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

**[2025] SGCA 1**

Court of Appeal / Civil Appeal No 24 of 2024

Between

DEM

… *Appellant*

And

DEL

… *Respondent*

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# GROUNDS OF DECISION

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[Arbitration — Recourse against award — Lack of proper notice — Whether actual or deemed notice of the arbitration was provided]
[Arbitration — Recourse against award — *Infra petita* — Whether *infra petita* challenges should be rationalised as natural justice challenges — Whether a non-participating party can bring an *infra petita* challenge]
[Arbitration — Recourse against award — Breach of natural justice]

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# DEM
# v
# DEL

**[2025] SGCA 1**

Court of Appeal — Civil Appeal No 24 of 2024
Sundaresh Menon CJ, Steven Chong JCA and Belinda Ang Saw Ean JCA
14 November 2024

3 January 2025

**Steven Chong JCA (delivering the grounds of decision of the court):**

## Introduction

1 The crux of this appeal concerned an interesting point of law as to whether a non-participating party to an arbitration can challenge an arbitral award on the ground that the arbitrator had failed to consider a point which was not put in issue (the "*Infra Petita* Ground")? The judge of the General Division of the High Court (the "Judge") decided that the arbitrator did in fact consider the lack of consideration point and therefore there was no basis to set aside the arbitral award on the *Infra Petita* Ground.

2 The underlying dispute concerned the sale of a franchised enrichment centre (the "Franchise") under a Business Purchase Agreement dated 4 January 2019 (the "BPA") between the respondent and three parties including the appellant. The central issue which the appellant claimed the arbitrator failed

to consider was that there was no consideration to support the BPA as against the appellant. The appellant alleged that the reason why the issue was not raised in the arbitration was because he was not served with the notice of arbitration (the "2020 NOA").

3 We heard and dismissed the appeal on 14 November 2024 with brief oral grounds. We agreed with the Judge that the appellant had notice of the arbitration but elected for his own reasons not to participate. However, contrary to the Judge's decision, we found that the lack of consideration point was not addressed by the arbitrator but the *Infra Petita* Ground was nonetheless not available to the appellant since he chose not to raise it in the arbitration by reason of his non-participation.

4 As we will explain below, the lack of consideration argument was misconceived in any event and, as such, would not have made any difference to the outcome even if the point had been raised and considered by the arbitrator.

**The material background facts**

5 The respondent (W Co) is a Singapore company incorporated by Ms U for the purposes of acquiring the Franchise from the appellant (Mr X), Z Co, and Ms Y (the sole legal owner of Z Co). To facilitate this acquisition, three agreements were signed on 4 January 2019:

(a) The BPA for the purchase of the Franchise for $200,000. Under the BPA, the appellant, Ms Y, and Z Co were listed as "Sellers", and the respondent was listed as the "Purchaser".

(b) The Shareholders Agreement between Ms U, the appellant and respondent – under which the appellant would be entitled to 30% shareholding in the respondent.

(c) The Employment Agreement between the appellant and respondent – under which the appellant would be employed as Head of Operations of the respondent.

6 Under the "Notice" clauses of all three agreements, the appellant provided: (a) an address of a flat in Tampines ("Tampines Address"), and (b) an e-mail address kxxxxxxx@gmail.com ("K E-mail Address"), as his contact details.

7 Shortly after the new Franchise came into effect, the respondent realised that the Franchise was generating significantly less revenue than expected because the appellant, Ms Y and Z Co had: (a) diverted clients and staff to a new enrichment centre; (b) misappropriated teaching curriculum; and (c) misrepresented the Franchise's revenue potential.

8 The respondent therefore commenced arbitration on 29 October 2019 by filing a notice of arbitration ("NOA") in the Singapore International Arbitration Centre ("SIAC") against the appellant, Ms Y and Z Co ("2019 NOA"). Under the 2019 NOA, the respondent sought to bring a consolidated arbitration in respect of all three agreements (the "Consolidation Application"). At this point, the appellant, Ms Y, and Z Co were all represented by Farallon Law Corporation ("Farallon Law").

9 The Consolidation Application was rejected by the SIAC on 2 March 2020, and on 29 May 2020, the respondent informed the SIAC that it would only be continuing with the arbitration under the BPA. Sometime around

this period, the appellant ceased to be represented by Farallon Law and stopped participating in the Arbitration.

