IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA(I) 2

Court of Appeal / Civil Appeal No 6 of 2024

Between

(1) DJP
(2) DJQ
(3) DJR

… *Appellants*

And

DJO

… *Respondent*

In the matter of Originating Application No 8 of 2024

Between

DJO

… *Claimant*

And

(1) DJP
(2) DJQ
(3) DJR

… *Defendants*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside — Section 24(*b*) International Arbitration Act 1994 (2020 Rev Ed)]

Version No 1: 08 Apr 2025 (12:29 hrs)

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DJP and others
v
DJO

[2025] SGCA(I) 2

Court of Appeal — Civil Appeal No 6 of 2024
Sundaresh Menon CJ, Steven Chong JCA, David Edmond Neuberger IJ
23 January 2025

8 April 2025 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

1 A fair process is foundational to the legitimacy of arbitration, especially as the parties are generally not accorded the right of an appeal against a tribunal's decision. Indeed, the most important warranty provided to them is that their dispute will be determined through a fair, impartial and equal process.

2 This appeal raises issues relating to an arbitrator's duty of independence and impartiality where he finds himself adjudicating upon related but separate arbitrations. The first to third appellants seek to reverse the decision of the High Court Judge (the "Judge") to set aside an award (the "Award") on the ground that it had been rendered in breach of the rules of natural justice. The Judge found that the arbitral tribunal (the "Tribunal") had impermissibly used two previous awards (the "Parallel Awards") issued in other arbitrations involving the same respondent but different claimants to those here, and to all of which the same presiding arbitrator but neither of the co-arbitrators was party, as

templates from which a substantial portion of the Award was prepared, but with changes such that the Award would appear to deal with the issues ventilated in the arbitration (the "Arbitration"): see *DJO v DJP and others* [2024] SGHC(I) 24 (the "Judgment") at [51]. Out of the 451 paragraphs in the Award, it was undisputed that at least 212 paragraphs were copied and pasted from the Parallel Awards.

3 In gist, the appellants' case before us is that the Tribunal's reference to the Parallel Awards had no material impact on the outcome of the Arbitration, and that procedural fairness was therefore not compromised in any meaningful way.

4 Having reserved judgment after hearing parties' submissions, we now provide our decision along with our reasons.

Background facts

5 The respondent in this appeal is [DJO], a special purpose vehicle set up to manage a network of Dedicated Freight Corridors in India. The appellants are [DJP], [DJQ] and [DJR], three companies which formed a consortium to tender for a contract relating to the respondent's western Dedicated Freight Corridors. Sometime in August 2015, the appellants were awarded the tender and entered into the "CPT-13 Contract" with the respondent.

6 On 19 January 2017, about one and a half years after the contract commenced, the Indian Ministry of Labour and Employment issued a notification pursuant to which the daily rates of minimum wages payable to workmen in India was to be increased with immediate effect (the "Notification").

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7 The CPT-13 Contract contained mechanisms allowing for adjustments, in the event that there was a change in legislation and/or in the cost of labour. Specifically, it incorporated the International Federation of Consulting Engineers Conditions of Contract (1st Ed, 1999) (the "FIDIC Conditions"), as amended by the Particular Conditions of the CPT-13 Contract (the "Particular Conditions") and its Appendix to Bid. The following contractual provisions are relevant to this appeal:

(a) Change in Legislation: Clause 13.7 of the FIDIC Conditions, as amended by the Particular Conditions, provided that adjustments may be made to the contract price to account for any increase or decrease in cost resulting from "changes in legislation" ("cl 13.7").

(b) Change in Cost: Clause 13.8 of the FIDIC Conditions, as amended by the Particular Conditions, provided that adjustments may be made to the amount payable to the appellants, to account for any rise or fall in the "cost of labour, [g]oods and other inputs to the Works" ("cl 13.8"). The revised amount payable was to be calculated by reference to a price adjustment formula set out in cl 13.8. It may be noted that the parties had specifically amended this formula such that the various factors of cost would carry different weightings when computing any adjustment.

(c) Notice of Claim: Clause 20.1 of the FIDIC Conditions, incorporated in its original form, stated that the appellants were to notify the respondent of any claim to additional payment within 28 days of the time that they became aware or ought to have become aware of the circumstances giving rise to the claim. The appellants were also to furnish a fully detailed claim with all supporting particulars within 42

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days of the same. The appellants would not be entitled to any additional payment if they failed to comply with these requirements ("cl 20.1").

(d) Dispute Resolution: Clause 20.6 of the FIDIC Conditions, as amended by parties, stated that any dispute arising out of the Contract would be finally resolved by arbitration ("cl 20.6"). Depending on the identity and, more particularly, the nationality of the contractors, arbitration was to proceed in either of the following ways:

(i) Where the dispute was between the respondent and a *foreign contractor*, the arbitration would be administered by the International Chamber of Commerce (the "ICC") and seated in either Singapore, Dubai or Delhi. In this case, the parties agreed on Singapore as the seat of the Arbitration ("cl 20.6(a)").

(ii) Where the dispute was between the respondent and a *domestic contractor* (which was defined to include a consortium of companies whose lead member was registered in India), the arbitration would be administered by the International Centre for Alternative Dispute Resolution, New Delhi, unless otherwise agreed by the parties. The arbitration would be seated in New Delhi.

8 It was not until 6 March 2020, about three years after the issuance of the Notification, that the appellants first lodged a claim for additional payment on the basis that the Notification was a change in legislation as defined in cl 13.7. The respondent rejected the claim.

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The Arbitration

9 The appellants commenced the Arbitration in December 2021. Pursuant to cl 20.6(a) (see [7(d)(i)] above), the Arbitration was seated in Singapore and conducted in accordance with the Rules of Arbitration of the ICC that were in force from 1 January 2021 (the "ICC Rules"). The CPT-13 Contract, and any substantive issues arising therefrom, were governed by Indian law.

10 In the Arbitration, the appellants sought a declaration that the Notification amounted to a change in legislation within the meaning of cl 13.7, and an order for additional payment on that basis. The appellants also sought pre- and post-award interest and the costs of the Arbitration.

11 The respondent contended that these claims were barred for three reasons. First, as more than three years had elapsed between issuance of the Notification and the time at which the claim was lodged, the claim was barred by the three-year statutory time bar prescribed in the Indian Limitation Act 1963 (the "Statutory Limitation Argument"). Second, the appellants had filed about 40 interim payment certificates in this three-year intervening period, none of which included any claim for payment on the basis of cl 13.7. By virtue of this, the appellants must be taken to have waived any right to additional payment on this ground (the "Waiver Argument"). Third, the appellants had not notified the respondent of its claim within 28 days of the Notification; they had also not provided the necessary supporting particulars within 42 days of the same. By operation of cl 20.1, the appellants were barred from claiming any additional payment (the "Cl 20.1 Argument"). On the merits, the respondent's primary case was that the Notification was not a change of legislation within the meaning of cl 13.7.

