Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH
[2008] SGHC 67

Case Number : OS 713/2007

Decision Date : 08 May 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Alvin Yeo SC, Chan Hock Keng, Koh Swee Yen and Bryanne Liao (WongPartnership LLP) for the plaintiff; Wong Por Luk Paul and Sharon Liu (Rodyk & Davidson LLP) for the defendant

Parties : Dongwoo Mann+Hummel Co Ltd — Mann+Hummel GmbH

Arbitration – Award – Recourse against award – Setting aside – Rules of natural justice – Whether party given full opportunity to be heard – Whether tribunal tacitly relying on information not disclosed to other party as required – Whether award made contrary to public policy

8 May 2008 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The plaintiff, Dongwoo Mann+Hummel Co., Ltd ("Dongwoo"), is a company incorporated in Korea and is in the business of manufacture and sale of automotive filtration systems to the Korean automotive industry. The defendant, Mann+Hummel GmbH ("M+H"), is a company incorporated in Germany and is in the business of automotive filtration.

2 Dongwoo commenced the present action (by way of Originating Summons No 713 of 2007 dated 9 May 2007) to set aside the final award dated 13 February 2007 (the "award") in an arbitration between Dongwoo and M+H ("the parties"). The arbitration was conducted pursuant to the Singapore International Arbitration Centre ("SIAC") Rules (2nd Ed, 22 October 1997) ("the SIAC Rules"). The *lex situs* was Singapore and the law governing the arbitration was therefore Singapore law.

3 Dongwoo brought this action in relation to the arbitration tribunal's ("the tribunal") determination of two particular issues raised in the arbitration: (1) the Crank Case Ventilation ("CCV") oil separator and (2) the S-Engine oil filter, and on the following grounds:

(a) that the conduct of the proceedings and/or the conduct of the tribunal was such that Dongwoo was not accorded a full and proper opportunity to present its case and/or was otherwise unable to present its case (pursuant to Art 34(2)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"));

(b) that the rules of natural justice had been breached in connection with the making of the award by which Dongwoo's rights have been prejudiced (pursuant to s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA")); and

(c) that the award is in conflict with the public policy of Singapore (pursuant to Art 34(2)(b)(ii) of the Model Law).

4 After hearing the parties' submissions, I dismissed Dongwoo's action. I now give my reasons.

Facts

5 Sometime in March 2001, M+H and one Mr Choonsung Ley ("Ley") entered into a memorandum of understanding ("MOU") in which they envisaged the establishment of a joint venture, using Dongwoo as the vehicle for the joint venture.

6 However, the parties did not proceed precisely along the terms of the MOU, but eventually entered into various agreements:

(a) A **share purchase agreement** dated 20 December 2002 between Dongwoo's shareholders and M+H for the acquisition of 10% equity interest in Dongwoo by M+H ("the SPA");

(b) A **shareholders agreement** dated 20 December 2002 between Dongwoo and Dongwoo's shareholders on one part and M+H on the other part ("the SA"); and

(c) As provided for in the SPA, a **technical assistance and trademark licensing agreement** between Dongwoo and M+H dated 3 January 2003 ("the TATLA").

7 Under the TATLA, M+H was obliged to supply Dongwoo with technical information in order that Dongwoo may manufacture air and liquid filtration products ("the Products") for vehicles, industrial and construction machinery and equipment, which included the CCV oil separator and the S-Engine oil filter. Article 3.1 of the TATLA provides as follows:

3.1 [M+H] shall supply [Dongwoo] with Technical Information available to [M+H] in order that [Dongwoo] may manufacture the Products. Such Technical Information shall include:

(a) Engineering drawings needed in the establishment of manufacturing processes for the Products;

(b) Specifications;

(c) Lists of recommended raw materials, and identity of sources of supply for raw materials;

(d) Data for inspection and trial operations;

(e) Any other Technical Information which in [M+H's] opinion will be reasonably necessary to [Dongwoo] in its manufacture of the Products; and

(d) Any **improvements or modifications** of the foregoing.

[emphasis added]

8 Technical information is defined in Article 1.6 of the TATLA as:

… designs, drawings and other technical and sales documentation and information relating to the manufacture, use and sale of the Products which [M+H] now possesses and is **free to disclose** to [Dongwoo**] without accounting to others** and which, in [M+H's] opinion, would be reasonably necessary for an experienced manufacturer to manufacture, use and sell the Products... [emphasis added]

9 Article 9 governs the termination of the TATLA and provides, *inter alia*, that:

> 9.1 This Agreement shall be effective for an initial period from the Effective Date of this Agreement until December 31, 2005, unless earlier terminated as provided herein…
>
> 9.2 This Agreement shall be terminable forthwith upon the sending of notice in writing upon the occurrence of one or more of the following events:
>
> …
>
> (c) by either party hereto, if the other party shall commit **a material breach** (including but not limited to nonpayment of the fees and royalties set forth in Article 4 of this Agreement or non-fulfilment of [M+H's] quality standards) of any of its obligations under this Agreement which **shall not be remedied within thirty (30) days** from the giving of written notice requiring said breach to be remedied provided, however, that if any **further breaches occur of the same type**, this agreement may then be terminated forthwith…
>
> [emphasis added]

10 Article 12.3 states that:

> 12.3 Any controversy or claim arising out of or in relation to this Agreement, or breach hereof, shall be finally settled by arbitration.
>
> (a) Arbitration shall be conducted in Singapore.
>
> (b) Arbitration shall be conducted in accordance with the rules of conciliation and arbitration of the SIAC.
>
> (c) …
>
> (d) The decision of the arbitrators shall be final and binding on all parties without right of appeal…

11 The SA provided in Article 11.1 for M+H to have a call option to acquire the balance of the shares in Dongwoo, and in Article 15.2(d) for the termination of the SA:

> … forthwith upon the sending of notice in writing upon the occurrence of one or more of the following events:
>
> …
>
> (d) by either Party hereto, if the SPA or the [TATLA] has been terminated due to breach by the other Party…

12 Subsequent to changes in Dongwoo's shareholding, Dongwoo's shareholders and M+H entered into an amended and restated shareholders agreement on 15 March 2004 ("the ARSA") which contained Articles 11.1 and 15.2(d) of the SA in the same terms, save that Article 15.2(d) included a reference to a second share purchase agreement providing for the acquisition of an additional 3% equity interest in Dongwoo by M+H. The second share purchase agreement was entered into at or about the same time as the ARSA.

13 On 14 September 2005, Dongwoo sent a letter to M+H stating that it had been experiencing substantial difficulties in communicating with and obtaining technical cooperation from M+H regarding its inquiries about various Products (which included the CCV oil separator and the S-Engine oil filter) and requiring M+H to promptly remedy its default in providing the requisite technical information.

14 On 10 October 2005, Dongwoo sent a further letter to M+H stating that the technical information provided by M+H continued to fall far short of the technical information that should be provided under the TATLA.

15 On 27 October 2005, Dongwoo sent a letter terminating the TATLA pursuant to Article 9.2(c) of the TATLA (see [9] above).

16 Thereafter, Dongwoo's shareholders sent a letter dated 28 October 2005 terminating the ARSA pursuant to Article 15.2(d) of the ARSA (see [11] and [12] above).

17 M+H denied the right of Dongwoo to terminate the TATLA and referred the question of the validity of the purported termination of the TATLA by Dongwoo to arbitration.

18 In its Statement of Case, M+H prayed for:

(a) a declaration that Dongwoo's purported termination of the TATLA was invalid and that the TATLA remained in full force and effect; and

(b) compensation for all legal and other expenses incurred in connection with the dispute. M+H did not have a specific prayer for damages.

19 In its Statement of Defence and Counterclaim, Dongwoo sought:

(a) a declaration that the TATLA had been validly terminated as of 27 October 2005;

(b) payment for all lost profits and loss of goodwill due to M+H's failure to provide the technical documents; and

(c) full compensation for all legal fees and other expenses incurred in connection with the arbitration.

20 In the course of the run up to the hearing of the substantive issues, the tribunal comprising Mr Tómas Kennedy-Grant QC (as chairman), Mr Michael Hwang SC and Dr Wolfgang Kuhn made rulings on various applications and gave various directions regarding the future conduct of the arbitration up to and including the hearing of the substantive issues.

21 Of particular relevance to the present action was the tribunal's rulings on discovery and document production. Another significant part of the tribunal's findings related to the S-Engine Oil Filter Project. I will elaborate on these in turn.

The tribunal's directions as to discovery

22 Prior to the arbitration hearing and by a letter dated 10 March 2006, Dongwoo's Korean counsel, M/s Bae Kim & Lee ("BKL"), sent a request to M+H for the production of 7 categories of documents as part of its discovery. In particular, Request No 7 was a request for copies of all technical information that related to certain Products, including the CCV oil separator, which was requested previously by

Dongwoo through its various correspondence sent to M+H. The basis for this request was that the documents were relevant to the arbitration because the scope of the technical assistance required under the TATLA was the primary issue to be resolved in the arbitration and M+H had alleged that it had already provided Dongwoo with the necessary technical assistance required.

23 On 17 March 2006, M+H's Korean counsel, M/s Kim & Chang ("KC"), wrote to the chairman of the tribunal with a copy to BKL and SIAC stating that Dongwoo's request for documents was unreasonably broad and burdensome. It sought the production of many categories of documents which were neither relevant nor material to this dispute. M+H further stated in the letter that it had already provided all the technical information that it was obliged to provide under the TATLA to Dongwoo. M+H therefore requested the tribunal to exercise its powers to determine the admissibility, relevance and materiality of the documents required by Dongwoo and to issue further instructions as it deemed necessary.

24 After the production of certain documents by M+H on 17 and 24 March 2006 in response to Dongwoo's request on 10 March 2006, BKL informed the tribunal by way of letter dated 7 April 2006 (with a copy to KC and SIAC) that the documents produced still fell short of satisfying Dongwoo's request. BKL explained the necessity of the documents to the tribunal as follows:

> Dongwoo respectfully submits that it is necessary for Dongwoo to review the requested documents to properly defend its claim in this dispute and that limiting the scope of discovery without sufficient grounds would unjustly preclude Dongwoo (and the Tribunal for that matter) from accessing potentially critical documents that are directly relevant to the core of the dispute. Thus, given that the documents requested by Dongwoo are clearly relevant to this arbitration and such documents are limited to those that have already been created prior to his dispute, Dongwoo believes that [M+H] should produce the documents according to the original request dated March 10, 2006. However, in the spirit of good faith and to lessen the burden on the Tribunal, Dongwoo has shortened and clarified its original document request below. Unless [M+H] agrees to produce the documents based on this modified request, Dongwoo seeks an order from this Tribunal instructing [M+H] to produce the documents at the earliest date possible to allow Dongwoo an opportunity to review them and defend its case accordingly.

25 In the interest of moving the case forward, BKL then clarified Request No 7 and narrowed it to the following items previously sought in specific correspondence from Dongwoo to M+H:

> (a) Test standards and reports on the performance of its spin-on type gasoline oil filters and for the oil filter part number W712/38 ("oil filter");
>
> (b) Design standards for the oil filter and for the CCV oil separator part number 39 310 70 900;
>
> (c) Design 'Failure Mode Effect Analysis' ("D-FMEA") reports and Process FMEA reports ("P-FMEA") for the CCV oil separator;
>
> (d) Quality control plans for the CCV oil separator;
>
> (e) Material standards for resonators, hose and duct in air cleaners; and
>
> (f) Benchmarking reports for the CCV oil separator and for the spin-on type gasoline oil filters installed in gasoline automobiles of 2.4 litres engine size exported to North America.

26 M+H still did not produce the documents in the narrowed and clarified Request No 7. Various

correspondence were exchanged and in a further reply dated 27 April 2006, M+H informed Dongwoo that the provision of these documents might be a breach of M+H's confidentiality obligations to its customers, and that the documents would not be produced unless ordered by the tribunal. In particular, one specific reason for the non-production of the documents relating to the CCV oil separator was that it was a very old part and that M+H did not have the information requested by Dongwoo. It was emphasised that "*Mann+Hummel repeats and confirms that it does not maintain this information.*" To address M+H's concern of confidentiality, Dongwoo offered to sign a confidentiality agreement or to abide by a stipulated order by which Dongwoo would agree to keep any documents produced under this category in strict confidence and not to use them beyond the purpose of the arbitration. However, KC insisted that the documents not provided to Dongwoo were beyond the scope of the TATLA and were irrelevant to this dispute.

27 On 10 May 2006, the tribunal issued a ruling ("the 1st Ruling") ordering, *inter alia*, M+H to comply with Dongwoo's narrowed and clarified Request No 7 on condition of an undertaking to be provided by Dongwoo on certain terms spelt out by the tribunal to safeguard the confidentiality of the documents ordered to be produced. The tribunal considered these documents to be relevant and material to the matters in dispute, but this was not to be taken as a finding on any substantive issue in the arbitration. In addition, the tribunal made it clear that it was not for M+H to decide whether the documents were relevant and material, or whether they arguably could or could not have been produced under the TATLA.

