AJT *v* AJU
[2010] SGHC 201

Case Number	: Originating Summons No 230 of 2010
Decision Date	: 16 July 2010
Tribunal/Court	: High Court
Coram	: Chan Seng Onn J
Counsel Name(s)	: Dinesh Dhillon, Felicia Tan and Emmanuel Duncan Chua (Allen & Gledhill LLP) for the plaintiff; Chua Sui Tong, Edwin Cheng and Daniel Tan (Wong Partnership LLP) for the defendant
Parties	: AJT — AJU

Arbitration

[LawNet Editorial Note: The appeal in Civil Appeal No 125 of 2010 was allowed by the Court of Appeal on 22 August 2011. See [2011] 4 SLR 739; [2011] SGCA 41.]

16 July 2010 Judgment reserved.

Chan Seng Onn J:

1 The plaintiff, AJT, took out Originating Summons No 230 of 2010 to set aside the Interim Award issued on 1 December 2009 ("the Award") in SIAC Arbitration ARB No 86 of 2006 (the "Arbitration"), on the grounds that the Award is contrary to:

(a) the public policy of Singapore; and/or

(b) the principles of natural justice. [note: 1]

2 The Award relates to the validity of an agreement entered into between AJT and the defendant, AJU, to terminate the Arbitration ("the Concluding Agreement").

Background facts

3 AJT is a company incorporated under the laws of the British Virgin Islands and AJU is a public company incorporated under the laws of Thailand whose principal business is that of production of television programmes and the promotion of shows and events. [note: 2] The Arbitration relates to claims brought by AJT against AJU under an agreement between [P] (a related company of AJT) and AJU. Consequent to disputes arising under the agreement, AJT, as the assignee of [P] under the agreement, initiated the Arbitration against AJU by serving a Notice of Arbitration on AJU on 21 August 2006.

4 On 21 November 2006, AJU made a complaint of fraud, forgery and the use of a forged document to the Thai police ("the Complaint") against AJT's sole director and shareholder, Mr [O] ("[O]"), [P], and [Q], another company related to AJT. The Thai police commenced investigations against all three pursuant to the Complaint. It is important to note at this point that under Thai law, fraud is a compoundable offence whilst forgery and the use of a forged document are both non-

compoundable offences. [note: 3]

5 While the police investigations were ongoing, the parties discussed and negotiated a settlement of their disputes and entered into the Concluding Agreement dated 4 February 2008. The salient terms were as follows: [note: 4]

(a) Clause 1 provided that "the Closing Date hereof [should] be the date that [AJU] has received the evidence of withdrawal and/or discontinuation and/or termination of all Criminal Proceedings" from the public prosecutor and/or the relevant authorities (the "Closing Date");

(b) Clause 3 provided that "[t]he Agreed Final Settlement Amount [amounting to US$470,000.00], subject to the other terms and conditions of this Agreement, [should] be paid for value on the Closing Date to [AJT]'s bank account";

(c) Clause 5.3 (i) provided that each party should, at the Closing Date, "take all such steps as are necessary or desirable to simultaneously and irrevocably terminate, withdraw and discontinue all actions, claims and counterclaims as applicable to the respective Parties in the Proceedings and in any other form of legal or other action, as well as to vacate any judgments, awards, or enforcement that may have been issued or are subsequently issued";

(d) Clause 8 provided that all claims between the parties would be deemed to have been fully settled; and

(e) Clause 9.1 provided that the Concluding Agreement should be governed by and construed in accordance with the laws of Singapore.

6 Soon after the Concluding Agreement was signed, AJU withdrew its complaint to the Thai Police, stating that the parties had reached an agreement and that AJU had no intention to proceed with further actions against [O] – whether civil, criminal or upon any other grounds. [note: 5] Consequently, in a letter dated 7 March 2008, the Special Prosecutor's Office, Criminal Litigation Section revealed that a cessation order ("Cessation Order") had been issued in respect of the criminal investigations. [note: 6] The relevant portion of the letter stated that:

> "The prosecutor has issued a cessation order not to prosecute the three alleged offenders with respect to the charges of joint fraud because the injured person has withdrawn its complaint, and had a non-prosecution opinion not to prosecute [[O]], the alleged offender number 3, with respect to the charges of the joint forgery and the use of the forged document."

7 Payment of US$ 470,000.00 was made by AJU to AJT on 11 March 2008. On 10 June 2008, the Thai Prosecution again confirmed that a non-prosecution order had been issued with respect to the charges of forgery and the use of the forged document "because the evidence is not enough to prosecute". [note: 7] On 18 June 2008, AJU gave [O], [P] and [Q] a letter of guarantee that it would not reinitiate criminal proceedings against them even though this letter of guarantee was not required under the terms of the Concluding Agreement. In the same letter, AJU requested AJT to withdraw and terminate all existing arbitration proceedings no later than 25 June 2008. [note: 8]

