

**Non-participating parties to an arbitration
cannot challenge an arbitral award based on an *infra petita* challenge:
DEM v DEL [2025] SGCA 1; [2025] 1 SLR 29**

I. Executive Summary

Arbitration is a form of dispute resolution, where parties mutually agree to bring disputes to arbitrators who make a binding decision in the form of an arbitral award. Generally, parties who participated in the arbitration may later invoke what are known as “*infra petita*” challenges to such arbitral awards, by pointing to the arbitrators’ failure to deal with matters falling within the scope of what was submitted to them for decision-making. However, the question arises: what if there were issues that were previously not raised in the arbitration, and a non-participating party to the arbitration challenges the award on that basis? In *DEM v DEL* [2025] SGCA 1, [2025] 1 SLR 29, the Singapore Court of Appeal (“CA”) considered whether such a non-participating party could challenge an arbitral award on the ground that the arbitrator failed to consider a point which was not put in issue.

In 2019, W Co entered into three agreements with Mr X, Ms Y and Z Co (the “**Sellers**”) for the acquisition of a franchised enrichment centre (the “**Franchise**”). Shortly after W Co’s acquisition, W Co discovered that the Sellers had (a) diverted clients and staff to a new enrichment centre; (b) misappropriated teaching curriculum; and (c) misrepresented the Franchise’s revenue potential. W Co therefore commenced arbitration against all the Sellers, who were initially represented by the same lawyers. Prior to the hearing, W Co reached a settlement with Ms Y and Z Co, and so the arbitration proceeded against only Mr X.

However, Mr X ceased to be represented by Ms Y and Z Co’s lawyers. Mr X did not participate in the arbitration, aside from when he reached out to the arbitrator (the “**Arbitrator**”) with an unknown e-mail address on the day of the substantive hearing. Nonetheless, he failed to respond to attempts to verify his identity. Only after the Arbitrator published her award and after W Co obtained a judgment to enforce the award did Mr X seek to set aside the award at the General Division of the High Court (“**HC**”). The HC dismissed Mr X’s application to set aside the award. He then appealed to the CA claiming that (a) he lacked proper notice of the arbitration; (b) he could challenge the award on the basis that the Arbitrator had failed to consider an important issue on lack of consideration (the “**Lack of Consideration Issue**”); and (c) there was a breach of natural justice.

The CA dismissed the appeal on all three grounds. First, the CA held that the non-service of a notice of arbitration (“**NOA**”) would not be fatal to the award if there was evidence proving that the other party had notice of the arbitration in forms other than service of the NOA. Mr X had both actual and deemed notice of the arbitration, and this was a situation where he had elected to remain silent despite all efforts to notify him of the arbitration. Second, the CA further held that it is not open to a non-participating party to an arbitration to raise an *infra petita* challenge where he (a) had elected not to participate in the arbitration; (b) did not file any pleadings; and (c) had consequently failed to raise the key issues which were the subject matter of his *infra petita* challenge. The *infra petita* challenge therefore failed as the Lack of Consideration Issue was not even properly brought before the Arbitrator for her determination. Lastly, the natural justice ground was dependent on the earlier two grounds and therefore failed as well.

II. Material Facts

W Co is a Singapore company incorporated by Ms U for the purposes of acquiring the Franchise from Mr X, Ms Y and Z Co. To facilitate this acquisition, the parties signed three agreements in 2019: (a) the Business Purchase Agreement (the “**BPA**”); (b) the Shareholders Agreement; and (c) the Employment Agreement. Under the “Notice” clauses of all these agreements, Mr X provided: (a) an address of a flat in Tampines (the “**Tampines Address**”), and (b) an e-mail address (referred to as the “**K E-mail Address**”), as his contact details.

Shortly after the new Franchise came into effect, W Co realised that the Franchise was generating significantly less revenue than expected as the Sellers had: (a) solicited clients and staff to join a new enrichment centre; (b) misappropriated teaching curriculum; and (c) misrepresented the Franchise’s revenue potential.

W Co therefore commenced arbitration against the Sellers, who were originally represented by Farallon Law Corporation. Mr X ceased to be represented by Farallon Law Corporation and stopped participating in the arbitration sometime in 2020 while W Co was applying for a consolidation arbitration in respect of all three agreements. Meanwhile, W Co reached a settlement with Ms Y and Z Co before the substantive hearing was scheduled to take place. Thereafter, the arbitration proceeded only against Mr X in the Singapore International Arbitration Centre (“**SIAC**”), with W Co claiming against Mr X for (a) misrepresentation; and (b) breach of his confidentiality, non-compete, and non-solicit covenants in the BPA (the “**Arbitration**”).

