AJU *v* AJT
[2011] SGCA 41

Case Number	: Civil Appeal No 125 of 2010
Decision Date	: 22 August 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Chua Sui Tong, Edwin Cheng and Daniel Tan Zi Yan (WongPartnership LLP) for the appellant; Dinesh Dhillon, Tay Yong Seng, Felicia Tan, Indulekha Crystal Chitran and Joel Lim Junwei (Allen & Gledhill LLP) for the respondent.
Parties	: AJU — AJT

Arbitration

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 4 SLR 649.]

22 August 2011 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal by the appellant, [AJU] ("the Appellant"), against the decision of the High Court judge ("the Judge") in Originating Summons No 230 of 2010 ("OS 230/2010") setting aside an interim award dated 1 December 2009 issued in its favour ("the Interim Award") by an arbitral tribunal ("the Tribunal") in Arbitration No 86 of 2006 ("the Arbitration"), an arbitration held under the auspices of the Singapore International Arbitration Centre ("the SIAC"), on the ground that the Interim Award was contrary to the public policy of Singapore (see *AJT v AJU* [2010] 4 SLR 649 ("the HC Judgment")).

2 The Interim Award was made in relation to a dispute between the Appellant and the respondent, [AJT] ("the Respondent"), as to the validity of an agreement entered into on 4 February 2008 between the Appellant on the one part and the Respondent, its sole shareholder and director ("[O]") and two companies associated with [O] (*viz*, "[P]" and "[Q]") on the other part. [note: 1] Under this agreement ("the Concluding Agreement"), which was governed by Singapore law, upon the fulfilment of certain specified conditions, the Respondent was to terminate the Arbitration, which had been commenced by it against the Appellant.

3 In the Arbitration, the Respondent had alleged, *inter alia*, that the Concluding Agreement was illegal because it was: (a) an agreement between the parties to stifle the prosecution in Thailand of forgery and the use of a forged document; (b) contrary to the law of Thailand; and (c) accordingly, contrary to public policy both in Thailand and in Singapore. The Tribunal rejected the Respondent's argument and decided in the Interim Award that the Concluding Agreement was valid and enforceable. On the Respondent's application (in OS 230/2010) to set aside the Interim Award, the Judge rejected the Tribunal's findings and held that the Concluding Agreement was an agreement to stifle the prosecution in Thailand of the aforesaid offences, which were non-compoundable under Thai law, and was illegal both under its governing law (*viz*, Singapore law) and the law of the place of performance (*viz*, Thai law). The Judge accordingly set aside the Interim Award under Art 34(2)(b)(ii) of the

UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") set out in the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA").

4 The Appellant has appealed to this court against the Judge's decision on the ground that the Judge erred in law in rejecting the Tribunal's findings and setting aside the Interim Award in the circumstances of this case, and thereby failed to give effect to the principle of finality applicable to arbitral awards.

Background facts

The events leading to the Concluding Agreement

5 The material facts as set out in the Interim Award are as follows. The Arbitration concerned claims brought by the Respondent against the Appellant in respect of an agreement dated 16 July 2003 entered into between [P] and the Appellant ("the Contract"), [note: 2] which enabled the latter to stage an annual tennis tournament in Bangkok ("the Tennis Tournament") for a term of five years from 2003 to 2007. Clause 23 of the Contract [note: 3] provided that the agreement should be construed and given effect in accordance with the laws of Hong Kong, and that any disputes should be settled by arbitration in Singapore under the rules of arbitration of the United Nations Commission on International Trade Law then in force ("the UNCITRAL Arbitration Rules"). Consequent to disputes arising under the Contract, the Respondent (as the assignee of [P]'s rights under the Contract) served a notice of arbitration on the Appellant by way of a letter dated 21 August 2006. The Tribunal was duly convened and the parties were notified of its constitution on 16 January 2007.

