**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2024] SGCA(I) 4**

Court of Appeal / Civil Appeal No 9 of 2023

Between

(1) DBO
(2) DBQ
(3) DBS
(4) DBU

… *Appellants*

And

(1) DBP
(2) DBR
(3) DBT
(4) DBV
(5) DBW

… *Respondents*

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# GROUNDS OF DECISION

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[Arbitration — Award — Recourse against award — Setting aside]

# DBO and others
# v
# DBP and others

**[2024] SGCA(I) 4**

Court of Appeal — Civil Appeal No 9 of 2023
Sundaresh Menon CJ, Steven Chong JCA, David Neuberger IJ
25 March 2024

24 June 2024

**David Neuberger IJ (delivering the grounds of decision of the court):**

## Introduction

1 On 25 March 2024, at the close of the oral argument, the Chief Justice announced that the appeal would be dismissed and that we would subsequently give our reasons. These are our reasons.

2 This was an appeal against a decision of the Singapore International Commercial Court (the "SICC") in *DBO and others v DBP and others* [2023] SGHC(I) 21 (the "Judgment"), dismissing the application of [DBO], [DBQ], [DBS] and [DBU] (the "Appellants") to set aside a Partial Arbitration Award dated 30 January 2023 (the "Award"), whereby an arbitral tribunal (the "Tribunal") dismissed a claim brought by the Appellants and [DBW]) against [DBP], [DBR], [DBT], and [DBV] (the "Respondents") pursuant to Rule 29.1 of the Rules of the Singapore International Arbitration Centre (the "SIAC").

3 Although the issues before the Tribunal were more extensive, the issue raised on this appeal was relatively narrow, and accordingly the relevant facts and analysis can be set out relatively shortly.

**The relevant facts**

4 By a Facility Agreement (the "Agreement") made on 26 February 2020, [DBR], [DBT] and [DBV] (the "Lenders") granted a loan facility (the "Loan") for US$200m to [DBO] and [DBQ] (the "Borrowers"). [DBP] was the Security Agent, and [DBS] and [DBU] (and [DBW]) were guarantors of the Borrowers (the "Guarantors").

5 The Loan was taken for the purposes of carrying out the development of a project (the "Project").

6 The Agreement contained a large number of provisions of the type one would expect in a professionally drafted term loan agreement, and those provisions included:

(a) Clause 6.1, which stated that "each Borrower which has drawn a Loan shall repay that Loan in full … on the Termination Date";

(b) Clause 10.2(a), which stated that "the Borrower to which a Loan has been made shall pay accrued interest on that Loan on the last day of each Interest Period";

(c) Clause 22.30, which provided that income from units in a mall owned by the 2nd Appellant (the "Mall") would be paid into a specified account; and

(d) Clause 22.31, which provided that the proceeds of sale of any unit in the Project would be paid into a specified account.

7 During 2020, the COVID-19 pandemic (the "Pandemic") and consequential government orders (the "Orders") restricting movement and business activities, adversely affected sales of units in the Project as well as the 2nd Appellant's rental income from the Mall.

8 The Appellants claimed that, as a result of the Pandemic and the Orders, they were unable to repay the Loan when it matured in March 2021.

9 The Agreement contained a clause that provided for disputes to be resolved by arbitration in accordance with the SIAC Rules, with the seat of the arbitration being Singapore.

10 On 6 December 2021, the Appellants (and [DBW]) issued a Notice of Arbitration, to which the Respondents responded on 21 December 2021. The Guarantors were joined as parties to the resulting arbitration (the "Arbitration") in March 2022.

11 The Tribunal was duly constituted on 26 April 2022, and it comprised Mr Govindarajalu Asokan, Sir Bernard Eder and, as presider, Mr VK Rajah SC.

12 On 4 July 2022, the Appellants filed their statement of claim in the Arbitration, contending that the Agreement had been discharged by frustration so that the Respondents had no rights under the Agreement on the grounds that:

(a) It was an express term of the Agreement that the repayment of the Loan would be from the sale of units in the Project, and that term

could not be complied with because of the Pandemic and/or the Orders (the "Frustrating Event").

