

**TRIBUNAL'S RELIANCE ON EXTRANEOUS MATERIAL AND ITS EFFECT ON NATURAL JUSTICE: A  
COMMENT ON *DJP & ORS. v. DJO*, [2025] SGCA (I) 2**

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**I. INTRODUCTION**

The mechanism of international arbitration presupposes the existence of procedural fairness, and a guaranteed adherence to the principles of natural justice.<sup>1</sup> These elements, often embedded under the overarching notion of *due process*,<sup>2</sup> are essential and non-derogable for safeguarding the legitimacy of the resulting arbitral award.<sup>3</sup> These principles posit that an arbitral tribunal must approach a dispute with an open mind, bereft of prejudgment, and adjudicate the same by considering *only* the arguments and material submitted before it by the parties. However, in modern arbitral practice, with the increasing frequency of arbitral appointments, it is not uncommon for an arbitrator to concurrently serve on multiple tribunals addressing analogous factual or legal issues. This gives rise to a critical question: In such cases, does the adoption or incorporation of reasoning and content from another award, arising from a separate proceeding in which the arbitrator also participated, constitute a violation of natural justice?

The Singapore Court of Appeal [“SGCA”] was recently seized with this question in the case of *DJP & Ors. v. DJO*<sup>4</sup> wherein a challenge to an arbitral award was mounted on the basis that the tribunal has copy-pasted a substantial portion of the award, including legal analysis and reasoning, from another arbitral award, thereby compromising the integrity of the arbitration process by impeding parties’ right to a fair hearing and independent adjudication. The nature of challenge is rather unique, and its careful analysis by the SGCA affirms the imperative of independent factual and legal assessment by arbitral tribunals in each proceeding.

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<sup>1</sup> MATTI S. KURKELA & SANTTU TURUNEN, *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* (Oxford Univ. Press 2nd ed. 2010).

<sup>2</sup> Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT’L L. 1313, 1321 (2003).

<sup>3</sup> Bernardo M. Cremades Sanz-Pastor, *The Use and Abuse of “Due Process” in International Arbitration*, 9 ARBITRAJE: REV. ARB. COM. INV. 661 (2016).

<sup>4</sup> *DJP & Ors. v. DJO* [2025] SGCA (I) 2.

## II. FACTS LEADING TO THE CHALLENGE BEFORE THE SGCA

### A. Background

The appellants in this case (claimants in the arbitration proceeding) is a consortium comprising of two Indian companies and one Japanese company (lead member of the consortium) which bid for, and were awarded, the tender for contract relating to managing respondent's Western Freight Corridor ["**CPT-13 Contract**"]. The respondent in this case (respondent in the arbitration proceeding) is a special purpose vehicle, operating a network of railway lines in India including the Western Freight Corridor for which the bids were invited. The CPT-13 Contract provided for arbitration to be conducted under the Rules of Arbitration of the International Chamber of Commerce ["**ICC**"] and was seated in Singapore.

In 2017, the Indian Ministry of Labour and Employment issued a notification enhancing the daily rate of minimum wages payable to workmen in India with immediate effect. The appellants, in 2020, sought a contractual adjustment due to increased labour costs following the notification on the ground that the same constituted 'change in legislation' as per the CPT-13 Contract. This request was rejected by the respondent, which led the appellants to initiate ICC arbitration proceedings in Singapore on 16 December 2021 ["**the Arbitration**"].

### B. The three arbitrations

The appellants (claimants in the Arbitration) and the respondent respectively nominated Hon'ble Justice K.K. Lahoti and Hon'ble Justice Gita Mittal as arbitrators, who nominated Hon'ble Justice Dipak Misra as the president ["**Presiding Arbitrator**"]. Interestingly, the Presiding Arbitrator was also parallelly chairing two other arbitration proceedings, namely CP-301 and CP-302 arbitration (both domestic arbitrations seated in New Delhi), which were similar in terms of issues raised and reliefs sought, and were against the same party which was the respondent in the present case, i.e., DJO ["**Parallel Arbitrations**"]. The CP-301 and CP-302 arbitration proceedings had concluded and arbitral awards were rendered before the award was issued in the Arbitration ["**Impugned Award**"].