10 On 14 August 2020, the respondent filed the 2020 NOA against the appellant, Ms Y and Z Co under the BPA (the "Arbitration") claiming:

(a) against the appellant, Ms Y, and Z Co for misrepresentation; and

(b) against the appellant for breach of his confidentiality, non-compete, and non-solicit covenants in the BPA.

11 The SIAC informed the parties of the appointment of a sole arbitrator (the "Arbitrator") on 22 October 2020. On 20 August 2021, before the substantive hearing was scheduled to take place, the respondent reached a settlement with Ms Y and Z Co. Thereafter, the Arbitration proceeded only against the appellant.

12 On 8 September 2021, the hearing for the Arbitration took place as scheduled. Right after the hearing, the Arbitrator received an unexpected email (the "8 Sep 2021 Email") from an unknown email address, jxxxxxxx@gmail.com (the "J Email Address"). The sender claimed to be the appellant and stated that Ms Y had informed him of the arbitration. He also requested for the correspondence relating to the arbitration to be sent to this new email address.

13 The Arbitrator and the respondent's lawyers attempted to verify the sender's identity and engage with him. However, they received no response. The Arbitrator then asked the respondent's lawyers to reach out to Ms Y to check if she had informed the appellant about the arbitration. When her lawyers replied to say she had not informed him, the Arbitrator decided to proceed with

the Arbitration. No further communication was received from the J Email Address until a much later stage, during the course of enforcement proceedings (see [15] below).

14 The Arbitration was declared closed on 19 November 2022, and the Arbitrator published her award on 27 April 2023 ("Award"), finding in favour of the respondent on all of its claims. The respondent then sought to enforce the Award in the Singapore courts, and obtained a judgment entered in terms of the Award on 12 June 2023.

15 On 20 July 2023, the respondent made an application for substituted service of the judgment to enforce the Award at the appellant's three last known e-mail addresses and via eLitigation to his Singpass inbox. A day later, on 21 July 2023, the appellant suddenly made a re-appearance after almost two years of silence. He sent an email using the J Email Address to the SIAC and the process server for the respondent's lawyers: (a) alleging that he was only recently made aware of the Award; (b) alleging that he was not given proper notice of the Arbitration; and (c) asking for all documents in the Arbitration and for the Award to be served at a different residential address.

16 The appellant then sought to set aside the Award on 8 August 2023 under s 48 of the Arbitration Act 2001 (2020 Rev Ed) ("AA") on four grounds: (a) lack of proper notice; (b) failure to consider an essential issue (*ie*, the *Infra Petita* Ground); (c) breach of natural justice; and (d) breach of public policy.

**The decision below**

17 In the proceedings below, the Judge dismissed all four grounds in *DEM v DEL and another matter* [2024] SGHC 80 (the "Judgment").

(a) On the lack of proper notice ground: the Judge held that proper notice was given to the appellant by way of delivery of the arbitration documents to the Tampines Address and K Email Address (Judgment at [74]–[102]). In any event, the Judge found that the appellant was not prejudiced because he deliberately chose not to participate in the Arbitration and proper service would not have made a difference to the outcome (Judgment at [103]–[106]).

(b) On the *Infra Petita* Ground: the Judge appeared to accept that the issue of whether the BPA was enforceable against the appellant for lack of consideration ("Lack of Consideration Issue"), should have been addressed by the Arbitrator, since the respondent had accepted the same (Judgment at [110]). However, the Judge found that on a proper reading of the Award, the Arbitrator had implicitly dealt with the Lack of Consideration Issue (Judgment at [112]–[119]).

(c) On the breach of natural justice ground: the Judge noted that the claims were parasitic on the first two grounds and therefore also failed (Judgment at [122]).

(d) On the public policy ground: the Judge held that the allegations raised by the appellant failed to meet the high threshold required to invoke the public policy ground (Judgment at [126]–[129]).

## The parties' cases on appeal

### *The appellant's case*

18 On appeal, the appellant dropped his challenge on the public policy ground but continued to rely on the other three grounds.