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12 These issues fell to be determined by a tribunal of three arbitrators, who were all eminent retired Indian judges. The Honourable Justice Krishn Kumar Lahoti, former Chief Justice of the Madhya Pradesh High Court, and The Honourable Justice Gita Mittal, former Chief Justice of the Jammu & Kashmir High Court (together, the "co-arbitrators"), were nominated as arbitrators by the appellants and the respondent respectively. The Honourable Justice Dipak Misra, a former Chief Justice of India, was nominated as president of the Tribunal by his co-arbitrators (the "President").

13 By its Award dated 24 November 2023, the Tribunal ruled in the appellants' favour on almost all issues. Materially, the Notification was found to be a change of legislation within the meaning of cl 13.7; the respondent was held liable to make additional payment on this basis; and the claim was found not to be precluded on any ground advanced by the respondent.

The Parallel Arbitrations

14 This was not the only arbitration considering the respondent's liability to make additional payment arising from the Notification. As has been alluded to, the respondent was also defending two other sets of arbitration proceedings (the "Parallel Arbitrations") involving similar claims and these were running at around the same time as the Arbitration.

15 The first of these was the "CP-301 Arbitration", commenced in May 2021 by [DJR] and an Indian company (collectively, "Consortium [Y]") against the respondent. Consortium [Y] had contracted to execute a set of works relating to the respondent's eastern Dedicated Freight Corridors under the "CP-301 Contract". The CP-301 Contract similarly incorporated the FIDIC Conditions, though its terms were amended differently by its Particular Conditions of Contract.

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16 About eight months after the Notification was issued, Consortium [Y] informed the respondent of its claim for additional payment on the basis of cl 13.7 of the CP-301 Contract (which was not precisely in the same form as in the CPT-13 Contract). The respondent rejected Consortium [Y]'s claim on the basis that the Notification was not a change in legislation, and that in any event the claim was time-barred. By way of the "CP-301 Award" issued in July 2023, this dispute was substantially resolved in Consortium [Y]'s favour.

17 The second was the "CP-302 Arbitration" which concerned the CP-302 Contract (the "CP-302 Contract"). This was commenced by [DJR] and another Indian company (collectively, "Consortium [Z]") against the respondent in October 2021. The CP-302 Contract was in terms largely similar to the CP-301 Contract. Consortium [Z] too lodged its claim for additional payment about eight months after the Notification was issued; this claim too was denied by the respondent. By way of the "CP-302 Award" issued in August 2023, the dispute was resolved substantially in Consortium [Z]'s favour.

Comparing the Three Arbitrations

18 The Arbitration and the Parallel Arbitrations (collectively, the "Three Arbitrations") were similar in many respects, in terms of the reliefs sought and issues raised in each of them. There was also some overlap in the identity of the parties, counsel, and arbitrators:

(a) In terms of the parties: [DJR], the third appellant in this appeal, was a claimant in both Parallel Arbitrations. [DJO], the respondent in this case, was also party to both Parallel Arbitrations. However, the first and second appellants in this appeal, [DJP] and [DJQ], were not parties to the Parallel Arbitrations.

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(b) In terms of the counsel: In the Arbitration, the respondent appointed counsel from the same firm as had represented it in the Parallel Arbitrations. The appellants hired counsel who were not involved in the Parallel Arbitrations.

(c) In terms of the arbitrators: All three tribunals were chaired by the same President. The co-arbitrators were not involved in the Parallel Arbitrations.

19 In terms of timelines, the Three Arbitrations proceeded more or less contemporaneously. Of the three, the Arbitration was commenced and resolved last. The hearings for the CP-301 Arbitration had begun even before the Tribunal in the Arbitration was constituted. By the time the Tribunal began hearing the Arbitration, the hearings in the Parallel Arbitrations had already substantially concluded. The Award was then rendered about three months after the CP-301 and CP-302 Awards were respectively issued.

20 There were also several points of distinction between the Three Arbitrations:

(a) Administering Institution and Seat of Arbitration: While all three underlying contracts shared an identical dispute resolution clause (see [7(d)] above), this applied differently in the circumstances. The CPT-13 Contract involved a foreign contractor and the Arbitration was therefore conducted in accordance with the ICC Rules and seated in Singapore (see [7(d)(i)] above). On the other hand, the CP-301 and CP-302 Contracts were entered into with domestic contractors. The Two Parallel Arbitrations were therefore seated in New Delhi and conducted in accordance with the rules of Arbitration of the International Centre for Dispute Resolution, New Delhi (see [7(d)(ii)] above).

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(b) Arguments Raised: The respondent's defence was not precisely the same across the Three Arbitrations. The Statutory Limitation and Waiver Arguments were new arguments raised *only* in the Arbitration (see [11] above). While the respondent relied on the Cl 20.1 Argument in all Three Arbitrations, this argument was formulated with a different nuance in the Arbitration (see [76] below).

(c) Particular Conditions: The three underlying contracts, while similar in most respects, were amended differently by their Particular Conditions of Contract. Importantly, the operative versions of cl 13.7 and cl 13.8 were not identical in the three contracts.

(d) Time of Claim: Consortiums [Y] and [Z] notified the respondent of its claim to additional payment about eight months after the issuance of the Notification. The appellants notified the respondent of their claim much later, about three years after the Notification had been issued.

Decision below

21 The respondent applied to set aside the Award on three grounds. First, it argued that the Tribunal had acted in breach of the agreed arbitral procedure under Article 34(2)(*a*)(iv) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") by failing to independently assess and apply its mind to the issues at hand and to give proper reasons for its decision. Second, it argued that in having reproduced in the Award such a substantial portion of the awards in the Parallel Arbitrations, the Tribunal had conducted the Arbitration in a manner that was contrary to Singapore public policy and the Award was therefore liable to be set aside under Art 34(2)(*b*)(ii) of the Model Law. Third, it argued that the Tribunal had acted in breach of

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natural justice under s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA").

22 The Judge set the Award aside on the third ground, namely, that the Award was rendered in breach of the rules of natural justice. In this light, it was unnecessary to make findings on the respondent's other arguments or grounds for setting aside: Judgment at [86]–[87], [119]–[120].