28 In response to the 1st Ruling, KC wrote to the tribunal on 19 May 2006 reiterating that the CCV oil separator was a very old part and M+H engineers did not maintain the information that Dongwoo had requested. M+H had searched its archives and was not able to locate any of the requested documents relating to the CCV oil separator except for **the design standard drawings for the CCV oil "filter"** (presumably referring to the CCV oil separator), which KC attached to the letter to the tribunal as **Exhibit A**. In this letter, KC **appealed to the tribunal to reconsider its decision** in relation to one aspect of the 1st Ruling and requested that it be modified only with respect to the CCV oil separator. KC explained that:

> The information in these drawings (as well as the D-FEMA and P-FEMA, quality control plans, etc.) regarding the CCV oil separator is not the property of Mann+Hummel. The CCV oil separator was designed to specifications provided by a major customer, and therefore contains proprietary information belonging to such customer. In addition, it was designed for a specific engine under a contract which gives all rights with respect to the technical information used by Mann+Hummel to produce this part to the customer. As such, the information requested by Dongwoo is the property of the customer. The confidentiality provisions of the contract currently in effect and applicable to this part are attached hereto as **Exhibit B**.
>
> Except under extremely limited circumstances, Mann+Hummel is not permitted to disclose this information to any third party. One such circumstance is a valid court order which requires the disclosure of this information, provided that Mann+Hummel must provide a written notice of the court order to the customer and receive full cooperation from the other party to ensure cooperation in the confidential treatment of the information. Mann+Hummel wishes to avoid being forced to make such a notification (i.e. that Mann+Hummel is compelled to disclose the customer's confidential information) because of the severe damage this may cause to its business relationship with this very important customer. In addition to damaging this important business relationship, the disclosure of this information could cause severe economic harm to Mann+Hummel and its customer.

Given the highly confidential nature of these documents, Mann+Hummel respectfully requests that the Tribunal review the attached design standard drawings and contractual confidentiality provisions governing the disclosure of these documents by Mann+Hummel. A review of these documents will enable the Tribunal to determine whether documents pertaining to the CCV oil separator are indeed relevant to this dispute in light of Mann+Hummel's obligations under the TATLA. If the Tribunal finds that these documents are not relevant to this dispute, Mann+Hummel respectfully requests that the Ruling be modified accordingly only with respect to the CCV oil separator.

[emphasis added]

29 Dongwoo was aware of the nature of the documents enclosed and given to the tribunal as it was also sent a copy of the letter dated 19 May 2006 albeit ***without* the enclosures** (*ie*, Exhibits A and B). However, at no time did Dongwoo agree that these Exhibits A and B (or any other documents) could be provided solely to the tribunal without Dongwoo being afforded an opportunity to review and comment on them.

30 On 24 May 2006, BKL replied by way of a letter emphasising the prejudice caused to Dongwoo by being deprived of an opportunity to comment substantively on the documents which had been intentionally withheld from Dongwoo and disclosed only to the tribunal. BKL requested the tribunal to disregard M+H's letter of 19 May 2006 and to order M+H to abide by the original deadline of 26 May 2006 in the 1st Ruling to supply the documents requested because of the following reasons:

(a) It was highly objectionable for M+H to drag into the discovery ruling procedures the very issues that would be addressed by both parties on the merits;

(b) It was a disguised request for a reconsideration of the discovery ruling for which M+H received no leave to seek. Effectively, M+H was asking the tribunal, in an *ex parte* manner, to retract its previous decision on the relevancy of the requested documents. This was grossly unfair and groundless as the confidentiality issue had been fully evaluated by the tribunal prior to rendering the 1st Ruling, and the tribunal had properly addressed the matter by conditioning the compliance of Request No 7 to certain undertakings which ensured that all documents under this category would be treated as confidential and used only for the purpose of the arbitration; and

(c) Showing the documents only to the tribunal had foreclosed Dongwoo's ability to comment substantively on them. This was highly prejudicial to Dongwoo. The documents were directly relevant to the core issue of whether the requested documents fell within the scope of the technical information available to M+H that ought to be supplied to Dongwoo to enable Dongwoo to manufacture the products as stipulated in Article 3.1 of the TATLA. The actions of M+H to disclose the critical evidentiary documents only to the tribunal (but not to Dongwoo) on grounds that M+H needed to maintain their business relationship with customers outside the arbitration, even though such documents would be kept in strict confidence, flew in the face of due process and the very purpose of reasonable document discovery in arbitration.

31 Further, on the same date, Dongwoo provided a confidentiality undertaking to M+H, pursuant to and in full compliance with the 1st Ruling.

32 On 26 May 2006, M+H disclosed several documents, but not those relating to the CCV oil separator. M+H explained (with reference to Dongwoo's Request No 7 for confidential and customer proprietary information on the CCV oil separator part number 39 310 70 900) that unlike standardized

parts such as spin-on filters, this particular CCV oil separator was designed to specifications by an OEM customer, and unfortunately the disclosure of technical information regarding this part was restricted by a confidentiality agreement with this customer. Supply of technical information on the CCV oil separator had been explicitly excluded under Article 1.6 of the TATLA, which limited the information to those which M+H was "*free to disclose to [Dongwoo] without accounting to others.*" As such, information on this CCV oil separator was irrelevant to the dispute, being outside the scope of assistance to Dongwoo under the TATLA. M+H further explained that this CCV oil separator was a relatively old part and was designed quite some time ago, and was therefore no longer in the database readily available to M+H engineers, which was why M+H mistakenly believed that it no longer maintained the information on it. However, this part was still in production.

33 BKL responded on 30 May 2006 that the disclosure again was inadequate and amounted to a deliberate non-compliance with the 1st Ruling, and that Dongwoo was disabled from preparing its defence in which it needed to establish that the documents it never received were in fact the crucial documents contemplated under the TATLA, and without which development of the Products was impossible. BKL submitted that if the arbitration were to proceed regardless of this non-disclosure, the tribunal should, at the very least, draw an adverse inference against M+H with regard to the relevancy of these documents and its behaviour against Dongwoo during the term of the TATLA.

34 On 2 June 2006, KC replied characterising the impasse as a legal dispute which did not require the production or examination of the documents relating to the CCV oil separator, which M+H admitted it had intentionally not provided to Dongwoo. KC said:

> … The question is: was the production of documents which were subject to third-party confidentiality agreements and/or contain third-party proprietary information required under the TATLA? Likewise, was the production of documents related to the design, development and manufacture of new products required under the TATLA? These are purely legal questions and do not require the examination of any documents which Mann+Hummel acknowledges were not provided to Dongwoo.
>
> .....
>
> … As explained above, there is no reason to compel the production of these documents, as there is no dispute between the parties as to the factual issues, and only legal issues remain. Mann+Hummel respectfully submits that the question of whether these documents are "relevant" to this dispute is actually a legal question rather than a factual or discovery-related question. Mann+Hummel also submits that the severe damage to an important business relationship and the negative economic consequences which Mann+Hummel would suffer if these documents are disclosed should be weighed against whatever alleged difficulties Dongwoo claims it will suffer if these documents are not produced.

35 On 5 June 2006, the tribunal issued a second ruling ("the 2nd Ruling") dismissing M+H's application for modification of the 1st Ruling and Dongwoo's application for an order for further and better production of documents by M+H, and reserving to Dongwoo the right to argue during the hearing that an adverse inference should be drawn against M+H by reason of the manner in which M+H had responded to the 1st Ruling. The tribunal gave the following reasons for making its 2nd Ruling:

> The reasons for the [2nd] Ruling

(a) [M+H's] application for modification of the Ruling of 10 May 2006

10 In its detailed response of 27 April 2006 to [Dongwoo's] letter of 7 April 2006 [M+H] did not raise confidentiality issues specifically in relation to the CCV oil separator, stating only that it was a very old part and that it did not have the information requested by [Dongwoo].

11 As noted in paragraph 2 of this Ruling, [M+H] now contends that the documents relating to this item are not its property and are unable to be made available in this arbitration without a Court order.

12 I make no finding as to the truth of this allegation.

13 Having regard to the clauses of the TATLA referred to by the parties in their submissions in this regard, it appears to me that it will be for [Dongwoo] to establish that information regarding the CCV oil separator is information which is necessary for the manufacture of the products intended to be manufactured but that it will be for [M+H] to establish, in respect of any such information, that it is not free to disclose it to [Dongwoo] without accounting to others. If [Dongwoo] succeeds in the former and [M+H] does not lead evidence to establish the latter, it may be open to the Tribunal to draw adverse inference against [M+H].

(b) [Dongwoo's] application for order for further and better compliance by [M+H] with the Ruling of 10 May 2006

14 I cannot, without deciding the substantive issues in this case, decide whether particular documents or categories of document which have not been disclosed should have been disclosed.

15 For similar reasons to those stated in paragraph 13 of this Ruling, I consider that it will be open to [Dongwoo] to ask the Tribunal to draw an adverse inference against [M+H] should [Dongwoo] satisfy the Tribunal that [M+H] has failed to produce documents which it should have produced.

36 It is important to note that the tribunal dismissed the request from M+H to modify the 1st Ruling and also refused Dongwoo's application for an order for further and better compliance with the 1st Ruling. In essence, the 1st Ruling remained unchanged. Further, the tribunal did not say that it would draw an adverse inference against M+H merely on proof of non-production of the documents ordered to be furnished to Dongwoo pursuant to the 1st Ruling. The tribunal specifically set out two conditions, which must both be satisfied before it was open to the tribunal to draw an adverse inference against M+H for the non-production. They were as follows:

(a) Dongwoo must first establish that the CCV oil separator information was indeed necessary for the manufacture of the Products that were intended by Dongwoo to be manufactured; and

(b) M+H did not lead evidence to establish that it was not free to disclose the CCV oil separator information to Dongwoo without accounting to others.

37 Following the 2nd Ruling, a copy of the confidentiality provisions of the OEM contract was provided on 8 June 2006 to BKL (redacted only to remove the OEM customer's name and identifying information).

The S-Engine Oil Filter Project

38 The S-Engine Oil Filter Project was a key motivation behind the conclusion of the TATLA between Ley and M+H, and one of the collaboration efforts between Dongwoo and M+H.

39 From April to May 2004, one of Dongwoo's engineers, Mr Hyun ("Hyun"), received from M+H know-how training and design drawings ("Initial Design") for the drain valve system (which also included the drain valve rubber, which was essentially the small rubber component within the oil filter that was supposed to prevent the oil from leaking) inside the S-Engine oil filter.

40 In June 2004, Hyun finalised the design for the drain valve system based on the Initial Design and this was later passed on to Dongwoo's customer for testing.

41 In February 2005, oil leaks were detected in the oil filter and this was reported back to M+H. In order to assure its customer that the design was indeed a verified design already in use by M+H, Dongwoo requested M+H to verify the parts and provide such confirmation.

42 In April 2005, one of M+H's employees, Mr Wolfgang Cedzich ("Cedzich"), visited Dongwoo's offices to provide comments on the S-Engine oil filter problems and gave a presentation on what was believed to be the cause of such problems. M+H further confirmed that the model was currently in mass production.

43 For several months, Dongwoo wrote to M+H asking for further technical information, in particular, updated drawings of the S-Engine oil filter in order to solve the oil leak problems.

44 It was only in late June 2005 that M+H provided Dongwoo with the updated drawings of the affected components.

45 The question arising in the arbitration was whether by the above, M+H had breached its obligations under the TATLA in relation to the S-Engine Oil Filter Project. Essentially, Dongwoo's argument on this was that M+H had breached its obligations under Article 3.1 of the TATLA by failing to provide updates, modifications and relevant technical documents until it was too late to be of any use.

46 In particular, Dongwoo alleged that M+H had intentionally delayed giving Dongwoo the full detailed design of the updated drain valve. M+H only provided the updated drawings some months after the initial request, at which time Dongwoo's relationship with its customers was already severely impaired due to Dongwoo's inability to respond with a solution to the oil leak.

47 The tribunal found against Dongwoo on this issue in that Dongwoo failed to establish that M+H had breached its obligations under the TATLA in relation to the S-Engine oil filter design. The primary reason for this finding was Dongwoo's failure to establish that the Initial Design was defective and that the defects were the cause of the oil leak. The tribunal went on to say that if Dongwoo was able to prove that the Initial Design was defective, the tribunal would have found that M+H was in breach of its obligations to Dongwoo under the TATLA because of the length of time that elapsed before M+H made available to Dongwoo the updated designs.

The award

48 The arbitration hearing took place from 11 to 15 September 2006 in Singapore.

49 On 13 February 2007, the tribunal issued the award as follows:

(a) M+H was entitled to a declaration that Dongwoo's purported termination of the TATLA on 27 October 2005 was invalid;

(b) Dongwoo was to pay M+H the sum of US$1,358,173.58 being its legal and other costs of the arbitration;

(c) Dongwoo was to pay the costs of the arbitration in the amount of S$484,554.30;

(d) M+H was to pay Dongwoo the sum of Korean Won 166,666,667 as damages for M+H's non-material breaches of contract together with interest thereon at 8% from the date of filing of Dongwoo's Response to the Notice of Arbitration up to the date of the award; and

(e) save and except as provided by sub-paragraph (d) above, Dongwoo's counterclaim was dismissed.

50 The tribunal was, *inter alia*, of the following opinion on the different issues:

(a) CCV oil separator

(i) If M+H's argument that the CCV oil separator information was confidential to third parties was made out, then its non-provision of such information requested by Dongwoo would be justified. If it was not made out, then the non-provision of the information would have constituted a breach of M+H's obligations to Dongwoo under Article 3.1 of the TATLA (see [119] of the award). The tribunal at [80] had interpreted Article 1.6 of the TATLA to cover technical information which was confidential or proprietary information only with regard to M+H (but not those with regard to third parties), and which M+H was to provide to Dongwoo.

(ii) Although M+H's evidence on the confidentiality of the CCV oil separator documents was not specific, however M+H had sufficiently established **on the evidence as a whole** (see [121]-[123] of the award for the tribunal's basis for this finding) that they were bound by confidentiality. There was therefore no basis for the drawing of an adverse inference because of M+H's failure to produce the documents sought. Accordingly, the tribunal dismissed Dongwoo's claim that M+H was in breach of its obligations to Dongwoo in relation to the CCV oil separators (see [124]-[125] of the award).