19 In relation to the lack of proper notice ground, he argued that the Judge erred in finding that he had proper notice of the Arbitration and/or the Arbitrator's appointment. His entire argument was predicated on the fact that cl 11.1 BPA did not provide for service by email as an agreed method of service and therefore he did not have proper notice of all the documents which were sent to the K Email Address. He did not appear to dispute that the documents were served at the Tampines Address.

20 As regards the *Infra Petita* Ground, the appellant first noted that the respondent had conceded that the Lack of Consideration Issue was an essential issue that should have been addressed by the Arbitrator. He then argued that the Judge erred in finding that the Arbitrator had implicitly formed the view that the BPA was supported by consideration from both parties.

21 Finally, with respect to the breach of natural justice ground, he raised three separate instances of an alleged breach of the fair hearing rule:

(a) First, he was not given proper notice of the appointment of the Arbitrator and the Arbitration.

(b) Second, the Arbitrator: (i) failed to ensure that the 2020 NOA and other documents were properly served on the appellant in accordance with cl 11.1 of the BPA; and (ii) hastily decided in September 2021 to disregard the appellant's attempt to participate in the arbitral proceedings.

(c) Third, the Arbitrator failed to apply her mind to the essential issue of whether the BPA was unenforceable against the appellant for lack of consideration.

***The respondent's case***

22 The respondent opposed each ground of challenge – relying primarily on the same reasoning as the Judge below. However, the respondent also raised a time bar defence which it did not rely on in the proceedings below.

**The issues**

23 The principal issues to be determined were as follows:

(a) whether the appellant had proper notice of the Arbitration;

(b) whether the appellant could challenge the Award on the ground that the Arbitrator had failed to consider an important issue notwithstanding his non-participation; and

(c) whether there was any breach of natural justice.

24 Given our decision to dismiss the appeal, it was not necessary to decide the time bar objection raised by the respondent.

**The appellant had notice of the Arbitration**

25 The first ground of challenge relied on by the appellant was the alleged lack of proper notice of the Arbitration. The case below proceeded on the basis that the 2020 NOA was not served on the appellant. But on the eve of the hearing before us, the respondent filed CA/SUM 34/2024 ("SUM 34") to adduce evidence to show that the appellant was notified of the 2020 NOA by virtue of the correspondence sent from the SIAC. The appellant objected to the application given its lateness and the fact that the respondent could have adduced it below. We did not think that it was necessary to decide SUM 34 and we made no order. In our view, as we will explain below, it was clear to us that

the appellant had notice of the arbitration even assuming the non-service of the 2020 NOA.

***The law on proper notice***

26 Under s 48(1)(*a*)(iii) of the AA, the legal burden lies on the applicant seeking to set aside the award to "prove to the satisfaction of the Court" that it "was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the party's case".

27 On its face, r 3.4 of the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 2016) ("SIAC Rules") required the respondent to serve the 2020 NOA on the appellant. The purpose of r 3.4 is to give notice of the arbitration to the other party. However, it is not mandatory in the sense that non-service of the notice would *per se* be fatal to the award, provided the evidence is clear that the other party had "proper notice" of the arbitration. "Proper notice", in this respect, may be *actual* or *deemed* (*DBX and another v DBZ* [2023] SGHC(I) 18 ("*DBX*") at [90]–[95]).

28 Actual notice of the arbitration requires proof that the arbitral respondent in fact knew about the arbitration and was in a position to fully present its case. Although the legal burden remains on the arbitral respondent to prove that it was not given proper notice (see [26] above), in practice, evidence that the arbitral respondent had actual notice of the arbitration would typically lie with the arbitral claimant. In the absence of such satisfactory evidence, the omission or failure to serve the notice of arbitration may be fatal. However, we should add that this consequence would not be due to the non-service *per se* but because the other party would not have any notice whatsoever of the arbitration.

29 In this regard, the concepts of "notice" and "service" should be distinguished. Personal *service* of the arbitration papers, where the arbitration papers are delivered personally, is typically how actual *notice* is demonstrated, but this mode of service is strictly not necessary. Ultimately, the relevant inquiry is whether a party was adequately notified of the arbitration such that it was given a full opportunity to participate in the same. Afterall, the lack of proper notice ground is a specific manifestation of an infringement on the right to present one's case (see *Zavod Ekran OAO v Magneco Metrel UK Ltd* [2017] EWHC 2208 (Comm) at [12]). In the final analysis, the focus is on the *substance* of the notice and not its *form*. If a party has been made aware of the arbitration in a manner that would allow it to fully present its case, the requirement for proper notice would be satisfied, notwithstanding the manner in which it was done. This is, of course, a fact sensitive inquiry.