(b) It was a condition and/or implied term of the Agreement that the servicing of the Loan was to be sourced from the rents from the Mall, and that condition and/or term could not be satisfied because of the Frustrating Event.

(c) The parties had negotiated the Agreement on the common assumption that the repayment of the Loan would be from (i) the proceeds of the sales of units in the Project during the term of the Agreement, and (ii) the rents of the Mall, and the Frustrating Event prevented the sale of the units and removed the income from the Mall.

13 On 15 August 2022, the Respondents filed their defence and counterclaim in the Arbitration, denying that the Agreement was frustrated and counterclaiming, *inter alia*, for a declaration that the Agreement was valid and enforceable, and for an order for payment of the total amount due and payable under the Agreement.

14 Following service of a reply and defence to counterclaim and a reply to the defence to counterclaim, on 18 October 2022 the Respondents applied for early dismissal under Rule 29.1 of the SIAC Rules ("Rule 29.1"), seeking:

(a) an order dismissing the Appellants' claim that the Agreement had been discharged by frustration, and of their other claims and defences;

(b) a declaration that the Agreement was valid and enforceable (subject to there being a subsequent determination as to whether one particular clause was an unenforceable penalty); and

(c) an order that the Appellants were jointly and severally liable to the Respondents for all sums due under the Agreement.

15 Rule 29.1 states as follows:

> 29.1 A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that:
>
> a. a claim or defence is manifestly without legal merit; or
>
> b. a claim or defence is manifestly outside the jurisdiction of the Tribunal.

**The Tribunal's determination**

16 The Application for Early Dismissal (the "AED") was based on arguments that:

(a) The adverse economic impact of the Pandemic and any consequential Orders could not be frustrating events.

(b) In any event, the Borrowers' obligation to repay the Loan and interest was plainly unconditional, and an unconditional payment obligation could not be frustrated.

(c) Under the Agreement, the parties allocated to the Borrowers the risk of their subsequent inability to repay the Loan and interest.

(d) There was plainly no scope for the implication of any term/condition as to the availability of a specific source of funds.

17 The Appellants contested the AED, submitting that:

(a) Rule 29.1 only applied to "undisputed or genuinely indisputable rules of law to uncontested facts", and the question of whether the Pandemic or Orders had caused a contract to be frustrated should therefore go to trial;

(b) the issues raised by their reliance on an express term, a condition, an implied term and a common assumption could only be resolved after a full hearing; and

(c) a multi-factorial approach had to be applied when determining whether a particular contract had been discharged by frustration, and this involved delving thoroughly into the disputed facts.

18 The Tribunal heard oral submissions on the AED at a hearing which took place on 16 December 2022 (the "Hearing"). During the Hearing, the Appellants sought to add to the arguments raised in their pleaded case by raising a contention (referred to in the Award as "the amendment") that there was an oral collateral contract to the effect that the funds for repaying the sums due under the Agreement would come from the sales of units in the Project and the income from the Mall (the "Collateral Contract"). The Respondents did not object to the Appellants' reliance on the amendment in addition to their pleaded case.

19 In the Award, the Tribunal accepted that it was only where a claim or defence was undoubtedly legally unsustainable that Rule 29.1 could be properly invoked, but it concluded that the Appellants' contention that the Agreement had been discharged by frustration was manifestly without legal merit because:

(a) It was impossible to interpret the Agreement as expressly limiting the Appellants' liability to make payments due thereunder only from income received from sales of units in the Project and/or from income from the Mall.

(b) A term that only a specific source would be used to repay the loan and pay interest could not be implied as (i) the Agreement was commercially viable without such a term; (ii) the term was not so obvious as to go without saying; and (iii) the term was inconsistent with the express unconditional payment obligations in the Agreement.

(c) Any common assumption concerning the source of funds for payment of interest or repayment of the Loan was at best no more than an "expectation", the thwarting of which would be insufficient to frustrate the Agreement.