23 The Judge observed that not every instance of an arbitrator making an award where portions had been copied from other sources without attribution would render the award liable to be set aside. In each case, the court would have to determine whether there had been a breach of natural justice having regard to the nature, extent and effect of the copying in question: Judgment at [98], [108]–[110]. In this case, there were at least four problems with the Award that would have caused a fair-minded, reasonable and informed observer to apprehend that the Tribunal had approached the matter with a closed mind.

24 First, it was clear from the Award that the Tribunal had failed to restrict itself to submissions made in the Arbitration. The Award contained verbatim reproductions of submissions made in the CP-301 Arbitration, save for the substitution of the names of the respective counsel and the omission of certain authorities that had not been cited in the Arbitration. Notably, para 333 of the Award (which was reproduced verbatim from the CP-301 Award) referred to a set of "computation[s] carried out by the respondent". Yet, at no point in the Arbitration had the respondent proposed any such computation; these had only been submitted in one or more of the Parallel Arbitrations. The inclusion of para 333 of the Award was a clear indication that the Tribunal had not applied its mind specifically to the submissions that had in fact been made in the Arbitration: Judgment at [57]–[65].

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25 Second, there were authorities referred to in the Award that were not cited by the parties or put to them for their consideration and submissions: Judgment at [66]–[67].

26 Third, the Tribunal cited an incorrect version of cl 13.8 at para 253 of the Award. As noted above, cl 13.8 took slightly different forms in the CPT-13 and CP-301 Contracts. Specifically, they set out different formulae for calculating the requisite adjustments arising from changes in cost. In the Award, the Tribunal referred to the *CP-301* version of cl 13.8, and not the *CPT-13* version of the same. Accordingly, the Tribunal applied the wrong coefficients and relied on a wrong set of data points: Judgment at [68]–[71].

27 Fourth, the Tribunal applied the wrong *lex arbitri* when it came to the issues of interest and costs. The Parallel Arbitrations were governed by the Indian Arbitration and Conciliation Act 1996 (the "Indian Arbitration Act") while the Arbitration was governed by the Singapore IAA. The Tribunal wrongly resolved these matters by reference to ss 31(7) and 31A of the Indian Arbitration Act: Judgment at [72]–[74].

28 By reason of the foregoing, the allegation of prejudgment giving rise to an assertion of apparent bias was made out against the President. The President had prejudged the Arbitration to the extent and in the sense that he allowed, or at least appeared to have allowed, his accumulated knowledge from the Parallel Arbitrations to influence his decision. This amounted to a breach of the rule against bias: Judgment at [100(a)], [113]–[114]. The parties had also been denied the right to a fair, independent and impartial process in that the Award was not the independent work of the Tribunal considering matters afresh; instead, the Tribunal relied heavily on material drawn from the Parallel Arbitrations which the parties had not had the opportunity to address. Further,

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the Tribunal failed to appreciate or even apply its mind to some of the differences between the Three Arbitrations: Judgment at [115]–[117].

The parties' cases on appeal

The appellants' case

29 The appellants submit that the Judge had been wrongly and unduly preoccupied by the degree of similarity between the Award and the Parallel Awards, which had no material impact on the outcome of the Arbitration. Many of the arguments raised in the Arbitration mirrored those raised in the Parallel Arbitrations. It followed that it was not necessarily objectionable for the Tribunal to have used the corresponding paragraphs from the Parallel Awards; these accurately rehearsed the parties' positions in the Arbitration. Further, to the extent the parties had raised fresh arguments in the Arbitration, such as the Statutory Limitation Argument, the Waiver Argument and the Cl 20.1 Argument, the Tribunal had drafted new paragraphs that addressed these arguments. In this light, it was submitted that the Tribunal had not adopted material from the Parallel Awards in an unthinking or injudicious manner. To the extent the Tribunal had copied material from the Parallel Awards, this was done as a "short cut" to preparing the Award which reflected their considered decision and did not compromise the integrity of the Arbitration in any meaningful way.

30 While the appellants accept that there were several errors in the Award, they maintain that these were inconsequential to the outcome of the Arbitration:

(a) The 60 or so authorities cited in the Award that had not been raised by either party only concerned established principles of law that were already in play in the Arbitration.

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(b) The incorrect citation of cl 13.8 of the Conditions and the mistake at para 333 of the Award were merely technical errors which bore no nexus to the outcome of the Arbitration.

(c) Although the Tribunal had applied the wrong *lex arbitri* to the issues of interest and costs, there is no material difference between the relevant provisions of Singapore and Indian law on those matters. In any case, neither party had made submissions on these issues and the respondent cannot now complain that it was denied the opportunity to be heard.

31 The appellants' alternative position is that only those parts of the Award shown specifically to be tainted by breach of natural justice should be set aside, with the affected issues remitted to the Tribunal for it to determine them afresh.

The respondent's case

32 The respondent on the other hand submits that a fair-minded and appropriately informed observer would undoubtedly, and quite reasonably, suspect that the Tribunal did not approach the Arbitration with a fair and open mind.

33 The process by which the Award was prepared was fundamentally flawed in that the Tribunal had clearly referred extensively to material falling outside the Arbitration. The Tribunal resolved common issues arising across the Three Arbitrations in exactly the same manner, and with the corresponding paragraphs of the analysis having been copied and pasted from the Parallel Awards. Even where the Tribunal purported to deal with fresh arguments raised in the Arbitration, these paragraphs of analysis were awkwardly interposed in between the paragraphs that had been lifted from the Parallel Awards. In these

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circumstances, the fair-minded observer would reasonably apprehend that the Tribunal's decision was heavily influenced by the decisions that had earlier been reached in the Parallel Arbitrations. This was fundamentally objectionable because the parties were entitled to the issues being considered afresh without the confirmation and anchoring biases that were inevitably incorporated into the Tribunal's decision-making process by virtue of the method it adopted in starting with and/or drawing so extensively from the earlier awards. This conclusion was fortified by the many errors contained in the Award. The respondent accordingly submits that the Award was correctly set aside in its entirety for having been made in breach of natural justice.

34 The respondent also submits that the Award may be set aside for breaching the agreed arbitral procedure, though this did not feature significantly in the oral or written arguments.

Issues to be determined on appeal

35 As we indicated to the parties at the hearing, we agree with the Judge that the principal complaint concerns the alleged breach of natural justice. If this is made out, then the consequential issue is what should follow from this. This is what we now turn to.