30 Deemed notice may be relied on where there is insufficient proof of actual notice. For present purposes, the relevant deeming provision is found in r 2.1(iii) of the SIAC Rules, which states that any communication shall be deemed to have been received if it is delivered "to any address agreed by the parties". In other words, notice effected in accordance with the contractually agreed manner of service (usually contained in a "Notice" or "Service" clause) will suffice as proper notice (s 60(1) of the AA). However, deemed notice may be rebutted by appropriate evidence of non-receipt (*Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] 5 SLR 393 at [33]).

31 Finally, even if proper notice is not given, the challenging party will still have to establish that the absence of notice has impacted its ability to present its case before the tribunal. For this reason, if the challenging party deliberately chose not to attend or participate in the arbitration (despite being aware of the same and being afforded the opportunity to participate), that party may not rely

on the absence of proper notice to challenge the award (*OUE Lippo Healthcare Ltd v David Lin Kao Kun* [2019] HKCU 2454 at [69]).

***Actual notice***

32 In the present case, the appellant evidently had actual notice of the Arbitration. By his own admission, he became aware of the Arbitration by 8 September 2021, when he emailed the Arbitrator. How he became aware of the Arbitration was beside the point (see [29] above).

33 As noted above (at [12]), the appellant sent the 8 Sep 2021 Email from the J Email Address on the day of the hearing, claiming that he was informed of the Arbitration by Ms Y and requested for the correspondence relating to the Arbitration to be sent to the J Email Address.

34 Given that the J Email Address was not the address stipulated in the BPA, the respondent sensibly sought to verify that the email was in fact sent by the appellant. In this regard, we were unable to accept the appellant's submission that there was no need to verify the identity of the sender behind the J Email Address because it was clear from the details contained in the email that it was the appellant. In our view, it was entirely reasonable and prudent for the respondent to have adopted this cautious approach given the confidentiality of the arbitral proceedings especially so since the J Email Address bore no resemblance to the appellant's name or the K Email Address.

35 The failure on the part of the appellant to respond to the verification request only served to confirm that it was indeed a prudent step to take. By this time, the appellant would have known that his interests were being implicated in the Arbitration. It was disingenuous for the appellant to assert that he did not access the very email address which he had himself provided. If such an

argument were to be accepted, it would allow a party to challenge an arbitral award for lack of proper notice by alleging that he did not access his own email address. That is simply an untenable argument.

36 Notwithstanding the appellant's continued silence, the Arbitrator nonetheless directed the respondent to reach out to Ms Y to verify if she had indeed informed the appellant about the Arbitration. When Ms Y confirmed that she did not communicate with the appellant about the Arbitration, the Arbitrator sensibly proceeded with the Arbitration without further engagement with the J Email Address.

37 Finally, there was no merit in the appellant's argument that the Arbitrator ought to have done more, such as by contacting him on the mobile number provided. The relevant inquiry was whether the Arbitrator took reasonable steps to ensure that the appellant was informed of the Arbitration and not whether any additional steps could and should have been taken. Given the appellant's failure to respond to the verification request, which was sent to the J Email Address, it did not lie in the appellant's mouth to criticise the Arbitrator for not exhausting all other means of communication. In the light of the appellant's past conduct, there was certainly no assurance that the appellant would have responded to calls on his mobile.

38 We should emphasise that we were not concerned with a situation where the appellant, upon becoming aware of the Arbitration, requested for time to respond and where the request was unreasonably denied. Instead, we were dealing with a situation where the appellant had elected to remain silent notwithstanding all efforts to notify him of the Arbitration. In our judgment, the appellant's deliberate failure to respond to the respondent's email sent to the J Email Address was entirely consistent with the appellant's decision not to

participate in the Arbitration. We were therefore amply satisfied that the appellant had proper notice of the Arbitration based on his own evidence.