(iii) Further, **even if the tribunal found against M+H on the confidentiality point**, it would still have dismissed Dongwoo's claim as the tribunal accepted what Mr Thomas Schleiden (for Development Responsibilities CCV systems in M+H) had stated in his reply dated 16 June 2005 in response to the request of Mr Oh (of Dongwoo) dated 13 June 2005 for the process control plan, test data and drawing, 5 samples, D-FMEA and benchmarking data with other competitors concerning the specific single cyclone CCV oil separator of part number 39 310 70 900. Mr Schleden said that "***The part 39 310 70 900 is a very old one and I do not have the information you are asking for. In order to get 5 samples please order them – I am not the right person for this issue.***" The tribunal opined that (at [191] of the award):

> … It is difficult to see how M+H could have provided more information on this subject. Obviously, this matter was not further pursued by the parties' engineers. In any event, in view of the Tribunal's decision on the confidentiality issue (see paragraphs 118-125 of this Award), there was no obligation on M+H to provide more information.

(b) S-Engine oil filter

(i) Dongwoo had failed to establish on a balance of probabilities that the design of the S-Engine oil filter originally provided to it by M+H was defective and that the defects were the cause of the leakage problems subsequently faced by Dongwoo because of: (1) the existence of the alternative explanation for the leakage put forward in the contemporary documents; and (2) the absence of independent technical evidence as to the likely cause or causes of the leakage (see [137] of the award).

(ii) Dongwoo failed to establish that the design was changed because it was defective as the changes might merely have been improvements of an already effective design (see [138] of the award).

(iii) However, had the tribunal been satisfied that the original design was defective, the tribunal would have found that M+H was in breach of its obligations to Dongwoo under the TATLA because of the length of time that elapsed before it made available to Dongwoo the revised design (see [139] of the award).

(c) Termination notice of 27 October 2005 was not valid in any event

(i) The tribunal found that even under the (incorrect) assumption that M+H had materially breached the TATLA, Dongwoo's termination of the TATLA would still be unlawful because its termination notice dated 27 October 2005 was not valid as M+H had confirmed on 23 September 2005 that it would make future information transfer more efficiently and secure in terms of punctuality and completeness, and confirmed their utmost best efforts to continue to provide the best possible support to Dongwoo. On the evidence, M+H had made all efforts to remedy any possible breaches (see [215] of the award).

(ii) As Dongwoo and its main shareholders did not address pending problems of the TATLA at the board meeting, the tribunal opined that Dongwoo did not regard the alleged breaches to be a material breach of the TATLA requiring urgent rectification, or that Dongwoo's representatives had acted in bad faith in giving the impression to M+H that the alleged breaches were not matters which could lead to termination if not attended to (see [220] of the award).

(iii) The termination of the TATLA for cause on 27 October 2005, *ie*, just two months before the TATLA expired would require an extremely severe breach of law or contract which would make it unacceptable for Dongwoo to continue the contractual relationship for another two months. Dongwoo neither substantiated nor gave proof that such an extreme situation existed on the day of termination (see [224] of the award).

(iv) The tribunal was of the clear view that Dongwoo should have accepted M+H's efforts "to deliver meaningful and valuable technical information" and continue the contractual relationship for another two months. Also due to this reason, the termination of the TATLA was void (see [226] of the award).

(d) Assessment of damages for non-material breaches due to negligence

(i) Although M+H's underperformance did not reach the level of a "material breach", M+H's acts and failures to act on Dongwoo's complaints on the porous ducts, HC Trap and air cleaners (*but excluding those concerning the CCV oil separator, S-Engine oil filter, oil filters*

and inadequate technical training where the tribunal found that Dongwoo failed to establish that there was a breach of the TATLA) must be characterized as "negligent", which would trigger damage claims by Dongwoo (see [232] of the award).

(ii) As Dongwoo had sufficiently substantiated the non-contractual performance of the TATLA by M+H for part of the year 2005 and proved that it suffered losses exceeding the contractual limitation of 60% of the total of the running royalties under Article 8.3 of the TATLA, and after assessing the contributory culpability, the tribunal evaluated the damage claim as 50% of the pro-rated royalties paid by Dongwoo for the year 2005, which was determined in the amount of Korean Won 166,666,667 (see [239] of the award).

Parties' submissions on setting aside the award

51 In relation to the CCV oil separator, Dongwoo alleged that the tribunal, in arriving at its decision:

(a) had examined various documents which were not extended to Dongwoo at any time in the proceedings, thereby depriving Dongwoo an opportunity to fully present its case on the documents, which it never had sight of;

(b) had failed to direct that M+H extend copies of such documents to Dongwoo;

(c) had thereby breached the principles of natural justice by not giving Dongwoo a fair opportunity to be heard; and

(d) had made an award which was in conflict with public policy by allowing M+H to "flagrantly flout" the tribunal's directions in relation to discovery, and by not drawing an adverse inference against M+H's refusal to furnish the documents as directed.

52 In relation to the S-Engine Oil Filter Project, Dongwoo alleged that they were precluded from fully presenting its case because the tribunal had based its decision on an issue which it had not indicated was central to the dispute and which the parties had not fully submitted on. This, Dongwoo further alleged, also amounted to a breach of natural justice.

Unable to present its case

53 Pursuant to Article 34(2)(a)(ii) of the Model Law, the issues before the court were:

(a) first, whether the disclosure of the design standard drawings to the tribunal and not to Dongwoo resulted in Dongwoo being unable to present its case with regard to the CCV oil separators; and

(b) second, with regard to the issue of the S-Engine Oil Filter Project, whether the tribunal had based its decision on an issue that had not been the focus of either party's submissions and/or evidence, thereby rendering Dongwoo unable to present its case.

54 Article 34(2)(a)(ii) of the Model law states:

Article 34. Application for setting aside as exclusive recourse against arbitral award

…

(2) An arbitral award may be set aside by the court specified in Article 6 only if:

(a) the party making the application furnishes proof that:

…

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

[emphasis added]

55 Whether a party was or was not able to present its case at the arbitration is very much a question of fact and degree, and it necessarily focuses on the overall conduct of the proceedings with particular attention paid to the conduct of the tribunal and the parties themselves. However, a tribunal's ruling in accordance with the rules of the arbitration on discovery or admissibility of evidence after hearing the parties, which necessarily disadvantages one party, cannot, without more, be regarded as evidence which shows that the party was therefore unable to present its case.

The CCV oil separators

56 It is not disputed that the design standard drawings of the CCV oil separator (seen earlier by the tribunal but not by Dongwoo) were not produced in contravention of the order to produce them.

57 Dongwoo alleged that both M+H's and the tribunal's failure to extend a copy of the design standard drawings of the CCV oil separator to Dongwoo resulted in Dongwoo having to change the manner in which its case was run (for instance, by seeking other resources such as technical expert reports). Dongwoo also argued that it was not able to assess whether the design standard drawings were indeed confidential to third parties and this in turn caused a "real risk" that the tribunal considered and was influenced by the drawings in arriving at their decision on the CCV oil separator. Dongwoo contended that the tribunal must have considered the drawings because it had stated that even if the confidentiality point was to be decided against M+H, M+H could not have provided more information. Dongwoo argued that being unable to submit on whether the design standard drawings were the correct documents, or whether they were correctly construed, ultimately resulted in it not being able to fully and properly present its case on whether the design standard drawings fell within the ambit of Technical Information which M+H was obliged to provide under the TATLA.

58 Dongwoo contended that M+H, by not extending the design drawings to Dongwoo, breached Article 24(3) of the Model Law which resulted in procedural injustice. Article 24(3) states:

Article 24. Hearings and written proceedings

…

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

59 Dongwoo also contended that M+H had breached r 22.7 of the SIAC Rules which is worded exactly the same as Article 24(3) of the Model Law.

60 M+H on the other hand argued that the burden of proof lay with Dongwoo to prove that there

was a "real risk" that the tribunal considered and/or was influenced by design standard drawings and, more importantly, that it was unable to present its case. They argued that this assertion of a "real risk" was unsubstantiated and that Dongwoo did not need to rely on the design standard drawings (withheld by M+H from discovery contrary to the tribunal's order) to present its case. According to M+H, the design standard drawings of the CCV oil separator in question were actually all on a single page.

61 M+H submitted that under Article 19(2) of the Model Law, the tribunal was at liberty to conduct the hearing in whatever manner it deemed fit, so long as all parties were treated equally and each party was given an opportunity of presenting its case. M+H further submitted that the tribunal had the discretion to do all things to ensure the just, expeditious, economical and final determination of the dispute and, in doing so, had not compromised on the fundamental principle that each party must be treated with equality and be given a full opportunity to present its case, as enshrined in Article 18 of the Model Law. Articles 18 and 19 state:

> *Article 18. Equal treatment of parties*
>
> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.
>
> *Article 19. Determination of rules of procedure*
>
> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

62 M+H also cited the following passage extracted from Howard M Holtzmann and Joseph E Neuhaus, *A Guide to The UNICITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, 1989) on the relationship between Articles 18 and 19 of the Model Law (at p 564):

> The UNICITRAL Secretariat observed that Article 19, along with Article 18, was the "Magna Carta of Arbitral Procedure" and … these Articles might be regarded as "the most important provision[s] of the model law". Article 19 establishes the principle of the autonomy of the parties and the arbitrators in governing the procedural conduct of the arbitration. The autonomy principle is critical to an effective system of commercial arbitration for international cases because in such cases there is a special need to be free of unfamiliar local standards. Moreover, this principle is at the heart of modern systems of arbitration; it expresses a profound confidence in the ability of parties and arbitrators to conduct the arbitration in a fair and orderly manner so as to arrive at a just resolution of a dispute. At the same time, however, Article 18 places fundamental restrictions on this principle.

63 In my judgment, the real issue is whether Dongwoo was in fact not able to present its case with regard to the CCV oil separator after M+H had refused to comply with the 1st Ruling of the tribunal to make specific discovery of the design standard drawings at the arbitration.

64 It is important to distinguish between the discovery stage of the arbitral proceedings and the

next stage of the arbitration, which is the main hearing of the arbitration itself. At the discovery stage, the application by M+H to the tribunal to modify the order of discovery to exclude from discovery the design standard drawings of the CCV oil separator because of the alleged confidentiality agreement that M+H had with a third party, was in fact turned down. The tribunal decided in favour of Dongwoo at that stage. Therefore, in my judgment, it is irrelevant and immaterial whether or not Dongwoo was unable to argue its case **at the discovery stage** because it had obtained an interlocutory decision **in its favour**. I would say that Dongwoo did very well for itself when it succeeded in opposing M+H's application to modify the 1st Ruling, whilst it was being "prevented" or "severely hampered" from arguing the case at that stage. Even if there was a breach of natural justice and a breach of r 22.7 of the SIAC Rules and Article 24(3) of the Model Law when the tribunal was deciding on the question whether or not it should modify the 1st Ruling at the request of M+H, that violation (which Dongwoo characterised as a violation of a fundamental procedural right, namely the principle of hearing both sides) did not result in any prejudice or injustice to Dongwoo as the 2nd Ruling that eventually resulted was entirely in favour of Dongwoo.

65 Since the 1st Ruling remained unmodified, M+H was therefore required to produce the design standard drawings for the CCV oil separator for the main arbitration hearing, subject to certain confidential undertakings from Dongwoo as ordered by the tribunal. If it failed to do so, M+H risked having an adverse inference being drawn against it by the tribunal and the tribunal had stated clearly that it would allow the parties to submit on the question whether an adverse inference ought to be drawn against M+H. Since M+H did not produce the drawings, the only question that was in issue at the arbitral hearing proper, as far as this was concerned, was whether or not in all the circumstances of the case and based on the evidence as a whole, an adverse inference ought to be drawn against M+H for its refusal to produce the drawings.

66 On this, the first question that I have to examine is whether there was any evidence to show that Dongwoo was unable to present its arguments on this issue, *ie*, whether an adverse inference ought to be drawn. Obviously, in such cases, where a question of adverse inference arises for determination by the tribunal, one party must have failed to disclose the documents to the other party. But a failure to produce, *per se*, does not automatically lead to a circumstance of setting aside under Article 34(2)(a)(ii) of the Model law by reason of the party being unable to present its case. The inability of a party to present its case in this context must be Dongwoo's inability to present its position on the issue or question on whether an adverse inference ought to be drawn, and not the mere fact of the failure to produce (for whatever reason).

67 I scrutinised the record of the arbitration hearing, the Post-Hearing Briefs and the conduct of the tribunal with respect to this issue in order to decide whether or not Dongwoo was given a fair opportunity to state its case on why an adverse inference ought to be drawn against M+H for its refusal to produce the documents in question.

68 Based on Dongwoo's Post-Hearing Brief at paras 4-7, and paras 87-109, I could see that Dongwoo had ample opportunity to present its case fully on the issue whether or not an adverse inference should be drawn. Dongwoo's arguments ran into 6 pages. It submitted very detailed reasons and presented cogent arguments why an adverse inference must be drawn, which I have summarised below as follows:

(a) The documents withheld were fundamental to Dongwoo's case. The documents were highly probative, even determinative, regarding the fundamental defence of M+H in this dispute, including whether M+H breached the TATLA, thus justifying Dongwoo's termination and claim for damages.