The nature of the problem with reproducing material from unattributed external sources in an arbitral award

36 The two fundamental tenets of natural justice are that an adjudicator must be disinterested and unbiased (as expressed in the maxim *nemo judex in causa sua*) and that the parties must be given an opportunity to be heard (as expressed in the maxim *audi alteram partem*): *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [43];

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Re Shankar Alan s/o Anant Kulkarni [2007] 1 SLR(R) 95 ("*Shankar Kulkarni*") at [42]; *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [1], [87]. Transcending both principles are the notions of fairness and the expectation that a determination will be made only after a full and fair opportunity has been afforded to all parties to make their case: *Soh Beng Tee* at [43], citing *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396.

37 These rules are given meaning and applied in a variety of diverse situations. Thus, a clear situation prohibited by the first of these rules is that one cannot be the judge of one's own cause: see, for example, *Tan Tiang Hin Jerry v Singapore Medical Council* [2000] 1 SLR(R) 553 at [55]; *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon CJ ed-in-chief) (Sweet & Maxwell, 2nd Ed, 2018) at para 15.075. Where the decision-maker is simultaneously the complainant in the matter, this will very likely give rise, at least, to a reasonable suspicion that he or she was impermissibly privy to extraneous information regarding the complaint and/or that he or she was wrongfully inclined to decide in a certain way: see, for example *Re Chuang Wei Ping* [1993] 3 SLR(R) 357.

38 More commonly, allegations of apparent bias are made against decision-makers whose conduct of the decision-making process gives rise to a reasonable suspicion or apprehension that he or she may have prejudged the dispute at hand: see, for example *BOI v BOJ* [2018] 2 SLR 1156 ("*BOI*"); *DJK and others v DJN* [2024] SGHC 309; *Sim Yong Teng and another v Singapore Swimming Club* [2016] 2 SLR 489. In each case, the allegation of prejudgment amounting to apparent bias must be grounded in the objective facts disclosed by the material in evidence. It is well-established that this determination of

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apparent bias is not to be taken from the point of view of the reviewing court concluding that there was a real danger that the decision-maker was in fact biased or had a closed mind. Rather, the question is whether a *fair-minded and informed observer of the public* would, having considered all the facts and circumstances of the case, *reasonably suspect or apprehend* that the decision-maker had reached a final and conclusive decision, or might be predisposed to a given view, before being made aware of all relevant evidence and arguments that the parties wished to present: *BOI* at [97], [109]; *Shankar Kulkarni* at [84]. This is in line with the principle that justice must not only be done, but it must also be seen to be done: *Shankar Kulkarni* at [103]; *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*") at [30]. In *BOI*, we clarified the proper list of attributes to be accorded to the fair-minded and informed observer: at [96]–[102]. Without repeating them in full, it suffices for us to note that the hypothetical observer is taken to be fully aware of all relevant facts that are capable of being known by a member of the public and that he or she will be taken to consider what has been seen or read together with its proper context: *BOI* at [99]; *CFJ and another v CFL and another and other matters* [2023] 3 SLR 1 ("*CFJ*") at [50].

39 Our case law also canvasses multiple amplifications of the second pillar of natural justice, that being the fair hearing rule. Two specific applications of this rule relevant for present purposes are that: (a) an adjudicator must properly apply his or her mind to the issues and arguments which are live in the dispute and the submissions and evidence adduced by the parties (*Front Row* at [35]–[39]); and (b) an adjudicator must not decide the case on a basis that was neither submitted nor contemplated by the parties without, at least, giving them the opportunity to consider the point and to make their submissions upon it (*JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at

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[145]–[162]; *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [30]).

Source of copying and other relevant circumstances

40 A case such as the present, where an award is substantially copied from another source, may implicate either or both of the fundamental rules of natural justice. To get to the heart of the complaint, it will invariably be helpful to consider the source from which the material was copied as well as the surrounding circumstances. It will also be important for the party challenging the award to particularise its complaint by reference to the specific rule or rules of natural justice alleged to have been breached. We provide some illustrations of this.

41 Where the material is lifted from the *submissions of one of the parties*, it will be necessary to consider whether the way in which this was done gives rise to the reasonable suspicion or apprehension of an unthinking adoption of that party's position. The task of any adjudicator is to apply his or her mind to both parties' cases with the requisite degree of fairness and impartiality. This would typically be reflected in an endeavour to summarise or distil each party's contentions, and to engage with their strengths or weaknesses. The output of such an endeavour will almost invariably be quite different from a party's submissions, which will take the form of advocacy in favour of its own position. Concerns of this nature have been recognised in the case law: see, for instance, *Lim Chee Huat v Public Prosecutor* [2019] 5 SLR 433 ("*Lim Chee Huat")* at [26], [48]–[49]; *Newton, David Christoper v Public Prosecutor* [2024] 3 SLR 1370 ("*Newton David Christopher*") at [40]–[41]; *Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] 2 SCR 357 at [54]. As earlier stated, the question to be determined is whether in all the circumstances, a

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fair-minded and informed observer would reasonably harbour a suspicion or apprehension that the adjudicator had not approached the matter with the requisite degree of fairness and impartiality. If so, the award may be liable to be set aside: *BOI* at [103]; *CFJ* at [50].

42 On the other hand, an adjudicator who copies material from an *external academic source* (such as an article or a textbook) without proper attribution, might be criticised for a lack of professionalism, but it would be harder to see how a party challenging the award would be able to demonstrate that this amounted to a breach of natural justice that caused it some prejudice.

43 In a situation such as the present, where the source of the copied material is a *related award*, much will likely depend on the nature of the material that is reproduced, as well as on the degree of proximity between the dispute at hand (the "relevant arbitration") and the proceedings from which that material emanated (the "related arbitration").

44 Where the material in question is uncontested and uncontroversial, such as a statement of the relevant facts which are not contentious or disputed, it may be that any copying from such a source is not objectionable in and of itself. This assumes that the material that has been reproduced is relevant and appropriate in the context of the relevant arbitration. However, where the material relates to points that are contentious, or which simply do not relate to the relevant arbitration, then different considerations may apply.

45 The inferences to be drawn may also vary depending on whether the two sets of proceedings involve the *same tribunal* and the *same parties*. It would be inappropriate for us to lay down any rules or principles as to how a challenge in such a situation, stemming from the reproduction of material from one

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arbitration award in the other, would be resolved because the considerations would plainly be fact-sensitive and be affected by such things as the nature of the material, the closeness of the issues in the two arbitrations, the openness of the tribunal to considering new points or evidence or arguments in the later arbitration, and what the reasonable expectations of the parties might have been in having the same tribunal deal with closely related issues: see, for example, *Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corpn and Chemical Engineering & Construction Co Ltd* [1982] 2 Lloyd's Rep 425, where, on the facts before it, the UK Court of Appeal found it "highly desirable" to appoint the same arbitrator in respect of separate arbitrations in which the same findings of fact would be material to their respective outcomes (at 1061, per Denning LJ). Subject to these nuances, the complaint would presumably be that the tribunal might manifest its prejudgment of the issues in its inclination to resolve the issues in the same manner as was done in the related arbitration.