### C. Determination of the set aside challenge

The issue arose from the fact that the contents of the Impugned Award were substantially '*copied*' from the earlier awards issued in CP-301 (and/or CP-302) proceedings. Therefore it was alleged that the arbitral tribunal failed to discharge its duty of fairness, the obligation of exercising independent

judgment, and to impartially review the evidence and submissions raised before it. This, as per the respondent, constituted a violation of the principles of natural justice and the Impugned Award was challenged before the Singapore International Commercial Court [“SICC”] on three grounds:

- (i) The tribunal’s failure to independently assess and apply its mind to the issues and to give proper reasoning in support of its award was a breach of the agreed arbitral procedure under Article 34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration [“**Model Law**”].
- (ii) The tribunal in substantially reproducing the contents of the awards rendered in the Parallel Arbitrations in the Impugned Award violated Singaporean Public Policy and thus the Impugned Award was liable to be set aside under Article 34(2)(b)(ii) of the Model Law.
- (iii) The tribunal had acted in breach of the principles of natural justice under Section 24(b) of the International Arbitration Act, 1994 [“**IAA**”].

The SICC set aside the Impugned Award vide judgment dated 15.08.2024,<sup>5</sup> holding that it was issued in breach of natural justice and found it unnecessary to address the remaining two grounds. This decision was assailed by the appellants before the SGCA resulting in the present ruling. The considerations that led to the decision of the SGCA are dealt with in the following paragraphs.

### III. DETERMINATION OF THE CHALLENGE *VIS-À-VIS* VIOLATION OF NATURAL JUSTICE

The principles of natural justice are integral to any adjudicatory process, and apply with equal force in the context of arbitration.<sup>6</sup> Every legal system strives to uphold this minimum standard of procedural fairness, which is variously articulated as, “due process”<sup>7</sup>, “reasonable opportunity to present its case”<sup>8</sup>, “*principe du contradictoire*”<sup>9</sup>, or “natural justice,” as is the case in Singapore.<sup>10</sup>

<sup>5</sup> *DJO v. DJP & Ors.* [2024] SGHC (I) 24.

<sup>6</sup> *Anwar Siraj & Anr. v. Ting Kang Chung & Anr.* [2003] 2 SLR(R) 287; *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.

<sup>7</sup> UNCITRAL Model Law on International Commercial Arbitration art. 34(2)(a)(ii), U.N. GAOR, 40<sup>th</sup> Sess., Supp. No. 17, U.N. Doc. A/40/17, at 280 (Dec. 11, 1985); GARY B BORN, Recognition and Enforcement of International Arbitral Award, in INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International 3<sup>rd</sup> edn 2021).

<sup>8</sup> Arbitration Act 1996, c. 23, § 33 (UK).

<sup>9</sup> Art 1464, *Code de Procédure Civile* (France); Catherine Kessedjian, *Principe de la contradiction et arbitrage* (1995) 3 REV ARB 381.

<sup>10</sup> International Arbitration Act 1994, § 24(b) (Sing.).

Article 24(b) of the IAA explicitly recognizes that Singaporean courts may set aside an award if it has been passed in breach of principles of natural justice. These principles are broadly formulated under two tenets, namely; (i) the adjudicator must be unbiased (*nemo iudex in causa sua*), and (ii) the parties must be given an opportunity to be heard (*audi alteram partem*).<sup>11</sup> These two traditional limbs are also recognized under English arbitration law,<sup>12</sup> and a failure to observe them may result in the award being set aside under Section 68 of the English Arbitration Act, 1996.<sup>13</sup>

The test for a successful challenge to an arbitral award on the ground of violation of the principles of natural justice has been propounded by the Singapore High Court in *John Holland Pty Ltd v. Toyo Engineering Corp (Japan)*.<sup>14</sup> It held that the party alleging the breach must establish *firstly*, which rule of natural justice has been breached; *secondly*, how the rule of natural justice has been breached; *thirdly*, in what way was the breach connected to the making of the award; and *fourthly*, how the breach has prejudiced its rights.

