

Singapore Court of Appeal re-affirms commitment to minimal intervention of arbitral awards at the intersection of illegality and public policy

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At the Herbert Smith Singapore Management University Asian Arbitration Lecture delivered by Michael Hwang SC on 4 August 2011, Hwang SC discussed incisively issues concerning the enforcement of arbitral awards concerning contracts allegedly tainted by corruption.

Less than three weeks after that seminal lecture, the Singapore Court of Appeal in *AJU v AJT* [2011] SGCA 41 weighed down on a different side of the same coin. The Singapore High Court had set aside an international arbitration award on public policy grounds for the first time, by finding that the underlying contract was illegal. Chief Justice Chan Sek Keong, writing for the Court of Appeal, reversed that decision. The judgment engaged the vexed issue of how far a court can re-open a tribunal's finding that the settlement agreement was valid and decide for itself that the agreement was illegal. In opting for what commentators call a standard of "minimal review", the Court of Appeal's decision reflects its continued commitment to the autonomous nature of the arbitral process.

Facts

The facts, involving the rights to stage a tennis tournament in Bangkok, are intriguing and therefore require a longer narrative than usual. AJT was a British Virgin Islands company and AJU was a Thai company. AJU had entered into a contract with P, enabling AJU to stage an annual tennis tournament in Bangkok for a term of five years. AJT was P's assignee under that contract. Consequent to disputes arising out of that contract, AJT commenced arbitration proceedings against AJU.

AJU then made a complaint of fraud to the Special Prosecutor's Office of Thailand against (i) Mr O, the sole director and shareholder of AJT; (ii) P; and (iii) Q, another company related to AJT. The complaint was made on the basis of a document, which AJU alleged was forged, purportedly showing that Q had the right to organize the said tennis tournament for five years. The Thai police commenced investigations against Mr O, P and Q on charges of joint fraud, joint forgery and the use of a forged document. Under Thai law, fraud is a compoundable offence, whereas forgery and the use of a forged document are non-compoundable. Generally speaking, if an offence is compoundable, the complainant has the right to withdraw his or her complaint, but not in the case of a non-compoundable offence.

As the investigations were ongoing, the parties concluded a settlement agreement. The settlement essentially provided for AJT to terminate the arbitration when AJU received evidence of the withdrawal, discontinuation or termination of all criminal proceedings against Mr O, P and Q. AJU was also required to pay US\$470,000 to AJT as final settlement of the arbitration.

Consequently, AJU withdrew its complaint to the Thai police and paid the settlement sum. The Thai police issued (i) a cessation order for the fraud charge; and (ii) citing insufficient evidence, a non-prosecution order for the forgery charges. However, AJT was dissatisfied because it took the view that the forgery charges against Mr O, P and Q could be reinstated if fresh evidence arose, even though AJU had re-assured AJT in writing that it would not reopen any or all of the charges.

But AJT refused to terminate the arbitration. AJU made an application to the arbitral tribunal to terminate the proceedings on the grounds that parties had reached a full and final settlement. AJT responded by challenging the enforceability of the settlement agreement on grounds of duress, undue influence and illegality. Parties agreed to have the tribunal determine the issue of the validity of the settlement agreement.

In an interim award, the tribunal held that the settlement agreement was not procured through undue influence, duress, and it was not illegal. The tribunal also dismissed the allegation that the non-prosecution order was procured by bribery. Accordingly, the tribunal terminated the arbitration.

Decision

AJT applied to the High Court to set aside the interim award, on the bases that (i) the settlement agreement was illegal because it was an agreement between the parties to stifle the prosecution of non-compoundable offences in Thailand; and (ii) bribery had been involved in the procurement of the non-prosecution order.

Rejecting the latter ground, the learned Judge accepted the former ground, and on that premise, set aside the award for being in conflict with the public policy of Singapore. In doing so, the learned Judge reviewed, *inter alia*, *Soleimany v Soleimany* [1999] QB 785 ("*Soleimany*") and *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and ors* [2000] 1 QB 288 ("*Westacre*").

On appeal, the key issue turned on whether the Judge was correct in re-opening the tribunal's finding that the settlement agreement was valid and decide for itself that the agreement was illegal. Before the Court of Appeal grappled with that issue, it first made explicit an underlying assumption that had surfaced in its previous decision of *CRW Joint Operation v PT Persusahaan Gas Negara (Pereso) TBK* [2011] SGCA 33 ("*CRW*") where the Court did not differentiate between the tests for enforcement and annulment challenges. In this case, CJ Chan stated specifically that the public policy of Singapore under both the setting aside and enforcement regimes was the same. It had been suggested by commentators that the threshold for invoking public policy to set aside an international arbitration award may be lower than that required to resist the enforcement of a foreign arbitral award ostensibly because the former may involve local concerns.

The Chief Justice rejected any such dichotomy on the basis that, under Singapore's International Arbitration Act, all awards – whether made in Singapore or not – are treated as having an "international focus". Consequently, awards made in Singapore should not have to bear greater scrutiny under the lens of public policy. This rejection of any parochialism towards awards made in Singapore set the tone for the rest of the judgment. Turning to the key issue at hand, the Chief Justice considered the two different approaches adopted under English case law:

(a) the "less interventionist" approach of Colman J at first instance in *Westacre* and the majority approach of the English Court of Appeal in *Westacre*, essentially giving a greater degree of deference

to a tribunal's findings as long as the illegality argument was made, entertained and ruled upon; and

(b) the "more interventionist" approach of *Soleimany* (where Waller LJ delivered the judgment) and the dissent of Waller LJ in *Westacre*, essentially requiring the court, if there is prima facie evidence of illegality, to ask as a two-stage test: first, whether to give full faith and credit to the award; and only if the court was satisfied that the award was unsafe, should the court embark on a more elaborate inquiry on the issue of illegality.

