Kluwer Arbitration Blog

# Ignorance Is Not Bliss: DEM v DEL [2025] SGCA 1

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Can a party refuse to participate in an arbitration, and thereafter challenge the arbitral award on the ground that the arbitrator failed to consider a point which was not put in issue? The Singapore Court of Appeal ("CA") in *DEM v DEL* [2025] SGCA 1 ("*DEM*") decided in the negative on this novel point of law.

**Background facts**

The Appellant, along with two other parties ("Y" and "Z"), entered into a Business Purchase Agreement ("BPA") with the Respondent, for the sale of a franchised enrichment centre (the "Franchise") to the Respondent. The "Notice" Clause of the BPA provided: (a) an address of a flat in Tampines, Singapore, and (b) an e-mail address, as the Appellant's contact details.

Subsequently, the Respondent discovered that the Appellant, Y and Z had diverted the clients and staff of the Franchise to a competitor, misappropriated teaching curriculum, and misrepresented the Franchise's revenue potential.

In August 2020, the Respondent commenced Singapore International Arbitration Centre ("SIAC") arbitration proceedings against the Appellant, Y and Z (the "Arbitration"). A sole arbitrator (the "Arbitrator") was appointed in October 2020. In August 2021, the Respondent reached a settlement with Y and Z, and the Arbitration proceeded only against the Appellant. At all times since the commencement of the Arbitration, the Appellant chose not to participate in the proceedings.

Immediately after the hearing on 8 September 2021, the Arbitrator received an email from an unknown email address, wherein the sender claimed to be the Appellant, stated that Y had informed him of the Arbitration, and requested that the correspondence relating to the Arbitration be sent to this email address. However, the email address was unresponsive when the Arbitrator and the Respondent's counsel attempted to verify the sender's identity. Y's counsel also denied that Y informed the Appellant of the Arbitration.

The Arbitrator proceeded with the Arbitration, declared the proceedings closed on 19 November 2022, and issued an award in favour of the Respondent on 27 April 2023 (the "Award"), which SIAC notified to the Appellant's contact details in the BPA. The Respondent obtained a judgment entered in terms of the Award on 12 June 2023 and served the judgment at the Appellant's email

address in the BPA as well as at the unknown email address used on 8 September 2021. On 21 July 2023, the Appellant suddenly re-surfaced using the same unknown email address, informing the SIAC and the Respondent's counsel that he was only recently made aware of the Award and was not given proper notice of the Arbitration.

The Appellant applied to the Singapore High Court ("HC") to set aside the Award under section 48 of the Arbitration Act 2001 (2020 Rev Ed) ("AA"). The HC dismissed the application. The Appellant appealed to the CA, arguing that the Award should be set aside as:

1. he was not given proper notice of the Arbitration and the appointment of the Arbitrator;
2. the Arbitrator failed to consider the essential issue that there was no consideration to support the BPA as against the Appellant (i.e. the *infra petita* ground of challenge); and
3. there was a breach of the fair hearing rule and hence a breach of natural justice arising from the foregoing facts.

The CA dismissed the appeal.

**Proper notice of the Arbitration was given**

The CA highlighted that under section 48(1)(*a*)(iii) of the AA, the burden lies on the Appellant to prove that it was not given proper notice of the Arbitration. Proper notice may be actual or deemed. Actual notice requires proof of actual knowledge of the arbitration, while notice is deemed when it is effected in accordance with the contractually agreed manner of service.

On the facts, the CA found that the Appellant had proper notice of the Arbitration even though the Notice of Arbitration was not served on the Appellant. The Appellant admitted that it was he who emailed the Arbitrator via the unknown email address on 8 September 2021. Therefore, he had actual notice of the Arbitration by his own admission. In any event, there was deemed notice of the Arbitration as service of arbitration papers was effected in accordance with the contractually agreed manner of service in the BPA, and this was not rebutted by any evidence of non-receipt from the Appellant. The CA warned that litigants could not simply evade notice of service by claiming that they could not access their email addresses (at [35] and [48]).

**A non-participating party cannot raise an *infra petita* challenge**

The CA clarified that Article 34(2)(*a*)(iii) of the UNCITRAL Model Law (which is identical to section 48(1)(*a*)(iv) of the AA) only considers situations where a tribunal exceeds its mandate and deals with issues outside of the scope of the submission to arbitration (i.e. *ultra petita*), but does not deal with the inverse situation whereby a tribunal fails to deal with a matter falling within the scope of the submission to arbitration (i.e. *infra petita*). Accordingly, the CA considered *infra petita* challenges as a "separate and independent natural justice challenge" (at [54]), which thereby engage the principles set out by the CA in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") (discussed here and here).

Crucially, the CA held that it is 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 (at [63]).

The CA considered that allowing the Appellant to raise his *infra petita* challenge at this stage would be "to permit hedging of the most egregious form" (at [65]). Since the issue of the lack of consideration was not even properly brought before the Arbitrator for her determination, the CA found that the *infra petita* challenge failed.

The final ground of appeal on the basis of breach of natural justice also failed, since it was parasitic on the other grounds, which had been dismissed.

**Commentary**

In upholding the award, the Singapore Courts have demonstrated that a party will not be able to escape the consequences of its non-participation in an arbitration, in the event a tribunal issues an unfavourable award which fails to consider a matter that falls within the scope of the submission to arbitration. Parties would thus need to reconsider their strategy for non-participation and account for this particular eventuality.

In particular, the CA's ruling that parties seeking to set aside an award on the grounds of *infra petita* must do so on the basis of a "separate and independent natural justice challenge", means that challenging parties would now need to satisfy the principles set out in *China Machine* and the general requirement of a reasonable right to be heard. This in turn means that challenging parties would not even be *allowed* to raise the *infra petita* challenge in the event that they do not participate. Put simply, non-engagement may have the consequence of depriving non-participating parties of an otherwise legitimate *infra petita* challenge if they had participated. The consequences of a failure to participate are thus potentially much more severe than before, and may potentially outweigh the benefits of costs savings from not participating in the arbitration.

This has the significant effect of compelling the challenging party to participate in the arbitration as early as possible, as the party has to afford the tribunal the opportunity to consider and respond to the objection (see *China Machine* at [170]). Practically speaking, parties would need to engage legal representation as soon as possible upon the receipt of a notice of arbitration notwithstanding the increased cost of legal representation upfront.

Additionally, the CA's re-iteration of the principles of what constitutes proper notice is timely. In particular, the CA crucially pointed out (at [29]) that:

> "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."

To elaborate, the challenging party would need to go further to demonstrate that in the absence of a "proper" notice, its ability to present its case before the tribunal has been substantially affected. Practically, the Singapore Courts have thus made it clear that a challenging party would need to adduce strong evidence that its very ability to present its case has been hamstrung by the lack of

notice. This decision is in line with the recent developments in Singapore law on the law of notice in arbitration such as the recent case of *DBX and another v DBZ* [2023] SGHC(I) 18, in which the Singapore International Commercial Court observed that even a purported lack of understanding of a notice of arbitration presented in English would not be a barrier to good notice as it was open to the parties to obtain assistance (at [99]). Instead, the key question is and always will be whether the lack of notice fundamentally affects the ability of the parties to present their cases. *DEM* confirms this position.

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