IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 69

Originating Summons No 249 of 2016
(Summons No 1731 of 2018)

Between

BVU

… Plaintiff

And

BVX

… Defendant

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

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BVU
v
BVX

[2019] SGHC 69

High Court — Originating Summons No 249 of 2016, Originating Summons No 249 of 2016 (Summons No 1731 of 2018)
Ang Cheng Hock JC
31 May, 22, 23 November 2018

13 March 2019 Judgment reserved.

Ang Cheng Hock JC:

Introduction

1 The originating summons before me is an application to set aside an international arbitral award on grounds of fraud and public policy. The accompanying summons (Summons No 1731 of 2018 ("SUM 1731")) is an application to set aside a subpoena to produce documents issued against [E], an employee of the respondent, which was the party who succeeded in the arbitration. The issue at the heart of these proceedings is this – after the conclusion of arbitration and the issuance of the final award, did the successful party's decision not to call certain witnesses to give evidence and disclose certain internal documents, which it did not view as being relevant to its case in the arbitration, render the award that was issued by the tribunal liable to be set aside on grounds of fraud or public policy?

Facts

The lead-up to the arbitration

2 In January 2011, in response to spiralling food prices and growing concerns about scarcity, the South Korean government embarked on a project (the "Project") to secure long-term stable lines of food supply from international sources and supplement the domestic food supply. The defendant, BVX ("the Purchaser"), a state-owned company, was appointed to spearhead the Project.

3 The Purchaser was put in touch with the plaintiff, BVU ("the Supplier"), which recommended that the Purchaser procure food ("the Products") from South America. The Supplier and the Purchaser began negotiations in mid-2011. On 14 June 2012, after governmental approval was obtained, the Purchaser and the Supplier formally entered into an agreement ("the Agreement").

4 The material terms of the Agreement are as follows:

(a) The Supplier shall be the Purchaser's "most preferred Supplier" (Clause 4.1 and Schedule 1).

(b) The Agreement will commence on 1 October 2012 ("the Commencement Date") and shall continue for 20 years ("the Contract Period") and any renewal thereof unless and until terminated in accordance with the termination clause (Clause 4.3).

(c) The Supplier shall use its "best commercially reasonable efforts in performing its supplying obligations" and that it will source for the Products mainly from Latin America (Clause 5.1).

(d) The Purchaser too shall use its "best commercially reasonable effort to order and purchase" the Products over the duration of the agreement, in accordance with the Forecast Range, which is defined to be "[m]inimum of 1,000,000 tons in total per annum" (Clause 6.1 and Schedule 2). The Purchaser is to provide "a rolling twelve months forecast of purchase orders" (Clause 6.5). Clause 6.1 was the critical clause in dispute in the arbitration, as I will explain later.

(e) The Agreement is to be governed by the "rules of the Vienna Convention on Contracts for the International Sale of Goods ("the CISG")" (Clause 10.1). Disputes arising out of or in connection with the Agreement will be finally settled by way of Singapore-seated arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC") (Clause 10.2).

5 Following the execution of the Agreement, the Purchaser did not submit a rolling forecast. In a letter to the Supplier on 26 December 2012, the Purchaser confirmed a rumour that it had entered into a Memorandum of Understanding ("MOU") with one of the Supplier's competitors, [Y Co]. Subsequently, a series of meetings between the parties took place.

6 On 19 April 2013, the Purchaser forecasted a purchase of 170,000 tons of the Products. This was considerably less than what was stated in the Forecast Range. The Purchaser, however, refused to place any orders under the Agreement. Instead, it began a public tender process. On 25 April 2013, it sent a letter inviting the Supplier to take part in the public tender for the amount of the Products earlier forecasted. Up to the time of the arbitration hearing, the Purchaser had not placed any orders with the Supplier.

The arbitration

7 On 25 July 2013, the Supplier commenced ICC Arbitration No 19630/CYK ("the arbitration") against the Purchaser claiming US$2.25m in damages plus interest for breach of the Agreement, among other requests for relief. According to the Supplier, this figure represented its loss of approximately 3 months of profit from October to December 2012.

The parties' positions in the arbitration

8 The Supplier alleged that the Purchaser had breached the Agreement by:

(a) failing to place purchase orders for the Products either in accordance with the Forecast Range or at all;

(b) failing to treat the Supplier as the "most preferred Supplier" by its actions in holding a public tender; and

(c) failing to submit an adequate rolling forecast in accordance with Clause 6.5 of the Agreement.

9 The Purchaser's position was that its obligations under the Agreement were not absolute or binding, but was to instead use its "best commercially reasonable effort" to order and purchase the Products as per the Forecast Range. According to the Purchaser, this was supported by the plain words used in the Agreement. Recourse to extrinsic evidence to interpret the Agreement was therefore unnecessary. It was pointed out that an earlier draft of Clause 6.1 originally provided in mandatory terms that the Purchaser "*shall* order and purchase the Products as per the Forecast Range" [emphasis added]. So, the fact that this was watered down in the finalised version of the Agreement to

become an obligation to use "best commercially reasonable effort" was significant.

10 The Purchaser argued that the Agreement was "a type of framework agreement". This was supported by the fact that the Agreement left out key commercial terms such as quantity, quality, supply method, supply date and, in particular, price. The parties had therefore contemplated that separate sale and purchase agreements would have to be concluded between the parties subsequently. Further, there could not have been a binding obligation to order a million tons of the Products annually over a 20-year period given that there was no guarantee that food production, distribution or price would remain stable over the entire period.

11 The Purchaser added that it was subject to certain laws and regulations in Korea that required it to call for a public tender as it was a state-owned enterprise. This should have been known to the Supplier given that it had knowledge of the Project, and should have aware that the Purchaser, as a state-owned corporation, would be under a statutory obligation to supply goods through a public or competitive tendering process. The standard of "best commercially reasonable effort" did not require the Purchaser to flout Korean public procurement laws by entering into a specially negotiated contract with the Supplier.

12 On Korean procurement law, the Purchaser took the position that Article 6.1 of the Contractual Affairs Regulations of Public Corporations and Quasi-government Entities ("the Contract Regulations") required it to conclude contracts by way of a competitive bidding process, which meant, in short, that it had to call a public tender. The Contract Regulations are enacted under the

State Act on Contracts to which the State is a Party ("the State Contracts Act"). In addition, the Purchaser contended that none of the exceptions, which would permit a specially negotiated contract (without the need for a public tender) under Article 8 of the Contract Regulations or Article 26 of the Enforcement Decree of the State Contracts Act applied to the situation at hand. The Purchaser disagreed with the Supplier's reading of Article 4 of the Contract Regulations (see [15] below) as it contended that "international tendering procedures" were different from "public competitive tendering". As a general rule, even if the Purchaser was exempt from international tendering procedures, it would still have to comply with Article 6 of the Contract Regulations and conduct a public tender.

13 The Supplier disagreed with the Purchaser's interpretation of the phrase "best commercially reasonable effort". The Supplier also argued that the invitation to hold a public tender and the entering of the MOU with [Y Co] were breaches of the Purchaser's obligation to treat the Supplier as the "most preferred Supplier".

14 On Korean procurement law, the Supplier relied on Article 7.1 of the State Contracts Act read with Article 26(1)(*1*)(a) of the Enforcement Decree of the State Contracts Act. The Supplier submitted that the effect of both of these provisions is that specially negotiated contracts would be permitted instead of public bidding exercises if deemed necessary, such as in cases of "natural disasters, movement of military forces for military operations … urgent events … sharp rises in raw material prices, or others similar thereto".

15 In addition, and alternatively, the Supplier relied on a Note to Annex 3 of the World Trade Organisation Agreement on Government Procurement, as

well as Article 4(1)(*l*) of the Contract Regulations, to argue that the Agreement was exempt from "international tendering procedures" because the goods procured thereunder were intended for resale. Article 4(1) of the Contract Regulations provides as such:

> Article 4
>
> (1) When Public corporations and/or quasi-government entities enter into procurement agreements… it will do so by way of international tendering procedures: provided, that the following cases shall be excluded from transactions subject to a procurement contract of public corporations/quasi-government entities made through international tendering procedures.
>
> 1. Where goods or services are procured as necessary for sale or resale…
>
> …
>
> 5. Where a negotiated contract is made in accordance with Article 8.