(b) As Dongwoo had furnished the confidentiality undertaking, M+H had committed a very serious and inexcusable breach of procedure and of due process since it denied Dongwoo the ability to support its own claims where it had the burden of proof and to challenge M+H's defences to its culpability.

(c) The refusal to produce in the face of the tribunal's order to produce amounted to a contempt of the tribunal and of justice itself.

(d) Dongwoo failed to provide evidence to support M+H's alleged defence that the documents were proprietary or confidential information, which fell outside the scope of the TATLA as Article 1.6 had excluded documents which M+H was not "free to disclose without accounting to others."

(e) Therefore, an adverse inference ought to be drawn that the documents were not confidential, that M+H was obliged to provide them under the TATLA, and their failure supported Dongwoo's claim for damages for the breach of the TATLA by M+H.

(f) In any event, this "defence" to non-production failed and M+H had told a "little white lie", which of itself was a significant breach of the TATLA.

(g) Of the 5 categories requested, Cedzich testified that at least 3 categories - (1) process control plans; (2) test data and drawings and (3) D-FMEA in relation to the CCV oil separator - could not be produced because they were confidential information of an M+H customer.

(h) The reacted copy of the product development agreement for the CCV oil separator contained a confidentiality section which described two categories of confidential information: "Supplier's Confidential Information" and "Buyer's Confidential Information". Surprisingly, under the definition of "Supplier's Confidential Information", the control plans, D-FMEA and test data and drawings requested by Dongwoo were categorized as M+H's own confidential materials, which the buyer was obliged to keep confidential, rather than the other way around as M+H claimed. Even more surprisingly, M+H flatly and unashamedly asserted the opposite to the chairman of the tribunal.

(i) On the other hand, the definition of "Buyer's Confidential Information" did not mention any of the categories of documents sought by Dongwoo in stark contrast to the "Supplier's Confidential Information" which expressly included them.

(j) M+H (which had the burden of proof) had not put any evidence to demonstrate that the information not disclosed was non-public and proprietary to the buyer (the first prerequisite for the information to be classified as "Buyer Confidential Information"). In fact, by the very terms of the agreement, the documents were defined as proprietary to the supplier, M+H, not the reverse. Hence the first prerequisite was not met.

(k) The second prerequisite (see [72]) was also not met since no evidence was produced to show that any of the requested documents were (1) volume projections; (2) related to the buyer's future products; or (3) identified by the buyer as confidential.

(l) Cedzich attempted to explain how the requested documents fell under the "Buyer's Confidential Information" by stating: "*Control plans, design drawings, test data, FMEA (D-FMEA and P-FMEA) and other technical information created using the Intellectual Property Rights of the Buyer was non-public and proprietary to the Buyer, and was inherently confidential*". In any

event, the pertinent question was whether the agreement prevented M+H from disclosing these documents to Dongwoo and, as explained, the confidentiality section itself did not do so.

(m) Cedzich's assertion that the paragraph on the "Supplier's Confidential Information" was meant to indicate confidential information of both the supplier and the buyer was indefensible and unsupportable.

(n) Section 15.01 on "Buyer's Intellectual Property Rights" (see [72] concerned documents and information of recognized types of intellectual property "provided to the Supplier" by the buyer. M+H provided no supportive evidence to show that the subject documents met this requirement. On their face, they did not, since they were documents created by M+H.

(o) The most that M+H could say was that the CCV oil separator "*was designed to specifications provided by a major customer, and therefore contains proprietary information belonging to such customer*". Naturally, "specifications" were not intellectual property rights as anticipated by s 15.01. Even if it were the case, M+H offered little more than bald, unsupported allegations – mere argument – to support it.

(p) M+H's position ignored the very obvious point that Article 1.6 of the TATLA only excluded documents under which M+H was under a clear legal obligation to a third party not to disclose without first obtaining permission. However, no such exclusion existed where M+H's claim of "confidentiality" rested only on its own internal policy or business decision, even if it was made out of respect for a customer or its business interests. In the latter case, M+H was still obliged to provide the documents to Dongwoo under the TATLA.

(q) Accordingly, with nothing but unsupported testimony to contradict the documents, M+H's position on the issue of confidentiality had no credibility. Furthermore, in the light of M+H's refusal to provide evidence in its possession contrary to the tribunal's order, M+H's argument that it was not free to produce certain documents "***without accounting to others***" should be wholly rejected.

69 Having regard to the very extensive arguments put forward by Dongwoo for the tribunal's consideration, I could not on any account see on the facts as disclosed in the documents before me, in what way Dongwoo was denied an opportunity to argue its position that an adverse inference ought to be drawn against M+H.

70 If after hearing full arguments from both parties, the tribunal decided wrongly that it was not appropriate to draw any adverse inference, it would then be a mere error of fact finding and/or of law, which cannot be a ground for setting aside the award. An error of fact or law made by the tribunal does not come within the ground for setting aside under Article 34(2)(a)(ii) of the Model Law. Just because the tribunal had ruled against Dongwoo on that question did not mean that the losing side (*ie*, Dongwoo) was thus unable to present its case on this issue. If losing on an issue would ordinarily mean that the party concerned was not able to present its case on that issue, then it would be a remarkable distortion of logic. It would also follow that in all arbitration cases, where one side must necessarily lose, a situation would be invariably created for setting aside because the losing party must have been unable to present its case and hence, it lost for that reason. That cannot be right.

71 Second, the inability to present the case cannot be attributed to the mere fact of non-production in contravention of a disclosure ruling, which contravention was the very reason why the question of adverse inference arose. If there were no contravention, the question of whether an

adverse inference ought to be drawn for non-disclosure could not even have arisen in the first place.

72 Hence, once the adverse inference question has arisen, and after the tribunal has given both sides an opportunity to submit fully on it, there can be no question that any party is denied an opportunity to present its case on that question. The tribunal is thereafter entitled, after taking account of the submissions of both parties, to decide on the issue whether as a matter of fact, law or mixed fact and law. In my judgment, the tribunal in the present case had given both parties the full opportunity to present their cases on the issue on whether or not an adverse inference should be drawn, and the tribunal had accordingly decided the issue as follows:

> "121 The grounds of M+H's claim that these documents were confidential and unable to be released to Dongwoo without accounting to third parties were explained in Mr Cedzich's witness statement (AB/II/Tab 2, paragraphs 22-26). At paragraph 22 he said:
>
> > ... the documents requested by Dongwoo are subject to a confidentiality agreement with the OEM customer for whom this part was designed to the customer's specifications. In fact, there is no standard CCV oil separator, so each model must be designed to a particular OEM customer's specifications. The currently effective contract with this particular OEM customer ("the OEM Contract") expressly states that Man+Hummell (the "Supplier" in the OEM Contract) must protect the confidential information of the OEM customer ("the Buyer"). A copy of the OEM Contract (with the OEM customer's name and identifying information redacted) is attached hereto at Tab 26.
>
> 122 The OEM Contract is reproduced at AB/III/2/555-588. M+H relies on Articles 15.01 and 17.01 of the Contract (AB/III/2/565 and 567 respectively). These articles read as follows:
>
> > 15.01 Buyer's Intellectual Property Rights. The Buyer and its Related Companies may have valuable Intellectual Property Rights in Tooling, documents and information provided to the Supplier. Intellectual Property Rights include trademarks, trade dress, patents, copyrights, trade secrets and industrial design rights. The Supplier may use the Intellectual Property Rights of the Buyer and its Related Companies only in the production and supply of the Goods to the Buyer and its Related Companies.
> >
> > 17.01 Confidential Information. Confidential Information is information that meets the requirements specified below for Supplier Confidential Information or Buyer Confidential Information. Information that does not meet these requirements is not Confidential Information, regardless of any legend or marking to the contrary. A reference in this Section 17 to Confidential Information of the Other Party is a reference to Supplier Confidential Information when the reference relates to an obligation of the Buyer, or to Buyer Confidential Information when the reference relates to an obligation of the Supplier
> >
> > ...
> >
> > (b) Buyer Confidential Information is any information that meets all of the following requirements, regardless of whether it has been disclosed under the Purchase Order:
> >
> > > i. The information is non-public information that is proprietary to: (A) the Buyer; (b) any of its Related Companies; or (C) any third party to which any of them has an obligation of confidentiality relating to the information.
> > >
> > > ii. The information is:

(A) a Volume Projection, as defined in Section 7.01 or is provided under a Team Value Management Initiative, as described in Section 18.01;

(B) the Buyer's or any of its Related Companies' future product plans or any details of those plans; or

(C) any other information identified by the Buyer or any of its Related Companies (orally or in writing) as confidential.

123 While M+H did not attempt to demonstrate, by reference to each specific provision in these articles, that the information that it did not provide Dongwoo with was Buyer Confidential Information in terms of Article 17.01 of the OEM Contract, it maintained its claim to confidentiality throughout the arbitration. In addition:

a. Mr Choi of Dongwoo admitted in cross-examination that the information that he requested on 21 October 2005 at one of the meetings between the parties which followed Dongwoo's letter of 14 September 2005 (including FMEA reports for CCV oil separators) was in regard to specific customer-type oriented products and was propriety technology (see the passages from his evidence quoted in paragraphs 89 and 90 of M+H's Post-Hearing Brief);

b. Mr Scheuermann, the independent engineering expert called by Dongwoo, was asked the following question and gave the following answer in cross-examination (TOH, 13/9/06, 31/9-16):

MR HUGHES: Mr Scheuermann, are you aware that there is no standard CCV oil separator and that each one must be designed for an OEM customer based on specifications provided by the customer?

A That is very well possible that special designs are required for every engine because specific engines would require filters due to different flow speed and other parameters.

c. Mr Scheuermann confirmed, in continued cross-examination (TOH, 13/9/06, 31/24-32/7), the statement in paragraph 34 of his witness statement (AB/II/Tab 9) that:

... tailor-made filter designs for customers that are developed by a company such a Mann+Hummel for or together with filter or automative manufacturers ... and are paid for by the latter are normally subject to confidentiality agreements.

124 The Tribunal considers that, although M+H's evidence on the confidentiality issue in relation to the CCV oil separator was not specific, on the evidence as a whole, the claim by M+H to be bound by confidentiality in that instance has been sufficiently established. (There is therefore no basis for the drawing of an adverse inference because of M+H's failure to produce the documents sought in Dongwoo's email of 13 June 2005 (see paragraph 116 of this Award.) The drawing of such an inference had been sought by Dongwoo in one of the prehearing applications referred to in paragraph 26 of this Award. The Tribunal declined to draw an adverse inference in advance of the hearing. Dongwoo has done so. As just stated, the Tribunal finds that there is no basis for such an adverse finding.)

125 It follows that the Tribunal dismisses Dongwoo's claim that M+H was in breach of its obligations to Dongwoo in relation to the CCV oil separators. (Even had the Tribunal found against

M+H on the confidentiality point, it would have dismissed Dongwoo's claim, for the reasons given in paragraphs 190-191 of this Award.)

Whether the tribunal took into account of what M+H disclosed to it but not to Dongwoo

73 The remaining issue is whether the tribunal did, in deciding the adverse inference question at the arbitral hearing itself, take into account what had been disclosed to it by M+H during the discovery stage of the proceedings, but which was not disclosed to Dongwoo. Here, Dongwoo simply assumed conveniently that the tribunal had done so (or appeared to have done so), and then it set up a whole series of arguments based on that assumption to justify its application in this action to set aside the award.

74 That assumption is all too easy to allege and construct for argument's sake, but it behoved Dongwoo to show that the assumption had rested on some firm evidential basis, and it should not be based on suspicions, surmise or speculation. It is all too easy to cast aspersions that the tribunal must have wrongly taken into account what it had seen (which was not disclosed to the other party), and then it must have decided the question of adverse inference on that basis. It is all too easy to allege a suspicion that the tribunal had in fact been influenced by what it had seen. It is all too easy to ignore the **other** evidence cited by the tribunal in its award to justify the decision it had made on this issue. The burden rested on Dongwoo to produce some strong and unambiguous evidence of the matters complained of. In my judgment, this burden was not discharged.

75 I studied carefully the above detailed reasoning of the tribunal (which I have set out in full above at [72]) for its decision not to draw any adverse inference against M+H for not complying with the discovery order to produce the design standard drawings of the CCV oil separator for the main arbitral hearing itself. No where in the award did the tribunal refer to or make use of any information disclosed in these design standard drawings in arriving at its decision not to draw any adverse inference. I could not find any evidence that the tribunal had indeed relied on what it saw on these design standard drawings when deciding the question of adverse inference. On balance, the absence of any reference in the arbitral award to any data or information obtained from the design standard drawings points more to the fact that the tribunal had disregarded what it might have seen earlier (*ie*, at the interlocutory stage from the design standard drawings) when it was deciding the question of adverse inference at the main arbitral hearing itself, than to the fact that the tribunal had secretly made use of data or information found on the design standard drawings to decide the question of adverse inference. I am not minded to give any credence to any aspersions that the tribunal might have deliberately kept silent or hidden that fact by not stating it in the award, *ie*, that it had indeed made use of information obtained earlier from the design standard drawings of the CCV oil separator for not drawing an adverse inference at the main hearing on account of the non-production of these design standard drawings. If the tribunal for instance had said that the design standard drawings had "CONFIDENTIAL" stamped on it and that was another reason why it was not drawing an adverse inference, then Dongwoo would have some basis to complain that it was unable to present its case on this issue. Nothing of that sort could be found in the tribunal's conduct as would be apparent from the award.