46 Where material is copied from an award issued by a *differently constituted tribunal*, or in an arbitration involving *different parties*, distinct concerns may arise. Given that only the parties and the arbitrators who are also involved in the related arbitration would have access to the award from which material was copied or reproduced, there may be concerns that the relevant arbitration had been decided on the basis of material that was: (a) *not equally accessible* to all relevant parties and/or arbitrators; and therefore (b) *not equally considered* by the same. This asymmetry of information between the parties or the arbitrators undermines the expectation of equality in the arbitral process and risks jeopardising the integrity of the arbitration. This is a point of importance which we will return to shortly.

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Comparison with cases involving judicial copying

47 We briefly consider the relevance of cases involving judicial officers who reproduce the contents of submissions or other materials. Some such cases were cited by the parties in both the court below and on appeal. While the principles set out in these cases might be somewhat helpful, it is important to recognise that there are some essential differences between arbitration and court litigation, which bear on how one assesses the materiality and significance of such copying.

48 *First*, and unlike in litigation, parties to an arbitration are generally not afforded the right to an appeal. When parties opt to arbitrate their dispute, they do so, or at least ought to do so, with the expectation that arbitration will be the first and only step in the dispute resolution process. The finality offered by arbitration leaves parties with limited recourse to judicial review: *Soh Beng Tee* at [65(c)]; *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [24]. The same cannot be said about the litigation process where, in general, established mechanisms exist that allow for appellate review of court decisions.

49 The emphasis on finality in arbitration means that particular attention must be paid to the integrity of the process by which a decision is reached. The right to due process and the assurance of a fair hearing are the key warranties provided to parties in an arbitration. Where this has been impermissibly compromised, the award is likely to be set aside, subject to considerations of materiality and prejudice. In *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [54] the court noted that "it is never in the interest of the court, much less its role, to assume the function of the arbitral tribunal" and then went on to observe:

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> the 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.
>
> [emphasis in the original]

50 These observations highlight the important point that a court reviewing an arbitral award is concerned with the *integrity of the process*, rather than with the correctness of the tribunal's reasoning or the result. That is so because the parties have chosen the arbitral tribunal as the relevant forum to resolve their disputes, and the court will not typically have any appellate right of review. This is not the position where a matter is heard in court, where there will typically be a right of appeal; in that setting, an appellate court may, having considered the material afresh, conclude that although a breach of natural justice was made out in the court below as a matter of process, that breach, in fact, had no bearing on the substantive outcome: see, for example *Lim Chee Huat* at [61]–[72].

51 This follows from the fact that when considering whether to set aside a decision of a lower court on the basis that it had been rendered in breach of natural justice, the appellate court is concerned not only with the integrity of the process but also with the correctness of the outcome. It will therefore typically be open to the appellate court, having found a breach of proper process, to go on to determine the underlying dispute afresh on the basis of the evidence that is already before it. This was done in *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 ("*Yap Ah Lai*"), a case concerning a district judge who copied crucial passages of reasoning from another of his own judgments. The district judge there had sentenced two offenders in an identical manner with the sentencing analysis in both judgments set out in exactly the same terms, in spite of the

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material differences between the two cases. In setting aside the decision, the appellate court found that a reasonable observer would be left with the impression that the district judge had not "considered each matter separately, thoroughly, or even sufficiently", and that the judge had "extracted what he thought were the essential similarities of the two cases and then proceeded to decide them as if they raised identical issues": at [69]–[70]. This formed a reasonable basis for concluding that the district judge had not fully appreciated the material that was before him. The appellate court then went on to consider the sentencing inquiry afresh and reduced the sentence imposed on the offender: at [73]–[74], [96]. This would not be an available option for parties to an arbitration whose award has been tainted by such a breach because it is not for the reviewing court to determine the underlying dispute.

52 Similarly, in *Lim Chee Huat*, a case concerning a district judge who had substantially reproduced one party's written submissions in his grounds of decision, even extending to the reproduction of a typographical error made in those submissions, the appellate court found that a reasonable observer could conclude that the district judge had completely failed to exercise independent judgment. No deference was therefore to be accorded to the district judge's decision: at [47], [54]–[56]. However, the appellate court declined to order a retrial on the basis that there was sufficient evidence for it to make a fresh decision on the substantive appeal, and, on a proper consideration of this evidence, held that the outcome of the dispute remained the same: at [57]–[59].

53 In our view, the impression that is conveyed to a reasonable observer of a judge or an arbitrator who copies from another source may often be similar, and as we have noted, this will often turn on the precise circumstances in which the copying is done. To this extent, case precedents involving how the courts have analysed these situations may provide helpful guidance. That being said,

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as we have also noted, the *effect* of setting aside a judgment and an award will typically differ.

54 The *second* difference between arbitration and litigation proceedings is that arbitration is a mode of *private* dispute resolution: the details of each arbitration and the reasoning contained in each award remain confidential to those who are privy to the arbitration. On the other hand, the judicial process is underpinned by the principle of open justice; court-issued judgments are generally available for public scrutiny, alongside the facts, submissions and evidence material to each dispute. A judgment functions not only to inform parties of why they have won or lost a case, but also to develop the corpus of the law and to assure the public that justice has been served: *Newton David Christopher* at [40(d)(i)]; *Lim Chee Huat* at [22].

55 Different considerations may therefore operate where a judge reproduces material from other sources in a judgment than when an arbitrator does so from another award. In the latter case, the source material would, by its nature, typically not even be available to those uninvolved in the proceedings from which it emanated. Further, it may also be noted that the confidential nature of arbitrations makes it far more difficult to detect whether an award has been copied from another source, such as another award rendered in a related arbitration, to which neither party in the relevant arbitration was privy. Finally, as we have observed, the possibility of appellate review in court litigation means that other avenues are available to maintain the integrity of the process and of the legal system.

Expectation of equality

56 We return to a point we have touched on, which is the expectation of equality in an arbitration. Article 18 of the Model Law gives expression to this

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by providing that each party in an arbitration shall be "treated with equality and … be given a full opportunity of presenting his case". As observed by the court in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi*"), these are non-derogable procedural guarantees under the Model Law (at [50]). They embody the basic notions of fairness and fair process which underpin the legitimacy of all forms of binding dispute resolution: *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/264, 25 March 1985) at Art 19, para 7, cited with approval in *China Machine* at [90].