The Supplier's position in the arbitration was that, if Article 4(1)(*l*) of the Contract Regulations was engaged, the exception under Article 4(1)(*5*) would not apply, and correspondingly, Article 8 of the Contract Regulations and Article 26 of the Enforcement Decree of the State Contracts Act would not apply as well.

16 The Supplier also asserted that the Purchaser had regularly resorted to direct purchases instead of public tenders.

The witnesses

17 Before the oral hearings for the arbitration took place, the Purchaser indicated that it would only call one factual witness, [B], and that it would not call [C] (president of the Purchaser), [D] (executive director of one of the

Purchaser's departments) and [E] (director-general of a separate department of the Purchaser) as witnesses. [E] was the most junior of the three and the former two were the Purchaser's officers who signed the Agreement. These three individuals had been referred to by the Supplier in its Statement of Claim as being involved in the negotiations for the Agreement. The Supplier applied to the arbitral tribunal ("the Tribunal") for an order that the Purchaser procure the attendance of these three employees as witnesses in the arbitration, but this application was unsuccessful. I elaborate on the Supplier's application below at [62].

18 The hearing therefore proceeded with the Purchaser calling [B] as its sole factual witness. [B] was a deputy director of the Purchaser. He was not involved in the negotiations leading to the Agreement but, at the time of the arbitration, he was responsible for the purchase and sale of the Products and for monitoring the performance of the Agreement with the Supplier. The Purchaser also called on two other experts to give their opinions on comparative and Korean law: Professor Young-Joon Kwon ("Prof Kwon") and Professor Won-Woo Lee ("Prof Lee"). Prof Kwon provided evidence on, *inter alia*, comparative and Korean law interpretations of the meaning of "best endeavours", "commercially reasonable efforts" and other similarly worded clauses. Prof Lee gave evidence on the requirement of public tenders under Korean law.

19 The Supplier called three factual witnesses: [F] (managing director of one of the Supplier's shareholders), [G] (co-founder of the Supplier) and [H] (a member of the board of directors of a corporate board member of the Supplier, and also one of the lawyers who represented the Supplier in the arbitration). They gave evidence primarily on the background to the Agreement as well as

the events occurring after the signing of the Agreement. The Supplier's main witness who dealt with negotiations for the Agreement was [H]. He had represented the Supplier in these negotiations.

The award

20 The final award ("the Award") was issued on 10 December 2015, and one of the three arbitrators comprising the tribunal issued a dissenting opinion.

21 The majority considered that there were two fundamental issues. The first involved the nature and scope of the Purchaser's obligations under Clause 6.1 of the Agreement to use its "best commercially reasonable effort" to buy the Products from the Supplier, the standard that the obligation entailed and, of course, whether the Purchaser had failed to discharge that contractual obligation on the facts of the case. The second issue was whether the Purchaser was indeed prohibited from making direct purchase orders of the Products from the Supplier under the Agreement as per the laws and regulations of Korea. The majority took the view that the second question was a "threshold issue":

> However, if Korean laws did not forbid [the Purchaser] from purchasing the Products under the Agreement, that would effectively be the end of [the Purchaser's] defence as to liability – certainly in relation to the first two issues in the Terms of Reference, which are (1) whether [the Purchaser] is subject to a legally binding obligation under the Agreement to place any purchase orders and if so, whether [the Purchaser] has breached such obligation; and (2) whether [the Purchaser] is subject to any minimum purchase obligation under the Agreement, and if so, whether [the Purchaser has breached such obligation. *This is because [the Purchaser's] defence to liability was that Korean law forbade it from purchasing Products under the Agreement without first calling for a public tender and hence [the Purchaser] could not be expected to flout the law in discharge of its obligations under Clause 6.1.*
>
> [emphasis added]

22 On this threshold issue, the majority concluded that the Purchaser was obliged under Article 6 of the Contract Regulations to call a public tender if it wished to purchase the Products in the circumstances covered by the Agreement. In reaching this conclusion, the majority stressed that the Supplier had not called any expert evidence to support its arguments to the contrary. On the other hand, on behalf of the Purchaser, Prof Lee was able to draw a difference between "international tendering procedures" and the "public tendering" requirement under Articles 4 and 6 of the Contract Regulations, respectively, on the basis of his familiarity with, and expertise in, Korean law. The majority also accepted that serious consequences (disciplinary actions or even criminal sanctions) could follow if the Purchaser entered into negotiated contracts without calling for a public tender. In short, the majority of the tribunal accepted the Purchaser's contention that it was not exempt under the laws of Korea from having to carry out a public tender if it wanted to buy the Products from the Supplier.

23 The majority then turned to examine the scope of the Purchaser's obligations under Clause 6.1 of the Agreement. The Agreement provided that the applicable substantive law of the contract was the CISG. Accordingly, it was Article 8 of the CISG that governed the interpretation of the Agreement.

24 The majority proceeded to note that the parties were "largely in agreement that the starting point for determining the intention of the parties is *the words used in the Agreement itself*" [emphasis added]. However, in determining intent, Article 8(3) of the CISG requires that all relevant circumstances be given due consideration – and all such relevant circumstances include, without limitation, the pre-contractual negotiations, usages and subsequent conduct of the parties.

25 The majority regarded Korean public procurement law as one such relevant circumstance. Put another way, the Tribunal took into account Korean public procurement law as part of the legal and regulatory background which has to be considered when it interpreted Clause 6.1 of the Agreement. To the majority, the key issue was therefore whether "best commercially reasonable effort" to place orders required the Purchaser to purchase the Products in a manner that required it to "bypass or run afoul of the law by placing orders without first calling a public tender".

26 On the face of Clause 6.1 of the Agreement, the majority found that it was clear that the plain words created no absolute obligations on the parties. They then looked at the pre-Agreement statements and conduct of the parties. [H]'s evidence in his witness statement was that there had not been "any mention of [the Purchaser] having to go through a public tender process in order to perform under the contract". The parties were in agreement that there were no discussions whatsoever on the public tender requirement during the pre-contract phase.

27 The majority considered that, on the balance of the parties' arguments, the Purchaser's position was to be preferred for the following reasons:

(a) First, the Agreement was a fairly loose agreement that provided for a long contract duration, but left many matters open.

(b) Secondly, the clear intention of the parties was not to place an absolute obligation on the Purchaser to a minimum quantity of the Products per year. This is made clear from the fact that the original mandatory wording used in a draft of clause 6.1 ("The Purchaser shall order and purchase the Products") was subsequently amended, during

the course of negotiations, such that the Purchaser need only use its "its best commercially reasonable effort" to order and purchase the Products.

(c) Thirdly, absent any discussion on the requirement of a public tender during the parties' negotiations, the Purchaser could not have been aware of the Supplier's mistaken assumption that the Purchaser was exempt from the requirements of Korean procurement law that it must carry out a public tender before buying the Products from the Supplier. There was thus no common understanding that the potential impact of the public tender requirements under Korean procurement law would be excluded from consideration such that the Purchaser would be under an absolute obligation to purchase the Products from the Supplier.

(d) Fourthly, the Supplier could not have been unaware that certain countries would require public tenders especially in the case of purchases by state-owned entities. The Supplier was advised by experienced lawyers and they should have sought Korean legal advice on this point. The law was a matter of public knowledge and the need for a public tender would not have been a fact known only to the Purchaser. Moreover, international traders would not disregard relevant regulatory requirements in the country in which they intend to supply goods.

(e) Fifthly the Purchaser's failure to call its employees involved in the pre-contract negotiations did not change the majority's view of the interpretation of the clause.

(f) Given the above, at the time when the Agreement was concluded, a reasonable person in the same circumstances as the parties would not expect that the Purchaser's obligation to use "best commercially reasonable effort" to purchase the Products under the Agreement would require the Purchaser to act in contravention of Korean public procurement law.

(g) In the circumstances, the Purchaser had satisfactorily discharged its obligations under Clause 6.1 of the Agreement by calling a public tender and inviting the Supplier to participate.