76 From a careful perusal of the award, what was clearly apparent to me from the record was that the tribunal had rightly relied on "**other** evidence" (which was also available to Dongwoo and which would also include the evidence of a continued deliberate non-production of the design standard drawings of the CCV oil separator in M+H's possession despite Dongwoo having given a confidentiality undertaking to M+H, whose act of non-production was therefore in contravention of the 1st Ruling), in deciding that no adverse inference was to be drawn. The tribunal in my view was entitled to find on these "**other** evidence" before it that M+H was bound by confidentiality, *ie*, the documents were

confidential and for which M+H had to account to third parties. That question of fact was eminently for the tribunal to decide and the tribunal did decide. At this stage of the hearing by the tribunal, I did not think that there was any breach of natural justice, or that Dongwoo was unable to present its case on the effect of the non-disclosure by M+H of the design standard drawings for the CCV oil separator based on such "**other** evidence."

77 Even if the tribunal made a wrong finding of fact in reliance on these "**other** evidence" that the documents were confidential and had to be accounted to third parties when they ought not to be, then that *bona fide* error of determination by the tribunal (whether of fact or law) is insufficient to constitute a valid ground (whether of public policy or otherwise) upon which to set aside the award.

78 For the purpose of analysis, it would be useful to consider a slightly different case, where the tribunal was never in fact given the design standard drawings of the CCV oil separator, and the tribunal's order for production of the drawings was not complied with by M+H. Accordingly, the tribunal would still have to decide based on the "**other** evidence" available to it (including the evidence of deliberate non-compliance with its order) to decide on the question whether or not it would be proper to draw an adverse inference for the non-production. In this hypothetical case, the tribunal's evaluation would obviously be without any benefit of the design standard drawings. Neither would the other party (*ie*, Dongwoo) have sight of the design standard drawings to make its submission on the drawing of an adverse inference. Under these circumstances, I do not believe that the party from whom the drawings were withheld (*ie*, Dongwoo) could have successfully contended that the award should be set aside on the ground of a breach of natural justice or an inability or hindrance in the presentation of its case, were the tribunal to make a finding based on the "**other** evidence" available to it that no adverse inference should be drawn. Whether the tribunal had erred in its assessment of the "**other** evidence" when it decided not to draw an adverse inference would be a totally different point. It is no longer a due process point but a fact finding point.

79 It appears to me that the real unhappiness of Dongwoo stemmed from its own perception of some 'cross-infection' of knowledge obtained by the tribunal at the earlier discovery stage, being allegedly applied to decide the later issue of whether or not drawing an adverse inference was appropriate on the facts of this case at the later arbitration stage, on which I have found no reliable evidence to persuade me to conclude that such 'cross-infection' had happened and that such 'cross-knowledge' was in fact applied to decide the later issue.

80 Dongwoo relied, *inter alia*, on the tribunal's statement that even if the confidentiality point were to be decided against M+H, M+H could not have provided more information to argue that this **must have meant that the tribunal had indeed considered the non-disclosed documents.** In my view, this is not a fair submission by Dongwoo on what the tribunal had done, because the tribunal obviously was relying on Mr Schleiden's email response, which clearly stated that the referenced part was a "*very old one*" and that M+H had no information on this part. It was plainly on the basis of this contemporaneous email response, and not on the undisclosed documents (*ie*, the design standard drawings of the CCV oil separator sent to the tribunal), that the tribunal derived its observation that "*[i]t [was] difficult to see how M+H could have provided more information on this subject. Obviously, this matter was not further pursued by the parties' engineers*" (see para 191 of the award). In my judgment, Dongwoo's submission on this issue did not have any merit.

81 Finally, if Dongwoo were relying on a mere perception or suspicion that the tribunal might have been unknowingly or subconsciously influenced by what it might have seen earlier on the design standard drawings, which could have indicated to the tribunal that M+H was accountable to third parties for the confidential documents, and that was why the tribunal decided (or was influenced by what it saw) not to draw any adverse influence at the main hearing itself, I would then only wish to

state that Dongwoo would be resting its case (for setting aside the award) on quick sand. My only comment would be that it would be a rather imaginative submission and I need say no more on that.

Threshold questions for production of documents

82 In applications for production of documents, an arbitral tribunal often has to deal with "threshold questions" on whether a particular document is in fact not relevant or whether it falls outside the relevant parameters for production or disclosure as alleged. There will be instances where the "threshold questions" can only be determined by a review of the contents of the document itself. A party, who may well be prepared to disclose the document to the tribunal for its review, may not necessarily want to disclose it to the other party often for reasons of confidentiality. But when the party seeking production insists on inspecting the document so that it can submit on the "threshold questions" (and perhaps also reassure itself that the other party has in fact acted in good faith in opposing the production), then the procedure to adopt for the determination of the "threshold questions" can be rather contentious unless the procedure has been pre-agreed or pre-determined by the parties as early as possible and, preferably, no later than the commencement of the stage of the arbitration when documents are to be exchanged and submitted to the tribunal. The tribunal can then apply the agreed procedure whenever such "threshold questions" arise, irrespective of the party seeking the discovery or production so that all parties will be accorded equal treatment. This minimises any possible challenge from any party on the basis that there has been contravention of Article 18 of the Model Law, which states, *inter alia*, that the parties shall be treated with equality. It may be useful to set out some of the procedures that parties may agree upon for the tribunal to adopt when resolving such "threshold questions".

83 One possibility is that described in Article 3(7) of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("the IBA Rules") which provides for the following procedure where a review of the document is required:

> 7 In exceptional circumstances, if the propriety of an objection can only be determined by review of the document, the Arbitral Tribunal may determine that it should not review the document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents the contents of the document reviewed.

84 Other possible alternatives (or a combination thereof) are:

(a) Sensitive confidential information is redacted and the document is then produced;

(b) Counsel signs a confidentiality agreement not to disclose to anyone including his client whatever he has seen during the review of the contents of the document, unless the other party producing the document consents;

(c) The document is produced only to the tribunal who will decide the threshold question after inspecting the document, but the other party will not be given a copy of the document. The tribunal can also consider what special measures are needed to preserve confidentiality if it orders production after inspecting the document; and

(d) A neutral third party (not necessarily an expert) bound by confidentiality is asked to examine the document and report its findings to the tribunal and the parties.

85 Often, parties have not thought about how these "threshold questions" are to be dealt with. The matter is usually left open ended. When they come to the bridge and have to cross it, the matter may then get unnecessarily contentious, especially where the institutional arbitration rules chosen by the parties do not set out specific procedures to resolve such "threshold questions".

86 If parties have thought about them, they should normally be able to come to an agreement on the procedure having regard to fairness, efficiency, expediency, effectiveness and costs, though each party may have its own preferences, and each party can then persuade the other party to adopt the procedure that it is comfortable with. In my view, it may well be a good practice for the tribunal to alert the parties to such procedural issues before commencing the arbitration so that the parties will address their minds to it.

87 Under the SIAC Rules, there do not appear to be rules specifically addressing the procedure for the "threshold questions" when applications for production or discovery are made. Indeed, the general rule in r 22.7 of the SIAC Rules (or r 21.6 of the SIAC Rules 2007) and Article 24(3) of the Model Law are substantively similar to Article 3(1) of the IBA Rules, which also requires each party to submit to the tribunal and the other parties all documents available to it on which it relies. While the SIAC Rules and the Model Law are silent on what procedure should govern disputes as to the relevance and admissibility of documents, the IBA Rules provide more comprehensively for the resolution of objections to production of documents. The general rule in r 22.7 of the SIAC Rules is therefore not inconsistent with a more nuanced approach in the event of such objections; nor should its silence be taken to suggest that the general rule for production to the opposing party is *absolute*. Thus, where the arbitration is conducted under the SIAC Rules and parties have not pre-agreed on any particular procedure in advance, the tribunal can, of course, decide for itself, after hearing submissions from the parties, what procedure it is going to adopt. This is a matter well within the jurisdiction of the tribunal, which has the power and the discretion to determine the rules of procedure and to conduct the hearing in a manner that it considers most appropriate to ensure the fair, expeditous, economical and just determination of the dispute. In the present case, I am not minded to interfere with the procedure adopted by the tribunal to deal with such "threshold questions" nor do I intend to take the fairly draconian step to set aside the arbitral award on account of the method that the tribunal has adopted to resolve the "threshold questions."

The S-Engine oil filter

88 Dongwoo contended that the tribunal's decision on liability (*ie*, that M+H had not breached its obligation under the TATLA to supply Dongwoo promptly with updated technical information on the S-Engine oil filter) was based on an issue which had not been the focus of either party's submissions or evidence and on which it had failed to invite the parties to address. That issue was whether or not the Initial Design of the S-Engine oil filter provided by M+H was defective, and Dongwoo argued that it was **not a live issue** during the arbitration.

89 According to Dongwoo, the tribunal's finding that Dongwoo failed to prove that the S-Engine oil filter was defective and, hence, M+H did not breach its obligation to supply the relevant technical information (promptly or otherwise) for the S-Engine Oil Filter Project, was a dramatic departure from the submissions of the parties, which focused instead on the inordinate delay in providing updated designs to Dongwoo, **regardless of whether the Initial Design was defective or not.** (*It would appear that I was expected to infer from this that Dongwoo might also be putting forth the further alternative claim, which Dongwoo did not clearly articulate before me, that even if the S-Engine oil filter was not defective, M+H was still liable to Dongwoo under the TATLA.*This point will be dealt with later at [100] to [111].)

90 Accordingly, Dongwoo submitted before me that the tribunal failed to give Dongwoo a fair opportunity to argue the point that the Initial Design was defective, which thus resulted in a breach of natural justice and "severe prejudice" to Dongwoo. I found no merit in this submission for the following reasons.

91 From the arbitration records, it was clear to me that the failure of and/or defects in the S-Engine oil filter had been put in issue. The extracts below showed that at all material times, both parties had disputed liability for the failure of and/or the defects in the S-Engine oil filter.

92 At paras 23 and 24 of its Response to the Notice of Arbitration dated 13 January 2006, Dongwoo stated the following as part of its counterclaim:

> 23. Another example of M+H's failure to provide adequate and timely technical assistance is shown in the project involving oil filters. Earlier in 2004, Dongwoo was participating in the development of oil filters as part of the "S-Engine project", led by **HMC [Hyundai Motors Company]**. Although Dongwoo believed that M+H's technical assistance in this matter should have been readily provided under the TATLA, M+H insisted on receiving a fee for the design assistance services involved. Reluctantly, Dongwoo paid 14 Million Korean Won for M+H's advice for the design, but ***the advice turned out to be flawed and inaccurate, leading to oil leakages in the model product, and causing delays to HMC's development schedule.*** Obviously, HMC was very displeased, sending official complaints to Dongwoo, and citing M+H's sluggish attitude as an issue of concern.
>
> 24. Naturally, Dongwoo expected M+H to be attentive and proactive about resolving the ***technical flaw issues***. However, M+H's disappointing conduct during and after the various meetings with Dongwoo and HMC showed that M+H was not prepared to act in a responsible manner. Because of M+H's lukewarm management of the S-engine ***design problems***, Dongwoo suffered a serious loss of credibility with HMC. This loss of credibility has directly resulted in the loss of substantial business opportunities, as HMC has not selected Dongwoo to participate in any oil filter project bids since then.
>
> [emphasis added]

93 The complaint about the flawed design provided by M+H was made very clear in Dongwoo's Statement of Defence and Counterclaim dated 21 April 2006 at the following paragraphs:

> 36 …the ***flawed advice*** [M+H] provided to Dongwoo during the S-Engine project created problems for Dongwoo in maintaining its credibility in relation to the S-Engine…
>
> 55 …In fact, the S-Engine project was one example where Dongwoo had to pay extra compensation in order to receive assistance (which later turned out to be ***flawed in any event***) despite the fact that Dongwoo felt such assistance should have been included within the basic scope of the TATLA.
>
> 79 ….. The S-Engine project … was under a separate arrangement as stipulated under Article 6 of the TATLA, whereby a Dongwoo engineer was dispatched to the [M+H's] premises to develop the S-Engine oil filter in conjunction with [M+H] engineers. ***The documents regarding the S-Engine project*** appear more specific than those of other projects, but bear in mind that this ***was due to [M+H's] need to correct its previously faulty advice,*** and these do not serve to advance [M+H's] assertion that these documents provide proof of its fulfilment of its obligations under Article 3.1.

98 Dongwoo, ***trusting that the design had no significant errors,*** implemented the design to the prototype model supplied to HMC on October 2004. However, in February 2005, Dongwoo received word from HMC that there were ***signs of leakage in the drain valve*** proto type models for the oil filter supplied by Dongwoo.

99 HMC sensed that it was strange that ***[M+H's] technology***, which was expected to be almost infallible, ***could show such shoddiness in terms of heat durability.*** HMC was particularly puzzled because the design provided by [M+H] was supposed to have been the same type of design currently applied to an actual product already being supplied to a couple of [M+H]'s valuable customers, Audi and Peugeot. Naturally, HMC began suspecting that ***[M+H] had provided Dongwoo with a design that was inferior to the design in actual use by [M+H].***

100 To investigate the validity and reliability of the design provided by [M+H], HMC demanded that Dongwoo provide it with a sample of the drain valve in actual production by [M+H] for its customers, and to investigate whether there were any other ***apparent defects*** in the drain valve and spring of oil filter design. In turn, Dongwoo requested [M+H] to provide the sample products on the SOP stage (*i.e.*, "start of product" stage) in [M+H].