57 One facet of equal treatment is that the parties should have equal access to any relevant material that may bear on the outcome of the dispute as well as an equal opportunity to comment on the same. Where this is not the case, and where it is shown that a tribunal has arrived at its decision by relying on material that the parties have not had access to, then subject to considerations of materiality and prejudice this would presumptively constitute a breach of the fair hearing rule of natural justice.

58 Another important facet of the principle of equality is the expectation of equality between the *arbitrators*, at least when it comes to the consideration of the material upon which the tribunal will make its decision. As observed in *Singapore International Arbitration: Law & Practice* (David Joseph and David Foxton gen eds, LexisNexis, 2014), the requirement of equal treatment must be observed by the parties and the tribunal alike: see para 2.11, cited in *Triulzi* at [112]. We agree with this.

59 It is a unique feature of arbitration that parties are permitted to choose their preferred adjudicator, subject to the constraints of their arbitration agreement and/or any relevant institutional rules: Gary Born, *International*

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Commercial Arbitration (Kluwer Law International, 2021, 3rd Ed) ("*Born*") at §12.01[B]. This does not mean that a party-appointed arbitrator should strive to resolve the dispute in favour of his or her nominator. On the contrary, every arbitrator, once appointed, is subject to an equal duty to act independently and impartially: *Born* at §12.05; ICC Rules at Article 11; *IBA Guidelines on Conflicts of Interest in International Arbitration* (25 May 2024) at General Principle (1); see also Sundaresh Menon CJ, "Adjudicator, Advocate, or something in between? Coming to terms with the role of the party-appointed arbitrator" (2017) 34:3 Journal of International Arbitration 347 at 357. As observed by Kiefel CJ (as she then was) and Gageler J (as he then was) in the decision of the High Court of Australia in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 ("*QYFM*"), each member of a decision-making body has an individual duty to adjudicate on the decision by reference to his or her own true view of the facts and the law (at [58]).

60 In our judgment, it follows from this that where an arbitrator is not equally placed with his co-arbitrators, it may be said that the other arbitrators have not had an equal, fair and independent opportunity to discharge their adjudicative function and this may be found to have undermined the core expectation of the parties when they choose to resolve their disputes by arbitration. To be clear, this does not mean that each arbitrator must have the same experience or hail from the same background; it is entirely within the parties' discretion to choose an arbitrator according to their own criteria. The point, rather, is that each arbitrator should be *equally placed to have the same access* to the details of the dispute at hand and of the material on the basis of which, they are to resolve it.

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61 For this reason, in a case where only one arbitrator has recourse to extraneous material which reasonably appears to have influenced the outcome of the arbitration, this may *in itself* form a basis for challenging the integrity of the arbitration. As explained, the most important right that a party has in arbitration is the right to a fair and equal process. The cornerstone of this right lies in the equal standing of the arbitrators and their collective agreement to resolve the dispute based only on matters falling within the realm of the arbitration. This expectation of equality is undermined where there is a material asymmetry of information not only between the tribunal and the parties, but also as between the tribunal members themselves.

62 Finally, there was nothing before us as to whether the co-arbitrators were aware of the fact that the President had drawn on the Parallel Awards in preparing the Award. However, we do not think anything turns on this. This is because even if we assume in their favour that they were not aware, this would not affect our analysis: see *Stubbs v The Queen* [2018] UKPC 30 at [33]; *QYFM* at [58]–[59]. As observed at [58] of *QYFM*:

> That jurisdictional consequence of bias on the part of any of its members has an important practical dimension for a multi-member court. Each member of the court has an individual duty to give effect to his or her own true view of the facts and applicable law. In the discharge of that duty, however, members of the court can properly be expected to confer together in private in order to obtain the benefit of each other's views and to agree where they can. For the public to be able to have confidence in the outcome of such a closed deliberative process, the public must be confident that each participant in the process is free from bias. *The process and the outcome would be tainted were a biased judge 'in the room'.*
>
> [emphasis added]

63 In our judgment, this applies equally in an arbitration. That having been said, if it were the case that the co-arbitrators were unaware, it raises significant questions as to how they too could have missed some of the errors in the Award

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if, as is to be expected, they had diligently considered the draft award with due regard to the provisions of the Contract, the submissions advanced, and the evidence led that related specifically to the Arbitration.

The nature of the respondent's complaint

64 In that light, we turn to analyse the nature of the complaint made in this case. A party who wishes to challenge an award on the basis of a natural justice breach must clearly establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights: *Soh Beng Tee* at [29].

65 Properly construed, the respondent's complaint is one made against the *entire decision-making process* employed in the Arbitration. The respondent contends that this process was fundamentally unfair, and that as a result it had been denied its right to be heard fairly in the Arbitration, on three main grounds, which together implicated both the key rules of natural justice:

(a) A fair-minded and informed observer, having considered the objective facts and evidence, would reasonably come to apprehend that the Tribunal had approached the Arbitration with a closed mind. By utilising the outcome of the Parallel Arbitrations as the starting point for its decision in the Arbitration, a fair-minded observer would reasonably come to suspect that the decision was influenced by the Tribunal's anchoring and confirmation biases as explained at [33] above.

(b) The President, at least, had recourse to material falling outside the scope of the Arbitration, which he had acquired from his involvement in the Parallel Arbitrations and which he drew upon in preparing the Award. This was evident in the fact that a substantial

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number of material paragraphs had been lifted from the Parallel Awards, in some instances without realising or appreciating the differences between the relevant proceedings. This resulted in the many errors that are found in the Award. The parties had neither contemplated nor agreed to this decision-making process, which in fact amounted to a breach of the fair hearing rule.

(c) To the extent the co-arbitrators were not privy to the Parallel Arbitrations, the expectation of equality amongst the arbitrators was compromised by the unequal access to relevant information and knowledge between the President and his co-arbitrators. The integrity of the entire decision-making process was thus compromised.

The problem with the appellants' response

66 In response to this, the appellants invite us to evaluate each complaint directed at the Award *in isolation*. The appellants advance separate submissions on each specific complaint, seeking either to explain why these were not material to the outcome of the Arbitration or to show that the Tribunal had properly applied its mind to that aspect of the case. For example, and in relation to the extent the Parallel Awards were reproduced in the Award, they highlight that 169 paragraphs of the Award were drafted afresh and submit that the Tribunal had applied its mind to the issues contained in these paragraphs. Counsel for the appellants also sought to suggest that in drawing from the Parallel Awards, the President was simply using a "short cut" to express the decisions that the Tribunal had arrived at in an appropriate manner. As to the errors in the Award (see [24]–[27] above), counsel submitted that these were technical errors that had no bearing on the outcome of the Arbitration.