8 In his response dated 25 June 2008, [O] however accused AJU of failing to comply with its obligations under the Concluding Agreement. According to him, the Concluding Agreement was meant to bring the Thai police investigations to an end; a mere statement from the Thai Prosecution that there was insufficient evidence in respect of the forgery charges was unacceptable because the

investigations could still be reactivated by new or additional evidence. [note: 9] As a result of AJT's refusal to terminate the Arbitration, AJU formally applied on 30 June 2008 to the Tribunal to terminate the process on the ground that the parties had reached a full and final settlement of all claims between themselves. [note: 10]

9 Through its then lawyers, AJT challenged the validity and enforceability of the Concluding Agreement on grounds of duress, undue influence and illegality. It initially took the position that the Tribunal had no jurisdiction to determine the validity of the Concluding Agreement. However, at a procedural meeting held on 16 December 2008, the parties agreed to have the Tribunal determine the preliminary question of whether the Concluding Agreement should be set aside or declared void on the basis of duress, undue influence and/or illegality. The parties further agreed that if the Tribunal found that the Concluding Agreement was valid, the Arbitration would terminate automatically with immediate effect. Conversely, if the Tribunal was of the opinion that the Concluding Agreement was void, the Arbitration would continue.

Findings of the Tribunal

10 After a 5-day hearing, the Tribunal decided that the Concluding Agreement was not illegal. The relevant portions of the Award are as follows:

> 109 Since the termination of the proceedings lies entirely in the hands of the Public Prosecutor, the only sensible and reasonable agreement parties could make would be that the Concluding Agreement would take effect only upon receipt of the non-prosecution order from the Thai authorities.
>
> 1 1 0 *The plain reading of Clause 1 does not suggest whatsoever that the Concluding Agreement was for an illegal purpose or that some illegal acts would be performed by the Respondent*.
>
> 1 1 1 *As drafted*, no contractual obligation was imposed on [AJU] to produce the non-prosecution order issued or that [AJU] would *cause or influence* the Public Prosecutor to issue such an order.
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> 112 There has been no suggestion that the withdrawal of the complaint on fraud was illegal. In fact, they wanted the complaint withdrawn. The only difficulty facing the parties was that the complaint on fraud had brought about the forgery charges as well. *We are of the view that consequent to the withdrawal of the fraud complaint, so long as the Public Prosecutor retains the power and right to continue with their investigations on forgery with whatever evidence they have or uncover*, [AJU]'s withdrawal of their complaint cannot be said to be illegal whatsoever.
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> 113 In the circumstances, the Concluding Agreement and its terms thereof cannot be said to be illegal.
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> [emphasis added]

11 As for the allegations that the Concluding Agreement was procured by undue influence or duress and the allegation that AJU had bribed the Thai authorities in order to obtain the non-prosecution order, the Tribunal found that there was insufficient evidence to support the same. [note: 11]

The issues raised in OS 230/2010

Whether the Award was contrary to public policy

12 AJT submitted that the Award should be set aside on the basis that it was contrary to public policy because of the following reasons:

(a) the Concluding Agreement, which the Award seeks to uphold, sought to stifle the prosecution of a non-compoundable offence;

(b) the Award sought to enforce a contract that was illegal and unenforceable in Thailand; and

(c) bribery and/or corruption of a public authority were involved in the performance of the Concluding Agreement.

13 AJT further submitted that the Award should be set aside as there was a breach of natural justice. However, for reasons which will be explained below, this submission will only be briefly dealt with at the end of this judgment.

General scope of the public policy principles

14 Before considering the merits of AJT's application, it is useful to first set out the relevant legal principles in relation to the setting aside of arbitration awards. Article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") set out in the First Schedule of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") provides that an arbitral award may be set aside only if the court finds that the award conflicts with the public policy of the State. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, the Court of Appeal held at [57] that errors of law or fact, *per se*, do not engage the public policy of Singapore under Article 34(2)(b)(ii) of the Model Law. The Court of Appeal further stated at [59]:

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" (see *Downer Connect* … at [136]), or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, *per* Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe General de L'Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir,1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at p 914):
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> > In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice*… It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus instances such as

corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.

In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] SGHC 62, Prakash J reiterated the principle she enunciated at [17] of *VV v VW* [2008] 2 SLR(R) 929 that assertions of breach of public policy cannot be vague and generalised. The party seeking to challenge an award has to identify the public policy which the award allegedly breaches and to show which part of the award conflicts with that public policy. Prakash J further cited *PT Asuransi* and stated that in order for a plaintiff to succeed on the public policy argument, it has to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice.

15 Thus, in order for AJT to succeed in setting aside the Award on the ground that upholding the Award would be in conflict with the public policy of Singapore, it has to establish, first, that the Tribunal decided erroneously on the issue of illegality of the Concluding Agreement. Next, it has to show that the error was of such a nature that enforcement of the Award would "shock the conscience," be "clearly injurious to the public good" or would contravene "fundamental notions and principles of justice".