102. HMC and Dongwoo met various times to address this problem, and after reviewing the relevant documents, they came to the conclusion that there was ***something wrong with the design*** provided by [M+H]…

104 … HMC concluded that the true reason for the ***oil leakage*** problem was, contrary to [M+H's] previous assurances, due to the fact that ***the dimensions and tolerance figures*** provide to Mr. Hyun were never actually applied by [M+H] and thus ***did not have the reliability that a design in actual use would have had***…

106 During this meeting with HMC, Mr. Baumann admitted that the design and size of the drain valve it provided were dimensions and tolerances that even [M+H] found ***problematic***…

107. [M+H], despite its obligations to provide "improvement and modification" under Article 3.1 (f) of the TATLA, recklessly failed to do so. Had [M+H] properly notified Dongwoo that the design it was about to produce to HMC ***was flawed*** and was discarded even by M+H, Dongwoo would have been able to avoid the catastrophic fiasco in regards to the oil filters supplied to HMC in connection with the S-Engine....

108. Because of the ***shoddy advice*** provided by [M+H] from the start, and its severely delayed technical assistance that followed (such as the belated provision of the proper drawings of the drain valve and spring), not only was the development of the oil filter delayed but also the overall development of entire S-Engine project was set back.

130. ... It was also improper for [M+H] to have ***recklessly given seriously defective design materials to Dongwoo, as it did during the S-Engine project,*** causing Dongwoo to produce and supply defective products, and sustain losses due to such defective products…

[emphasis added]

94 The above constituted in my view indisputably clear evidence that Dongwoo put into the forefront of its case why the design provided by M+H was flawed or defective. Ultimately, it failed to prove that the design was defective before the tribunal. It would be extraordinary for Dongwoo now to submit that it was unaware that the issue (whether or not the design was defective) was a live

issue, especially given that Dongwoo itself had thrust that issue into the forefront of its case on the S-Engine oil filter before the tribunal for its consideration.

95 Seeing how Dongwoo had approached and stated its case, I found that the tribunal had correctly characterised Dongwoo's complaint of the breach as one where M+H had initially provided a **defective** design of the oil filter, **and then**, it failed to **provide the correct design promptly to *remedy* the defects** in the original design when the defects were drawn to its attention (see [132] of the award).

96 Dongwoo only had itself to blame if it did not make clear to the tribunal and to M+H in its pleadings that it had a **further alternative ground** that if the initial design provided for the oil filter was **not defective** or if M+H had indeed provided a**suitable or workable Initial Design** for the oil filter, then M+H was **still in breach** of the TATLA for not providing suitable updates in time to make it an **even better or improved** design (as opposed to a case of providing design updates promptly to **remedy the defects** in the **defective Initial Design**, which is very different).

97 Even at the hearing before me, I was also given the same impression that Dongwoo's complaints were premised on the defective design. In the submissions before me, Dongwoo alleged that the Initial Design provided by M+H was defective because oil leaks were detected after Dongwoo's engineers had finalised their design based on the Initial Design from M+H. Dongwoo then requested updated drawings of the S-Engine oil filter in order to solve the oil leak problems. As the provision of updated drawings were intentionally delayed by M+H and only provided months after the initial requests, they were no longer of any use when Dongwoo received them as Dongwoo's relationship with its customers was already severely impaired due to Dongwoo's inability to respond promptly with a solution to the oil leak (see paras 81-86 of the written submissions of counsel for Dongwoo.)

98 Hence, the main thrust of Dongwoo's argument remained that the Initial Design was defective. Under these circumstances, obviously the tribunal (including M+H) would have focused on this issue whether or not the Initial Design was defective, and, if it was not, the whole basis of the complaint would then fall away. Accordingly, the Initial Design would not be the cause of the oil leak. If there was nothing wrong with the Initial Design provided by M+H (which Dongwoo relied upon for the design of its own engine oil filter), the obvious natural inference would be that there was then something wrong with what Dongwoo had itself done, which had nothing to do with the Initial Design. It would follow that no liability should be attached to M+H for the delays in supplying updates to a non-faulty design. The tribunal rightly focussed on what and where the real problem was, given the state of play in the briefs and submissions of the parties at the arbitral hearing.

99 After having made sure that the thrust of its argument was that the Initial Design provided by M+H was defective, Dongwoo then made this rather surprising and unattractive submission before me that the issue whether the initial Design was defective was never at the front of the parties' minds and that the tribunal ought to have invited the parties or counsel to submit on the issue whether or not the Initial Design was defective (see paras 87-92 of Dongwoo's submissions). From this, Dongwoo formulated the present complaint that it was not given an opportunity to argue that the Initial Design was defective, which I had found to be unmeritorious for the reasons stated earlier.

Possible alternative claim by Dongwoo?

100 It was not at all clear to me and I had to distil it out from the way the submissions were run that Dongwoo might be pursuing the further possible alternative ground that it was also not given an opportunity to argue that even if the S-Engine oil filter design originally provided was **not defective**, M+H remained liable under the TATLA for the delay in providing it promptly with **improved versions**

of the non-defective Initial Design as part of its obligations under the TATLA. Not having made clear to both the tribunal and M+H that it was also going to run that further alternative case, and not having made submissions clearly along those lines in its Post-Hearing Brief, I did not think it would be fair to the tribunal and to M+H now to say that they ought to have known that such an alternative claim was being pursued.

101 Dongwoo cannot take advantage of its own default arising from its own lack of clarity, to allege that there was a breach of natural justice by the tribunal, when the tribunal might not even have understood or known that such an alternative case was in fact being pursued by Dongwoo. There is also the other side of the coin that M+H, not having been notified of this alternative claim, may in turn suffer prejudice as it might also not have known that it was expected to meet this alternative claim, which Dongwoo never clearly spelt out.

102 In my view, one cannot, after the conclusion of the arbitral hearing and the handing down of the arbitral award, make an allegation that a breach of natural justice has occurred on the ground that the tribunal failed to give it a chance (or to invite it) to argue a further alternative claim, when the responsibility rests with the party concerned in the first place to make it clear in its own statement of case in the arbitration and in its post hearing briefs that it has, and is indeed relying on and pursuing a further alternative claim such as the one that I have described above.

103 In seeking to set aside the award and have the matter re-heard, Dongwoo was effectively asking for a second bite at the cherry so that it could ventilate an alternative claim at a second arbitration, when such an alternative claim was clearly foreseeable and should have been included for determination at this arbitration in the first place. Dongwoo would be exploiting its own default to the prejudice of M+H if I were to allow the award to be set aside on this ground.

104 Dongwoo relied on *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 ("*Zermalt*") where Bingham J set aside the award on the ground that the arbitrator dealt with matters on which the parties never had the chance to deal with. At [15], Bingham J opined as follows:

> … Nevertheless, the rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him. That is contrary both to the substance of justice and to its appearance, and on the facts of this case I think that the landlords' case is made out.

105 The present case is distinguishable from *Zermalt*'s case. Dongwoo failed to plead an alternative claim during the arbitration. Dongwoo basically wanted the tribunal to consider this alternative claim that was never expressly pleaded before it in the first place. Dongwoo then alleged that not having done so, the tribunal has breached natural justice.

106 If Dongwoo's allegation is right, justice is turned on its head in my view. It is akin to the hypothetical case of a defendant who never pleaded a defence of limitation (when it should have done so since a limitation defence was arguable on the facts). The defendant then says that there is

a duty on the part of the tribunal to consider on its own accord whether the defendant has any other valid defences (including the limitation defence) to defeat the plaintiff's claim, although these defences have never been pleaded. Should the tribunal find that such defences do exist, then it has the further duty to invite the parties to consider these possible defences, so that they have the opportunity to comment and make submissions before the tribunal makes its decision. This invitation is allegedly to fulfil the requirement of natural justice. In this hypothetical case, the tribunal supposedly would have a duty to alert the defendant that it has a defence of limitation. If the tribunal did not do so and allowed the plaintiff's claim, would there be any breach of natural justice? I do not think so.

107 It is trite that the tribunal is only to decide on issues in dispute before it, and has no business, much less a *duty*, to assist either party in raising claims or defences that the party may have missed. This is eminently the job of each party's legal counsel. Clearly, it is not for the tribunal to descend into the arena and act in part as counsel for Dongwoo in considering whether or not that Dongwoo would have this alternative claim and then to invite M+H to rebut this alternative claim, if there was one. In my view, it was for Dongwoo to set out clearly what its claims were, and not for the tribunal to look out for what other claims or alternative claims it might have against M+H.

108 The comments of Bingham J in *Zermalt* ([104] *supra*) must be read in the context of that case, which concerned relevant evidence on a matter that had already been put into issue. The main issue in dispute was the open market rent of shop premises. The arbitrator however depressed his valuation of the appropriate rent on account of the state of the premises and the need for considerable expenditure to bring them up to a standard normally expected of shop premises. Counsel for the landlords complained that this was an aspect which was never explored, never referred to by the surveyors on either side, never put by the arbitrator to the surveyors on either side, and, indeed, appeared for the first time in the award. The landlords' counsel submitted that it was wrong in principle that the outcome of the arbitration should be affected by a matter which had never been in the parties' argument at all.

109 Hence, the above comments in *Zermalt*'s case must be limited only to a case where the matter has been put into issue and in the course of evaluating the evidence on that issue, the tribunal relies on extraneous evidence or facts that the tribunal considers relevant, and of which the tribunal may have special or expert knowledge (but which do not form the corpus of evidence or facts alluded to by the parties at all) and of which the tribunal makes use in its evaluation of the totality of the evidence for the proof of that issue.

110 But the present case is one where Dongwoo, having failed to do its own preparatory work to ensure that all relevant claims including any alternative claims it might have, were made, now turns the tables and blames the tribunal for not realising that Dongwoo in fact has an alternative claim, and because the tribunal did not decide on that alternative claim in reliance on the evidence available to it in favour of Dongwoo, it next attacks the tribunal for breaching natural justice. In my view, by doing this, Dongwoo is in reality asking the tribunal to commit a breach of natural justice against M+H, because M+H would then not have the opportunity to put up any defence against an alternative case that Dongwoo had never pleaded in the first place.

111 I am of the view that the holding by Bingham J in *Zermalt* ([104] *supra*) relied upon by Dongwoo must be qualified in that it can only be applicable to the factual evidence in relation to proof of claims or issues that the parties have themselves already pleaded in the statement of case for the arbitration, but not to those claims or issues never raised or pleaded in the statement of case. For instance, if there are certain considerations or facts, which the tribunal intends to rely on in deciding an existing stated or pleaded claim or issue, which considerations or facts the parties had never at all alluded to, then it behoves the tribunal to make it known to the parties that it is considering such

matters and to invite the parties to at least comment on them, and, if they so deem it necessary, to bring supporting evidence in relation to those facts or considerations, before the tribunal finally takes into account those matters to decide on the stated claims or issues. I do not believe that Bingham J's holding can have application to non-stated claims or issues (whether as alternative claims, issues or otherwise) or to matters which have never been made a part of the parties' statements of case in the arbitration. If Dongwoo's counsel is contending that the ambit of Bingham J's holding extends to a duty on the part of the tribunal to explore issues **neither covered nor stated** in the statement of case, then, with respect, I will not be able to agree because the essential function of an arbitrator is to resolve the claims and the live issues raised and disputed by the parties and does not extend to those which the parties never raised in the first place.

M+H was led to focus on the main claim (not the alternative claim)

112 As a result of the conduct of Dongwoo, M+H rightly and appropriately focused primarily on refuting the main argument of Dongwoo (and not on the said alternative claim) that the Initial Design of the S-Engine oil filter was defective, in (a) its pleadings, (b) the evidence it led, and (c) its Post-Hearing Brief. I shall deal with each in turn.

113 It should have been clear to Dongwoo from the manner in which M+H responded below in its Reply to Respondent's Counterclaims dated 26 May 2006 that M+H was concentrating on refuting Dongwoo's allegation that M+H's Initial Design was defective (at para 86):

> 86. [M+H] discovered a number of problems when it conducted a detailed analysis of the oil filter sample made by Dongwoo. These problems arose because **Dongwoo worked on the design independently and ignored [M+H's] advice**. The final drawing prepared by Dongwoo and presented to HMC contained **a number of differences** from the design recommended by [M+H], which caused severe problems in the function of the oil filter…

114 M+H adduced evidence at the arbitral hearing that the S-Engine oil filter was still in serial production by M+H, *ie*, the design was ***not*** defective, which then implied that the defects arising in the S-Engine oil filter were the result of Dongwoo's execution of the design.

115 I further noted that M+H in its Post-Hearing Brief had also focussed primarily on showing that the Initial Design was not defective, which should have been plain to Dongwoo that it was a crucial issue in dispute to be resolved by the tribunal. M+H submitted at the following paragraphs:

> 77. … as was demonstrated at the Hearings, there was **no defect in the initial design**. [Cedzich] clearly stated that both of these drawings are correct and that the part based on the initial drawing is still in serial production by [M+H]…
>
> 78. As such, the **defects** in Dongwoo's drain valve had nothing to do with any differences between these drawings, but rather were **caused primarily by Dongwoo's use of inappropriate rubber material**. This is a **critical error**, since the drain valve is made entirely of rubber…
>
> 83. After it was demonstrated during Mr. Song's [Dongwoo's representative] cross examination that the differences between the two drawings of the drain valve were not due to **design defects**…
>
> 84 … the facts and the evidence plainly show that **the problems in this project** were caused, among other things, by **Dongwoo's use of the wrong drain valve rubber material,**

produced in Korea according to the order of Dongwoo…

[emphasis added]

116 In Dongwoo's Post-Hearing Brief, it was also evident that Dongwoo was in turn challenging these contentions of M+H regarding the design of the S-Engine oil filter, when it alleged at para 136 that "*the fact that the previous applications did not show the same defects in European cars is not conclusive to show that the* ***original design had no problems***."