The SICC, in setting aside the Impugned Award, applied the abovementioned test and was of the view that the arbitral tribunal has rendered the Impugned Award in violation of principles of natural justice. That is, by substantially relying on the awards rendered in the Parallel Arbitrations the arbitral tribunal had prejudged the disputes, and its reliance on extraneous considerations led to a decision which was not rooted in the arguments and submissions of the parties constituting a violation of the fair hearing rule.

A. Prejudgment and apparent bias: The fair-minded observer test

An arbitral tribunal is vested with the duty to independently assess the arguments, submissions and material presented before it in an arbitration proceeding, without being influenced by, or being predisposed towards, the issues in the dispute. That is, an arbitral tribunal, in exercising its adjudicatory functions, must be bereft of any prejudgment and should approach each issue impartially. Impartiality, in essence, is a trait related to the mind of the arbitrator which ensures ‘complete receptivity’ towards arguments raised by the parties.<sup>15</sup>

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<sup>11</sup> DJO, *supra* note 4, at 36.

<sup>12</sup> Arbitration Act, *supra* note 8, § 33.; *Minmetals Germany GmbH v. Ferco Steel Ltd.*, [1999] CLC 647; *See also* DAVID ST. JOHN SUTTON ET AL., *RUSSELL ON ARBITRATION* ¶ 5-038 (Sweet & Maxwell 24<sup>th</sup> edn 2015).

<sup>13</sup> *Norbrook Laboratories Lid v. Tank* [2006] EWHC 1055.

<sup>14</sup> *John Holland Pty Ltd v. Toyo Engineering Corp* 2001 2 SLR 262; *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.

<sup>15</sup> Sam Luttrell, *Bias Challenges in International Commercial Arbitration- The Need for a “Real Danger” Test*, KLUWER L. INT’L, p. 15 (2009).

Axiomatically, any prejudgment in relation to the subject-matter of the dispute constitutes a lack of impartiality,<sup>16</sup> and may give rise to a finding of apparent bias. In the present case, the arbitral tribunal extensively used the substantive contents from the award rendered in the Parallel Arbitrations, and used those awards as template for drafting the Impugned Award with slight adjustments to accommodate for the specific differences of the Arbitration. The question before the SGCA, therefore, was whether this gives rise to a justifiable doubt of apparent bias?

To this end, the SGCA posited that the relevant standard for assessing the presence of apparent bias is the “fair-minded observer” test. That is, whether a fair-minded and informed observer, after considering the facts and circumstances of the case would reasonably apprehend that the arbitral tribunal had either formed a conclusive stance, or demonstrates a predisposition towards a given view, before perusing the evidence and considering the arguments raised by the parties.<sup>17</sup> This is a widely-recognized standard, and has also been adopted in other jurisdictions, such as the UK, in adjudicating allegations of apparent bias.<sup>18</sup>

The SGCA, applying the “fair-minded observer” test conclusively determined that in the present case, a fair-minded and informed observer would reasonably apprehend apparent bias on the end of the tribunal, on the basis of the following facts:

- (i) The tribunal used the awards rendered in the Parallel Arbitrations as the starting point for drafting the Impugned Award which suggests that the tribunal remained ‘*anchored*’ to its earlier decision, compromising its ability and openness to consider matters afresh. This, as per the SGCA, also hinted towards the Impugned Award being plagued by *confirmation bias*.<sup>19</sup>
- (ii) Some of the arguments raised in the Arbitration were novel, nuanced and/or distinct from the arguments raised in the Parallel Arbitrations, however, the same did not find express reference in the Impugned Award demonstrating the tribunal failed to address the fresh contentions of the respondent.<sup>20</sup>
- (iii) The new arguments raised by the respondent, which were eventually considered by the tribunal, were mostly interposed between paragraphs that were extracted from the awards

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<sup>16</sup> IBA Rules of Ethics for International Arbitrators, Art 3.1 (1987).

<sup>17</sup> DJP, *supra* note 4, at 38.

<sup>18</sup> *Halliburton v. Chubb*, [2020] UKSC 48; *ASM Shipping Ltd of India v. TTMI Ltd of England* [2005] EWHC 2238 (Comm).

