IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 23

Court of Appeal / Civil Appeal No 73 of 2024

Between

DKT

… *Appellant*

And

DKU

… *Respondent*

In the matter of Originating Application No 844 of 2024

Between

DKT

… *Applicant*

And

DKU

… *Respondent*

GROUNDS OF DECISION

[Arbitration — Award — Recourse against award — *Infra petita* challenge]
[Arbitration — Award — Recourse against award — Breach of fair hearing rule of natural justice]

DKT
v
DKU

[2025] SGCA 23

Court of Appeal — Civil Appeal No 73 of 2024
Sundaresh Menon CJ, Steven Chong JCA and Belinda Ang Saw Ean JCA

9 May 2025

21 May 2025

Sundaresh Menon CJ (delivering the grounds of decision of the court):

1 This was a baseless appeal against the dismissal by a judicial commissioner (the "Judge") of an application to set aside an arbitral award. Having considered the submissions before us, we were satisfied that the appellant's numerous complaints in this case were nothing more than unmeritorious complaints because they were, in truth, directed at challenging the merits of the award, but presented under the guise of natural justice challenges in a vain attempt to come within the ambit of the limited grounds that exist to set aside an arbitral award.

2 We agreed with the Judge's decision to dismiss these challenges and upheld the award. However, our reasons for dismissing the challenges differed slightly in that the Judge had, if anything, been exceedingly generous in the attention she had devoted to the appellant's arguments. This was reflected in the

Judge's detailed examination of the arbitral record which, in our view, was unnecessary and, of greater concern to us, also risks encouraging recalcitrant award debtors to burden the courts with needlessly excessive and convoluted references to the arbitral record. We take this opportunity to clarify the proper scope of an *infra petita* challenge and reiterate that, in this sort of inquiry, the court should not countenance any attempt to re-open the merits of an award and should carefully scrutinise invitations to delve into the details of the arbitral record.

Background

3 We begin with some brief background facts. The respondent provided electricity transmission services in Singapore through its network of buildings located around the island. It engaged the appellant under two term contracts to maintain these buildings. The responsibilities of the appellant included carrying out crack repairs on the walls and ceilings of the respondent's buildings where necessary.

4 Between 2012 and 2016, the appellant submitted at least 278 claim forms (seeking payment of a total of around $2.2m) for grouting works it had allegedly carried out. Sometime in 2018, the respondent engaged a construction consultancy firm to carry out some sample testing of the works that had allegedly been carried out and completed by the appellant and that the respondent had paid for. They discovered that the works in question were either incomplete or had not been carried out in compliance with the specifically agreed method for performing the crack repairs. Relying principally on an expert report prepared by that firm's managing director, one Mr K (the "K Main Report"), the respondent commenced arbitration proceedings against the appellant for breaches of the term contracts.

5 The tribunal accepted the K Main Report and found that in at least 246 instances, the appellant had charged the respondent for crack repair works where no repairs were actually necessary. Accordingly, it rendered an award requiring payment of around $2m in favour of the respondent. Dissatisfied, the appellant sought to set aside the award pursuant to s 48(1) of the Arbitration Act 2001 (2020 Rev Ed), alleging multiple breaches of rules of natural justice.

6 Of the numerous complaints that were raised, the ones which remained on appeal could essentially be boiled down to three main natural justice challenges, including one that was raised in the written arguments but not pursued in the oral submissions:

(a) first, the tribunal allegedly disregarded certain of the appellant's pleaded defences;

(b) second, the tribunal allegedly failed to apply its mind to the appellant's arguments relating to Mr K's admission that he had taken core samples from the wrong places in at least five locations; and

(c) third, the tribunal allegedly adopted a chain of reasoning that was not reasonably expected when dealing with the fact that Mr K admitted to taking the said core samples from the wrong places.