***Deemed notice***

39 Even if the appellant did not have actual notice of the Arbitration, we were satisfied that he had *deemed* notice of the same.

*Service at the Tampines Address and K Email Address was contractually permitted*

40 It is undisputed that notice effected in accordance with the contractually agreed manner of service will suffice as proper notice (see [30] above). Here, cl 11.1 of the BPA provided:

> 11. **Notices**
>
> 11.1 Any notice or communication under or in connection with this Agreement shall be in writing and in the English language and shall be delivered personally, or by post or facsimile to the addresses set out below or at such other address as the recipient may have notified to the other Party in writing:
>
> **The Sellers**
>
> [Z Co]
> [Ms Y]
> [address redacted]
> Email: dxxxxxx@gmail.com
> Phone: xxxxxxxx
>
> [Ms Y]
> [address redacted]
> Email: dxxxxxx@gmail.com
> Phone: xxxxxxxx
>
> **[the appellant, Mr X]**
> **[the Tampines Address]**

> **Email: [K Email Address]**
> Phone: xxxxxxxx
>
> **The Purchaser**
>
> Attn:
>
> [Ms U]
> [the respondent, W Co]
> [address redacted]
> Email: xxxxx@xxxxxxxxxxxxxxx.com
>
> [emphasis added]

41 In our view, cl 11.1 of the BPA permitted the respondent to serve "any notice or communication" to the appellant at the Tampines Address and K Email Address.

42 The Judge correctly noted that it made no sense for every party to the BPA to provide an email address under cl 11.1 unless they intended for notices to be delivered to them at these email addresses. We did not accept the appellant's explanation that parties were "merely listing their contact details" for other purposes such as to facilitate post-closing payments. Such a strained explanation overlooked one simple fact: these addresses were not provided generally at the start or end of a contract where parties' details are typically set out for *general* communication. Rather, these addresses were specifically provided under a "Notice" clause, prefaced by a *chapeau* which explicitly stated that notices shall be delivered "*to the addresses set out below*".

43 We also agreed with the Judge's observation that although cl 11.1 referred to delivery by "facsimile", none of the parties provided a facsimile number. This omission indicated that the parties: (a) were aware that the stated modes of delivery in cl 11.1 might not be applicable to all addresses provided; and (b) intended that, where a stated mode was inapplicable, delivery would be by the relevant means to the relevant addresses provided.

44 Therefore, the appellant was deemed to have received all of the arbitration papers sent to the Tampines Address and K Email Address. This included various procedural orders and directions, pleadings, and meeting details for the relevant hearings. These documents were clearly sufficient to provide the appellant with proper notice of the Arbitration. Indeed, the appellant himself appeared to accept this.

*No evidence of non-receipt*

45 The appellant's deemed notice of the Arbitration was not rebutted by any appropriate evidence of non-receipt. The burden, in this respect, laid squarely on the appellant to adduce sufficient evidence that he did not, in fact, receive any of the communications sent to the Tampines Address and K Email Address.

46 On this point, the appellant did not take the position that the arbitration papers were not *sent* to the Tampines Address and K Email Address. Instead, he offered the following two contrived explanations for why he did not have *access* to them:

(a) the Tampines Address was tenanted out to one Mr J from January 2020 to an unknown date; and

(b) he was allegedly advised by the police to log out of the K Email Address in "mid-2020" and did not log in again thereafter.

47 In relation to the Tampines Address, there was clear evidence which showed that the appellant knew the tenant. First, the tenant turned out to be the registered proprietor of a trademark used for the appellant's workplace. Second, this connection was further strengthened by the fact that the tenant's name was

found in the J Email Address, which the appellant purportedly used to send the 8 Sep 2021 Email to the Arbitrator. The appellant failed to provide an explanation for these connections, with his counsel even confirming that the appellant knew the tenant. In these circumstances, the appellant evidently failed to discharge his burden of proving that he did not receive the arbitration papers which were sent to the Tampines Address.

