviso to Section 24(1) must be construed to limit the discretion of the Tribunal to the extent that in the event a party requests for leading oral evidence then the same must be granted by the Tribunal. However, the Tribunal does have the right to limit the length and scope of the oral evidence depending upon the facts and circumstances of the case. The Court also highlighted the supplemental powers of a Tribunal when a party's request for leading oral evidence is not entirely reasonable, then the Tribunal may under Section 31(8) read with 31A of the Act, impose costs against such party while allowing the oral evidence.

However, for the sake of completeness of the present Article, it is important to highlight another recent decision<sup>18</sup> of the Delhi High Court, wherein the

Court has read down the proviso to the Section 24(1) of the Act. A perusal of the said decision showcases that the prior judgment of the Court in Sukhbir Singh<sup>19</sup> was not presented to the Court or the Court had not considered the same. It is relevant to note that in Telecommunications Consultants<sup>20</sup>, the High Court was approached under the Writ Jurisdiction on account of which the High Court also declined to interfere with the order of the Tribunal rejecting the request of a party to lead oral interference as it may be opposed to the settled principle of the law of minimal interference under Writ Jurisdiction.<sup>21</sup>

From the discussion held above and upon a perusal of Telecommunications Consultants and Sukhbir Singh, it may appear that the decision in the latter is beneficial to the Parties in an arbitration proceeding on the lines of providing full opportunity. It can be fairly stated that there exists a limit to the discretion of the powers of a Tribunal as per the Act. However, in the absence of a judgment by a larger bench of the High Court or a judgment by the Supreme Court, it may not be possible at this juncture to conclusively determine the interpretation of Section 24 of the Act. A possible way it may be done is through a comparative analysis with similar rules of another institutional arbitration.

### VI. Singapore Chambers of Maritime Arbitration Rules: A comparative analysis:

To supplement the above analysis, we may compare Section 24 of the Act with provisions under Rule 25.1, 25.2 read with Rule 28.1 of Singapore Chambers of Maritime Arbitration Rules, 3rd Edition 2015, which have to read in conjunction with Section 24 of International Arbitration Act, 1994 (“IAA”) of Singapore. The relevant provisions of both are reproduced below:

#### Singapore Chambers of Maritime Arbitration Rules, 3rd Edition 2015:

*“25. Conduct of the Proceedings*

Construction, (2021) SCC OnLine Del 4863

19 Sukhbir Singh, supra note 17

20 Telecommunications Consultants, supra note 18

21 Surender Kumar Singhal v. Arun Kumar Bhalotia, (2021) SCC OnLine Del 3708

17 Sukhbir Singh v. HPCL, (2020) SCC OnLine Del 228

18 Telecommunication Consultants India Ltd. v. B.R. Sukale

## IMPORTANCE OF ORAL EVIDENCE IN ARBITRATION PROCEEDINGS: TRIBUNALS WITNESS GATING POWERS UNDER THE ARBITRATION & CONCILIATION ACT, 1996

25.1. The Tribunal shall have the widest discretion allowed by the Act (where the seat of the arbitration is Singapore) or the applicable law (where the seat of the arbitration is outside Singapore) to ensure the just, expeditious, economical, and final determination of the dispute.

25.2. Subject to these Rules, it shall be for the Tribunal to decide the arbitration procedure, including all procedural and evidential matters subject to the right of the parties to agree to any matter.

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28. Hearings

28.1. Unless the parties have agreed on a documents-only arbitration or that no hearing should be held, **the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions.**"

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**International Arbitration Act, 1994 of Singapore:**

24. Despite Article 34(1) of the Model Law, the General Division of the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) **a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.**

Upon a perusal of the above Rules and Section 24 of IAA, it may appear that the any Tribunal conducting arbitration proceedings has the widest discretion to determine the arbitration procedure including evidential matters, subject to the limits imposed by the principles of natural justice. The Court of Appeal of the Republic of Singapore in CBS v. CBP<sup>22</sup>, was seized of a question that whether a Tribunal can refuse a party's request to lead oral evidence. The Court in its judgment while discussing the ambit of a Tribunal's power under the Rules, held as follows:

**"61 We have little difficulty accepting that tribunals have the power to limit the oral examination of witnesses as part of their general case management powers.** This can occur when the evidence from multiple witnesses are repetitive or of little or no relevance to the issues. This much is also envisioned by Art 19(2) of the Model Law. **However, r 25.1 cannot be an unfettered power that overrides the rules of natural justice. This is evident from the plain language of the provision itself. The "widest discretion" afforded to the tribunal is that "allowed" by the IAA and s 24(b) of the IAA specifically provides that an award rendered in breach of the rules of natural justice by which a party's rights have been prejudiced is liable to be set aside.**"

Ultimately, the Court held that the Tribunal's powers to decide the procedure for evidential matters do not supersede party autonomy and in the event a party requests for leading oral evidence, the Tribunal must allow the same unless, as per the facts and circumstances of the case, it may appear that the party has produced multiple witnesses, which may provide repetitive oral testimony which may not be material to the case. Therefore, the principles of Natural Justice, flowing through the notions of providing 'full opportunity' to the parties to present their case have been held to be sacrosanct by the Court.

The judgment of the Court of Appeal of the Republic of Singapore in the CBS v. CBP is on similar lines as Sukhbir Singh, therefore, it may appear that the provision under Section 24 of the Arbitration and Conciliation, Act 1996 may have been holistically interpreted by the Court in Sukhbir Singh which is in line with the approach of an arbitration institution of a pro-arbitration jurisdiction.

### VII. Conclusion:

In conclusion, oral evidence holds significant importance in arbitration proceedings. It complements written documents, provides necessary insights, and aids in the understanding of complex factual disputes. The principles of natural justice dictate that parties must be given a full opportunity to present

<sup>22</sup> CBS v. CBP, (2021) 1 SLR 935

## **IMPORTANCE OF ORAL EVIDENCE IN ARBITRATION PROCEEDINGS: TRIBUNALS WITNESS GATING POWERS UNDER THE ARBITRATION & CONCILIATION ACT, 1996**

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their case, including the right to lead oral evidence when necessary.

While arbitral tribunals have certain powers to control the proceedings and gate the witnesses, such powers should be exercised reasonably and in line with the principles of natural justice. The discretion to exclude or limit oral evidence should be balanced with the need for a fair and comprehensive presentation of the parties' cases.

The interpretation of Section 24(1) of the Arbitration and Conciliation Act, 1996, highlights the Tribunal's authority to decide on the use of oral evidence, but it should be guided by the proviso, which emphasizes the importance of allowing oral hearings upon a party's request. The tribunal's

powers should be exercised within the limits set by the principles of natural justice, ensuring that parties have a genuine opportunity to present their case.

In light of comparative analysis with other arbitral rules, such as the Singapore Chambers of Maritime Arbitration Rules, it is evident that party autonomy and the right to lead oral evidence are generally respected, with limitations imposed only in cases of repetitiveness or irrelevance.

Ultimately, striking a balance between the efficient conduct of proceedings and the parties' right to present their case through oral evidence is crucial for upholding the integrity and fairness of arbitration proceedings.