(d) Therefore, the Pandemic and Orders did not frustrate or discharge the Agreement as alleged by the Appellants, as the Agreement imposed an unconditional obligation on the Appellants to repay the loan and pay interest thereon.

(e) The amendment relying on the Collateral Contract could not assist the Appellants.

20 Consequently, the Tribunal made the following determinations:

(a) The Appellants' claim and defence that the Agreement had been discharged by frustration, and that, consequently, the Respondents had no rights under the Agreement or the related security documents, were dismissed.

(b) The Appellants' other claims and defences were accordingly unmaintainable and they were dismissed.

(c) The Agreement was valid and enforceable (save for the determination in due course of the allegation that a particular clause was an unenforceable penalty).

(d) The Appellants were jointly and severally liable to the Respondents for all sums due under the Agreement, excluding any default interest said to be due under the alleged penalty clause.

**The SICC decision**

21 On 20 March 2023, the Appellants made an application to the General Division of the High Court to set aside the Award pursuant to s 24 of the International Arbitration Act 1994 (2020 Rev Ed) and Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration.

22 On 11 May 2023, the application ("SIC/OA 6/2023") was transferred to the SICC pursuant to O 23 r 11, read with O 2 r 4, of the Singapore International Commercial Court Rules 2021, and was heard on 21 August 2023 by Chua Lee Ming J, Thomas Bathurst IJ, and Zhang Yongjian IJ.

23 As described by Chua Lee Ming J (in the Judgment at [28]), the Appellants' case was that:

> … the Tribunal breached the rules of natural justice and exceeded its jurisdiction for the following reasons:
>
> > (a) The Tribunal failed to assume the existence of the Collateral Contract despite:
> >
> > > (i) having proceeded with the hearing on the basis that it would be assumed that the Collateral Contract existed, and the Arbitration

> Respondents having acknowledged that the hearing would proceed on this basis;
>
> (ii) the Arbitration Respondents having agreed to assume the truth of the case that repayment of the Agreement would only be from the proceeds of rental and sale; and
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> (iii) the Tribunal being bound to assume the existence of the Collateral Contract.
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> (b) The Tribunal should not have decided that the Arbitration Claimants' case on the Collateral Contract was manifestly without legal merit when the existence of the Collateral Contract was in dispute.
>
> (c) The Tribunal should not have decided that the doctrine of frustration did not apply when the applicability of that doctrine involved a legal controversy.

24 The SICC dismissed SIC/OA 6/2023 on 21 August 2023. On 23 November 2023, Chua Lee Ming J issued the grounds of decision of the court dismissing the application, concluding, in summary:

(a) The Appellants' contention that the Tribunal had "proceeded on the basis that the existence of the Collateral Contract would be assumed" and that what was assumed "to be true were the pleaded facts relied on by the [Appellants] to prove their case on the alleged express term, condition, implied term, common assumption and/or Collateral Contract", should be rejected (Judgment at [33]).

(b) There was "no suggestion, acknowledgement or assurance [by the Tribunal] that it would be assumed that the alleged implied term, condition, implied term, common assurance and/or Collateral Contract existed" (Judgment at [34]).

(c) The Respondents "did not agree that the existence of the Collateral Contract would be assumed. They also did not agree that there

was any agreement that the amounts due under the Agreement would only be repaid from specified sources of funds" (Judgment at [39]). They "only agreed to the [Appellants'] case on the Collateral Contract being deemed to be part of the pleadings without a formal amendment application" (Judgment at [42]).

(d) "There was no basis for the [Appellants'] submission that the … Respondents agreed that the Collateral Contract should be assumed to exist" (Judgment at [42]).

(e) "The Tribunal's conclusion and reasons did not depend on any disputed underlying facts" (Judgment at [47]).

(f) The Tribunal had not acted in breach of natural justice, or acted in excess of its jurisdiction (Judgment at [57] and [62]).