On 8 September 2021, right after the hearing for the Arbitration, the Arbitrator received an e-mail from an unknown e-mail address (henceforth referred to as the “**J E-mail Address**”). The sender claimed to be Mr X and requested for correspondence relating to the Arbitration to be sent to this new e-mail address. The Arbitrator and W Co’s lawyers attempted to verify the sender’s identity and engage with him, but received no response. The Arbitrator then asked W Co’s lawyers to reach out to Ms Y to check if she had informed Mr X about the Arbitration. When her lawyers replied in the negative, the Arbitrator decided to proceed with the Arbitration. No further communication was received from the J E-mail Address until a much later stage.

The Arbitrator found in favour of W Co on all its claims (the “**Award**”). On 21 July 2023, one day after W Co made an application for substituted service of the judgment to enforce the Award, Mr X suddenly made a re-appearance after almost two years of silence. He sent an e-mail using the J E-mail Address to the SIAC and W Co’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.

Mr X then sought to set aside the Award at the HC on 8 August 2023 under section 48 of the Arbitration Act 2001 (2020 Rev Ed) (the “**AA**”) on four grounds: (a) lack of proper notice; (b) failure to consider an essential issue, which would be the *infra petita* ground; (c) breach of natural justice; and (d) breach of public policy. The HC dismissed all four grounds, and Mr X appealed. On appeal, Mr X dropped his challenge on the public policy ground but continued to rely on the other three grounds.

III. Issues

The CA addressed the following principal issues on appeal:

- (a) Did Mr X have proper notice of the Arbitration?

- (b) Could Mr X challenge the Award on the ground that the Arbitrator had failed to consider the Lack of Consideration Issue notwithstanding his non-participation?
- (c) Was there any breach of natural justice?

A. *Did Mr X have proper notice of the Arbitration?*

(i) The law on proper notice

The CA first distinguished the concepts of “notice” and “service”. Under rule 3.4 of the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 2016) (“**SIAC Rules**”), W Co was required to *serve* the NOA on Mr X so as to give Mr X *notice* of the Arbitration. The CA held that non-service of the notice – in itself – would not be fatal to the award, provided the other party had “proper notice” of the arbitration. “Proper notice” may be actual or deemed. Personal *service* of the NOA is typically how actual *notice* is demonstrated, but this mode of service is not strictly necessary.

Actual notice requires proof that the arbitral respondent in fact knew about the arbitration and was in a position to fully present its case. In the absence of satisfactory evidence, the omission or failure to serve the NOA may be fatal to the claimant’s case because the other party would not have any notice of the arbitration. **Deemed notice** may be relied on where there is insufficient proof of actual notice. Under rule 2.1(iii) of the SIAC Rules, any communication shall be *deemed* to have been received if it is delivered to “any address agreed by the parties”. In other words, notice that is given in accordance with the contractually agreed manner of service, usually contained in a “Notice” or “Service” clause, will suffice as proper (deemed) notice. However, such deemed notice may be rebutted by evidence of non-receipt.

Next, even if proper notice was not given, the challenging party has to establish that the absence of notice 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.

The CA noted that Mr X had the legal burden of proving that he did not have “proper notice” of the Arbitration. The relevant inquiry would therefore be whether a party was adequately notified of the arbitration such that it was given a full opportunity to participate in the same, with a focus on the substance rather than the form of the notice. For instance, 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.

(ii) Application of the principles regarding notice

The CA held that Mr X had both actual and deemed notice of the Arbitration. With regard to **actual notice**, Mr X admitted that he became aware of the Arbitration when he e-mailed the Arbitrator via the J E-mail Address. However, he did not respond when the Arbitrator and W Co’s lawyers attempted to verify the sender’s identity and engage with him (resulting in the Arbitrator deciding to proceed with the Arbitration). The CA disagreed with Mr X’s argument that there was no need to verify the identity of the sender behind the J E-mail Address. This is because the J E-mail Address was not stipulated in the BPA, nor did it bear any resemblance to Mr X’s name or the K E-mail Address (*ie*, the e-mail address in the BPA). It was reasonable and prudent for W Co to have adopted a cautious approach given the confidentiality of the arbitral proceedings.