117 In my view, it was very clear from the above extracts that at all material times throughout the proceedings, the issue (whether or not the Initial Design was defective) was very much alive and both parties were fully aware of that. Dongwoo knew that it had to address M+H's contention that the design was not defective. As such, Dongwoo was in no way precluded from fully presenting its case that the Initial Design was defective. No natural justice was breached and Dongwoo was in no way prejudiced in this respect. From the evidence presented and the briefs submitted, the tribunal was entitled to make a finding of fact that Dongwoo had failed to prove that the Initial Design was defective, and that accordingly, there was no breach of the TATLA by M+H. Since there was no further alternative claim or alternative case stated and made known to the tribunal by Dongwoo, the tribunal need not, and should generally also not, go on further to address that further alternative claim or case on its own accord in the arbitration.

118 It is worth noting what V K Rajah JA had said in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86 ("*Soh Beng Tee*") that (at [41]):

> 41 … if we were to determine that the issue of whether time was at large was not truly alive during the arbitration, that *per se* would not be sufficient to inexorably lead to the conclusion that the Arbitrator had *necessarily* failed to adhere to the rules of natural justice in denying Fairmount an occasion to present its contentions on the issue. It is frequently a matter of degree as to how unexpected the impugned decision is, such that it can persuasively be said that the parties were truly deprived of an opportunity to argue it. As helpfully summarised in Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) ("*Commercial Arbitration*") at p 312:
>
> > If the arbitrator decides the case on a point which he has *invented* for himself, he *creates surprise* and deprives the parties of their right to address full arguments on the base which they have to answer. Similarly, if he receives evidence outside the course of the oral hearing, he breaks the rule that a party is entitled to know about and test the evidence led against him.
>
> [emphasis in original]

119 It was evident to me that Dongwoo had known all along that this issue of the defectiveness in the Initial Design was going to be a contested issue as it had itself put that into issue in its own statement of case for determination at the arbitration. To now say that Dongwoo was surprised would be inherently and highly incredible. I thus agreed fully with the submission of M+H's counsel that this issue of the defective design had been disputed vigorously at all stages of he arbitration process and the present case was definitely not an instance where the tribunal had decided the award on a point it had invented.

120 Having had the full opportunity to argue the point, but having lost the argument at the arbitration, Dongwoo is now contriving a flimsy basis to set aside the award on the ground that it was

not given an opportunity to be heard on that issue.

121 I would also like to point out that an incorrect finding of fact, if any, and upon which certain legal conclusions on liability are founded is not a ground for setting aside an award. As such, I will not discuss whether or not it was wrong of the tribunal to find on the evidence before it that Dongwoo had not discharged its burden to persuade the tribunal that the original design of the S-Engine oil filter and that the alleged defects in the original design were the cause of the problem of the leakage which occurred in early 2005, on which Doogwoo had sought the technical assistance of M+H under the TATLA.

Breach of the rules of natural justice

122 Pursuant to section 24 of the IAA, the issues before the court were:

(a) first, whether the tribunal's conduct with regard to the discovery of the design standard drawings was in breach of the rules of natural justice; and

(b) second, whether the tribunal's conduct in determining the issue of the S-Engine Oil Filter Project was in breach of the rules of natural justice.

Section 24 of the IAA states:

Court may set aside award

24. Notwithstanding Article 34 (1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34 (2) of the Model Law, **set aside the award** of the arbitral tribunal if —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a **breach of the rules of natural justice** occurred in connection with the making of the award **by which the rights of any party have been prejudiced**.

[emphasis added]

123 It is clear therefore that under the IAA, the breach of natural justice must prejudice the rights of a party before the court may intervene: *Soh Beng Tee* ([118] *supra*) at [82]. The Court of Appeal also held that (at [91] and [98]):

91. … an applicant will have to persuade the court that there has been some actual or real prejudice caused by the alleged breach. While this is obviously a lower hurdle than substantial prejudice, it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis. There must be more than technical unfairness. … What we can say is that to attract curial intervention it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way. If, on the other hand, the same result could or would ultimately have been attained, or if it can be shown that the complainant could not have presented any ground-breaking evidence and/or submissions regardless, the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award.

98 … It is only where the alleged breach of natural justice has surpassed the boundaries of

legitimate expectation and propriety, culminating in actual prejudice to a party, that a remedy can or should be made available.

124 Dongwoo contended that the requirements under s 24(b) of the IAA were fulfilled in this instance because its rights had been prejudiced. Dongwoo argued that it did not have a fair opportunity to be heard as it could not deal with the documents fully or properly submit the reasons why M+H was obliged to provide these documents under the TATLA. Dongwoo contended that justice could not be seen to be done as there was no way of knowing whether and to what extent the documents had influenced the tribunal's decision and that efforts had to be expended to mount its defence and counterclaim, which, in turn, hampered its case. Dongwoo contended that these breaches of natural justice caused it substantial prejudice as they resulted in the issue of whether there was a material breach with regard to the CCV oil separators being decided against Dongwoo.

125 Dongwoo also contended that there was no way for it to know whether the documents could have influenced the tribunal's decision and it was only fair and just for the tribunal, upon receipt of such documents, to return the documents immediately to M+H without attempting to review them or disclose them to Dongwoo.

126 In *Soh Beng Tee* ([118] *supra*), the Court of Appeal held at [29] that a party challenging an arbitration award as having contravened the rules of natural justice had to establish:

(a) which rule of natural justice was breached;

(b) how it was breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced its rights.

127 The Court of Appeal went on to state at [73] that even if there had been a breach of the rules of natural justice, there had to be a causal nexus between the breach and the award made.

128 As to what constitutes the rules of natural justice, the Court of Appeal in *Soh Beng Tee* ([118] *supra*) held at [43]:

> 43 In *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396, Marks J helpfully distilled the essence of the two pillars of natural justice in the following terms:
>
> > The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – *nemo judex in causa sua*. The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim – *audi alteram partem.* In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done; (Lord Hewart, CJ in *R v Sussex Justices; ex parte McCarthy*, [1924] 1 K.B. 256 at p 259; [1923] All E.R. Rep. 233). Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.

[emphasis in original]

129 In my view, I did not think that the tribunal relied on the design standard drawings in coming to the conclusion not to draw any adverse inference for the reasons that I have already elaborated above from [73] to [81]. As stated before, I was not at all persuaded that the contents of the undisclosed standard design drawings had in fact led the tribunal to decide in the way it did. The tribunal had made it clear what evidence it did rely on to make its finding and in none of them was anything that could possibly be derived from the contents of the standard design drawings of the CCV oil separator that was not disclosed to Dongwoo. Applying the principles set out in *Soh Beng Tee* ([118] *supra*), I could not see how the alleged breach was connected to the making of the award, nor could I find any causal nexus between the alleged breach and the award made. On a close examination of the arbitral process and the conduct of the tribunal, I found that the evidence pointed to the contrary that there was no breach of the rules of natural justice in this case. The tribunal had properly concluded that there was no material breach of the TATLA for the CCV oil separator and the S-Engine oil filter and that M+H had fulfilled its obligations under the TATLA **based on all the credible evidence disclosed to the tribunal and to all parties during the arbitration on the live issues that were plainly before it,** and the tribunal as the determiner of fact and law, was entitled to make those findings.

Conflict with public policy

130 Dongwoo tried to set aside the award on the further ground that it was in conflict with public policy, under Article 34(2)(b)(ii) of the Model Law, which states:

> *Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> …
>
> (b) the court finds that:
>
> …
>
> (ii) the award is in conflict with the public policy of this State.

131 In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 ("*PT Asuransi Jasa Indonesia (Persero)*"), the Court of Appeal explained what would constitute a conflict with public policy (at [57] and [59]):

> 57 … The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the Act and Art 34 of the Model Law. … In the present context, errors of law or fact, *per se*, do not engage the public policy of Singapore under Art 34(2)(b) (ii) of the Model Law when they cannot be set aside under Art 34(2)(a) (iii) of the Model Law.
>
> 59 Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" (see *Downer Connect* ([58] *supra*)

at [136]), or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, *per* Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 508 F 2d, 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at 914):

> In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice*… It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as *corruption, bribery or fraud* and similar serious cases would constitute a ground for setting aside."

[emphasis added]

132 In *Profilati Italia SRL v Paine Webber Inc* [2001] 1 Lloyd's Rep 715 ("*Profilati*"), Moore-Bick J made the following observations in relation to the argument that non-disclosure of material documents constituted a breach of public policy in the context of s 68 of the English Arbitration Act 1996 (at [17], [19] and [26]):

> 17. … where the successful party is said to have procured the award in a way which is contrary to public policy it will normally be necessary to satisfy the Court that some form of ***reprehensible or unconscionable conduct*** on his part has contributed in a substantial way to obtaining an award in his favour. Moreover, I do not think that the Court should be quick to interfere under this section [*ie*, s 68(2)(g) of the Arbitration Act 1996]. In those cases in which s. 68 has so far been considered the Court has emphasized that it is intended to operate only in ***extreme cases****...*
>
> 19. Where an important document which ought to have been disclosed is deliberately withheld and as a result the party withholding it has obtained an award in his favour the Court may well consider that he procured that award in a manner contrary to public policy. After all, such ***conduct is not far removed from fraud***…
>
> 26. Even if there had been a deliberate failure to give disclosure of the two documents in question it would still be necessary for Profilati to satisfy the Court that ***it had suffered substantial injustice as a result***.
>
> [emphasis added]

Section 68 of the English Arbitration Act 1996 provides as follows:

> (1) A party to arbitral proceedings may … apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

…

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

…

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.

133 In my view, what was stated in [19] (quoted above) in *Profilati* ([132] *supra*) should not be read in the absolute sense without any qualifications. If there is a good reason for the intentional non-disclosure of an important document (which of course must not be a fictitious reason), then it cannot be said that the resulting deliberate non-disclosure is akin to fraudulent conduct.

134 Recently, in *Elektrim SA v Vivendi Universal SA* [2007] 1 Lloyd's Rep 693 ("*Elektrim*"), Aikens J, endorsing *Profilati* ([132] *supra*), opined at [81]-[87]:

81. In my view the strict approach to the construction of the words "obtained by fraud" that I have adopted must also be applied in relation to the disclosure of documents in an arbitration. If a party to the arbitration is ordered to produce a document (or a class of documents) that is relevant to the arbitration and the party, through its directors, its employees or its lawyers, in the knowledge that the document exists, decides *deliberately to conceal it, with the intention of inducing the tribunal and the other side into the belief that the document does not exist, then that must be a "fraud"* for the purposes of section 68(2)(g). However, because an allegation of fraud is being asserted, the accuser will have to demonstrate its case to a *high standard of proof*.

82. *But an award will only be "obtained by fraud" if the party which has deliberately concealed the document has, as a consequence of that concealment, obtained an award in its favour.* The party relying on section 68(2)(g) must therefore also *prove a causative link* between the deliberate concealment of the document and the decision in the award in favour of the other, successful, party.

83. If there has been a failure to disclose a document as a result of either negligence, or an error of judgment, concerning the interpretation of an order for production or the scope of the obligation to search for a document following an order of the tribunal, that is not "fraud" for the purposes of the paragraph. In this regard I respectfully agree with the comments of Moore-Bick J in the *Profilati* case at para 19, although those comments were made in relation to the words "procured contrary to public policy" in the section.

...

85. Neither side sought to argue that the position would be any different if the phrase "procured contrary to public policy" is applied to the facts of this case. In the *Profilati* case, the allegation was that a party to an arbitration had wrongly failed to disclose two material documents and that this failure had led to an award being made in favour of one party that would have been made in favour of the other party had the documents been disclosed. It was not alleged that the two documents were deliberately withheld by either the party concerned or its solicitors. However, it was argued that if a document is wrongfully withheld as a result of either negligence or an error of judgment, and it is demonstrated that the award is different in

consequence, then the award has been "procured contrary to public policy" within section 68(2)(g).

86. Moore-Bick J did not accept this argument. He concluded that, in the context of disclosure, documents had to be deliberately withheld to the knowledge of a party to the arbitration (or its solicitors), before it could be said that the award had been procured contrary to public policy. He said that normally it would have to be shown that there had been some "reprehensible or unconscionable conduct" by the party concerned, that had contributed in a substantial way to obtaining an award in that party's favour: see para 17.

87. I respectfully agree with that analysis. Thus, at least in the context of allegations of perjury and deliberate concealment of relevant documents, the phrase "an award procured contrary to public policy" goes wider than the phrase "an award obtained by fraud" for the purposes of section 68(2)(g).

[emphasis added]

135 Dongwoo asserted that the award was procured in such a way that it was contrary to public policy, *ie*, M+H had wrongly failed to disclose the documents which related to the CCV oil separators, which might have supported Dongwoo's case in relation to whether there were breaches of the TATLA and might have allowed Dongwoo's counsel to make submissions or introduce evidence which would not be made in the same way or force if the documents were disclosed, and, to that extent, the award was improperly procured as the tribunal was effectively misled.

136 Dong further asserted that M+H knew for a fact that the documents were relevant and had admitted that it deliberately withheld the documents on the pretext of confidentiality. M+H took advantage of its pretext of confidentiality by disclosing the documents solely to the tribunal, hoping to influence its decision. The disclosure only to the tribunal but not to it had never been consented to by Dongwoo and Dongwoo had maintained its objections throughout. Substantial prejudice was caused to Dongwoo as it was likely that the documents might have impacted the minds of the tribunal. Justice was not seen to be done. Dongwoo had no way of knowing how the documents influenced the tribunal not just on the issue of confidentiality, but also the decision on whether there was a breach and whether this was a material breach and so forth. If the documents had been disclosed, it would enable Dongwoo to cross-examine more pointedly and to demonstrate that the evidence of M+H's witness was false, and this would have resulted in Dongwoo persuading the tribunal to reach an opposite conclusion. More questions could also have been put to M+H's witnesses.