16 In determining whether the Tribunal decided correctly on the issue of illegality of the Concluding Agreement, the approach of the Court in exercising its supervisory jurisdiction has to be borne in mind. In Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (London Informa, 2009), the authors stated the following at p 75:

> The mere fact that an award contains an error of law is not enough. The cases recognise public policy issues in the following situations:
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> …
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> (c) [T]he award is tainted by illegality. If the arbitrators have jurisdiction under the arbitration clause to determine the legality of the underlying contract, and have concluded that the contract is valid under its applicable law, the award is generally enforceable even though the contract was illegal in the place of its performance, although in exceptional circumstances the court may go behind the award and apply overriding principles of public policy, e.g. the prevention of corruption, or to save the law of the place of performance from being flouted. Equally, if the arbitrators have ignored "palpable and indisputable illegality" the award will not be enforced. By contrast, if illegality under the applicable law has not been raised before the arbitrators, the court may consider whether the underlying contract was illegal under its applicable law although the presumption is in favour of enforcement.

17 In *Soleimany v Soleimany* [1999] QB 785, the parties entered into an agreement under which the plaintiff purchased and exported carpets out of Iran in contravention of Iranian revenue laws and export controls, and the defendant sold the carpets elsewhere out of Iran. Disputes arose between the parties over division of the proceeds of sale and they resolved to arbitrate their disputes before the Beth Din which applied Jewish law. The award referred to the illegality of the agreement and upheld the plaintiff's claim. In an application to set aside the order granting enforcement of the award, Waller LJ, delivering the judgment of the English Court of Appeal, held at 800 that where public policy is involved, the interposition of an arbitration award may not isolate the successful party's claim from the illegality which gave rise to it. He further elaborated:

> The reason, in our judgment, is plain enough. The court declines to enforce an illegal contract, as

> Lord Mansfield said in *Holman v Johnson* (1775) 1 Cowp 341, 343 not for the sake of the defendant, nor (if it comes to the point) for the sake of the plaintiff. The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.

18 Waller LJ acknowledged that the Court was dealing with a situation where the arbitrator had found that the agreement was illegal and that different considerations would arise if the arbitrator had found otherwise. In the latter case, there would be tension between the public interest that the awards of arbitrators should be respected and the public interest that illegal contracts should not be enforced. Nevertheless, he stated that:

> In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality.

Finally, Waller LJ concluded at 803 thus:

> An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country… This rule applies as much to the enforcement of an arbitration award as to the direct enforcement of a contract in legal proceedings.

19 In the subsequent case of *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [2000] QB 288, the Court of Appeal was concerned with the enforcement of a Swiss arbitration award arising from an agreement where the plaintiff was appointed as consultant in respect of the sale of certain military equipment to Kuwait by the defendant. In return, the plaintiff was to receive various payments. After securing several contracts with the Kuwaiti authorities, the defendant repudiated the agreement. The agreement provided for a Swiss arbitration clause. The arbitral tribunal upheld the plaintiff's claim for damages as the defendant had not established that there had been any bribery which would have rendered the agreement illegal under the proper law, which was Swiss. The majority of the Court of Appeal held that enforcement of the award was not contrary to public policy.

20 In his dissenting judgment at 314, Waller LJ elaborated on the principles which he stated in *Soleimany*:

> [T]here will be circumstances in which, despite the prima facie position of an award preventing a party reopening matters either decided by the arbitrators or which the party had every opportunity of raising before the arbitrators, the English court will allow a re-opening. The court is

in this instance performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English court is not abused. *It is for those reasons that the nature of the illegality is a factor, the strength of case that there was illegality also is a factor, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal is a factor*.

[emphasis added]

21 In contrast, Mantell LJ, with whom Sir David Hirst agreed, was of the opinion that the seriousness of the alleged illegality is not a factor to be considered at the first stage of deciding whether or not to mount a full-scale inquiry. Instead, it should be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality – something which can only be performed at the second stage when deciding whether the award should be enforced.

22 In *Corvertina Technology Ltd v Clough Engineering Ltd* 183 FLR 317, the defendant alleged that the plaintiff performed the contract in a manner which was illegal in the place of performance and that the enforcement of award based on the contract was therefore contrary to public policy. At an interlocutory application, the plaintiff sought a ruling on whether this defence could be raised. McDougall J stated at [14] that according to *Soleimany*, it is in principle open to a party to rely on the issue of illegality even if it had already been raised before and decided by the arbitrator; the majority of the Court of Appeal in *Westacre* did not say anything to the contrary. The judge further stated, at [18], that:

The very point of provisions such as s 8(7)(b) [of the Australian International Arbitration Act 1974 (Cth), which is the equivalent provision to s34(2)(b)(ii) of the Model Law] is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award. In some cases the inquiry that it required will be limited and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion, which is expressly referred to it, simply because of some "signal" that this might send to people who engage in arbitrations under the Act. *There is, as the cases have recognised, a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy*. The resolution of that conflict, in my judgment, should be undertaken at a final hearing and not on an interlocutory application.

[emphasis added]

23 A similar approach was adopted by Belinda Ang J in *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] SGHC 108 where she considered an application for leave to enforce a final arbitral award. Ang J held at [38]-[39]:

38 Although Prakash J at [63] [of *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174] uses the phrase "review" of the arbitrator's decision rather than a "rehearing", the specific point in issue in [*Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755] as to whether the review is a limited review or a full rehearing was not in issue and therefore not specifically decided in *Aloe Vera*.