25 Accordingly, the SICC dismissed the Appellants' application, a decision against which the Appellants now appeal.

**This appeal**

26 Realistically, the Appellants accepted that they had no grounds for challenging the Award in so far as it was based on the Appellants' original pleaded case, *ie*, without the amendment. The Agreement was quite clear in its terms that the repayment of the Loan was to take place by a specified date, and none of its provisions could be said to suggest, let alone to provide, that the repayment or the servicing of interest payments in the meantime could only be from a specified source or specified sources. It was impossible to imply a term to that effect. It would, as the Chief Justice pointed out during the hearing before us, convert what appeared to be a standard term loan arrangement into a non-

recourse arrangement. The only provisions which could be cited even to hint at an arrangement such as that for which the Appellants argued were cll 22.30 and 22.31, but they fall very far short of positively supporting the Appellants' case, not least because they are entirely consistent with the Loan being a standard term loan agreement.

27 As in the SICC, the Appellants' case rested squarely on the amendment, *ie*, on the Collateral Contract, which they contended that the Tribunal was bound to accept existed.

28 The Appellants put their case in a number of different ways before this Court, namely inappropriate invocation of Rule 29.1, unfairness, procedural error, excess of jurisdiction, and breach of natural justice. However, it seemed to us that, on a proper analysis, they all came back to one central contention, namely that; for the purposes of the AED Hearing, the Tribunal and the Respondents had accepted that a Collateral Contract existed, and that the Tribunal was therefore bound to find that, if the proceedings went to a full hearing, there would be a factual dispute as to whether there was an oral agreement between the parties that the Loan would only be repaid, and interest on the Loan would only be paid, out of sums received from the Project or from the Mall. According to the Appellants' argument, in light of their central contention, once it was accepted that there was a dispute as to whether there was such a Collateral Contract, Rule 29.1 could not have been properly invoked by the Respondents, and the AED should have been dismissed.

29 Even though we agreed that the Tribunal and the Respondents had accepted, for the purpose of the AED, that a Collateral Contract existed, we reject the Appellants' contention that the AED should have been dismissed. On an analysis of the transcript of the Hearing (the "Transcript"), it was apparent

that, both: (a) as communicated by Mr Peter Gabriel ("Mr Gabriel"), counsel for the Appellants at the Hearing; and (b) as understood by Mr Conall Patton KC ("Mr Patton"), counsel for the Respondents at the Hearing, the Collateral Contract was not an agreement to the effect that the Loan would be repaid and serviced *only* from the proceeds of the Project and the rents from the Mall: it was simply an agreement that those proceeds and rents would be (or were expected by the parties to be) so used. Such an agreement in no way cuts across the proposition that, if those proceeds and rents were *not* so used or were insufficient, the Respondents, in reliance on the plain terms of the Agreement, could look to the Appellants to pay what was so due.

30 The Transcript shows that the argument that there was a Collateral Contract was raised by Mr Gabriel relatively late during the oral argument at the Hearing. The Tribunal did not require the Appellants to amend their pleaded case to incorporate the allegation of a Collateral Contract, or even to record the terms of the alleged oral Collateral Contract in writing. Such a course should have been taken, because, otherwise, it would be almost inevitable that the precise terms of the alleged Collateral Contract would be expressed more than once during the Hearing, and in somewhat different terms. It was therefore unfortunate that the Tribunal did not require those terms to be committed to writing as soon as it was clear that an oral contract was to be assumed for the purpose of the AED. After all, often what appear to be small verbal changes can lead to very different outcomes in law.

31 As it is, therefore, we had to do the best we could by reference to the Transcript.

**The Collateral Contract as characterised on behalf of the Appellants**

32 It appeared to us that the terms of the Collateral Contract as identified by Mr Gabriel did not go so far as the Appellants now suggest, in that they did not give rise to an agreement that the Loan would be serviced and repaid *only* out of the proceeds of the Project and the rents from the Mall. Those terms may well have given rise to an agreement that those proceeds and rents would be so used, respectively, to repay and service the Loan, but that was a long way from agreeing that those proceeds and rents would be the only source of payment.