28 Alternatively, the majority found that the requirement for a public procurement contract to be concluded by means of a public tender was a usage which "in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned". This thus fell under Article 9(2) of the CISG. Thus, this usage was impliedly made applicable to the Agreement since parties had not agreed otherwise. Hence, the Tribunal's majority found that the Purchaser had not breached any obligation by not placing a purchase order given that any public procurement contract would have to be concluded by means of a public tender.

29 The majority also found that the Purchaser's dealings with [Y Co] were not in breach of the terms of the Agreement. This was because the Agreement did not confer on the Supplier any exclusive rights. In any event, there had been no binding agreement entered into between the Purchaser and [Y Co].

30 As for the minority opinion, the dissenting arbitrator held that adverse inferences ought to be drawn in respect of the Purchaser's decision not to

produce its employees that were involved in the contractual negotiations as witnesses.

31 The dissenting arbitrator was prepared to assume that the Purchaser was under a statutory obligation to make purchases by way of public procurement procedures. However, he was of the view that the parties had contemplated entering into the Agreement "on commercial terms", in that the parties had not anticipated purchases only by way of conducting public tenders. Accordingly, he found that the Purchaser was in breach of the Agreement.

Post-arbitration developments

32 After the Award was issued, the Supplier instructed its Korean solicitors to reach out to the three employees whom the Purchaser had declined to call as witnesses in the proceedings in the hope that these individuals would give evidence to aid the Supplier in setting aside the Award. Sometime in late December 2015 or early January 2016, the Supplier's Korean solicitors got in touch with [E]. By then, [E] was no longer working on the Project though he was, and still is, employed by the Purchaser. The Supplier explained to [E] the reasons for contacting him and updated him on what had happened in the arbitration. He then agreed to provide evidence on the facts and circumstances surrounding the making of the Agreement, which would go towards showing that the parties' understanding of how the Agreement would operate was contrary to the position that the Purchaser had taken in the arbitration.

33 On 10 March 2016, the Supplier applied by this originating summons to set aside the Award on the basis that the Purchaser had "deliberately put forward a false case in the [a]rbitration by concealing the true facts and withholding and suppressing crucial evidence". Such crucial evidence, it is argued, included the

testimony of [E] and also key documents belonging to the Purchaser that would *corroborate* [E]'s testimony.

34 On the same day, [E] filed an affidavit in support of the Supplier's application. He claimed to have intimate knowledge of the Purchaser's efforts in respect of the Project. On the threshold issue of whether the Purchaser was under a statutory obligation to procure the supply of the Products by way of a public tender, [E] deposed in his affidavit that the Purchaser, in fact, had operated in the belief that it could enter directly into negotiated contracts because two exceptions to Article 6 of the Contract Regulations were applicable:

(a) First, Article 6(1) of the Contract Regulations permits the "Head or Person in Charge" to conclude negotiated contracts if "deemed necessary considering the purpose, characteristics and size of a contract". [E] claimed that he was one such "person in charge" and he would designate contracts with international suppliers as negotiated contracts that would not be subject to the public tender requirement.

(b) Secondly, Article 8(4) of the Contract Regulations also provides that a negotiated contract may be "made secretly" when it relates to "national security, diplomatic relationship, public purposes and other similar cases".

It should be noted that this was not the position advanced by the Supplier in the arbitration as to why Korean law permitted a specifically negotiated contract between the Purchaser and the Supplier.

35 [E] also agreed with the Supplier's contention in the arbitration that the obligation to purchase the Products under the Agreement was intended to be immediately binding on the parties, and was not subject to the further step of a public tender. According to [E], in the lead-up to the signing of the Agreement, the Purchaser never once raised the need for a public tender to be conducted in any document or correspondence with the Supplier. Instead, what was envisaged was that, under Clause 6.1 of the Agreement, the obligation to exercise "best commercially reasonable effort" to purchase goods from the Supplier was to be fulfilled "within the context of a binding obligation… to purchase the minimum stipulated amount per annum".

36 After the setting aside papers were served on the Purchaser, on 4 April 2018, the Supplier procured an issuance of a subpoena to [E] to attend court to produce four categories of documents, which were all essentially the Purchaser's internal documents:

(a) all documents relating to the Purchaser's internal position that its contracts with international food suppliers were not or would not be subject to the public tender requirements;

(b) all documents relating to the Purchaser's internal position that the Agreement was not subject to any public tender requirement under South Korean law;

(c) all documents relating to the Purchaser's intention to impose a binding obligation on the Supplier to supply to the Purchaser a minimum quantity of one million tonnes of food per annum by entering into the Agreement; and

(d) all documents relating to the Purchaser's knowledge that the amendment of Clause 6.1 of the Agreement referring to "best commercially reasonable effort" would not detract from the binding obligation aforementioned.

37 On 12 April 2018, the Purchaser filed SUM 1731 to set aside this subpoena. I was informed by counsel for the Supplier that the subpoena has been served on [E] and he will produce the documents sought if SUM 1731 is dismissed. He cannot presently hand over the documents to the Supplier because he is subject to confidentiality obligations, but he will comply with the subpoena as it is an order of court, unless it is set aside.

38 The parties appeared before me on 31 May 2018 and, after considering the parties' respective positions, I decided to adjourn the hearing of SUM 1731 so that it would be heard together with the application to set aside the Award. I took the view that it would be expedient to do so for two reasons.

39 First, the arguments in relation to the subpoena application would involve delving into the merits of the setting aside application in some detail because the Supplier would have to establish how the subpoenaed documents were relevant, material and necessary for the determination of the setting aside application.

40 Secondly, one possible outcome was that I might decide to set aside the subpoena and also dismiss the originating summons, without the need to refer to the subpoenaed documents, if I was eventually satisfied that these documents would not assist in the case to set aside the Award. Let me explain. If, after hearing arguments on the setting aside application, I was unconvinced that the

Supplier could make out its case that the Award should be set aside because of fraud or public policy *even if I were to accept [E]'s statements on affidavit*, the documents sought to be produced via the subpoena would be irrelevant and unnecessary. This is because the documents were said to be relevant to the application for setting aside the Award *only to corroborate* what [E] had already stated in his affidavit.

41 If, on the other hand, I was able to arrive at a *tentative* view from hearing the parties' submissions that the Supplier had established a case to set aside the Award based on [E]'s affidavit evidence as it now stands, I would dismiss SUM 1731 and allow the documents which were the subject of the subpoena to be produced to the court and the parties. I would then permit the Purchaser to file affidavits to *explain the produced documents*, and also permit *further* submissions by the parties *in relation to the documents* in the context of the setting aside application. I would only make a final decision on the originating summons after hearing the Purchaser's explanations of the produced documents and considering the parties' further submissions on how these documents supported or detracted from the case that the Award should be set aside.

42 The parties subsequently appeared before me on 22 and 23 November 2018 to make arguments on the originating summons and SUM 1731.

The applicable legal principles on setting aside an arbitral award for fraud and conflict with public policy

43 The plaintiff relies on two grounds to set aside the award:

(a) First, that the Award was induced or affected by fraud or corruption, contrary to s 24(a) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA");

(b) Secondly, that the Award is in conflict with the public policy of Singapore, contrary to Art 34(2)(*b*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law").

44 As counsel for the Supplier submitted, there is "substantial overlap" between the two grounds as the "public policy" ground also encompasses corruption, bribery or fraud: see also *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573 ("*Swiss Singapore*") at [24], citing *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [59]. The "public policy" ground for the setting aside of an award can be invoked for a wider variety of matters (see David Sutton *et al*, *Russell on Arbitration* (Sweet & Maxwell, 24th Ed, 2015) at para 8–112), though its scope is very much narrowed by its high threshold. The upholding of an award conflicts with public policy only if it would "shock the conscience", be "clearly injurious to the public good", be "wholly offensive to the ordinary reasonable and fully informed member of the public", or when the award "violates the forum's most basic notion of morality and justice": *PT Asuransi* at [59].