The *infra petita* challenges

A framework for analysing infra petita *challenges*

7 We begin with the first two natural justice challenges which are of the "*infra petita*" variety, meaning that the essential complaint was that the tribunal had not carried out its mandate by considering all the material issues that were raised in the arbitral proceedings. As in the present case, there has been an

increasing tendency for disgruntled award debtors to abuse this ground of challenge on wholly unmeritorious grounds. We therefore take this opportunity to set out a clear framework for dealing with *infra petita* challenges to deter such unmeritorious challenges.

8 In our judgment, a successful *infra petita* challenge can only be mounted if *all* of the following four conditions are satisfied:

(a) First, the point must have been properly brought before the tribunal for its determination. It is not open to a party to raise an *infra petita* challenge where it elected not to participate in the arbitration or for some other reason failed to raise the point in question (see *DEM v DEL* [2025] 1 SLR 29 ("*DEM*") at [63]–[65]). It is similarly not open to a party to bring such a challenge on account of the tribunal's failure to consider a case which that party *wished* it had made before the tribunal, rather than the case which it had actually run (see *Palm Grove Beach Hotels Pvt Ltd v Hilton Worldwide Manage Ltd and another* [2025] 1 SLR 526 ("*Palm Grove*") at [22]). In a sense this is just the logical consequence of applying the rule in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 at [167]–[170] to the effect that a complaint of a breach of natural justice will not be admitted absent fair intimation to the tribunal of the alleged failure in the arbitral process, and "a tribunal cannot be criticised for failing to consider points not put to it" or alleged procedural defects which a party, by their conduct, had intimated their satisfaction with; otherwise, parties would be encouraged to impermissibly hedge against an adverse result in the arbitration by changing their case before the courts when mounting their challenges against an unfavourable award.

(b) Second, the point must have been *essential* to the resolution of the dispute. A tribunal does not have the duty to deal with every issue raised and need only deal with the *essential* ones (see *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [40(a)] and [46(a)]). Using a claim involving negligence as an example, if no duty of care is found in the first place, it follows that there can be no breach of any such duty of care and, consequently, no damages can be claimed. The arbitral tribunal is not obliged to pursue moot issues and consider the merits of either the standard of care or the claim for damages in such a context (see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [77]).

(c) Third, the tribunal must have completely failed to consider the point. Assessing whether the tribunal completely overlooked an essential point will typically be a matter of inference, and if such an inference is to be drawn at all, it must be shown to be clear and virtually inescapable (see *AKN and another v ALC and another and other appeals* [2015] 3 SLR 488 ("*AKN*") at [46] and *BZW and another v BZV* [2022] 1 SLR 1080 ("*BZW*") at [60(a)]). In making such inferences, our courts adopt a "generous approach", avoiding a hypercritical or excessively syntactical analysis of the award (see *BLC and others v BLB and another* [2014] 4 SLR 79 at [86]). Any doubt in this regard will be resolved in favour of upholding the award in accordance with the principle of minimal curial intervention (see *Palm Grove* at [71]). We emphasise again that the focus here is not on how well or accurately the tribunal understood, analysed and dealt with the point; but with whether it did in fact consider the point *at all* (however incompetently or incorrectly it may be said to have done so). Earlier suggestions that a tribunal's failure to understand an argument may amount to a breach of

natural justice (see *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [31] and [37]), were doubted and clarified in *AKN* at [47], where we made clear that a tribunal's "failure to comprehend [an] argument and so to appreciate its merits" is not a breach of natural justice. Otherwise, the courts will be inundated with challenges seeking to relitigate matters already decided in arbitration on the ground that the tribunal did not fully appreciate its argument or the evidence. It is not enough for the applicant to demonstrate that the tribunal's consideration of the matter was somehow lacking; it will have to show that the tribunal completely failed to even consider an essential issue. The inquiry is not directed at the *adequacy* of the tribunal's analysis, but with the *existence and fact* of such analysis. The only qualification to this would be in the truly exceptional circumstance where the tribunal's purported analysis is so woefully incomplete and cursory that it leads to the clear and virtually inescapable inference that the tribunal had in fact completely failed to consider the issue (*AKN* at [44]–[46]). However, for the avoidance of doubt, the threshold for such a finding will be a *high* one, for, if it were otherwise, errors of law or fact would impermissibly be made a ground for setting aside an arbitral award under the guise of a "natural justice" challenge (see *Palm Grove* at [24] and [48]; see also *India Glycols Ltd and another v Texan Minerals and Chemicals LLC* [2025] SGHC 28 at [34]).