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67 We do not consider this to be an appropriate approach to the present matter. The respondent's complaint does not involve discrete complaints or incidents or an isolated breach of the rules of natural justice. If the complaint had *only* been that there were, for instance, some authorities cited in the Award that had not been raised by either party, and those authorities were not decisive on any point, it might well have been appropriate to evaluate whether this *specific* breach was material and/or whether it had resulted in some form of prejudice. But that was not the manner in which the respondent had framed its case. The true gravamen of the respondent's complaint was that the Arbitration had been decided by means of an unfair *process*. Each specific allegation that was raised – such as that the Award was substantially lifted from the Parallel Awards, or that there were errors in the Award – was intended to serve as *evidence* of this underlying failure of the process. They were not framed as isolated breaches of natural justice to be considered in silos. In our judgment, the way in which the appellants sought to address the respondent's complaint was simply inapposite because it failed to engage with its substance.

Whether the Award was correctly set aside for breach of natural justice

68 We turn to the crux of the present appeal, which is whether the Judge had correctly set the Award aside for being rendered in breach of natural justice.

Prejudgment amounting to apparent bias

69 We begin with the fact that neither party disputes that the President had, in the course of the Arbitration, used extensive material derived from the Parallel Arbitrations. It is also common ground that the Award was not drafted afresh. Rather, the Parallel Awards were used as templates, with adjustments made to account for what were thought to be the specificities of the Arbitration.

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70 The question that arises is whether a fair-minded and informed observer would, after considering all the relevant facts and circumstances, reasonably apprehend or harbour the suspicion that by reason of what the President had done, he was materially influenced by the earlier decisions that he had been party to in the Parallel Arbitrations. In our judgment, the answer to this is plainly in the affirmative. We say this because it was incumbent on this Tribunal to consider the matter afresh. This was especially the case where there were new members on the Tribunal; new counsel at least on one side; and to some degree new arguments being raised. The point can be demonstrated by considering what the reaction of the co-arbitrators and the parties would have been if, at the very outset, the President had made it clear that he would unilaterally have regard to, draw from and/or be influenced by whatever earlier decisions *he alone* had made or been party to in other related arbitrations. In our judgment, on the facts before us, the extent to which the Award drew from the Parallel Awards was such that the informed and fair-minded observer would reasonably apprehend that the Award was prepared by a Tribunal that did not keep an open mind because it was impermissibly influenced by the Parallel Awards that had been rendered earlier.

71 For the avoidance of doubt, we should be clear that it is not inherently wrong for an arbitrator to resolve two related disputes in the same manner. In *CNQ v CNR* [2023] 4 SLR 1031, the same arbitrator adjudicated upon two sets of related disputes involving the same parties. In a subsequent challenge, the court rejected the argument that the arbitrator had prejudged the later arbitration because he was inclined to resolve it in the same manner as in the earlier arbitration. There, the parties had been given ample opportunity to address the earlier award in the course of the later proceedings. In its later award, the arbitrator also expressly highlighted the similarities and differences between the two related arbitrations, so as to explain his later decision. In these

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circumstances, it could not be said that the arbitrator had approached the later arbitration with a closed mind (at [54]–[62]). That is simply not the case here, where not only was there no possibility of the parties addressing the points raised or conclusions reached in the separate proceedings, but portions from the Parallel Awards were reproduced in the Award, without even being adjusted for differences in the arguments made or in the terms of the applicable contracts. In this regard, we make four points.

72 First, and as a preliminary point, there were several material differences between the Three Arbitrations (see [20] above). The respondent explained that it had adopted a slightly different case strategy in the Arbitration: it abandoned some of the submissions made in the Parallel Arbitrations (see, for example [24] above) and replaced these with new arguments unique to the Arbitration (see [20(b)] above). These new arguments arose because of the slightly different factual matrix presented by the Arbitration: for instance, the difference in the length of delay between the issuance of the Notification and the appellants' claim allowed the respondent to make additional arguments on estoppel.

73 Despite this, the Parallel Awards were used as templates in drafting the Award to a very substantial degree. It is undisputed that at least 212 paragraphs from the Parallel Awards were retained in the 451-paragraph Award. This has several implications.

74 For one thing, in our judgment, a fair-minded observer would be left with the reasonable apprehension or suspicion that the Tribunal's decision was improperly influenced by a degree of anchoring bias, which refers to the unconscious tendency to rely on a conclusion earlier made without regard to new information and fresh analysis: *G (A Child: Care Order) (Complex Developmental Needs) (No. 1)* [2023] EWFC 168 (B) at [140]). By utilising the

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Parallel Awards as the *starting point* for drafting the Award, the impression conveyed to the fair-minded observer would reasonably be that the decision-maker might have been wrongly anchored to the earlier decision in a way that compromised his ability and openness to consider matters afresh. Such a decision would also appear to be plagued by a confirmation bias, referring to the difficulty of persuading a decision-maker that has come to an initial view to then change its view: *HCA International Ltd v Competition and Markets Authority and another* [2015] 1 WLR 4341 at [4]. We recognise that the risk of confirmation bias exists so long as two similar disputes are heard by a common arbiter; as earlier explained, this is not in itself sufficient to amount to a breach of natural justice (see [71] above). In this case, however, we find that the appearance of confirmation bias would be exacerbated by the fact that the Parallel Awards were in fact used as the starting point for the Award, and there was then nothing to displace that appearance. On the contrary, the failure to appreciate some of the differences between the different sets of proceedings and the importation of parts of the Parallel Awards that became errors, at least when they were incorporated in the Award, would strengthen such an apprehension.

75 Second, this suspicion of bias or prejudgment would have been further compounded when one considers the identity of issues and outcomes in the Three Arbitrations. In so far as common issues were ventilated in each arbitration, they were all resolved to the same conclusion. Further, a substantial portion of the relevant analysis featured in similar terms across the three Awards, *despite the fact that slightly different arguments had been raised by the respondent in the Arbitration.*

76 To give an example, we earlier noted that the respondent had advanced a revised version of the Cl 20.1 Argument in the Arbitration (see [20(b)] above). For context, the respondent had argued in the Parallel Arbitrations that the

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respective consortiums' claims were barred by the 28-day timeline contained in cl 20.1 (see [7(c)] above). It expanded on this argument in the Arbitration, averring that the appellants had also failed to maintain the necessary evidential records of the alleged additional costs as was required by cl 20.1. In spite of this difference, the Tribunal's recitation of the respondent's case in the Award was in essence identical to that set out in the Parallel Awards, with no express reference made to the additional argument on lack of evidence. The Tribunal's subsequent analysis and disposal of the Cl 20.1 Argument was then largely derived from the discussion made in the Parallel Awards. It was not open to the appellant to suggest that Tribunal's omission to refer to the additional argument on lack of evidence had no bearing on the Cl 20.1 Argument, given the context that a different version of the argument had been run in the Parallel Arbitrations, and that the outcome in the Parallel Awards had essentially been reproduced in the Award. That might reasonably have led a fair-minded and informed observer to apprehend that the Tribunal had failed to grapple specifically with the argument that had actually been made by the respondent in the Arbitration.