However, there is indication that where one of the grounds under s 31(2) of the IAA has been properly raised, then a rehearing on that specific issue would be allowed because Prakash J at [56] held

> Except to the extent permitted by those grounds [s 31(2) of the Act], I cannot look into the merits of the Award and allow Mr Chiew to re-litigate issues that he could have brought up either before the Arbitrator or the supervisory court.

39 Read in this light, *Dallah Estate* and *Aloe Vera* may be read consistently with each other, and the court is entitled to conduct a rehearing based on the grounds prescribed in s 31(2) of [the Act]. The party opposing enforcement has the burden of proving to the satisfaction of the court one of the grounds prescribed by s 31(2) of [the Act]…

24 Thus, on the facts of this present case, while the Tribunal determined that the Concluding Agreement was not illegal, this was not conclusive. In an appropriate case, the Court, in exercising its supervisory jurisdiction, may examine the facts of the case and decide the issue of illegality. While there is a need to uphold the public interest in ensuring the finality of arbitral awards, the Court must also safeguard the countervailing public interest in ensuring that its processes are not abused by litigants.

The law on agreements to stifle prosecution

25 As stated above at [5], the governing law of the Concluding Agreement is Singapore law. It is therefore necessary to consider the law relating to agreements to stifle prosecution. In *The Law of Contract*, Third Edition (Andrew Grubb series ed)(Michael Furmston gen ed)(LexisNexis Butterworths, 2007), the learned editors considered the types of contracts which are contrary to public policy and the reasons why they are contrary to public policy:

> **Contracts prejudicial to the administration of justice**
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> 5.59 Generally speaking, there is no doubt whatsoever that any contract prejudicial to the administration of justice must perforce be invalidated, for justice is one of the key ideals underlying the very enterprise of law itself. Contracts that fall foul of this ideal can vary in both form and content, and only the more common and notorious instances will be discussed here.
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> 5.60 One of the more common instances involves contracts to *stifle a prosecution*. This type of contract clearly undermines the public interest in the maintenance of justice, particularly in the realm of law and order. On a more pragmatic level, the allowance of such contracts promotes not only chaos and corruption but would also ultimately affect the very fabric of society as a whole. The proscription is, understandably, prophylactic, and no allowance is made even in the instance where no financial or other gain is involved; indeed, Cotton LJ observed in *Windhill Local Board of Health v Vint* thus:
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> > ... the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public. It would be the case of persons taking into their own hands the determining what ought to be done; and that ought not to be taken into the hands of any individuals... but ought to be left to the due administration of the law, and to the Judges, who can determine what in the particular case ought to be done. I think it goes beyond saying, that in the particular case there can be or cannot be any evil to the public; but you are taking the administration of the law, and the object which the law has in view, out of the hands of the

Judge and putting it into the hands of a private individual. That to my mind is illegal.

(emphasis in original, underline added)

26 In *Windhill Local Board of Health v Vint* (1890) LR 45 Ch D 351, Cotton LJ stated, at 364, that "stifling" of prosecution meant the prevention of any prosecution which has been instituted from being conducted in the ordinary course.

27 The question of what constitutes an agreement to stifle the prosecution has been considered in a number of cases. In *Kamini Kumar Basu and ors v Birendra Nath Basu* AIR 1930 PC 100, the parties were concerned with the validity of an arbitrator's award which held that the plaintiffs were entitled to a certain share in a market. The defendants argued that the arbitrator's award was unenforceable because the parties' referral of the dispute to arbitration was made in consideration for an agreement that a complaint of a non-compoundable offence by the plaintiff against the defendants would not be proceeded with. The Privy Council upheld the defence on the basis that the parties had agreed not to proceed with the complaint; the plaintiff had stated to the magistrate that the dispute was settled, which led to the magistrate dismissing the complaint for non-production of evidence. Sir Binod Mitter stated, at 102, that:

> The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the ekrarnama was unlawful … If it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama as the case may be, is unlawful… and the award or the ekrarnama was invalid, quite irrespective of the fact whether any prosecution in law had been started.
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> …
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> In a case of this description it is unlikely that it would be expressly stated in the ekrarnama that a part of its consideration was an agreement to settle the criminal proceedings. It is enough for the defendants to give evidence from which the inference necessarily arises that part of the consideration is unlawful…

28 In *Shirpad v Sanikatta Co-Operative Sale Sale Society* AIR 1945 Bombay 82, the defendants' brother misappropriated certain consignment of goods which he had contracted with the plaintiffs to transport to various places. As a result, the plaintiffs filed a complaint with the police. The defendants subsequently obtained a promissory note from their brother (whose whereabouts were supposedly unknown) in favour of the plaintiffs and persuaded the latter to state to the police that they had no objection to withdrawing the case against him. However, the magistrate disallowed the withdrawal and convicted the defendants' brother. The plaintiffs sought recovery of the money due under the promissory note when the defendants failed to make payment. Lokur J held that there was a mutual understanding between the parties that upon the execution of the promissory note, the plaintiffs would have no objection to the withdrawal of the case against the defendants' brother and the agreement was thus against public policy. He stated at 84-85 that:

> [7] *It is true that it was not within the power of the plaintiffs to withdraw the complaint. It is so in the case of all cognisable offences which are non-compoundable. It is only in such cases that an agreement not to prosecute or not to proceed with the prosecution is regarded as opposed to public policy, and is, therefore, unlawful*. If the offence is compoundable, the complainant has a right to withdraw his complaint, and such withdrawal is not, under any circumstances, opposed to public policy. *But in the case of a non compoundable offence, once*

the case is taken cognizance of, the complainant is powerless to withdraw it, but even an agreement to do anything directed towards its withdrawal is against public policy and cannot be countenanced… even if the creditor does not expressly agree to drop the prosecution, yet if the agreement is the outcome of an implied understanding that he should consent to the withdrawal of the prosecution, it is against public policy, although it may not be in his power to withdraw the prosecution himself.