33 The Appellants' written case for the purpose of their appeal to this Court cited two descriptions (the "Two Descriptions") of the Collateral Contract by Mr Gabriel as recorded in the Transcript, namely:

> (a) on p 146 he described it as "a collateral agreement between the parties on the fact that this [*ie*, the Project] would be the source of the funds [for repayment of the Loan]"; and
>
> (b) on pp 151–152, he stated that the parties "entered into the transaction on the agreement, we say, that these units must be sold and the monies will be used to partly repay the loan down as well as for construction, so that the sales can carry on and the more sales come in and the more it is", and, after referring to the provision in the Agreement for a possible extension, "[t]hat was part of the agreement pursuant to which they had entered into this loan agreement".

34 Each of the Two Descriptions was consistent with the notion that the Respondents could expect (and quite possibly could insist on) the proceeds from the Project and the rents from the Mall being used to pay off the Loan. However, especially given the clear effect of the Agreement, the words used by Mr Gabriel

in the Two Descriptions cannot reasonably be given the effect argued for by the Appellants, namely that the only source of repayment to which the Respondents were entitled to look were those proceeds and rents.

35 Although not cited in the Appellants' written case, we should refer to two other statements by Mr Gabriel according to the Transcript. At p 158, he was recorded as saying that "the parties entered into the transaction on the basis that that [the Project, and presumably, the Mall] was the only source of funds available". We considered that that too was insufficient for the Appellants' purposes. It is not unusual for a borrower and lender to enter into a loan agreement with the common belief or expectation that the only source of money available to the borrower to repay the loan will be the project for which the loan is made. However, even where that is understood by, or agreed, between, the parties, it does not convert the loan into a non-recourse arrangement, at least in a case where the parties have entered into a formal loan agreement which is clearly a normal term loan arrangement and not a non-recourse arrangement.

36 Mr Gabriel was also recorded as saying on p 156 of the Transcript that "[i]t is an express agreement that the monies would be obtained and even to the extent to say it is only to be paid from the source, because that was the understanding". Although this formulation contains the word "only", we considered that it was not nearly clear enough to justify ascribing to it the meaning which the Appellants now suggest. The words "and even to the extent … it is only to be paid" when read in light of what Mr Gabriel said on pp 151–152 of the Transcript (see [33(b)] above), appeared to be covering the possibility of all the proceeds of the Project being used to "repay the loan down", and none of the proceeds being used "for construction".

37 In their written reply to the Respondents' case for this appeal, the Appellants contended that the Collateral Contract reflected the assumption pleaded in paragraph 77 of their statement of claim in the Arbitration, which alleged a "common assumption that … the monies to repay the Loan …would be financed from a specific source of funds, that is the monies from the sales of the units in the … [Project] during the term of the … Agreement". In our view, this contention suffered from the same problem as the other passages we have considered, namely that the fact that the parties may have agreed that the Loan would be repaid from certain specified receipts does not prevent the Respondents from arguing that the Loan could also be repaid from other sources. Further, the Appellants were wrong to suggest, as they did, that paragraph 77 "specifically referred to exclusive sources of repayment": it referred to "specific" not "exclusive" sources.

38 Accordingly, in our view, the Collateral Contract the existence of which the Appellants contended should have been assumed by the Tribunal for the purposes of the AED, did not have the effect for which the Appellants contend.

**The Collateral Contract as understood by the Respondents**

39 Examination of the Transcript showed, in our opinion, that, as contended by the Appellants, the Respondents did agree that the Collateral Contract would be assumed to exist for the purposes of the AED without the need for a formal amendment of the Appellants' case, but it also showed that the Respondents did so on the basis that they understood that the Collateral Contract did not have the effect of limiting the source of repayment of the Loan to the proceeds of the Project and the rents from the Mall. It also appeared to us that, when this understanding was communicated to the Tribunal, it was not challenged (and was thus impliedly accepted) by the Tribunal and by the Appellants.

40 On being asked by the Tribunal whether "for the purpose of this application", he was "prepared to accept all the additional facts that Mr Gabriel has adverted to without the need to go through a formal application", Mr Patton was recorded on p 154 of the Transcript as saying that he was "happy to accept that you should proceed on that basis".