Furthermore, Mr X would have known by that time that his interests were being implicated in the Arbitration. It was disingenuous for Mr X to assert that he did not access the very email address which he had himself provided. Accepting this argument would essentially allow a party to challenge arbitral awards for lack of proper notice by alleging that he did not access his own e-mail address.

Finally, the CA rejected Mr X's argument that the Arbitrator ought to have done more. In the CA's view, the question is whether the Arbitrator took reasonable steps to ensure that Mr X was informed of the Arbitration, not whether any additional steps could and should have been taken. Since Mr X failed to respond to the verification request sent to the J E-mail Address, he could not criticise the Arbitrator for not exhausting all other means of communication. In sum, this was a situation where Mr X had elected to remain silent despite all efforts to notify him of the Arbitration, and his deliberate failure to respond to W Co's e-mail sent to the J E-mail Address was consistent with his decision not to participate in the Arbitration. Therefore, Mr X had actual notice of the Arbitration.

With regard to **deemed notice**, it was undisputed that notice effected in accordance with the contractually agreed manner of service would suffice as proper notice. Clause 11.1 of the BPA permitted W Co to serve "any notice or communication" to Mr X at the Tampines Address or the K E-mail Address. Mr X did not appear to dispute that the documents relating to the Arbitration were sent to the Tampines Address and the K E-mail Address.

The CA stated that it made no sense for the parties to the BPA to provide an e-mail address under Clause 11.1 unless they intended for notices to be delivered to them at those e-mail addresses. The CA also rejected Mr X's explanation that the parties were "merely listing their contact details" as the addresses were specifically provided under the BPA's "Notice" clause, prefaced by text that explicitly stated that notices shall be delivered "to the addresses set out below".

The deemed notice was also not rebutted as Mr X did not provide appropriate evidence of non-receipt. The burden was on Mr X to prove that he did not receive any of the communications sent to the Tampines Address and the K E-mail Address. The fact that the Tampines Address was tenanted out was irrelevant as Mr X knew the tenant. Furthermore, Mr X's assertion that he was allegedly advised by the police to log out of that email address in "mid-2020", and did not long in thereafter, was not accepted by the CA. Mr X was never physically, technically, or legally constrained from accessing the K E-mail Address, which was his personal e-mail address. It was impermissible for Mr X to claim improper notice if he deliberately chose to ignore documents sent to a contractually agreed e-mail address that he could readily access.

In any case, neither of those arguments altered the undeniable fact that the two addresses were provided by Mr X under the BPA for service of "any notice or communication". W Co could not be faulted for continuing to serve the arbitration papers on these two addresses, and Mr X must take the risk if they were served in his absence. If it was true that he could access neither the Tampines Address or the K E-mail Address, he should have properly informed all relevant parties of the change of address.

The CA concluded that Mr X's complaint of lack of proper notice was without merit by reason of the terms of the BPA, and by reason of the fact that he knew of the hearing and did not bother to respond, take steps to participate in the proceedings, or understand what the relevant issues

were. Mr X made an informed decision not to participate in the Arbitration. That was a risk he took, and he must therefore bear the consequences of his decision.

B. Could Mr X challenge the Award on the ground that the Arbitrator had failed to consider the Lack of Consideration Issue notwithstanding his non-participation?

Though the CA held that the Arbitrator had failed to consider the Lack of Consideration Issue, it held that the *infra petita* ground was not available to Mr X since he had chosen not to raise the issue in the Arbitration by reason of his non-participation. In any event, his lack of consideration argument was misconceived and would not have changed the outcome.

(i) The law on *infra petita* challenges

Infra petita challenges are directed at a tribunal's failure to deal with a matter falling within the scope of submission to the arbitral tribunal. Though some older cases had considered such challenges as falling within the ambit of Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration, the CA held that *infra petita* challenges were better rationalised as a separate and independent natural justice challenge. The failure to consider an important issue that was put in issue in an arbitration is manifestly a breach of natural justice, as the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. As such, the principles that apply to natural justice challenges would apply equally to *infra petita* challenges.¹

(ii) The impact of Mr X's decision not to participate in the Arbitration

The CA held that a party cannot 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. 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; it cannot hold the point in reserve and raise it only after the tribunal has made its decision. 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. 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 that issue.

(iii) Did the Arbitrator fail to consider the Lack of Consideration Issue?