45 In the present case, just as in *Swiss Singapore*, the allegation that the Award is in conflict with the public policy of Singapore is made on the same basis as the allegation that the Award has been procured by fraud – *ie*, the failure by the Purchaser to call [E] as a witness and its failure to disclose the subpoenaed documents in the arbitration. After examining the parties' submissions and the authorities tendered, it appeared to me that the approaches under both s 24(a) of the IAA and Art 34(2)(*b*)(ii) of the Model Law in respect of the withholding or non-disclosure of evidence are by and large similar: see, *eg*, *Elektrim SA v Vivendi Universal SA* [2007] 1 Lloyd's Rep 693 ("*Elektrim*")

at [83], [85] and [87]; *Swiss Singapore* at [24] and [26]; *Russell on Arbitration* at para 8–112. In fact, the Singapore decisions on this point refer extensively to the English authorities, which in turn examine awards through the lens of the Arbitration Act 1996 (c 23) (UK) ("the English Arbitration Act"), in particular, s 68(2)(*g*), which refers to "the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy" as one composite category of serious irregularity that could render the award liable to be set aside.

46 It is uncontroversial that a high threshold has to be met for an award to be set aside for fraud or a contravention of public policy. As regards fraud, a convincing case must be shown. The claimant would have to produce evidence that is "cogent and strong"; fraud will not be inferred: *Swiss Singapore* at [64]. Likewise, a "high standard of proof" applies where the upholding of an award is said to contravene public policy because it was secured by fraudulent or unconscionable means: *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 ("*Dongwoo*") at [147]. This does not mean that the standard is something other than the balance of probabilities, but when it relates to the failure to call a witness or disclose documents, it must be shown that what is involved is dishonesty, and not the more likely explanation of human error: *Celtic BioEnergy Ltd v Knowles Ltd* [2017] 1 Lloyd's Rep 495 ("*Celtic BioEnergy*") at [69]; *Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 (Comm) ("*Chantiers*") at [56].

47 It appears to me that both *Dongwoo* and *Swiss Singapore* endorse the approach that, in order for the non-disclosure or suppression of evidence to warrant the setting aside of the award, three requirements have to be satisfied. First, it must be shown that there is deliberate (as opposed to innocent or

negligent) concealment aimed at deceiving the arbitral tribunal. Secondly, there must be a causative link between the deliberate concealment and the decision in favour of the concealing party (*ie*, the concealment must have substantially impacted the making of the award). Thirdly, there must not have been a good reason for the non-disclosure.

48 The first two requirements – the concealment was intentional for the purpose of deceiving the tribunal as well as the link between the fraud committed and the outcome in the award – are well-established. In *Profilati v PaineWebber* [2001] 1 Lloyd's Rep 715 ("*Profilati*"), Moore-Bick J held that the suppression of a document as a result of negligence, an error of judgment or an innocent failure to give disclosure would not suffice. Instead, where an important document is *deliberately* withheld and *as a result*, the party withholding the document has obtained an award in its favour, the Court may consider that the award was procured in a manner contrary to public policy (at [19]–[21]).

49 In *Elektrim*, Aikens J cited *Profilati* with approval. He held that there is "fraud" within the meaning s 68(2)(*g*) of the English Arbitration Act only if a party "decides deliberately to conceal [a document that the party was ordered to produce], with the intention of inducing the tribunal and the other side into the belief that the document does not exist" (at [81] and [83]). Aikens J also held that the aggrieved party had to show a causative link between the concealment and the decision in favour of the successful party (at [82]). In other words, the aggrieved party would have to show that "reprehensible or unconscionable conduct" by the party concerned had contributed in a "substantial way" to the obtaining of an award in that party's favour (at [86]).

50 Subsequently in *Double K Oil Products 1996 Ltd v Neste Oil OYJ* [2010] 1 Lloyd's Rep 141 ("*Double K Oil*"), Blair J held that it would not be sufficient to show a lack of proper disclosure, if it was an innocent failure to do so, or that one party had inadvertently misled the other, however carelessly. Generally, it would be necessary to satisfy the court that some reprehensible or unconscionable conduct has contributed in a substantial way to the obtaining of the award (at [33]). These principles were echoed by Jefford J in *Celtic BioEnergy* at [66]–[67]).

51 The Singapore decisions on alleged fraud arising from non-disclosure are consistent with these English authorities. In *Swiss Fortune*, Judith Prakash J (as she then was), after reviewing the authorities, concluded that "negligence or error in judgment in failing to discover a crucial document would not be sufficient to justify a setting side of the award and for that purpose, the non-disclosure must have been deliberate and aimed at deceiving the arbitrator" (at [30(d)]). Further, Prakash J held that the complainant would have to go further to show that "the reprehensible conduct or fraud had caused it substantial injustice in that the same procured or substantially impacted the making of the award" (at [29]). Hence, if the fraud concerned the non-disclosure of a material document, the document must be "*so material that earlier discovery would have prompted the arbitrator to rule in favour of the applicant*" [emphasis added] (at [30(c)]).

52 The facts of *Swiss Fortune* are illustrative of what it means to require that the allegedly fraudulent non-disclosure substantially impact the making of the award. In that case, the underlying dispute concerned a party's (the buyer) failure to take delivery of cargo. The defendant (the seller) claimed to have mitigated its damages by selling the cargo to two buyers, one of which was

Terapanth, for prices substantially lower than the contract price payable by the buyer. The seller then claimed for the difference in price. What was not disclosed during the arbitration was that Terapanth also breached the sale and purchase agreement with the seller as it refused to take delivery of all the cargo it had contracted to purchase. The buyer managed to obtain a declaration from a director of Terapanth to the effect that only a smaller quantity of cargo was, in fact, sold to Terapanth. Prakash J found that the failure to disclose Terapanth's breach of contract and the consequences of the same would not have affected the arbitrator's findings on the availability of cargo for sale at the time of the breach of contract. Terapanth's breach of contract was therefore "legally immaterial" to the damages suffered by the seller as a result of the buyer's breach. There was no need, therefore, for the seller to reveal this fact and the quantum of damages awarded by the arbitrator was not procured by fraud or unconscionable conduct (at [54], [63] and [82]).

53 In addition to the earlier two requirements discussed, the winning party to the arbitration may resist the setting aside application by demonstrating a good reason for the non-disclosure: *Swiss Fortune* at [28], citing *Dongwoo* at [133]. This is the third element referred to at [47] above. In *Dongwoo*, Chan Seng Onn J held that the position in *Profilati* should not be read "in the absolute sense without any qualifications", and that if a good reason for intentional non-disclosure was shown, the resulting non-disclosure would not constitute fraudulent conduct.

54 The parties in *Dongwoo* entered into a memorandum of understanding envisaging the establishment of a joint venture, using the plaintiff (Dongwoo) as its vehicle. The parties entered into a technical assistance and trade mark licensing agreement, under which the defendant (M+H) was obliged to supply

Dongwoo with technical information so that Dongwoo could manufacture filtration products for vehicles, industrial and construction machinery, including a crank case ventilation oil separator ("the Device"). Subsequently, there was a dispute over M+H's failure to provide the requisite technical information, and Dongwoo terminated the Agreement. The parties went to arbitration and Dongwoo sought discovery of technical information relating to certain products, including the Device. The tribunal ordered the disclosure of the documents sought because it considered them to be relevant and material to the matters in dispute. M+H then wrote to the tribunal to explain that they no longer had the information requested, save for the design standard drawings of the Device, which were attached as exhibits to the letter to the tribunal. It explained that it could not disclose these documents as they were designed to specifications provided by a major customer and M+H was not permitted to disclose the information. Then, on the application of Dongwoo, the tribunal issued a second ruling affirming its first ruling, and reserving to Dongwoo the right to argue during the hearing that an adverse inference should be drawn against M+H if the documents were still not produced. M+H did not comply with either ruling. The tribunal eventually found that Dongwoo failed to establish that M+H had breached its obligations under the agreement. In relation to the Device (see [50] of *Dongwoo*), the tribunal was of the view that the confidentiality of the information relating to the Device was sufficiently established and therefore M+H's non-provision of the information requested was justified. The tribunal also accepted that the part of the Device for which Dongwoo was seeking information was very old and that M+H could not have provided the requested information. The tribunal decided against drawing an adverse inference against M+H.