77 Third, and related to the above, in so far as the Tribunal had analysed and discussed the fresh arguments raised by the respondent in the Arbitration, these paragraphs of analysis were mostly interposed between paragraphs that were reproduced from the Parallel Awards. Without commenting on the correctness of these decisions, we observe only that the *structure* and *presentation* of these reasons would have given rise to the reasonable impression or concern that the fresh arguments might not have been considered by an open mind.

78 Fourth, and finally, there were many errors in the Award arising from the approach that was taken to producing it from the Parallel Awards. Thus, the Award made reference to the CP-301 and CP-302 version of cl 13.8 instead of

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the relevant CPT-13 version of the same. The Tribunal also applied the wrong *lex arbitri* to the issues of interest and costs; in short, it applied the procedural law applicable to the Parallel Arbitrations and not the Arbitration. There are several other minor errors, not all of which were canvassed in the Judgment: for instance, the Award cites the title of the CP-301 Contract instead of the CPT-13 Contract. Viewed in totality, these errors further evidence the problem with the underlying decision-making process. To the fair-minded and informed observer, it would appear that the Tribunal might not have adequately applied itself to the facts and submissions actually made in the Arbitration. Again, this would cast doubt on the integrity of the decision-making process.

79 We are therefore amply satisfied that a fair-minded observer having formed these suspicions would have concluded that the integrity of the decision-making process had been compromised and agree with the Judge that the allegation of apparent bias has been made out: Judgment at [114].

Reference to extraneous considerations

80 We turn to the respondent's second complaint, which is that the Tribunal impermissibly drew on materials that the parties did not have access to and could not address. To restate the relevant legal principles briefly, a tribunal must consider the material before it and make a decision on this basis: see *Front Row* at [37]; *Pacific Recreation* at [30]; *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 ("*CAJ*") at [55]. An arbitrator who finds himself or herself struck by a point not raised by either party should put this to the parties for their consideration and comment: see *Zemalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at p 15, per Bingham LJ.

81 In *CAJ*, we upheld a decision to set aside part of an award which had been made, at least to some degree, on the basis of an arbitrator's prior

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experience in dealing with disputes of a similar nature. That prior experience was an *unarticulated* consideration which the parties were not afforded the opportunity to address: see *CAJ* at [55].

82 Applying this to the present case, the patently substantial material derived from the Parallel Arbitrations were extraneous considerations that had not been raised to the parties' attention. That material formed such a pervasive part of the Award that it simply could not be overlooked. It was plain that it was neither contemplated nor agreed to by the parties that the Award could be prepared by such a process. For these reasons, we again agree with the Judge that there had been a breach of the fair hearing rule: Judgment at [115].

Unequal position of the Arbitrators

83 We also consider that the expectation of equality as between the Arbitrators was compromised. While, as we have noted, there is no evidence as to what actually transpired between the members of the Tribunal, it is known that the two co-arbitrators in this case were not privy to the Parallel Arbitrations. They would thus have had no direct access to any material or knowledge derived from those proceedings, but which appeared to have significantly influenced the outcome of the present Arbitration. The integrity of the Arbitration was therefore further compromised as a result (see [56]–[63] above).

84 In sum, we are satisfied that the Award was correctly set aside for being made in breach of the rules of natural justice.

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Whether the Award should have been set aside in part

85 We finally consider the appellants' alternative argument that the Award should, if at all, only have been set aside in the parts tainted by breach, with those issues being remitted to the Tribunal for determination.

86 A court in determining the course of action open to it when faced with a breach of natural justice should focus on the proportionality between the harm caused by that breach, and how that harm may be remedied. If the breach is only in respect of an isolated or standalone issue, it may not be appropriate to set aside the entire award. The parties should not be required to arbitrate the entire dispute over again if the breach does not taint the entire award. Such an approach is in line with the policy of minimal curial intervention and preserves the finality of the arbitral process to the greatest extent: *Soh Beng Tee* at [92]–[93]. These propositions were more recently affirmed in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*"), where we reversed the lower court's decision to set aside an award in its entirety. Where only isolated issues in the arbitration are affected by a breach of natural justice, it will often be appropriate to remit the corresponding portion of the award for reconsideration, thus preserving the finality of the Award as far as possible: *AKN* at [80], [105] and [116].

87 The difficulty, however, is that the breach of natural justice in this case does not relate to discrete or limited issues ventilated in the Arbitration. The complaint was made against the process employed by the Tribunal to prepare the Award and its decision. In our judgment, the breach of natural justice permeated the whole Award, and it was correctly set aside in its entirety.

88 In any event, the issue of remittal does not arise in this context. Remission operates as a mutually exclusive alternative to the power to set aside

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an award: *Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd* [2025] 1 SLR 88 at [56]. As the Award was set aside at first instance, and since we have found no basis for reversing the Judge's decision below, it is no longer open to the appellants to seek an order of remission on appeal: *AKN and another v ALK and others and other appeals* [2016] 1 SLR 966 at [17]–[18], [33]–[34]; *CBS v CBP* [2021] 1 SLR 935 at [103]–[106].

Conclusion

89 The appellants' appeal is accordingly dismissed. In coming to this decision, we do not insinuate any bad faith on the part of the Tribunal. That is simply not the test when it comes to assessing a challenge such as the present one. Rather, our decision rests on the importance of safeguarding the integrity and fairness of the arbitral process, which is the primary right accorded to those who opt to resolve their disputes through this means.

90 Unless the parties are able to come to an agreement on costs, they are to furnish written submissions, limited to eight pages each, within three weeks of the date of this judgment, setting out their respective positions on the appropriate costs order to be made in respect of the present appeal and in respect of the application for sealing and redaction in CA/SUM 33/2024.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

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David Edmond Neuberger
International Judge

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Toby Landau KC (instructed), Tham Lijing, Rochelle Lim (Tham Lijing LLC) for the respondent.

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