...

The test in all such cases is whether any part of the consideration of the agreement sued upon consisted of a promise to do some act directed towards the stifling of criminal proceedings in respect of a non-compoundable offence. If so, the agreement is against public policy, and is void and unenforceable in a Court of law.

[emphasis added]

29 In *Shirpad*, Lokur J relied extensively on Lord Atkin's judgment in *Bhowanipur Banking Corporation Ltd v Sreemati Durgesh Nandini Dasi* AIR 1941 PC 95. There, the appellant bank sought to recover a sum due upon a mortgage bond executed by the respondent. The respondent argued that the mortgage bond was given as part of the consideration for a promise by the bank to withdraw criminal proceedings against her husband and therefore unlawful. Lord Atkin held at 98-99 that the agreement constituted an infringement of public policy since the bank had asked the magistrate to withdraw the case in consideration of the mortgage bond. His Lordship put it thus, at 96:

The law in regard to agreements to stifle prosecutions is reasonably clear… it is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue, criminal proceedings for some alleged offence… In all criminal cases reparation where possible, is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand, to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts, they have to be inferred from the conduct of the parties after a survey of the whole circumstances.

30 In another Indian decision, *Ouseph Poulo and ors v Catholic Union Bank Ltd and Ors* AIR 1965 SC 166, the Supreme Court of India held at 161that:

It is well-settled that agreements which are made for stifling prosecution are opposed to public policy and as such, they cannot be enforced. The basis for this position is that the consideration which supports such agreements is itself opposed to public policy... With regards to non-compoundable offences… the position is clear that no court of law can allow a private party to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not, for itself. It is obvious that if such a course is allowed to be adopted and agreements made between the parties based solely on the consideration of stifling criminal prosecutions are sustained, the basic purpose of criminal law would be defeated; such agreements may enable the guilty persons to escape punishment and in some others they may conceivably impose an unconscionable burden on an innocent party under the coercive process of

a threat of the criminal prosecution. In substance, where an agreement of this kind is made, it really means that the complainant chooses to decide the fate of the complaint which he has filed in a criminal court and that is clearly opposed to public policy.

31 Similarly, in *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (former known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224, the Supreme Court of Malaysia explained the rationale of the principle at 231:

> The defence raised by the defendants was, without doubt, the well-known defence, known as an agreement to stifle prosecution and no court will enforce such an agreement for it should be apparent that such agreement, if allowed to be enforced, could mean that the law of freedom to contract has been abused for purpose of extortion where the person accused is innocent, or where he is guilty, it has been abused for making a trade of a crime.
>
> In our opinion, the principles applicable to our instant case were incidentally and carefully dealt with in an Indian Supreme Court case in ***Ouseph Poulo v Catholic Union Bank*** , and the Privy Council`s Indian appeal of ***Kamini Kumar Basu v Birendra Nath Basu*** , and there is no need to quote in extenso passages from them, apart from saying that we share the views expressed therein.
>
> Such contracts to stifle prosecution are unlawful because their consideration or object is against public policy and they are caught by the second limb of s 24(e) of the Act.

32 The prohibition against agreements to stifle prosecution has been adopted by the Singapore High Court in *Teo Yong Seng & Ors v Lim Bweng Tuck & Ors* [1998] SGHC 70 where the plaintiffs entered into a shares buy-out agreement with the defendants because of the latter's threat to report their pocketing of money from the company. The plaintiffs subsequently sought to recover the money paid under the agreement. Warren Khoo J held that the agreement was essentially to stifle prosecution and hence it was an illegal contract. Consequently, the Court would not assist in the recovery of money paid under it.

33 It is clear from the above authorities that agreements to stifle the prosecution of non-compoundable offences contravene public policy as they undermine the public interest in the maintenance of justice – particularly in the realm of law and order. To allow such contracts may, on the one hand, expose innocent accused persons to extortion, and on the other, allow a guilty person to escape punishments by offering reparation to the victim. The basic purpose of criminal law, and more fundamentally, the entire administration of justice will be defeated if such agreements are upheld.

Foreign illegality and the principle of international comity

34 As stated in [4], under Thai law, while the offence of fraud is a compoundable offence, forgery and the use of a forged document are non-compoundable offences. In this regard, in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 at [45], Yong Pung How CJ (as he then was) cited the principle in *Foster v Driscoll and Others, Lindsay v Attfield and Another, Lindsay v Driscoll and Others* [1929] 1 KB 470 that the courts will treat a contract governed by its own law as void where the parties' intention and object contemplated thereby jeopardises relations between its government and another friendly government. This was stated by Lawrence LJ, at 510, in the following manner:

> On principle however I am clearly of opinion that a partnership formed for the main purpose of

deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it. The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our Courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects), and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality.