55 Chan J trawled through the evidence in order to determine whether there was any *mala fides* involved. He posed the question as such (at [139]):

> 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. [emphasis added]

56 From the available evidence, he was of the view that M+H "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" (at [141]). This was because it had disclosed both the existence and contents of the design standard drawings of the Device to the tribunal (but only the existence of such documents to Dongwoo), and this was not the behaviour of a party with something damning to hide.

57 Chan J was also of the view that 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. This was in fact what the tribunal made clear and on which the tribunal invited the parties to make submissions. Further, Dongwoo could have applied to the High Court to compel production of the documents under ss 13 and 14 of the IAA (the latter section has since been repealed) if it was not content with merely arguing on the question of adverse inference but Dongwoo chose not to do so (at [143] and [145]). Ultimately, Dongwoo had the full opportunity to persuade the tribunal that an adverse inference ought to be drawn but it failed to do so.

Chan J found that the tribunal had examined the other evidence and the parties' submissions, and then exercised its fact finding and decision making powers in deciding not to draw the adverse inference even though it was entitled to do (at [146]). The requisite standard of proof to show a contravention of public policy was not met in that case (at [147]) and the application to set aside the award was dismissed.

Issues to be determined in the originating summons

58 The issues to be determined in relation to the application to set aside the award track the requirements set out at [47] above, and they are as follows:

(a) Whether there was deliberate concealment aimed at deceiving the Tribunal;

(b) Whether there was a causative link between the alleged concealment and the decision in favour of the concealing party; and

(c) Whether there was a good reason for the non-disclosure.

My decision

Issue 1 – Whether there was deliberate concealment aimed at deceiving the Tribunal

59 The Supplier submits that the Purchaser had deliberately concealed or withheld relevant and material evidence from the Tribunal because it had failed to name [E] as a witness for the hearing, even though his evidence would have been clearly relevant and material, and [E] had indicated that he was able and willing to attend the arbitration. The Supplier alleges that this was done to

deceive the Tribunal as to the true intentions of the Purchaser when the Agreement was entered into.

60 There is no dispute between the parties that the Purchaser made a conscious and deliberate decision not to call [E] as a witness and not to disclose its internal documents. There also does not appear any dispute that the Purchaser was aware of what [E]'s views were before the arbitration hearing took place. Nevertheless, in my judgment, the Supplier's argument that there was an attempt by the Purchaser to deceive the Tribunal fails on several levels.

61 First, there was no obligation on the Purchaser to call [E] as a witness or to adduce the documents that [E] now intends to produce. There was no order from the Tribunal directing the Purchaser to do so. Under the IBA Rules on the Taking of Evidence in International Arbitration ("the IBA Rules"), which governed the procedural aspects of the arbitration, the Purchaser was not under a general obligation to produce *all* documents that could be relevant and material to its case or to produce witnesses, unless it was seeking to rely on his or her testimony. Under Article 3.1 of the IBA Rules, parties are only required to voluntarily disclose documents "available to it on which it relies". In this regard, the disclosure obligations of the party in an arbitration are not as wide as those in common law jurisdiction court proceedings, where there is generally a continuing obligation to disclose documents relevant and material to the case, including documents which have the potential to adversely affect the party's own case or support the other party's case: *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon CJ *et al*) (Sweet & Maxwell, 1st Ed, 2014) at para 10.031; see also *Chantiers* at [213]–[214].

62 Secondly, the Tribunal had thoroughly considered the question as to whether [E] should be called as a witness to the arbitration. As I have mentioned earlier, after the Purchaser indicated that it would only be calling [B] as their factual witness, the Supplier applied to the Tribunal for an order that the Purchaser procure the attendance of [E] and the other two employees as witnesses.

63 By way of an e-mail dated 16 September 2014, the Supplier requested the Tribunal to order the Purchaser to "confirm that [these three] witnesses will appear at the hearing" or to "deliver the private addresses to the Tribunal" so that the three employees could be summoned directly. The Supplier followed up on this with another e-mail on the following day, explaining that the three employees had to be called "to further corroborate certain of its factual allegations" because [B] has no connection with the making of the Agreement. The Supplier also submitted that the three had to be called so that it could have the opportunity of challenging and testing the Purchaser's allegations by questioning the Purchaser's employees who were actually involved in the dispute. The Supplier also justified the legal basis of its application by reference to the Tribunal's powers under Art 4(10) of the IBA Rules to order a party to provide for the appearance of a witness whose evidence is relevant or material.

64 In its reply dated 25 September 2014, the Purchaser submitted that the application was improper and made at the eleventh hour (the hearings were scheduled to take place in Singapore on 3 and 4 November 2014). The Purchaser noted that it would be unorthodox to summon officers or employees of the other party to testify at an evidentiary hearing without first submitting witness statements or affidavits.

65 The Purchaser also made two observations: first, that the Supplier had not been specific about the expected content of the testimony that they expect from the three employees; and, second, that the stated purpose ("to further corroborate" factual allegations) made it clear that the testimony would not be material but at best be cumulative. It was also argued that the only point mentioned in the Supplier's Statement of Claim that was not corroborated by any other individual except for the three witnesses was the following:

> [The Purchaser] feared in particular that China's growing "hunger" for [the Products] (cf. Exhibit C-5) might lead to scarcity on the market and thereby jeopardize Korea's food security.

66 The Tribunal then invited a response from the Supplier. The Supplier declined, stating that it saw no benefit in a further exchange of submissions.

67 On 1 October 2014, the Tribunal communicated to the parties its decision not to order the Purchaser to call the three employees as witnesses. The Tribunal noted that it was not persuaded that the Supplier "had identified specific subjects or relevant issues on which the witness testimony is sought that would be material to the outcome of the case". It considered that it was for the Purchaser to decide whether it needed to call the three employees and if it did not do so, the Tribunal would hear submissions and be able to weigh the evidence on the relevant matters in dispute.

68 On 7 October 2014, the Supplier wrote to the Tribunal again to request that the Tribunal reconsider its decision, arguing that the non-appearance of the three employees as witnesses at the arbitration would compromise the Supplier's procedural rights. On 13 October 2014, the Purchaser restated its position in its earlier reply on 25 September 2014. On the same day, the

Tribunal informed the parties that it would not change its earlier decision not to order the Purchaser to call the three employees.

69 In the circumstances, it seems to me that the Supplier had simply been unable to persuade the Tribunal to secure the attendance of [E] because it failed to sufficiently show the materiality of [E]'s evidence, and it was not the case that the Purchaser had deceived or misled the Tribunal as to what [E]'s views were. Such situations arise regularly as a result of the cut and thrust of dispute resolution proceedings, whether in arbitration or in litigation. I did not find that it involved, as the Supplier alleged, a fraudulent suppression of evidence to deceive the Tribunal on the part of the Purchaser. There was nothing stated in the Purchaser's communications to the Tribunal, when it was considering the Supplier's application, that can be said to be untrue or misleading.

70 Moreover, the Supplier had the opportunity to submit on the significance that ought to be accorded to the non-attendance of [E] (and the other two employees) and it did so during the oral hearings as well as in its Post-Hearing Brief. The Supplier submitted that the non-attendance of these witnesses was "telling" and "clearly signalled that the Purchaser does not sincerely dispute [the Supplier's] position". This latter reference was to the fact that the Supplier argued in the arbitration that the proper interpretation of the Agreement was that the Purchaser was obliged to purchase Products from the Supplier, regardless of what Korean procurement law mandated.

71 In the Award, the majority of the Tribunal specially noted the Purchaser's failure to call [E] and the two other mentioned employees, even though they were involved in the negotiation of the Agreement. It did not, however, draw any adverse inferences. On the other hand, the dissenting

arbitrator had, in his opinion, drawn adverse inferences from the employees' non-attendance. Specifically, he held that it should be inferred that the Purchaser's factual contentions would have been contradicted by the testimony of the non-attending witnesses. While the Tribunal came to a split decision on the significance of the witnesses' non-attendance, the arbitrators were alive to the fact that [E] was not called, and none of them took the view that a fraud was being perpetrated by the Purchaser in the arbitration. Just like in *Dongwoo* (see [54] above), the Supplier had the full opportunity to persuade the Tribunal that an adverse inference ought to be drawn but it failed to convince the majority. The Tribunal then exercised its fact finding and decision making powers in deciding whether or not to draw an adverse inference. The majority decided not to do so, but the dissenting arbitrator thought it appropriate to exercise such powers in favour of the Supplier.