(d) Finally, even if the tribunal failed to consider an essential point placed before it, there must have been real or actual prejudice occasioned by this breach of natural justice in the sense considered in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54]. Thus, we dismissed the *infra petita* challenge in *DEM* because the overlooked argument was so

fundamentally flawed that the tribunal's failure to address it caused no prejudice to the applicant in that case (at [67]–[73]).

The two* infra petita *challenges were without merit

9 Applying this framework, it became obvious at once that the first two natural justice challenges at [6(a)] and [6(b)] above had no merit.

10 The appellant's first challenge rested on para 291 of the award, in which the tribunal had stated that it did not need to deal with certain of the appellant's pleaded defences because these had not been pursued in its closing submissions. However, the appellant failed to engage with the subsequent paragraphs of the award where the tribunal *nonetheless* did go on to deal with those defences by distilling them down to certain key factual premises and finding that there was "not a shred of evidence to substantiate" them (see paras 292–295 of the award). In our judgment, the tribunal evidently had considered the defences and that was the end of the matter. To the extent that the appellant found fault with the tribunal's failure to analyse the deficiencies of the pleaded defences with appropriate references to the arbitral record, we have already explained at [8(c)] above that the court is only concerned with the *existence* of the tribunal's consideration of an issue and not with the *adequacy* of its analysis. The tribunal in this context identified the issues, stated that it had applied its mind to the defences, and then rejected them, and there was then no room for the appellant to complain that the arbitrator had not applied his mind *sufficiently* to the appellant's contentions.

11 For completeness, we touch on the appellant's second argument which was not pursued in its oral submissions. This related to the tribunal's alleged failure to apply its mind to Mr K's admission that he had taken five core samples at the wrong places. Again, this challenge was without merit. At paragraphs 213

and 272 of the award, the tribunal observed that the five wrong core samples were not fatal because these were merely the "final bit of proof" in the respondent's case. This could only mean that the tribunal had considered the five wrong core samples but was nonetheless satisfied on the totality of the evidence that the K Main report was reliable and adequate. Indeed, this was *expressly* stated by the sole arbitrator at para 273 of his award: "[h]aving carefully considered all the evidence before me, *and on the basis that the core sampling is rejected*, I find on a balance of probabilities, that the Claimant had established that the Respondent had breached the Term Contracts" [emphasis added]. The appellant may disagree with this finding, but that was beside the point. Indeed, it did not matter whether the tribunal was correct or not in its assessment – it applied its mind to the potentially wrong core samples, came to the view that it did not affect its conclusions, and that was the end of the matter. We emphasise again that in this sort of inquiry, the court is not to be drawn into the merits, correctness or sufficiency of the arbitrator's analysis.

The chain of reasoning challenge

12 There was finally a challenge based on the tribunal's chain of reasoning. Exceptionally, a tribunal's chain of reasoning may breach the fair hearing rule where it was: (a) not one which the parties had reasonable notice of; or (b) one which did not have a sufficient nexus to the parties' arguments (*BZW* at [60(b)]). It bears emphasising that this was developed as one of the tests that may be deployed for considering whether a tribunal has come to a conclusion on a basis that was never put before it. It was in this specific context that we suggested that a "manifestly incoherent decision" may amount to a breach of the fair hearing rule (*BZW* at [56]). We make this point in order to emphasise that "manifest incoherence", in itself, is *not* a ground to challenge an award for a breach of

natural justice. The fundamental question that remains is whether the "manifest incoherence" in a particular case:

(a) results from a chain of reasoning that parties had no reasonable notice of or had an insufficient nexus to the parties' arguments, such that the parties did not have the chance to address the point in that chain of reasoning (see, for instance, *BZW* at [60]–[61]); or

(b) gives rise to a clear and virtually inescapable inference that the tribunal had *completely failed* to consider an essential point (likewise, see *BZW* at [60]–[61]).