137 In coming to its decision on the award as to whether adverse inference should be drawn against M+H, Dongwoo submitted that the tribunal failed to appreciate the real motive for M+H's non-disclosure and the fact that in the light of the confidentiality undertaking provided by Dongwoo and its own findings in the 1st Ruling that such documents were relevant and material. It was incumbent on M+H to produce such documents in compliance with the 1st Ruling. However, M+H flagrantly disregarded the tribunal's discovery orders and deliberately withheld documents. Dongwoo argued that the deliberate flouting of the tribunal's directions must be taken to violate the forum's most basic notion of morality and justice. Dongwoo's case was hindered by the non-production of the documents, and it could not fairly present its case in relation to a key issue in the arbitration. Not only did Dongwoo suffer injustice as it was deprived of an opportunity of presenting its case, it also did not know how the documents (disclosed to the tribunal but not to Dongwoo) had influenced the tribunal's substantive decision. M+H's conduct "effectively misled" the tribunal. Dongwoo strenuously argued that it had therefore resulted in an award that was in conflict with public policy. Dongwoo contended that it was generally accepted that such non-compliance with discovery obligations would

be inconsistent with the public policy of most countries.

138 However, Dongwoo did not dispute (see [137] of its submissions) that mere non-compliance with a tribunal's order for production of documents *per se* would not necessarily lead to the setting aside of the award on the basis of the award being contrary to public policy, according to the principles in *Profilati* ([132] *supra*). However, Dongwoo placed reliance, *inter alia*, on *Profilati* ([132] *supra*) and *Elektrim* ([134] *supra*) to submit that the situation would be different if the party had deliberately flouted discovery orders, or deliberately withheld an important document.

139 I carefully examined whether M+H in reality believed that it did not have any good reason not to disclose the documents, whether it invented a reason not to disclose, and whether M+H did intentionally mislead or commit a fraud on the tribunal by concealing an important key document (including even its existence) which if disclosed would have been so unfavourable that the tribunal would not have decided the award in the way it did. I trawled through the evidence to find whether there was any *mala fides* involved. Was the motive for the deliberate non-disclosure to prevent a document with some damning evidence from surfacing at all costs and without any good reason at all, in order to mislead the tribunal into coming to a wrong conclusion in its favour? If so, then this sort of despicable and reprehensible conduct of the party smacks of total bad faith and destroys the whole basis for a fair arbitration of the dispute. Such conduct of the party is tantamount to committing a fraud on the tribunal, which will not be countenanced as it undermines the entire foundation of a fair arbitration. When parties resort to arbitration, it goes with saying that they expect the tribunal to resolve their dispute properly, fairly and justly in accordance with the law and the institutional or agreed rules governing that arbitration. Parties embark on the arbitral process with a common fundamental understanding and with trust that (a) no party will use any underhanded tactics to fool the tribunal into coming to a result in its favour; (b) no party will bribe the tribunal into giving a decision in its favour or do anything to corrupt or subvert or compromise the professional integrity, impartiality and independence of the tribunal; (c) no party will fabricate evidence in support of its case; and (d) no party will do anything that will "violate and undermine the forum's most basic notion of morality and justice". If so, then I will be minded to set aside the award on the grounds of public policy as upholding such an award will certainly "shock the conscience" and will be "clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public."

140 The question before me is whether such features as those mentioned above do exist in the conduct of M+H in the arbitration? I think whatever Dongwoo had attempted to paint as misconduct on the part of M+H were so far removed from those that would ground a setting aside based on public policy that they could be said to be as different as that between "chalk" and "cheese".

141 From the available evidence, M+H appeared to me to have honestly believed that it had a good reason not to disclose the documents because it was covered by a confidentiality agreement with a third party. Its acts of disclosing both the existence and the contents of the documents (*ie*, the design standard drawings of the CCV oil separator) to the tribunal but only disclosing the existence of the documents (but not their contents) to Dongwoo seemed to me to be the very opposite behaviour of a party who had something very damning to hide. The last thing I would expect a party who had something very damning to hide would be to show everything to the very tribunal which was going to decide the matter. Why would M+H even want to disclose the existence of the allegedly damning documents to Dongwoo and even take the further step of showing their entire contents to the tribunal if those documents should not see the light of day at all?

142 The more likely inference would be that M+H genuinely believed that the documents were covered by the confidentiality agreement and they were entitled not to disclose them as they were

irrelevant and outside the scope of the TATLA, which then led to their conduct in making full disclosure of the documents to the tribunal in the hope that the tribunal would rule in its favour, which the tribunal did not when it refused to modify the 1st Ruling for discovery and gave its brief reasons for doing so. In my judgment, M+H's motivation and behaviour were more characteristic of someone who was not trying to hide any smoking gun so to speak, but who was unable to make disclosure due to a confidentiality agreement and who was hoping to persuade the tribunal that that was the case by disclosing only the documents to the tribunal.

143 As there are indeed some arbitral and court procedures in which the tribunal or the court, as the case may be, can itself decide the **"threshold question"** of discovery without the other party having sight of the documents (see [82] to [87]), it would not, in my opinion, be fair to pin any *mala fides* on the part of M+H when it similarly made full and frank disclosure of the contents of the documents only to the tribunal and requested the tribunal to determine that **"threshold question"** objectively based on what the tribunal could see for itself. In any event, M+H failed to persuade the tribunal to modify the discovery order during the discovery stage of the proceedings. So this act did not in reality result in any substantial prejudice or injustice to Dongwoo, or for that matter any prejudice or injustice at all. The documents were ordered to be produced by M+H subject to certain confidentiality undertakings from Dongwoo. Since the confidentiality undertakings were in fact provided by Dongwoo, M+H was therefore obliged to make discovery of those documents. But at the arbitration hearing itself, M+H decided to risk having an adverse inference drawn against it when it refused to produce the documents in contravention of the discovery order of the tribunal. The tribunal made it absolutely clear that that question of adverse inference would be considered and the parties would have the opportunity to submit on it if no production of the documents was made. Intentionally or deliberately taking of that risk by M+H in itself as part of the adversarial process was not something that I would regard as belonging to the category of reprehensible or unconscionable conduct (given the circumstances that M+H was in), that would shock the conscience and would warrant setting aside the award on the basis that it would be contrary to public policy for me to uphold it.

144 After carefully considering the matter, I did not regard the whole conduct of M+H in the arbitration as having come within those sort of behaviour or conduct that I alluded to earlier that would justify a setting aside based on public policy. It would be wrong in my view to set aside the award on the ground of public policy if all that could be shown, at the highest, was perhaps that M+H or the tribunal had only made an honest mistake, be it a procedural lapse or otherwise.

145 A deliberate refusal to comply with a discovery order is not *per se* a contravention of public policy because the adversarial procedure in arbitration admits of the possible sanction of an adverse inference being drawn against the party that does not produce the document in question in compliance with an order. The tribunal will of course consider all the relevant facts and circumstances, and the submissions by the parties before the tribunal decides whether or not to draw an adverse inference for the non-production. Dongwoo also had the liberty to apply to the High Court to compel production of the documents under s 13 and 14 of the IAA, if it was not content with merely arguing on the question of adverse inference and if it desperately needed the production by M+H of those documents for its inspection so that it could properly argue the point on drawing an adverse inference. However, Dongwoo chose not to do so.

146 Further, the present case was not one where a party hides even the existenceof the damning document and then dishonestly denies its very existence so that the opposing party does not even have the chance to submit that an adverse inference ought to be drawn for non-production. M+H in fact disclosed the existence of the documents but gave reasons why it could not disclose them. Here, Dongwoo had the full opportunity to submit that an adverse inference ought to be drawn, but it failed

to persuade the tribunal to draw the adverse inference. The tribunal examined the **other** evidence before it, considered the submissions of the parties and rightfully exercised its fact finding and decision making powers not to draw the adverse inference as it was entitled to do so. It would appear to me that the tribunal was doing nothing more than exercising its normal fact finding powers to determine whether or not an adverse inference ought to be drawn.

147 A high standard of proof is required for an allegation of fraudulent, unconscionable or similar reprehensible conduct against another party, who is said to have thereby secured the award by fraudulent or unconscionable means. The requisite standard of proof was not met in this case. As such, I did not think Dongwoo succeeded in proving that this was a case where upholding the award would "shock the conscience", or would be "clearly injurious to the public good" or "wholly offensive to the ordinary and reasonable fully informed member of the public", or would "violate the forum's most basic notion of morality and justice". Dongwoo failed to convince me that the tests laid down in *PT Asuransi Jasa Indonesia (Persero)* ([131] *supra*) were satisfied, and, for these reasons, I could not agree with Dongwoo's argument that the award ought to be set aside on the ground that it was in conflict with the public policy of Singapore.

Alternative finding of tribunal

148 The tribunal had an alternative finding at [215] of the award that even under the (incorrect) **assumption that the eight emails** referred to by Dongwoo (and the further circumstances related thereto) **constituted a "material breach" of the TATLA, Dongwoo was still not entitled to terminate the TATLA** because its termination notice dated 27 October 2005 was not valid (see [215], [220]–[222], [224] and [226] of the award). This part of the award was **not challenged by Dongwoo** in this action. I agreed with M+H that indeed this part of the award could not be challenged because it was extensively argued and submitted on by the parties in the course of the arbitration. Dongwoo would have no basis to set aside this part of the award on the usual grounds of public policy, a breach of natural justice or an inability on the part of Dongwoo to present its case at the arbitration hearing. There was clearly no prejudice occasioned whatsoever to Dongwoo in so far as the invalidity of the termination was concerned as held by the tribunal.

149 The remaining issue that I have to consider is whether there would be any increase in the amount of damages payable by M+H to Dongwoo if the tribunal found that M+H had materially breached its obligations in respect of **all the items**, namely, the porous ducts, HC trap, air cleaners, CCV oil separators, oil filters, S-Engine oil filter and inadequate technical training. I did not think so for the following reasons.

150 At [239] of the award, the tribunal found that Dongwoo had sufficiently substantiated the non-contractual performance of the TATLA by M+H for part of the year from March 2005 till September 2005 (**a period of 7 months**) and that Dongwoo had sufficiently substantiated and proved that it **suffered losses "exceeding the contractual limitation of 60%" of the total of the running royalties under Article 8.3 of the TATLA.** As a result of the contributory negligence of Dongwoo (whom the tribunal found could have better facilitated M+H's transfer of technical information and know-how), the tribunal evaluated Dongwoo's damage claim as 50% of the royalties paid by Dongwoo to M+H under the TATLA for the year 2005. Essentially, the tribunal allowed a pro-rating of **6 months** (*ie*, 50% of one year) of the royalties for the year 2005 instead of using the actual period of **7 months** for the computation. It basically reduced the pro-rating by one month, which resulted in a figure of 50%. Based on the total royalties paid by Dongwoo to M+H under the TATLA agreement (effective initially from 3 January 2003 until 31 December 2005) of about 1 billion Korean Won for the 3 years from 2003 to 2005, the pro-rated damages for half a year or 6 months was determined by the tribunal to be Korean Won 166,666,667. Hence, even if Dongwoo could prove that it suffered

additional damages due to the additional breaches arising from the CCV oil separator and the S-Engine oil filter (*ie*, assuming that the tribunal was wrong in not drawing an adverse inference and should have found that there was a breach in the case of the **CCV oil separator**, and assuming that the tribunal was wrong in deciding on a point that was not argued and if argued would have found for Dongwoo with regard to the **S-Engine oil filter**), it made no real difference to Dongwoo as the amount of damages awarded would very likely have remained at Korean Won 166,666,667 because of the limitation on liability and damages under Article 8.3 of the TATLA. Under these circumstances, I could not see any impact nor any appreciable difference whatsoever in the outcome in monetary terms having regard to the contractual limitation on damages in the TATLA, even if it were true that the tribunal had erred in the manner alleged by Dongwoo and further damages ought to be assessed and given on account of those additional breaches. I could not find any prejudice occasioned to Dongwoo even if all of its complaints were borne out and Dongwoo had succeeded on all the issues because the final outcome of the arbitration would not have been any different since the tribunal found that the M+H's notice of termination was invalid.

151 For all these reasons and bearing in mind what the Court of Appeal said in *Soh Beng Tee* ([118] *supra*) at [64] in its summary of applicable principles that an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied, I found on the whole that there was no breach of natural justice that had actually altered the final outcome in some meaningful way.

Conclusion

152 In conclusion, it is perhaps worth emphasizing what Bingham J said in *Zermalt* ([104] *supra*) at [14] that as a general approach:

> … the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it…

153 I found that Dongwoo was given ample opportunities to present its case, and there was no breach of natural justice in relation to both discovery and document production in relation to the CCV oil separator and the S-Engine oil filter. I also found that the award was not in conflict with public policy.

154 Even if there was some procedural irregularity or some non-observance of due process, I was not prepared on the facts of this case to exercise my discretion to set aside any part of the award because, on the whole, I did not find that Dongwoo had suffered any injustice or prejudice on account of them.

155 Accordingly, I dismissed Dongwoo's action with costs. Costs were given on an indemnity basis due to a specific clause in Article 20 in the TATLA concerning expenses and enforcement costs.

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