72 I therefore find that there was no deliberate concealment of [E]'s evidence in order to deceive the Tribunal, and that the Purchaser's conduct was not fraudulent. I agree with counsel for the Purchaser that the Supplier's real grievance is that it had failed to persuade the arbitrators in the majority to effectively penalise the Purchaser for not procuring the attendance of [E] and the other employees by drawing adverse inferences. But, this decision of the majority, being a decision within the remit of the Tribunal's fact finding and decision making powers, cannot be the subject of review at this stage and in this forum. That would be an impermissible review of part of the merits of the dispute.

73 Thirdly, the Supplier could have requested for the documents that were the subject of the subpoena during the arbitration if it truly believed that these categories of documents were crucial. Instead, its requests for the production

of documents during the arbitration were considerably narrower. For instance, one of the categories sought in a Redfern Schedule dated 30 April 2014 was a "Report by [the Purchaser] to the Korean National Audit concerning [the Project] and any related internal communication of the Purchaser". This request, which was eventually denied by the Tribunal, was said to be relevant to "demonstrate that the [Purchaser] entered into a firm commitment to purchase a minimum yearly amount of [the Products] under the Agreement and was prepared to purchase corresponding amounts". It is notable that this is the very issue that the Supplier is seeking to prove through the subpoenaed documents and [E]'s statements in his affidavit in this setting aside application. The question is why the Supplier did not apply for the documents, which are the subject of the subpoena, to be disclosed in the course of the arbitration.

74 To this, the Supplier's answer is that [E]'s evidence, and the information from him as to the existence of the Purchaser's internal documents, were not available to the Supplier at the material time and it was not open for the Supplier to approach [E] for evidence as he was an employee of the Purchaser. Additionally, the Supplier argues that it had no means of knowing or ascertaining the existence of internal documents in the Purchaser's possession, which would have supported its understanding of the parties' respective obligations under the Agreement.

75 I agree with the Purchaser, however, that these were not satisfactory explanations. First, [E] remains an employee of the Purchaser and yet the Supplier was able to obtain his evidence. Secondly, under Article 3(a)(*ii*) of the IBA Rules, a party may make a request for the production of documents as long as it reasonably believed that the requested documents exist. The Supplier does not need to be apprised of the precise nature of the documents in the Purchaser's

possession. I therefore do not think that the Supplier can maintain its position that there had been a fraudulent concealment of evidence by the Purchaser. This was a case where the internal documents were not being relied upon by the Purchaser to advance its case, and the Supplier had not applied to the Tribunal for disclosure of them when it could have done so.

Issue 2 – Whether there was a causative link between the alleged concealment and the decision in favour of the concealing party

76 Aside from there being no fraudulent concealment on the part of the Purchaser, I am also unpersuaded that [E]'s evidence, as set out in his affidavit, and the internal documents of the Purchaser showing its subjective views, could have made an impact on the Tribunal's decision in favour of the Purchaser.

77 The Supplier submits that [E]'s evidence would have impacted the Tribunal's decision in the following ways:

(a) On the threshold issue, it would have materially impacted the determination of the majority as to whether the Purchaser was "operating under any legal impediment" as a matter of Korean law and the appropriate weight to be placed on Prof Lee's opinion.

(b) It would have affected the majority's finding on the interpretation of clause 6.1 of the Agreement. The Supplier points to the Purchaser's submission in the arbitration that the objective understanding of a contract, as apparent to a reasonable person, would be adopted if "the parties' contemporaneous intent at the time of entering into a contract is not *mutually shared*" [emphasis added]. The Supplier submits that [E]'s evidence would have gone towards demonstrating that both parties shared a mutual intent that the Agreement obliged the

> Purchaser to place purchase orders for a minimum quantity of Products in accordance with its rolling forecasts.

78 I am unable to accept these arguments. I find that it is highly unlikely that [E]'s evidence would have changed the outcome reached by the majority on the threshold issue because that issue raised a question of law, not fact. This is why the majority premised its decision on the expert opinion of Prof Lee. At the time of the arbitration, Prof Lee held the position of Dean and Professor of Law at the Seoul National University. The majority accepted his views and chose to give them "due weight and respect". Conversely, the majority observed that the Supplier had not called any expert witnesses to give evidence on Korean procurement law. In fact, the Supplier had asserted in its statement of reply that it regarded the Purchaser's misinterpretation of Korean procurement law to be "so obvious" that there was no need for it to appoint any Korean law experts in response.

79 The Supplier, in the present proceedings, seeks to introduce [E]'s evidence as to the Purchaser's opinion on Korean public procurement law, but [E] is not legally trained and his views on Articles 6 and 8 of the Contract Regulations, or any of the other enactments, would surely not be legally relevant to the proper interpretation of these statutory provisions. Given that this threshold issue is purely a question of Korean law, I reject the Supplier's submission that [E]'s factual evidence, as to what he or the other employees of the Purchaser thought was the position under Korean law, would have impacted the Tribunal's decision on the issue of what was the applicable Korean law or the interpretation of Prof Lee's opinion. I should add that, in any event, Prof Lee had already applied his mind to the exceptions set out in Articles 8(1) to

8(6) of the Contract Regulations in his earlier opinion and he was of the view that the present case did not satisfy any of them, contrary to [E]'s opinion.

80 This suffices to deal with the impact that [E]'s evidence could purportedly have had on the majority's decision on the threshold issue, but I will make two further observations. First, [E]'s view that the procurement of Products under the Agreement fell within the exceptions under Articles 6 and 8 of the Contract Regulations contradicted the case that the Supplier ran in the arbitration, which was that the Agreement was exempt from the public tender requirement because it was intended to be a resale agreement. The Supplier's case in the arbitration was mainly premised on Art 4(1)(*l*) of the Contract Regulations (see [15] above). I agree with counsel for the Purchaser that this new position by the Supplier was clearly an afterthought and an attempt to seek through the setting aside of the Award a second bite of the cherry, as it is so often put.

81 Secondly, there is also reason to seriously question [E]'s views on Korean procurement law and how it applies to the case at hand. [E] claims to have the power and authority of a "Head or Person in Charge" under Article 6(1) of the Contract Regulations such that he can designate contracts to be negotiated contracts and thus cause them to be exempt from the public tender requirement. However, even on the Supplier's case, it was [C] and [D], president of the Purchaser and executive director of one of the Purchaser's departments respectively, who were the "top managers of [the Purchaser]" who participated in the negotiations and signed the Agreement. Not only that, [E] claimed that the Agreement was a negotiated contract to be "made secretly" because it concerned issues of national security. This, however, is contradicted by [B]'s unchallenged evidence at the arbitration that, in 2012 and 2013, the

Purchaser had entered into 130 food purchase contracts, of which only four were negotiated contracts, and in those cases only as a result of there being only one or no bidder participating in a prior public tender. It bears mention that the primary objection to [B]'s evidence – *ie*, that he was not involved in the negotiations leading up to the Agreement – does not affect this portion of [B]'s evidence. Hence, I found it difficult to accept [E]'s views as being credible insofar as he asserts that that food procurement contracts like the Agreement qualify under the exception under Article 8(4) of the Contract Regulations.

82 Turning to the interpretation of clause 6.1 of the Agreement, I agree with counsel for the Purchaser that [E]'s personal and subjective views as to the scope of the Purchaser's obligation under that clause would not have impacted the Tribunal's decision.

83 During the course of the arbitration, it was common ground between the parties that the Agreement would have to be interpreted in an objective fashion and from the viewpoint of a reasonable person in the same circumstances as the parties, as opposed to the subjective intentions of any of the parties.

84 The Purchaser's position was consistent throughout – it would be relying primarily on the language used in the Agreement:

(a) In its Statement of Defence, the Purchaser submitted that clause 6.1 of the Agreement was "plain and ambiguous" and the dispute could be resolved "within the four corners of the [Agreement] itself".