48 In relation to the K Email Address, the appellant claimed that he was advised by the police to log out of it, because of an alleged offence under the Computer Misuse Act 1993 lodged by the respondent. Quite apart from the fact that this claim was not supported by any evidence, the Judge correctly noted that the appellant was never physically, technically, or legally constrained from accessing the K Email Address (Judgment at [91]). This was, after all, his *personal* email address. By the appellant's own admission, he was aware of the Arbitration by 8 September 2021 at the latest. In the face of such information, it was impermissible for the appellant to claim improper notice if he deliberately chose to ignore documents sent to a contractually agreed email address that he could readily access. As we explained above (at [35]), accepting this argument would create a dangerous precedent whereby any litigant could simply evade notice of service by claiming he did not access his email address. Ultimately it was for us to decide if there was sufficient evidence of non-receipt, and in the circumstances, it was clear to us that the appellant’s baseless assertions must be rejected.

49 In any case, none of these arguments altered the undeniable fact that the two addresses were provided by the appellant under the BPA for service of “any notice or communication”. The respondent cannot be faulted for continuing to serve the arbitration papers on these two addresses and the appellant must take the risk if they were served in his absence. If there was any truth in his claim

that he could neither access the K Email Address nor the Tampines address, the proper step for the appellant to take would be to properly inform all relevant parties of the change of address. However, this was not done by the appellant at all material times and significantly, when he purported to do so on 8 September 2021, he chose not to respond to the respondent's request for verification (see [34]–[38] above).

50 All of the above painted a clear picture of the appellant's informed decision not to participate in the Arbitration. That was a risk he took and must therefore bear the consequences of his decision.

51 In our view, the complaint of lack of proper notice was therefore without merit – both by reason of the terms of the BPA and by reason of the fact that he in fact knew of the hearing and did not bother to respond or to take steps to participate in the proceedings or to understand exactly what the relevant issues were.

### The alleged failure of the Arbitrator to consider the Lack of Consideration Issue

52 The second ground of challenge was the Arbitrator's alleged failure to consider the "essential issue" of whether the BPA was supported by consideration (*ie*, the *Infra Petita* Ground). Given our finding that the appellant had actual notice of the Arbitration but made an informed decision not to participate in it, we examined this *infra petita* challenge on the premise that the appellant was aware of the Arbitration at all material times.

#### *The proper characterisation of* infra petita *challenges*

53 At its core, an *infra petita* challenge is directed at the tribunal's failure to deal with a matter falling within the scope of submission to the arbitral

tribunal (*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") at [89], citing *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*") at [39]). It is often seen as the flipside to an *ultra petita* challenge – which is directed at a tribunal dealing with a matter falling outside the scope of submission to the arbitral tribunal.

54 Several local decisions have rationalised both *infra petita* and *ultra petita* challenges as falling within the ambit of Art 34(2)(*a*)(iii) Model Law (see *eg*, *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [31]–[33]; *BLB v BLC* [2013] 4 SLR 1169 at [96]–[97]). However, in our view, *infra petita* challenges should be better rationalised as a separate and independent natural justice challenge (and not under Art 34(2)(*a*)(iii) Model Law).

55 Article 34(2)(*a*)(iii) Model Law (which is phrased identically to s 48(1)(*a*)(iv) AA) provides that an award may be set aside if:

> the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, except that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside

56 The plain wording of the provision is phrased in the positive. In other words, it only contemplates *ultra petita* challenges – where the tribunal *exceeds* its mandate by "deal[ing] with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of submission to arbitration". It does not apply to the

negative scenario where the tribunal *fails* to deal with an issue referred to it by the parties (*ie*, an *infra petita* challenge).

57 This is also the view taken by the United Nations Secretariat in their interpretation of the equivalent provision under Art V(1)(*c*) of the New York Convention (see UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (United Nations, 2016) at p 176, para 12). Notably, they refer to a number of leading commentators who "agree that article V(1)(*c*) does not apply to awards which fail to address all the issues submitted to the arbitral tribunal for resolution" (Jean-François Poudret & Sebastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) at pp 836–837, para 914; Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at pp 987–988, para 1700; Stefan Michael Kröll, *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2007) at pp 541–542, para 84).