<sup>19</sup> DJP, *supra* note 4, at 74.

<sup>20</sup> DJP, *supra* note 4, at 76.

of the Parallel Arbitration. Moreover, a large part of the analysis appeared in similar terms across all three awards, even though the respondent had raised slightly different arguments in the Arbitration.<sup>21</sup>

- (iv) The Impugned Award referred to incorrect provisions and applied the version of Clause 13.8 (providing the formula for price adjustment) from CP-301 and CP-302 contracts, which differed from the formula provided in CPT-13 contract. The Tribunal also incorrectly applied Indian law as *lex arbitri* (which was the *lex arbitri* for the Parallel Arbitrations) instead of Singaporean law. Furthermore, the tribunal cited the title of CP-301 contract instead of CPT-13 contract in the Impugned Award.<sup>22</sup>

The SGCA, highlighting the abovementioned circumstances, held that a fair-minded observer would have concluded that the integrity of the arbitral process was compromised and upheld the finding of apparent bias.

#### B. The fair hearing rule

The second head under which the SGCA tested the compliance of the Impugned Award with natural justice principles is the *fair hearing rule*. This rule, enshrined in Article 18 of the Model Law, mandates the arbitral tribunal to treat the parties with equality and give them a full opportunity to present their case.<sup>23</sup> These non-derogable guarantees<sup>24</sup> represent the basic notions of fairness that underpin the legitimacy of the arbitral mechanism,<sup>25</sup> and have been characterized by the UN Commission on International Trade Law as “fundamental principles” applicable throughout the arbitral proceedings.<sup>26</sup>

The contours of the fair hearing rule has been explained by the SGCA observing that an arbitral tribunal is required to apply their independent mind to the issues which are in the dispute, and the said dispute must not be adjudicated on a basis that was neither submitted before it nor contemplated

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<sup>21</sup> *DJP*, *supra* note 4, at 77.

<sup>22</sup> *DJP*, *supra* note 4, at 78.

<sup>23</sup> PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 330–36 (Kluwer Law Int’l 2019).

<sup>24</sup> *Triulzi Cesare SRL v. Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114.

<sup>25</sup> Analytical Commentary on Draft Text of a Model Law on Int’l Comm. Arb., U.N. Doc. A/CN.9/264, ¶ 7 (Mar. 25, 1985).

<sup>26</sup> U.N. Comm’n on Int’l Trade Law, Report on the Work of Its Eighteenth Session, U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17, at 176 (June 3–21, 1985).

by the parties.<sup>27</sup> This requirement of exercising independent mind is a fundamental component of arbitral procedural safeguards with its significance recognised across jurisdictions, and has been held to be “*indispensable*” by the French courts.<sup>28</sup> It follows, when a tribunal arrives at a decision by considering extraneous material to which parties did not have access, it would constitute a violation of the fair hearing rule.

In the instant case, the arbitral tribunal’s reliance on extraneous material formed a pervasive part of the Impugned Award. It remained undisputed that about 212 paragraphs out of 451 paragraphs of the Impugned Award, including aspects of legal reasoning, were copied and pasted from the awards rendered in the Parallel Arbitrations.<sup>29</sup> Though the appellant argued that it was merely a “short cut” for preparing the Impugned Award and did not affect the outcome of the arbitration proceeding, the SGCA took a contrary position and held that it constituted a breach of the tribunal’s duty to confine itself to the submissions made in the Arbitration. Moreover, by drawing its factual and/or legal reasoning from other decisions, without giving the parties an opportunity to respond, the tribunal violated the principle of fair hearing.

Furthermore, as the tribunal drew heavily from the facts and submissions of the Parallel Arbitrations, and failed to deliberate upon and address the new arguments raised by the respondent. Thus, the SGCA conclusively determined that the tribunal violated the respondent’s right to a fair, independent and impartial decision implicit in the principle of fair hearing.