(b) In its Rejoinder, the Purchaser submitted that the surrounding circumstances cannot override the "clear language of the [Agreement]"

and the parties' intent can be discerned from their decision to amend "shall" to "best commercially reasonable effort" (see [27(b)] above).

(c) Counsel for the Purchaser argued during the oral opening statements that focusing on the documents would suffice, and that the Tribunal would not have to bother with what exactly any of the witnesses would say during the arbitration. Mr Kevin Kim ("Mr Kim"), who represented the Purchaser, submitted that "the agreement is so clear" and further, that there was no specific allegation of any fact that would be material to the question of the proper of the interpretation of the Agreement which would have to be responded to by factual evidence from the Purchaser. I elaborate on this further at [99] later.

85 At the arbitration, the Supplier agreed with the Purchaser that the "starting point in interpretation" is the "wording of the contract". The Supplier also relied on the proposition that "statements and contractual provisions… are to be interpreted according to the understanding that a reasonable person in the shoes of the addressee would have had". The Supplier repeatedly emphasised that the Agreement would have to be interpreted from the "viewpoint of a reasonable businessperson". I agree with counsel for the Purchaser, therefore, that the dispute before the Tribunal was undoubtedly over the right conclusion to be reached from an *objective* interpretation of the Agreement.

86 The Tribunal agreed with both parties that the starting point was the words of the clause itself, and that the proper analysis to adopt is that of a "reasonable person in the same circumstances of either of the parties". For the reasons set out at [27] above (foremost of which were how the Agreement resembled a framework agreement with many gaps, and how the obligation

under clause 6.1 of the Agreement was clearly not meant to create an absolute obligation), the Tribunal preferred the Purchaser's submissions on the interpretation to be accorded to clause 6.1 of the Agreement. Accordingly, I find that [E]'s subjective views on what obligations the Agreement entailed on the part of the Purchaser would highly unlikely have had any, let alone substantial, impact on the outcome reached by the majority of the Tribunal.

87 In the proceedings before me, the Supplier submitted that an objective interpretation of the Agreement was only adopted because there was no evidence before the Tribunal that both the Purchaser and the Supplier "shared" a common contemporaneous intention that the Agreement was to be a negotiated contract which imposed on the Purchaser a binding obligation to place a minimum order (see [77(b)] above). It was argued that [E]'s evidence would therefore have "drastically altered" the Tribunal's interpretation of the Agreement.

88 The difficulty with this submission is that what is required is not "intent" that is privately held or "unspoken", but "subjective intent" that has been manifested in some fashion and communicated "across the table" to the counterparty, and from which one could draw the conclusion represented the "common intent" of the parties. Put another way, it would have been of no assistance to the Tribunal on the interpretation of the Agreement if the Purchaser and the Supplier both subjectively held views on what the contractual obligations would require, but neither party had communicated these views to the other side.

89 Article 8 of the CISG, which governs the interpretation of the Agreement, provides as follows:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

90 The 2012 edition of the UNCITRAL "Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods", which the Purchaser relies on, contains useful commentary on Article 8 of the CISG. I set out the relevant extracts here:

> SUBJECTIVE INTENT OF THE PARTY (ARTICLE 8, PARAGRAPH 1)
>
> 6. … According to one court, "article 8(1) of the CISG, in recognizing subjective criteria for interpretation, invites an inquiry as to the true intent of the parties, but excludes the use of in-depth psychological investigations. Therefore, if the terms of the contract are clear, they are to be given their literal meaning, so parties cannot later claim that their undeclared intentions should prevail."
>
> …
>
> 8. The subjective intent of a party is irrelevant unless it is manifested in some fashion; *this is the rationale behind one court's statement that "the intent that one party secretly had, is irrelevant".* A different court stated that, due to *the need that the intent be manifested in some fashion*, the "Convention is indeed governed by the principle of reliance that is common to numerous legislations: it is applied to expressed declarations and to communications, but also to the persuasive conduct exhibited before or after the conclusion of a contract".
>
> [emphasis added]

91 In the present case, sub-article (1) is inapplicable as it has not been shown that the Purchaser "knew or could not have been unaware of what the [Supplier's] intent was". In any event, the Supplier does not rely on Article 8(1)

of the CISG. Also, [E] does not purport to give evidence as to the Purchaser's knowledge of the Supplier's intent – rather his focus is on the Purchaser's "understanding" and "actual knowledge" about its obligations under the Agreement.

92 I reiterate the important point that it is not in dispute that, in the negotiations leading up to the Agreement, there was no mention by either side of the public tender requirement. Any subjective intent of the parties about the extent to which obligations under the Agreement were immediately binding was therefore "secretly had", not "manifested in some fashion". Hence, to my mind, they would be clearly irrelevant. In this regard, it would be recalled that [H]'s (the Supplier's witness) evidence was that the Purchaser never even mentioned the public tender requirement during the pre-contract phase. The Supplier also conceded, in the arbitration, that "its representatives did not raise the issue during the pre-contract discussions". The Supplier, in its written submissions for the present proceedings, confirms again that it is common ground between the parties that "there was no communication at all between the parties regarding a public tender during the negotiations leading up to the Agreement" (see also [26] above). As such, the subjective intent of [E] is legally immaterial and it would not have had any impact on the interpretation of clause 6.1 of the Agreement.

93 What I have stated above on why [E]'s testimony would be irrelevant to the Tribunal's determination of the proper interpretation of clause 6.1 of the Agreement applies equally to the documents which are the subject of the subpoena. The internal documents of the Plaintiff, which may show its employees' subjective understanding of the scope of its obligations under the

Agreement, are not relevant since there is no allegation that any such documents were shared with the Supplier in the course of the pre-contractual negotiations.

94 [E]'s evidence and the Purchaser's internal documents also do not address the majority's alternative finding that the requirement for a public procurement contract to be concluded by means of a competitive tender was a usage impliedly applicable to the Agreement pursuant to Article 9(2) of the CISG (see [28] above) given that parties had not agreed to exclude this usage. This finding was premised on the expert evidence of Prof Kwon, as well as [B]'s unchallenged evidence on the Purchaser's "uniform practice… to hold public tenders for the purposes of procurement". The majority took the view that the Supplier ought to have known of this usage, given the Supplier's and its legal advisors' experience, as well as the "near-universally established practice" of competitive tendering for public procurement contracts.

95 For the reasons above, I find that the non-disclosure of [E]'s views and the Purchaser's internal documents would not have impacted the outcome of the arbitration.

Issue 3 – Whether there was a good reason for the non-disclosure

96 I start by pointing out that this third factor for consideration does not appear to me to add very much to the analysis in this case since the reasons for the non-disclosure were already considered when I decided whether the Purchaser had acted to deceive the Tribunal by not disclosing relevant and material evidence. In any event, it would flow from my discussion on the first two issues that the Purchaser's decision not to call [E] as a witness was a legitimate one. Given that there were no discussions whatsoever on the public tender requirement, the Purchaser had good reason to believe that its own

internal documents and communications that were never communicated to the Supplier were legally immaterial. It therefore rested its case on the words used in the Agreement, with a view to supplementing its case with factual evidence if it because necessary to do so.

97 The Purchaser explained its approach to the Tribunal at various junctures. In his oral opening statement, Mr Kim (the Purchaser's counsel) stated:

> "RC: One last thing. Claimants [the Supplier] argue that respondent bring some of our employees to testify in this arbitration. Respondent [the Purchaser] consider, or respondent counsel review claimant's evidence and try to see what the claimant's witness say in their witness statement, or any evidence to show that any of our employees say something in the negotiations or in any commitment.
>
> We couldn't find any single evidence or specific arguments. In claimant's witness evidence does not suggest any particular person say any particular thing or conduct anything in a particular occasion.
>
> We see no reason to bring our employees to this arbitration. Of course this arbitration is quite simple. The tribunal can just look at the agreement and interpret the contract, we don't have to bother by hearing about what happens in the negotiated history whatever, because documents shows quite enough.
>
> But there's no specific allegation or evidence from the claimant's side, and we have no reason to bring out witness. I think that close my opening. Thank you.
>
> AT: Thank you Mr Kim. I have a couple of questions if I may.
>
> On the last point which you mentioned there was nothing in the claimant's witness statements as to - questions as to fact to which you might disagree. The claimant's position is that in the negotiations leading up to the contract there was no mention of a requirement for public tenders.
>
> RC: Yes.