58 Rationalising *infra petita* challenges as a separate and independent natural justice challenge is also consistent with a line of more recent local cases (see *eg*, *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [46]; *BRS v BRQ and another and another appeal* [2021] 1 SLR 390 at [90]–[91]; *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [36]; *BTN and another v BTP and another* [2020] 5 SLR 1250 at [103]; *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [42]). We accept that these cases do not expressly state that *infra petita* challenges fall outside of Art 34(2)(*a*)(iii). Consistently, these cases recognise that the failure to consider an important issue that was put in issue in

the arbitration is manifestly a breach of natural justice. As we put it in *AKN* at [46]):

> To fail to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. …

59 Given our preferred approach articulated in [54] above, the principles we have held to apply to natural justice challenges – such as those set out in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") – will apply equally to *infra petita* challenges.

***The Arbitrator failed to consider the Lack of Consideration Issue***

60 In the case below, the Judge accepted that the Lack of Consideration Issue was an important point and held that the Arbitrator implicitly dealt with it. With respect, we did not think this was correct.

61 The Judge based her finding on a number of paragraphs in the Award where the Arbitrator was recounting each party's role in the dispute before and after the BPA. This was a factual narrative, intended to provide context for the subsequent analysis rather than to draw substantive conclusions. In these paragraphs, the Arbitrator did not allude to any exchange of promises between the appellant and respondent which underpinned the BPA. The sole reference to what the Judge claimed was the consideration received by the appellant can be found at paragraph 76 of the Award, where the Arbitrator noted that the appellant was employed and made a 20% shareholder by the respondent "[f]ollowing the sale of the Franchise" and that the 20% shareholding in the respondent "formed part of the consideration of a *Shareholder's Agreement* between the [respondent] and the [appellant]" (emphasis added). In our view,

neither of these statements suggested that the Arbitrator implicitly formed the view that the appellant's employment and 20% shareholding in the respondent was the consideration he received *under the BPA*.

62 However, while it might be true that the Arbitrator omitted to specifically address the Lack of Consideration Issue, that did not constitute any breach of natural justice because the omission would have been the direct consequence of the appellant's failure to raise the issue by reason of his non-participation in the Arbitration.

***The impact of the appellant's decision not to participate in the Arbitration***

63 In our judgment, it is simply not open to a party to raise an *infra petita* challenge where:

(a) he had elected not to participate in the arbitration;

(b) he did not file any pleadings; and

(c) consequently, he failed to raise the key issues especially the issue which was the subject matter of his *infra petita* challenge.

64 In the recent decision of *DFM v DFL* [2024] 1 SLR 1283 which cited *China Machine*, we said (at [45]):

> … In [*China Machine*] (at [168]), we held that an aggrieved party cannot complain after the fact that its hopes for a fair trial had been irretrievably dashed by the acts of the tribunal, if it had conducted itself as if it had been content to proceed with the arbitration and obtain an award during the course of the arbitration before that tribunal. The principle is this: a party that believes it has a basis to object to some intended act of the tribunal must take the point before the tribunal and afford the tribunal the opportunity to consider and respond to the objection. That party cannot hold the point in reserve and raise

> it only after the tribunal has made its decision. We observed in *China Machine* (at [170]):
>
> > … if a party intends to contend that there has been a fatal failure in the process of the arbitration, then there *must* be fair intimation to the tribunal that the complaining party intends to take that point at the appropriate time if the tribunal insists on proceeding. This would ordinarily require that the complaining party, at the very least, seek to suspend the proceedings until the breach has been satisfactorily remedied (if indeed the breach is capable of remedy) so that the tribunal and the non-complaining party has the opportunity to consider the position. This must be so because if indeed there has been such a fatal failure against a party, then it cannot simply 'reserve' its position until after the award and if the result turns out to be palatable to it, not pursue the point, or if it were otherwise to then take the point. After all, the requirement of a fair process avails both parties in the arbitration and to countenance such hedging would be fundamentally unfair to the process itself, to the tribunal and to the other party. In the final analysis, it is a contradiction in terms for a party to claim, as CMNC now does, that the proceedings had been irretrievably tainted by a breach of natural justice, when at the material time it presented itself as a party ready, able and willing to carry on to the award. If a party chooses to carry on in such circumstances, it does so at its own peril. The courts must not allow parties to hedge against an adverse result in the arbitration in this way. [emphasis in original]

65 In our view, to allow the appellant to raise this *infra petita* challenge at this stage and in these circumstances would be to permit hedging of the most egregious form. Where an issue was not properly brought before the tribunal, an aggrieved party should not be allowed to complain about the tribunal's failure to consider the same. The courts "must be wary of a party who accuses an arbitrator of failing to consider and deal with an issue that was never before him in the first place" (*BLC and others v BLB and another* [2014] 4 SLR 79 at [4]). Indeed, as we put it in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [32]:

> … [The] disputes which [parties] choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them. An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. …

66 We therefore held that the *infra petita* challenge failed, as the Lack of Consideration Issue was not even properly brought before the Arbitrator for her determination.