#### IV. RECOGNITION OF THE ‘EXPECTATION OF EQUALITY’ PRINCIPLE

A particularly notable aspect of this decision of the SGCA, arguably novel in international arbitration practice, is recognition of the principle of ‘expectation of equality’ in arbitral proceedings.<sup>30</sup> The SGCA, tracing the origin of this principle under the duty of ‘*equal treatment*’ enshrined in Article 18 of the Model Law,<sup>31</sup> held that this duty binds both the parties and the tribunal.<sup>32</sup> While it is doctrinally well-established that the duty to exercise independent and impartial judgment extends equally to all the members of an arbitral tribunal;<sup>33</sup> the SGCA by recognizing the ‘expectation of equality’ principle

<sup>27</sup> DJP, *supra* note 4, at 39; *CJA v. CIZ*, [2022] SGCA 41; *JVL Agro Industries Ltd v. Agritrade International Pte Ltd* [2016] 4 SLR 768.

<sup>28</sup> *Ury V Galeries Lafayette*, Decision of Court of Cassation 13 April 1972 (1975) Rev Arb 235.

<sup>29</sup> DJP, *supra* note 4, at 73.

<sup>30</sup> DJP, *supra* note 4, at 63.

<sup>31</sup> DJP, *supra* note 4, at 56.

<sup>32</sup> *Singapore International Arbitration: Law & Practice* (David Joseph & David Foxton eds., LexisNexis, 2014); *See also Triulzi Cesare SRL v. Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 [112].

<sup>33</sup> Sundaresh Menon, *Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator*, 34 J. INT’L ARB. 347, 357 (2017).

has extended this principle by holding that each arbitrator must also have equal access to the materials relevant to the dispute.

SGCA clarified that where only one arbitrator has access to extraneous material that reasonably appears to have influenced the outcome of the arbitration, such a circumstance may, *in itself*, constitute grounds for challenging the integrity of the arbitral process.<sup>34</sup> The underlying objective is that all arbitrators are afforded the same opportunity to consider the relevant information, thereby upholding the principles of fairness and equality in arbitral proceedings.

The expectation of equality is compromised when there is material asymmetry of information among tribunal members. Applying this principle in the present case, the SGCA found that unlike the co-arbitrators, the Presiding Arbitrator was privy to the Parallel Arbitrations which significantly influenced the outcome of the Arbitration. This unequal access to relevant information compromised the expectation of equality between the Presiding Arbitrator and the co-arbitrators, which resultantly undermined the integrity of the Arbitration. Notably, contentions on this ground were not raised by the respondent before either the SICC or the SGCA.

## V. CONCLUSION

This judgment is a nuanced contribution to the international arbitration jurisprudence pertaining to determination of a set aside challenge mounted on the basis of natural justice violations. The SGCA has underscored the significance of fair procedure in arbitration and its intricate relationship with the integrity of the arbitral process. Although it acknowledged that the mere act of copying materials into an award is not infractory, it clarified that inclusion of such extraneous material must not come at the cost of tribunal's duty to render independent and impartial judgment.

Having said that, the judgment fails to conclusively delineate the threshold at which reliance on prior award(s) or other extraneous material may constitute procedural impropriety. Therefore, there is a need for clearer normative guidelines to determine when such reliance may compromise procedural fairness. To this end, a practical safeguard could be the disclosure by arbitrators of their involvement in related proceedings, and requiring the arbitrators to pre-emptively inform the parties of any extraneous material that may inform their reasoning, thereby affording them an opportunity to object.

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<sup>34</sup> DJP, *supra* note 4, at 61.

Furthermore, though the SGCA endorsed the application of the principle of ‘expectation of equality’ in arbitration, it offered limited guidance on its practical application, thereby leaving scope for future challenges on this ground. In this light, it is important to systematically address the informational asymmetry between the tribunal members as arbitrators, especially presiding arbitrators, are often appointed due to their specialized knowledge, subject-matter expertise, and because of their familiarity with the dispute which naturally places them in a position of informational advantage. The resulting imbalance could inadvertently invite challenges on this ground. In this regard, institutional arbitral rules might benefit from incorporating procedural protocols to ensure that all tribunal members have access to the same evidentiary material and communications. This would operationalise the principle of ‘expectation of equality’ and minimise the risk of post-award challenges based on informational asymmetry.