35 Similarly, Sankey LJ stated at 521-522 as follows:

[A]n English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in certain events, alternative modes or places of performing which permit the contract to be performed legally.

36 Yong CJ summarised the above from *Foster* as follows: that an agreement whose object to be attained is a breach of international comity will be regarded by the courts as being against public policy and void (*supra*, at [45]). He also cited *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 where the House of Lords were concerned with a contract governed by English law for the sale and delivery of goods to be shipped from India to Genoa for resale to South Africa. The parties were aware that at the material time, there was a prohibition on the export of goods to South Africa by the Indian Government. One party repudiated the contract and the other brought an action for breach of contract. Lord Keith of Avonholm stated at 327:

[T]o recognise the contract between the appellant and the respondent as an enforceable contract would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international comity. On grounds of public policy, therefore, this is a contract which our courts ought not to recognize.

37 Further, Lord Reid stated at 323 the relevant principle as follows:

To my mind, the question whether this contract is enforceable by English courts is not, properly speaking, a question of international law. The real question is one of public policy in English law: but in considering this question we must have in mind the background of international law and international relationships often referred to as comity of nations. This is not a case of a contract being made in good faith but one party thereafter finding that he cannot perform his part of the contract without committing a breach of foreign law in the territory of the foreign country. If this contract is held to be unenforceable, it should, in my opinion, be because from the beginning the contract was tainted so that the courts of this country will not assist either party to enforce it.

38 Finally, in *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, the plaintiff sought to recover commission from the defendants for assisting to procure the renewal of a contract between the defendants and the Qatar General Petroleum Co ("QGPC"). Phillips J found that the agreement between the parties which was governed by English law involved a transaction which was contrary to the public policy of Qatar. Hence, the agreement was void under the law of Qatar and unenforceable in Qatar. Phillips J noted that there was no authority to support the proposition that English courts should, as a matter of comity, refuse to enforce an English law contract on the sole ground that performance would be contrary to the public policy of the country of performance.

However, even though the public policy of Qatar could not of itself constitute any bar to the enforcement of the agreement, it might be a relevant factor when considering whether the court ought to refuse the agreement under principles of English public policy.

39 Phillips J also considered the case of *Kaufman v Gerson* [1904] 1 KB 591where the English Court of Appeal left open the question of whether an agreement to stifle prosecution was one which the English court would not enforce on grounds on public policy. Phillips J distinguished *Kaufman v Gerson* on the basis that the contract there (governed by French law and to be performed in France) was not contrary to French law and was valid and enforceable in France. In *Lemenda Trading*, however, the country in which the agreement was to be performed, i.e. Qatar, shared the same public policy as England. He further held the following at 461:

> In my judgment, the English courts should not enforce an English law contract which falls to be performed abroad where: (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.
>
> In such a situation international comity combines with English domestic public policy to militate against enforcement.

40 Applying the above to the facts of the present case, if the Concluding Agreement was entered into by the parties in furtherance of an illegal purpose under the law of the place of performance, i.e. Thai law, it will have to be set aside on the ground that it is contrary to the public policy of Singapore under Article 34(2)(b)(ii) of the Model Law. Similarly, it will also have to be set aside if the Concluding Agreement was contrary to the public policy of both Singapore as well as Thailand.

Application of the legal principles

41 Having considered the relevant legal principles, it is now appropriate to consider the merits of AJT's application. As stated above, AJU filed the Complaint on 21 November 2006 which provided as follows: [note: 12]

> In or around early 2546BE (2003AD), [AJU] requested evidence of the 5 years license contract and management fees from [[Q]]. [[O]] therefore faxed to [AJU] a copy of the agreement between ITP Limited and [[Q]] dated 15 December 2545BE (2002AD) that showed a contract period of 5 years from 2546BE (2003AD) to 2552BE (2008AD) and the fee of US$400,000 that [[Q]] shall pay to ITP Limited.

42 In fact, AJU sought and obtained confirmation that, in truth, the licence contract that [Q] had been granted was only for 3 and not 5 years. [note: 13] AJU alleged, therefore, that the document they had received and which evinced a licence period of 5 years was forged. This document was forwarded by AJU to the Thai police for their investigation. [note: 14] The nature of the Complaint thus clearly encompassed the alleged offences of forgery and use of a forged document. Further, the Managing Director of AJU, [C], testified in his statement as follows: [note: 15]

> On 21 November 2006, [AJU] lodged a criminal complaint with the Economic and Technology Crime Suppression Division of the Royal Thai Police against [P], [Q] and [O] *in respect of the forgery and fraud*. I believe that this complaint resulted in a formal investigation by the Thai Police, and criminal proceedings being subsequently commenced against [P], [Q] and [O].

