

## Setting aside of an arbitral award on public policy grounds: *AJU v. AJT* [2011] SGCA 41

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The recent decision of the Singapore Court of Appeal in *AJU v. AJT* [2011] SGCA 41 is instructive as to the Courts' approach to arbitral awards that conflict with public policy in Singapore. This case concerned an interim award upholding the validity of an agreement to withdraw certain criminal complaints in Thailand.

The appellant had entered into the agreement with the respondent on 4 February 2008, whereby the appellant agreed, among other things, to withdraw a fraud complaint made to the Thai authorities against some parties. The Thai authorities commenced investigations against the relevant parties for fraud and forgery. Some of these offences were not compoundable under Thai law.

In the arbitration, the respondent argued that the agreement was illegal, being contrary to Thai law, and to public policy in both Thailand and Singapore. The arbitral tribunal rejected the respondent's argument, and rendered an interim award affirming the validity and enforceability of the agreement.

The respondent then applied to the High Court, and obtained an order from the judge setting aside the interim award pursuant to Article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). The judge held that the agreement was intended to stifle the prosecution in Thailand of the offences in the complaint, which were not compoundable under Thai law. The agreement was thus illegal both under Singapore law (the governing law of the agreement) and Thai law (the law of the place of performance).

Article 34(2)(b)(ii) of the Model Law provides that an arbitral award may be set aside by the Court only if it is in conflict with the public policy of the state. The Model Law is applicable in

Singapore, by operation of section 3 of the International Arbitration Act (Cap. 143A).

The Court of Appeal, in allowing the appeal against the High Court's decision, agreed with the judge that the Court could decide for itself whether the agreement was illegal or contrary to public policy. Should the Court decide that the agreement was tainted with illegality, it would be entitled to set aside the interim award. However, this did not mean that in every case where illegality was invoked with regard to the underlying contract, the Court would be entitled to re-open the arbitral tribunal's finding that the underlying contract was not illegal.

The different conclusions reached by the arbitral tribunal and the High Court judge arose from a different finding of fact. The arbitral tribunal held that a plain reading of the agreement did not disclose illegality, while the High Court judge held that the tribunal should not have taken a literal reading of the words of the agreement, but should instead have considered all the surrounding circumstances pointing to the illegality of the agreement. The Court of Appeal held that the arbitral tribunal did not ignore palpable and indisputable illegality, nor was it so clear that the agreement was tainted by illegality. In the circumstances, the judge was not entitled to reject the arbitral tribunal's factual findings and to substitute his own findings.

The general principle was that even if the tribunal's findings of law and/or fact were wrong, such errors would not in themselves engage the public policy of Singapore, unless the error of law concerned what the public policy of Singapore was. This was a question of law, and only an error of law in this regard could justify the setting aside of an arbitral award pursuant to Article 34(2)(b)(ii) of the Model Law.

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