> AT: Is that common ground on both sides? Common ground that during the discussions or negotiations leading up to the contract there was absolutely no discussion on public tenders? That is the claimant's position?
>
> CC: Certainly.
>
> AT: I'm trying to see if it's common ground.
>
> RC: Yes, because in this transaction in entering the negotiation, nobody ask whether it's public tender or negotiated contract, and the respondent's case is that because it's so clear, and if claimants want exception, claimants raise the issue and specify in the contract. No discussion at all. And the claimant is experienced … trader, and then they have an agent in Korea, they're always dealing with the procurement process. They always participate public tender process.
>
> AT: So in short, Mr Kim, the respondent's position is that the claimants either knew or ought to have known –
>
> RC: Yes.
>
> AT: - that there was a requirement for a public tender?
>
> RC: Yes."

98 As can be seen from the exchange with the Tribunal (referred to as AT) quoted above, the key point emphasized by the Purchaser's counsel (referred to as RC) was that there was no mention in the pre-contractual negotiations to the need or otherwise for a competitive public tender. This was confirmed by the Supplier's counsel (referred to as CC) to the Tribunal. It was thus explained to the Tribunal why the Purchaser did not see the need for any of its employees involved in the negotiations for the Agreement to give evidence as witnesses.

99 There was yet a further illuminating exchange between the Tribunal and Mr Kim later during the oral opening statement where Mr Kim was asked about this decision not to call the employees involved when the Agreement was made:

> AT: … As I see it, your side doesn't have anyone who can testify as to what the contemporary understanding was

> about the negotiation of the contract, or about the fairly extensive correspondence between the parties after the signing of the contract. And I'm trying to understand how, from our standpoint, we're supposed to handle that…
>
> RC: But in case of evidence, if you read witness statement from claimants, there's no specific allegation. There is no specific thing said by any particular person. So they just say three persons, three employees. We don't know which persons say what….
>
> And even if somebody said in the course of negotiation, the agreement is stipulated in the contract. That's the agreement… this case is so obvious. That the agreement is stipulated at the last version in the agreement, and then in this arbitration we try to find any documents, anything to indicate that anybody does say this is just not public tender. It's just a negotiated contract. No single document, no evidence at all.
>
> So that's why we believe that. In normal case, if there are any evidence, competing evidence – we will be happy to bring our directors or the president or whoever is involved in this transaction or a final decision-making process.
>
> But we don't feel that we must bring our CEO in this arbitration who made the final decision because the agreement is so clear, and there is no evidence from the claimant's side to say our CEO says something or any decision-maker says something.
>
> AT: So as I understand it, you think the agreement is so clear it doesn't need reference to other sources of interpretation?
>
> RC: In addition to that, there is no –
>
> AT: There's no specific – as I hear you, there's no specific allegation of fact regarding any material question relating to the interpretation agreement which has been raised by the claimant, which you think needs to be responded to by factual evidence on your side. That's what I understand.
>
> RC: Yes. Exactly, thank you.

100 Given that the Purchaser had clearly explained its position to the Tribunal, it can scarcely be said that it had sought to commit fraud. There is no

suggestion that the oral explanation provided by Mr Kim to the Tribunal was not true, inaccurate or misleading in anyway. Instead, it was the Supplier that failed to satisfy to the Tribunal, following its application on 16 September 2014, on the need for the attendance of the three employees in question. And, even after the Supplier failed to secure the attendance of [E] and two other employees of the Purchaser as witnesses, the Supplier still had then opportunity to persuade the Tribunal that an adverse inference should be drawn. However, on the evidence, it failed to convince the majority of the Tribunal that it would be appropriate for an adverse inference to be drawn.

101 In sum, I find that the decision not to call factual witnesses aside from [B] was a legitimate approach employed by the Purchaser that was grounded on the principles of contractual interpretation under the CISG. In other words, there was good reason for the decision not to call the three employees as witnesses. Also, as Chan J observed in *Dongwoo* at [143], the intentional decision to take the risk of having an adverse inference drawn against a party was part of the adversarial process and not unconscionable conduct. Furthermore, the factual evidence of laypersons would have been irrelevant for the threshold issue of whether there was a public tender requirement under Korean law.

102 Similarly, in light of the approach which the Purchaser took in its defence in the arbitration, there was no necessity for the Purchaser to disclose its internal documents, which it did not intend to rely on. There is no allegation by the Supplier in the arbitration or in the proceedings before me that the Purchaser had breached any order for the disclosure of documents in the arbitration. So, again there was good reason for these internal documents not to

have been disclosed. In such circumstances, it cannot amount to fraud that the subpoenaed documents were not disclosed in the course of the arbitration.

The subpoena to produce the Purchaser's internal documents

103 The applicable principles in relation to the setting aside of subpoenas are not disputed. What is sought in a subpoena for the production of documents must be "relevant, material and necessary for the fair disposal of the matter": *The Lao People's Democratic Republic v Sanum Investments Ltd & Anor* [2013] 4 SLR 947 at [24]. It follows from my discussion above that the subpoenaed documents would not be relevant or necessary for the disposal of this originating summons for the setting aside of the arbitral award.

104 These documents were sought in order to corroborate what [E] had stated in his affidavit in support of the application to set aside the Award. I have already found that, even if one is to accept what [E] has stated in his affidavit to be true, his evidence does not support the Supplier's case that the Award ought to be set aside on the basis of fraud and or public policy. Hence, the documents sought via the subpoena are legally irrelevant and or unnecessary for the determination of the originating summons.

105 The threshold for setting aside a subpoena is not an easily surmountable one, but it will be crossed when the documents sought are clearly irrelevant, as I have found above, or when the subpoena application is an abuse of process or where it has been issued for a collateral purpose: *ALC v ALF* [2010] SGHC 231 at [19]–[21]. I also find the subpoena to be an abuse of process. In my view, the Supplier is seeking to reopen the arbitrated dispute through a backdoor appeal on the merits. This is clear from the way it has changed its case on the threshold issue on Korean procurement law (see [34] and [80] above), and from

the way it is seeking to adduce irrelevant material on [E]'s uncommunicated subjective intent when it was content to argue its case on the basis of an objective interpretation of the Agreement at the arbitration.

106 I should also add that, when new evidence is being introduced to demonstrate fraud at the setting aside stage, the applicant would have to demonstrate why, at the time of the arbitration, the new evidence was not available or could not have been obtained with reasonable diligence: *Double K Oil* at [33] citing *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 at 77; *Chantiers* at [59]. I did not accept that the Supplier had provided satisfactory explanations as to why it could not have applied for disclosure of these internal documents of the Purchaser in the course of the arbitration (see [75] above).

107 There was also no explanation as to why the Supplier had not sought curial assistance for the production of documents under s 13 of the IAA from [E] (assuming that he was prepared to accept service of the subpoena as has done now) while the arbitration was still ongoing if it really thought such documents were critical and was not content to argue its case based on adverse inferences: see *Dongwoo* at [145]. If that had happened, the issue of relevance of the documents might well have been thrashed out and determined at that stage, either in court or before the Tribunal, instead of after an unsuccessful outcome in the arbitration by way of a setting aside application. In my view, the subpoena issued to [E] is part of an attempt by the Supplier to re-arbitrate the merits of the dispute on the basis of new documents by first getting the Award set aside on rather spurious allegations of fraud and public policy. Such conduct amounts to an abuse of process. In the circumstances, I set aside the subpoena to produce documents.

Conclusion

108 For the reasons set out above, I allow SUM 1731 (the Purchaser's application to set aside the Supplier's subpoena) and I dismiss Originating Summons No 249 of 2016 (the Supplier's application to set aside the Award).

109 I will hear the parties separately on the question of costs.

Ang Cheng Hock
Judicial Commissioner

Jainil Bhandari, Tng Sheng Rong and Stella Ng (Rajah & Tann Singapore LLP) for the plaintiff;
Lin Weiqi Wendy, Jill Ann Koh Ying and Wong Yan Yee (WongPartnership LLP) for the defendant.