In the final analysis, any "manifest incoherence" that is said to infect an award must be tied back to a demonstrable breach of an established rule of natural justice.

13 The specific complaint here again stemmed from the wrong core samples. The appellant argued that in dealing with Mr K's admission that he took some wrong core samples, the tribunal adopted a chain of reasoning which the appellant did not reasonably expect.

14 We began by noting that in the arbitration, and indeed before us, the appellant framed the issue of the wrong core samples as a natural justice point. The contention appeared to have two parts: (a) first, that because Mr K admitted to taking five core samples from places he could not identify, it allegedly prevented the appellant from addressing the tribunal on which five buildings were affected by this; and (b) that if the arbitrator found that Mr K had used the correct locations, then this would be in breach of natural justice because there was no evidence as to where the samples were taken from. In our view, this was not in fact a natural justice point. In the ordinary way, this would have been

presented as an argument that Mr K's report was not reliable because the underlying material was not identified by reference to the correct locations; but, in any case, the appellant raised its complaint concerning Mr K having taken some core samples at wrong or unidentified locations as a natural justice point. In its response, the respondent submitted in the arbitration that there were no natural justice concerns because the appellant was never prevented from meeting its case. As the respondent put it, the appellant had in fact conflated its ability to "meet" the respondent's case with its ability to "rebut" it effectively.

15 The tribunal dealt with this issue, and it did so by agreeing with the respondent's submission in the arbitration that there were no natural justice concerns here (see paras 201–209 of the award). The tribunal, in our view, correctly observed (at para 210 of the award) that if core samples had been taken from the wrong places, it would only affect the *credibility* of the K Main Report. In this regard, the tribunal again emphasised that the core sampling was merely "the final bit of proof" and it was satisfied that the K Main Report contained sufficient findings to make out a *prima facie* case against the appellant (see para 213 of the award). The evidential burden therefore shifted to the appellant, and in the tribunal's view, it did not adduce sufficient evidence to rebut the K Main Report (at paras 214–216 of the award). In our judgment, this chain of reasoning could not have come as a surprise to the parties. The tribunal was simply addressing and resolving the appellant's "natural justice" argument by accepting the respondent's counter arguments.

Conclusion

16 We therefore dismissed the appeal. We also exercised our discretion to award indemnity costs against the appellant.

17 We have recently affirmed that when a court exercises its discretion to award costs, it will generally uphold a contractual bargain for indemnity costs "unless it would be manifestly unjust to do so" (*Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another appeal* [2024] 2 SLR 143 at [43]). Clauses 24.1.1 of both term contracts in this case expressly required the appellant to fully indemnify the respondent for all legal costs on an indemnity basis. These indemnity clauses covered all costs arising "whether directly or indirectly or consequentially" from any breach of any of the provisions in the term contracts. The legal costs in the present proceedings evidently arose "indirectly or consequentially" from the appellant's breaches of the term contracts. The appellant did not offer us any reason why it would be "manifestly unjust" to enforce this agreement, especially in light of its unmeritorious appeal. Indeed, even aside from cll 24.1.1 of the two contracts, we might have been inclined to award indemnity costs in any case because this appeal was so bereft of merit. Accordingly, we awarded indemnity costs in favour of the respondent in the sum of $70,000.00 and we made the usual consequential order for payment out of security for costs. The respondent was also allowed its claim for disbursements in the sum of $3,349.88.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Tan Tian Luh and Tan Xian Ying (Chancery Law Corporation) for the appellant;
Zhuo Jiaxiang and Ngo Wei Shing (Providence Law Asia LLC) for the respondent.
