

ARTICLE

Singapore: combating dilatory conduct and non-participation in arbitration proceedings - The delicate balance

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While most will agree that justice should not be hurried, what happens when parties refuse to comply to arbitration procedural timelines?

In this article, we discuss the challenges in balancing efficiency and procedural fairness in arbitration proceedings by examining the recent Singapore court decision of *Sai Wan Shipping Ltd v Landmark Line Co, Ltd* [2021] SGHC 8 (“*Sai Wan*”).

Dilatory tactics in arbitration proceedings

The use of dilatory tactics by recalcitrant parties is a common, if not expected, problem in arbitral proceedings. For the aggrieved party, a delay in proceedings necessarily increases the overall costs involved. Understandably, an aggrieved party will attempt to press ahead with



proceedings as best it can. The arbitrator also has a general duty to conduct proceedings efficiently under some major institutional rules. The SIAC Rules 2016 requires the Tribunal to conduct the arbitration in a manner that ensures the “*expeditious*” and “*economical*” resolution of the dispute, and to discuss procedures that will be most “*efficient*” for the case.⁽¹⁾ The ICC Rules 2021 requires the arbitral tribunal and parties to conduct the arbitration in an “*expeditious and cost-effective manner*”.⁽²⁾ However, while the English Arbitration Act 1996 imposes on the tribunal a general duty to adopt suitable procedures “*avoiding unnecessary delay or expense*”⁽³⁾, no similar wording exists in Singapore’s International Arbitration Act (“IAA”) or in the UNCITRAL Model Law (“Model Law”).

Limits to procedural efficiency

Faced with a defaulting or absent counterparty, the temptation may be to proceed with the arbitration as quickly as possible, or to force the recalcitrant party into submitting to procedural directions by issuing draconian orders. On one hand, some may argue that efficiency should be secondary to due process or procedural fairness. On the other, one could possibly view efficiency as one of the key pillars of procedural fairness itself. Undergirding procedural fairness is the party’s right to be treated equally and to be given a full opportunity to present its case.

In the recent Singapore court decision of *Sai Wan*, the balance between the arbitrator’s enforcement of procedural timelines and a party’s right to be heard was examined. In particular, the Singapore Court examined whether an arbitrator went too far in issuing and enforcing a final and peremptory order against a defaulting party.

What happened?

In *Sai Wan*, the Owner of a vessel brought an *ad hoc* arbitration against the Charterer over unpaid hire. The Charterer had failed to participate in the first part of the proceedings. The Owner then applied for a final award on the balance sum. Without inviting any submission from the Charterer on the time it would require, the arbitrator directed that the Charterer was to provide its defence by a specified date and time, failing which, the Owner may apply for a final and peremptory order. The Charterer failed to meet the deadline, and there was correspondence between the parties’ counsel for an



extension of time. Upon review of this correspondence, the arbitrator proceeded to issue a final and peremptory order for the Charterer to file its defence by a further set date and time. The Charterer failed to serve its defence submissions within the time stipulated. It only did so later the same day, citing internet connectivity issues as the reason for its delay. The arbitrator considered that he was bound by the clear terms of his peremptory order, and must exclude the Charterer's defence submissions, unless the Owner was prepared to accept them into evidence. The Owner declined, and the arbitrator upheld the final and peremptory order.

The Charterer applied to set aside the final award on the basis that a breach of natural justice occurred, namely that the fair hearing rule was breached.

Given that this was an arbitration seated in Singapore for which no arbitral rules had been agreed, the court considered that the Model Law (which is given force of law by Section 3 of the IAA) applied as to whether the arbitrator had the power to make or enforce peremptory orders. Under the Model Law, if a respondent fails to communicate his statement of defence within the prescribed time, without showing sufficient cause, the tribunal may continue the proceedings without treating the failure in itself as an admission of the claimant's allegation.

The court found that first, the arbitrator should set a procedural timetable, consulting both parties on the appropriate procedure and timetable. The arbitrator must be open to reconsidering the time fixed for submissions. This is even more important in the event no arbitral rules have been adopted.

Second, when considering whether the party in default has shown sufficient cause for the failure to communicate its statement of defence, the arbitrator must hear both parties. The tribunal should give reasonable opportunity for the defaulting party to explain its failure to comply. While it is for the arbitrator to determine whether sufficient cause has been shown, that discretion is subject to the Court's review to consider if the arbitrator acted according to what a reasonable and fair-minded tribunal in the circumstances might have done.

The court found that in the present case, the arbitrator failed to ask for or consider input from the Charterer on the procedure to be



adopted, the procedural timetable to be imposed, reasons for any non-compliance, or whether the sanction should be imposed or applied. Further, the terms of the peremptory order exceeded the arbitrator's powers under Article 25 of the Model Law. On this basis, the arbitrator failed to give the Charterer the opportunity to be heard, and the award was set aside.

What does this mean for parties?

On a practical level, *Sai Wan* has an important effect on the manner in which arbitrations are managed by counsel (and tribunals). On one hand, the decision may signal that tribunals should tread cautiously in its zest to move an arbitration along, and may reinforce the oft-cited "due process paranoia". Seen another way, the decision merely emphasizes the already accepted principle that due process cannot be sacrificed in the name of efficiency.

A party seeking an expeditious or cost-efficient resolution to an arbitration should take care to ensure that the defaulting party, dilatory as it may be, is given a reasonable opportunity to be heard on the procedure adopted and timelines to be prescribed – or risk an award being set aside. Where timelines are not complied with, the defaulting party should still be given a reasonable opportunity to be heard on the reasons for non-compliance and the proposed sanctions for continued non-compliance. This is especially so if sanctions by way of draconian peremptory orders are to be imposed.

Moreover, in the event the arbitration agreement does not provide for arbitral rules, such as in *Sai Wan*, it is advised that parties should adopt one of the institutional rules that requires the tribunal to conduct the arbitration efficiently or expeditiously, such as the SIAC or ICC Rules.

In striking the delicate balance, it is perhaps worth keeping in mind Justice Philip Jeyaretnam's words at the start of his decision in *Sai Wan*: "*Justice hurried risks justice buried, while justice delayed may be justice denied.*"

Footnotes

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