41 We also noted that Mr Patton was recorded as saying (on p 155 of the Transcript), "[w]hat we don't understand to be suggested is that there was an actual express agreement that … the loan would be repayable only from those specific sources of funds". He immediately added that "[o]bviously, if there were facts available to plead that sort of an agreement, then that would be a very different kettle of fish from what we have been debating. So that is not the territory we are in". He also emphasised that he was "not agreeing" to "an allegation that there was an agreement that the loan would only be repayable from a particular source of funds" (on pp 155–156 of the Transcript).

42 The Tribunal then asked Mr Gabriel if he was contending that the Collateral Contract was an agreement by implication, to which he replied that it was "either by implication, express, an oral agreement", and then stated what we have quoted above at [36].

43 After a little further discussion, Mr Patton was recorded on p 157–158 of the Transcript as making the point that "whether you call it a common assumption or whether you call that an agreement … makes no difference to the substance of the matter because in the end all that is being said is that it was agreed or understood that these particular sources of monies would be the source for the borrower to repay". He then added that "that doesn't answer the question as to what is the contractual obligation to repay and who is under the contractual risk if that source doesn't materialise".

44 In other words, it was made quite clear by Mr Patton that the Respondents were accepting that: (a) for the purpose of the AED, the Appellants could rely on the existence of the Collateral Contract; and (b) that the Respondents' acceptance was on the basis of their specifically expressed understanding that that Collateral Contract did not have the effect which the Appellants now say that it has.

45 Very shortly after the passage quoted in [43] above, the Tribunal was recorded on p 158 of the Transcript as stating to Mr Gabriel, "[w]e have given you the additional route to amend the pleadings through an informal mechanism through which Mr Patton has agreed and we will deem this to be part of your pleadings". It appeared clear to us from the passages cited (above at [41] and [43]) that Mr Patton had made it plain that he "agreed" on the basis that the Collateral Contract did not have the effect of limiting the Respondents' right to seek repayment of the Loan to the proceeds of the Project and the rents from the Mall alone. Yet no objection was taken to the Tribunal's statement by Mr Gabriel.

**Conclusion**

46 It is only fair to the Appellants to add that, when considering the amendment in the course of the Award, the Tribunal appeared in some places to have been casting doubt on the existence of any contractual arrangement outside the ambit of the Agreement. We would accept, at least for present purposes, that, if this did represent part of the Tribunal's reasoning, it was not a position which was open to it, as the Respondents and the Tribunal had made it clear during the course of the Hearing that it would be assumed for the purpose of the AED that a Collateral Contract was part of the Appellants' case.

47 Turning to the terms and effect of the Collateral Contract, for the reasons which we have given, it seemed to us that the Collateral Contract was neither advanced on behalf of the Appellants nor understood by the Respondents as being an agreement whose effect was to limit the Respondents' right to seek repayment of the Loan, once its term had expired, or otherwise to cut down the Respondents' rights as laid down by the Agreement.

48 Accordingly, the Tribunal was entitled, and indeed was right, to conclude, as it did, that the amendment and Collateral Contract did not enable the Appellants to defeat the AED any more than its pleaded case did.

49 It follows that we considered that the SICC rightly rejected the Appellants' application. As explained in [1] above, that was the view this Court reached at the end of the arguments, and it therefore remains for us to determine the question of costs.

50 As to that aspect, we heard brief arguments from counsel at the end of the hearing of this appeal, and we consider that the Appellants should pay the Respondents' costs of this appeal, assessed at S$100,000 to be paid within 14 days of today.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

David Neuberger
International Judge

Zhulkarnain Bin Abdul Rahim, Reuben Gavin Peter and Hannah Chua (Dentons Rodyk & Davidson LLP) for the appellants;
Jelita Pandjaitan and Junjie Huang (Linklaters Singapore Pte Ltd) (instructing), Ong Tun Wei Danny, Bethel Chan Ruiyi, and Tan Mazie (Setia Law LLC) (instructed) for the first to fourth respondents;
Zhuo Jiaxiang (Providence Law Asia LLC) for the fifth respondent.