[emphasis added]

43 As submitted by AJT, [note: 16] any agreement between the parties must have required AJU to withdraw the Complaint in relation to both the allegations of forgery and the use of a forged document in addition to the fraud allegation. It would have been cold comfort to AJT if any such agreement only required AJU's withdrawal of the complaint of fraud. In addition, before the actual execution of the Concluding Agreement, the parties negotiated on the terms to be contained therein. Clauses 5 and 6(c) of the initial draft provided that:

> 5 It is a condition precedent to each Party's respective performance obligation under Section 1 and Section 4 above that [AJU], at its own cost and expense, take such action as is necessary to withdraw and/or discontinue certain criminal proceedings… filed… by [AJU] against [Q], [P] and [O] with the Special Prosecutor Office, Criminal Proceedings Section, Southern Bangkok 7 (Prakanong), by withdrawing the charge or causing a non-prosecution order to be issued by the public prosecutor or other applicable government office or official (as the case may be) ("Withdrawing of Criminal Charges").
>
> 6(c) the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby do not and will not (i) violate or conflict with the charter or by-laws of the signing party, (ii) violate or conflict with any judgment, decree or order of any court applicable to or affecting the signing party, (iii) breach the provisions of, or constitute a default under, any contract, instrument or obligation to which the signing party is a party or by which the signing party is bound.

44 As stated by the Tribunal, the initial draft clause 5 appeared to impose an obligation on AJU to both withdraw the charge against AJT and cause a non-prosecution order to be issued in respect of the fraud and forgery charges against [O], [P] and [Q]. [note: 17] Thus, the parties clearly intended to enter into an agreement with the object of compounding a non-compoundable offence. Following further discussion between the parties and their respective legal advisers, this initial draft clause 5 was amended to the final version as reflected in the Concluding Agreement, i.e. Clause 5.3(i) (see [5] above). Further, as shown by Clause 1 of the Concluding Agreement, the parties intended for the Arbitration to terminate when AJU received notice of the termination of all criminal proceedings against [O], [P] and [Q] subsequent to AJU's withdrawal of the Complaint against them. [note: 18]

45 However, the Tribunal stated that a plain reading of Clause 1 did not suggest that the Concluding Agreement was for an illegal purpose or that some illegal acts would be performed by AJU. [note: 19] Further, as the Thai Prosecution retained the power to continue with their investigations on forgery with whatever evidence they had, AJU's withdrawal of the Complaint could not be said to be illegal. [note: 20]

46 The Tribunal's decision was based on the literal terms of the Concluding Agreement. The Tribunal appeared to limit itself to a consideration of the Concluding Agreement only as drafted without concerning itself with the relevant surrounding circumstances leading to the finalisation of the Concluding Agreement to ascertain the true object, purpose and intentions of the parties. However, as stated in *Kamini Kumar Basu* and *Bhowanipur*, agreements of an illegal nature are unlikely to be expressly stated. Inferences have to be made from the surrounding circumstances as to whether the Concluding Agreement involved any illegality or illegal act to be performed by the parties. AJU's Opening Statement at the Arbitration proceedings is particularly telling. Paragraph 15 states that:

> The terms of the Concluding Agreement, however, reveal a very different picture. Under the

Concluding Agreement, the Respondent is required to (i) make a substantial payment to the Claimant, (ii) withdraw its counterclaim for fraudulent misrepresentation, (iii) *withdraw its complaint in the Thai criminal proceedings*, and (iv) bear half of the costs associated with the arbitration. The Claimant, on the other hand, is only required to withdraw its claim in the arbitration. [note: 21]

[emphasis added]

47 Furthermore, [D], a consultant of AJU, admitted that his understanding of the Concluding Agreement was that AJU was under an obligation to withdraw its Complaint. The relevant portion of the transcript at the Arbitration hearing is as follows:

Q. Yes. If you look at the next page … "In this agreement, the closing date hereof shall be the date that BEC has received the evidence of withdrawal and/or discontinuation and/or termination of all criminal proceedings …" Earlier you had mentioned that it was a question of semantics and English and so on, but *your real understanding of what was required was that [AJU] would withdraw its complaints; am I correct*? [note: 22]

Yes. (emphasis added)

48 Similarly, [C] testified that he understood that AJU was obliged to ask for withdrawal of the criminal complaint under the Concluding Agreement:

Q. So [AJU] withdrew its criminal complaint. The question is: [AJU] withdrew its criminal complaint as part of its obligations under the [C]oncluding [A]greement; is that correct?

A. That's correct.

Q. And [AJU] would also not voluntarily participate in the police proceedings; is that correct?

A. That's correct.

49 After AJU withdrew its complaint to the Thai authorities, it sent an email to [O] stating that it had requested the Thai authorities to withdraw the forgery charges:

As earlier informed… [AJU] already withdrew a fraud charge because it was not complicated… For forgery charges, it's more complicated but our request for removal of such charges has been processed within the prosecutor's office already and we are just waiting for a non-prosecution order from the prosecutor's office which will take a little longer.

As such, you may not be able to say [AJU] seems not to perform its obligation.