The High Court appeared to prefer the latter approach but had, as pointed out by commentators as well as the Court of Appeal, omitted the first-stage analysis.

The Court of Appeal charted a different path from the High Court by endorsing the former approach, stating that was "consonant with the legislative policy" of Singapore's International Arbitration Act of "giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards". CJ Chan clarified that the Court was entitled to decide for itself, as a matter of law, what the public policy of Singapore is, and in turn, whether any agreement governed by Singapore law is illegal. However, it was not prepared to do so in the case at hand. The core reasoning can be summarised as follows:

(a) The tribunal did not ignore palpable and indisputable illegality and had considered all relevant surrounding circumstances in interpreting the settlement agreement;

(b) The tribunal had found as findings of fact that, inter alia, the intentions of the parties when they signed the settlement agreement did not involve the giving of bribes to government officials, and that AJT signed the settlement agreement even though it knew that AJU's withdrawal of the police complaint would not terminate proceedings in respect of the forgery charges; and

(c) The (il)legality engaged in the present case was premised upon those findings of fact which ought not have been re-opened by the court because the public policy objection is limited to findings of law made by a tribunal, to the exclusion of findings of facts, absent fraud, breach of natural justice or some other recognized vitiating factor.

Interestingly, the Court of Appeal cited section 19B(1) of the International Arbitration Act which in essence provides that the effect of an international arbitral award shall be final and binding on the parties as calling for the Court to give deference to the factual findings of the tribunal.

The Court of Appeal also disapproved of the approach taken in another High Court decision (*Rockeby biomed Ltd v Alpha Advisory Pte Ltd* [2011] SGHC 155) which, mirroring the Paris Court of Appeal decision of *European Gas Turbines v Westman International Ltd*, XX Yearbook of Commercial Arbitration 192 (cf. *M Schneider Schaltgeratebau und Elektroinstallationen GmbH [Austria] v. CPL Indus. Ltd. [Nigeria]* (10 September 2009)), had embarked on a *de novo* examination of "the facts of the case afresh".

The Court of Appeal's eschewal of Waller LJ's two-stage approach may raise concerns among those who fear that this gives *carte blanche* to arbitral tribunals dealing with issues concerning illegality. This is especially so if, adopting the Court's characterisation, the issue of illegality can be framed by the parties or the tribunal as being premised upon certain findings of fact, such as the parties' intentions when they concluded the underlying contract.

To some degree any criticism that the preferred approach may be too *laissez faire* can be assuaged upon a closer examination of the rigour by which the Court dissected the award. While the Court emphasised that parties must live by their choice of arbitration and arbitrators and any errors of finding of facts and/or law should not normally be subject to subsequent court review, the Court went

to some length to satisfy itself that the issue of illegality was indeed raised, entertained and disposed by the tribunal — not only did the Court look at the composition of the tribunal, it delved into the reasoning of the award and the language of the settlement agreement in order to satisfy itself that the issue of illegality had been dealt with.

In doing so, it is submitted that it may be inevitable that such an analysis will shade into the first stage of Waller LJ's two-stage test, albeit not to the extent envisaged by Waller LJ. Although not expressed in this manner, the tone of the analysis undertaken by the Court could be read to be saying that, even if one applied Waller LJ's two-stage test in the present case (as the majority did in *Westacre*), the Court was satisfied that "this was not an appropriate case for the Judge to reopen the Tribunal's finding".

That the Court was by no means *laissez faire* and always bore in mind the justice of the case at hand is no better exemplified by how, for completeness, it went on to opine that, contrary to the Judge below, in its view the settlement agreement was not illegal in any event.

This judgment joins the contemporary series of arbitration-related decisions from the Singapore Court of Appeal that have, without fail, expressly underscored an attitude of minimal curial intervention, healthy respect for the arbitral process, and giving due effect to commercial decisions to enter into arbitration agreements. In its previous decision of *CRW*, the Court (*per* VK Rajah JA) has shown that in an appropriate case, it will not flinch from setting aside an international arbitration award "once a statutorily prescribed ground is clearly established".

It is interesting to postulate how the deference to a tribunal's findings of fact exemplified in the present case would play out in the *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 ("*Dallah*") scenario — the English Court of Appeal decision was cited in the present case — where the jurisdiction of the tribunal (a question of law) turned upon whether the parties had the common intention to be bound by the arbitration agreement (a question of fact).

It would not be difficult to hypothesize that the Singapore Court of Appeal may, by dint of the reasoning employed in the present case, defer to a tribunal's finding of whether there was common intention between the parties, and consequently the finding on jurisdiction. Yet in *Dallah*, Lord Mance, in response to counsel's submission that deference ought to be given to a tribunal's finding on jurisdiction, said that the party seeking to enforce the award "starts with the advantage of service, it does not start fifteen or thirty love up." Be that as it may, specifically how and when the public policy objection will be successfully invoked in Singapore -- and how the Court will tame the proverbial unruly horse — will now have to await a re-match.

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