The CA found that the Arbitrator failed to consider the Lack of Consideration Issue. Consideration is a return recognised in law given in exchange for a promise sought to be enforced. In other words, for a promise to be enforceable under the law, the one who was given the promise (the promisee) must provide something in return to the party who first made the promise (the promisor).

The HC held that the Arbitrator had implicitly dealt with the Lack of Consideration Issue. The CA disagreed. The HC had based its finding on some paragraphs in the Award. In those paragraphs, the Arbitrator had provided a factual narrative that was intended to provide context for the subsequent analysis rather than to draw substantive conclusions. However, the Arbitrator did not allude to any exchange of promises between Mr X and W Co which

¹ Examples of the principles applicable to natural justice challenges include the right to be heard, which is each party's right to present its case and respond to the case against it (*China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 at [87]–[89]).

underpinned the BPA. The sole reference to what the HC claimed was the consideration received by Mr X was the statements where:

- (a) the Arbitrator noted that Mr X was employed and made a 20% shareholder by W Co following the sale of the Franchise; and
- (b) that the 20% shareholding in W Co was said to “[form] part of the consideration of a Shareholder’s Agreement between W Co and Mr X”.

The CA found, contrary to the HC decision, that neither statement suggested that the Arbitrator implicitly formed the view that Mr X’s employment and 20% shareholding in W Co was the consideration he received under the BPA. As such, the Arbitrator had failed to consider the Lack of Consideration Issue.

Regardless, the CA held that the Arbitrator’s failure to address the Lack of Consideration Issue did not constitute a breach of natural justice. This is because the omission would have been the direct consequence of Mr X’s failure to raise the issue by reason of his non-participation in the Arbitration.

(iv) Was there prejudice arising from the Arbitrator’s failure to deal with the issue?

For Mr X to succeed on the natural justice challenge, he also had to establish prejudice arising from the Arbitrator’s failure to deal with the Lack of Consideration Issue. However, he failed to do so as his arguments on the Lack of Consideration issue were meritless.

In any lack of consideration argument, it is important to first identify the promise sought to be enforced. This promise helps to identify the relevant promisor(s) and promisee(s), and subsequently, to determine if sufficient consideration was furnished for that particular promise. For example, the promises sought to be enforced against Mr X in this case were contained in the non-compete and non-solicit provisions of the BPA. In that context, Mr X was the promisor and W Co was the promisee. To enforce Mr X’s promise not to compete and solicit clients, W Co (as the promisee) needed to furnish sufficient consideration.

Firstly, the CA rejected Mr X’s argument that he received no consideration because the entire contractual sum of \$200,000 went to Ms Y and Z Co. While consideration must move from the promisee (*ie*, W Co), it need not move to the promisor (*ie*, Mr X) and so it was irrelevant that he did not receive any part of the contractual sum.

Secondly, the CA held that what Mr X furnished as consideration was irrelevant in this case as the enforceability of W Co’s promises was not in contention. Indeed, as it was the promises made by Mr X that were sought to be enforced, sufficient consideration had to be furnished by W Co for those promises. In any event, Mr X did furnish sufficient consideration for W Co’s promise to pay \$200,000 by agreeing to the restrictive covenants in the BPA – he offered something of value and/or suffered a detriment in exchange. Therefore, Mr X did not suffer any prejudice from the Arbitrator’s alleged omission as there was no merit in his argument regarding lack of consideration.

C. Was there any breach of natural justice?

The CA considered the natural justice challenge to be “parasitic” on the other grounds above (which the CA had dismissed). Regardless, to the extent that the complaint was directed at what the Arbitrator did or did not do after Mr X’s email on 8 September 2021, and her failure to ensure all arbitration documents had been served, the CA did not think she was obliged to do anything more.

IV. Conclusion and Lessons Learnt

DEM v DEL is pivotal in clarifying what amounts to proper notice in the arbitration context, and limiting the ambit of how *infra petita* challenges can be used to challenge arbitral awards. Parties should be clear that while the non-service of a notice of arbitration would not be fatal to the award, there must be clear evidence that the other party had “proper notice” of the arbitration. More importantly, it is not open for non-participating parties to raise an *infra petita* challenge when the subject matter of such a challenge was not raised over the course of the arbitration. In sum, this case underscores the need for parties to actively participate in all arbitration proceedings.

Written by: Krystal Tan Yu Qiao, Second-Year LLB student, Singapore Management University Yong Pung How School of Law.

Edited by: Ong Ee Ing, Principal Lecturer, Singapore Management University Yong Pung How School of Law.