***No prejudice in any event***

67 In any event, in order for the appellant to succeed on the natural justice challenge, it was incumbent on him to establish prejudice arising from the Arbitrator's failure to deal with the Lack of Consideration issue. The appellant's arguments on this point were unfortunately based on a flawed understanding of the law of consideration and riddled with conceptual inaccuracies.

68 Consideration signifies a return recognised in law which is given in exchange for the promise sought to be enforced (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [66]). In any lack of consideration argument, it is therefore important to first identify the promise sought to be enforced. This promise will then serve as the anchor point to identify who the relevant promisor(s) and promisee(s) are, and subsequently, to determine if sufficient consideration was furnished for that particular promise sought to be enforced. This is an important preliminary step as the same contracting party within the same contract can either be the promisor or promisee – depending on which promise is in question.

69 Here, the promises sought to be enforced against the appellant were contained in the non-compete and non-solicit provisions of the BPA. In this context, the appellant was the promisor, and the respondent was the promisee.

To enforce the appellant's promise not to compete and solicit clients, the respondent (as the promisee) needed to furnish sufficient consideration.

70 The appellant's initial argument was that he received no consideration for his agreement to be bound by the BPA because the entire contractual sum of $200,000 went to Ms Y and Z Co. But this argument misapprehended a fundamental principle of contract law. It is trite that while consideration must move from the promisee (*ie*, the respondent), it need not move to the promisor (*ie*, the appellant) (*KLW Holdings Ltd v Straitsworld Advisory Ltd and another* [2017] 5 SLR 184 at [54]). Consequently, it was legally irrelevant that the appellant was not contractually entitled to receive a dime of the contractual sum. The respondent had furnished sufficient consideration for the appellant's promises, by paying $200,000 to Ms Y.

71 In the course of the hearing, this fundamental principle was repeatedly put to Mr Nicholas Tan, the appellant's counsel. Instead of addressing this legal obstacle, Mr Tan kept repeating the same factual assertion that the appellant neither sold nor received anything under the BPA. However, it was entirely irrelevant what the appellant furnished as consideration. As stated above (at [69]), it was the promises made by the *appellant* that were sought to be enforced. In this context, sufficient consideration had to be furnished by the *respondent* for these promises. It was misconceived for the appellant to point to the fact that *he* did not furnish sufficient consideration, because the enforceability of the respondent's promises was not even in contention.

72 In any event, the appellant did furnish sufficient consideration for the respondent's promise to pay $200,000 by agreeing to be bound to the non-compete and non-solicit provisions in the BPA. By agreeing to those restrictive

covenants, the appellant offered something of value and/or suffered a detriment in exchange for the $200,000 paid to Ms Y.

73 Ultimately, there was no merit in the appellant's argument that the BPA lacked consideration. Therefore, the appellant did not suffer any prejudice from the Arbitrator's alleged omission to deal with the Lack of Consideration Issue.

**There was no breach of natural justice**

74 That leaves the final natural justice challenge, which was essentially parasitic on the other grounds which we dismissed above. But to the extent the complaint was directed at what the Arbitrator did or did not do after the 8 Sep 2021 Email and her failure to ensure all of the arbitration documents had been served, as stated above (at [29] and [37]), we did not think she was obliged to do anything more.

**Conclusion**

75 We therefore dismissed the appeal with costs fixed in the aggregate sum of $50,000, with the usual order for payment out of security.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Tan Pang Leong Nicholas, Sheryl Lauren Koh Quanli (Xu Quanli) and Siddartha Bodi (Chua & Partners LLP) for the appellant;
Joshua Thomas Raj and Vigneesh s/o Nainar (Tang Thomas LLC) for the respondent.

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