50 It is thus patently clear from the evidence that the parties to the Concluding Agreement (and in particular AJU) understood that AJU was obliged to withdraw the Complaint in its entirety. This would involve the allegations of forgery and the use of a forged document – both of which are non-compoundable offences under Thai law. As shown in *Shirpad*, even if the complainant has no power to withdraw the prosecution for non-compoundable offences, an agreement consenting to or requiring any action directed at the charge's withdrawal will still be against public policy. The fact that the Thai Prosecution retained the power to continue with (and prosecute) the criminal investigations against [O], [P] and [Q] does not mean that the Concluding Agreement was not illegal. It is in the nature of all non-compoundable offences that parties cannot unilaterally terminate the proceedings

once a complaint has been made to the relevant authorities.

51 As a result of AJU's withdrawal of the Complaint, the charges of forgery and use of forged document against [O], [P] and [Q] were dropped due to a lack of evidence (see [6]-[7] above). Contrary to the Tribunal's finding, this clearly amounted to a stifling of the prosecution process in Thailand in respect of these non-compoundable offences. By holding that the Concluding Agreement involved no illegality, the Tribunal effectively validated an agreement entered into by the parties with the intention and purpose of doing an act which undermined the administration of justice in Thailand. Accordingly, to uphold the Award would constitute a breach of international comity by enforcing a contract which is illegal under the law of Thailand, the place of performance. The illegality of the Concluding Agreement under Thai law is borne out by the evidence of the parties' witnesses. For instance, AJT's expert witness, one Dr [R] stated in her evidence that: [note: 23]

> A compromise, or a settlement agreement, between the injured person and the alleged, is valid and enforceable only if it is a compromise on compoundable offence. If the compromise or settlement agreement is for non-compoundable offence, such agreement will be void on the basis that such act is contrary to public order or good morals…

52 The same position was taken by AJU's expert witness under cross examination during the Arbitration proceedings: [note: 24]

Prof Tan:	But what it [sic] party A and party B agree, both parties agree, that the complainant will withdraw the charge, or withdraw the complaint? Sorry, it should be withdraw the complaint, rather than withdraw the charge. So I have complained against you, for example, and later we agree that I will withdraw my complaint.
A:	Yes.
Prof Tan:	Is this agreement between you and me contrary to Thai civil law? You have said it's not contrary to Thai civil law but is it contrary to Thai civil law?
A:	Yes, according to the precedents of the Supreme Court decision.
Mr Rashid:	It is contrary to Thai law?
A:	Thai civil law, yes.
	…
Mr Rashid:	If, as you say, someone files a complaint of a non-compoundable offence and the two parties get together and do an agreement and say, "We will withdraw this evidence, we will withdraw this complaint", and then other things are triggered off, is that, in Thai civil law, unenforceable, that sort of agreement? You said it is unenforceable?
A:	That's correct.
THE CHAIRMAN:	What is unenforceable? I don't understand.
A:	Unenforceable means no effect. That agreement bears no legal effect whatsoever.

53 The Concluding Agreement was therefore illegal both under its governing law, i.e. Singapore law

(see *Teo Yong Seng & Ors v Lim Bweng Tuck* above at [32]), and under the law of the place of performance. Further, as testified by Dr Srivanat, the Concluding Agreement would be void under Thai law on the basis that it was contrary to public order or good morals. In accordance with the principles enunciated in *Peh Teck Quee* (and the cases cited therein), *Lemenda Trading* and *Soleimany*, the Award ought to be set aside under Article 34(2)(b)(ii) of the Model Law on the ground that it is in conflict with the public policy of Singapore.

The remaining issues

54 In light of the above conclusion, it is unnecessary to deal with the other submissions of AJT, *viz* the alleged bribery of the Thai public authority and breach of the principles of natural justice. Suffice to say that the records show that the Tribunal had adequately dealt with and disposed of AJT's submissions. There is no ground for arguing that there had been a breach of natural justice. The tribunal found that the allegation of bribery was not proved. [note: 25] I am not minded to interfere with this finding of fact by the tribunal.

Conclusion

55 For the foregoing reasons, I allow AJT's application to set aside the Award. Unless the parties have arguments on costs, I will make the usual order for AJT to have its costs paid for by AJU.

[note: 1] Plaintiff's Submission at [1]

[note: 2] Plaintiff's Submission at [6]

[note: 3] Arbitral Award at [64]; [71]

[note: 4] Plaintiff's Core Bundle of Document at pp 46-48

[note: 5] PCBD pp 345-352 at p 351

[note: 6] PCBD at p328

[note: 7] PCBD at p 331

[note: 8] [O]'s first affidavit at p 788

[note: 9] [O]'s first affidavit at pp 791-792

[note: 10] [O] first affidavit at p 794

[note: 11] Award at [122] –[125]

[note: 12] PCBD at p 341

[note: 13] PCBD at pp 341- 343

[note: 14] Arbitral Award at [57]

[note: 15] PCBD at p 488

[note: 16] Plaintiff's submission at [66]

[note: 17] Award at [105]

[note: 18] See above

[note: 19] Award at [109]

[note: 20] Award at [112]

[note: 21] PCBD at p 212

[note: 22] PBCD at p506

[note: 23] PCBD ast p 363

[note: 24] PCBD at pp 522-524

[note: 25] Arbitral Award at [122]

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