6 On 21 November 2006, approximately three months after it was served with the notice of arbitration, the Appellant made a complaint of fraud ("the Complaint") to the Special Prosecutor's Office of Thailand ("the Thai prosecution authority") against [O], [P] and [Q]. The Complaint alleged that [O], [P] and [Q] had induced the Appellant to sign the Contract by fraudulently representing that [Q] had the right to organise the Tennis Tournament for five years when it had the right to do so for only three years [note: 4] ([Q] was the party which had originally been granted the right to organise the Tennis Tournament, but, at [O]'s request, [P] was used instead as the contracting party for the Contract). Together with the Complaint, a forged document purporting to be an agreement by which one [R] Ltd granted [Q] the right to organise the Tennis Tournament for a five-year period from 2003 onwards was forwarded to the Thai prosecution authority for investigation. Pursuant to the Complaint, the Thai prosecution authority commenced investigations against [O], [P] and [Q] on charges of joint fraud, joint forgery and the use of a forged document. For ease of reference, the charge of joint fraud will hereafter be termed "the Fraud Charge"; the charges of joint forgery and the use of a forged document will be termed "the Forgery Charges"; and the charges taken collectively will be termed "the Charges". It is common ground that under Thai law, fraud is a compoundable offence, whereas forgery and the use of a forged document are non-compoundable offences.

7 While the investigations in Thailand into the Charges ("the Thai criminal proceedings") were ongoing, the Appellant, the Respondent, [O], [P] and [Q] negotiated a settlement that led (as mentioned at [2] above) to the signing of the Concluding Agreement on 4 February 2008 between the Appellant on the one part and the Respondent, [O], [P] and [Q] on the other part. The Concluding Agreement provided, *inter alia*, as follows:

(a) Clause 1 stated that: [note: 5]

> In this Agreement, the Closing Date hereof shall be the date that [the Appellant] has

> received the evidence of withdrawal and/or discontinuation and/or termination of all the Criminal Proceedings … from the public prosecutor [*ie*, the Thai prosecution authority] or other applicable judicial or government office or official (as the case may be).

The expression "the Criminal Proceedings" was defined in the same clause as, in essence, the Thai criminal proceedings.

(b) Clause 3 stated that: [note: 6]

> The Agreed Final Settlement Amount [defined in cl 2 as the sum of US$470,000], subject to the other terms and conditions of this Agreement, shall be paid for value on the Closing Date to [the Respondent]'s designated bank account …

(c) Clause 5.3(i) stated that on the closing date as defined in cl 1 ("the Closing Date"), subject to the Respondent's receipt of the agreed settlement amount of US$470,000 ("the Agreed Final Settlement Amount"), each party to the Concluding Agreement was to: [note: 7]

> … 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 [*ie*, the Arbitration, for the purposes of the present appeal] and in any other form of legal or other action, as well as to vacate any judgments, awards, or enforcements that may have been issued or are subsequently issued …

(d) Clause 8 stated that all the claims between the Appellant on the one part and the Respondent, [O], [P] and [Q] on the other part would be deemed to have been fully settled.

The events following the Concluding Agreement

8 On 7 February 2008, a few days after the Concluding Agreement was signed, the Appellant withdrew the Complaint which it had made to the Thai prosecution authority. [note: 8] This led the Thai prosecution authority to write a letter dated 7 March 2008 to the Appellant stating that it had decided to issue the following:

(a) "a cessation order not to prosecute the three alleged offenders [*ie*, [O], [P] and [Q]] with respect to the charges of the joint fraud [*ie*, the Fraud Charge] because the [Appellant] ha[d] withdrawn [the] [C]omplaint"; [note: 9] and

(b) "a non-prosecution opinion not to prosecute [[O]] … with respect to the charges of the joint forgery and use of the forged document [*ie*, the Forgery Charges]". [note: 10]

A copy of this letter was sent by the Appellant to the Respondent on the same day that it was issued.

9 Upon receipt of the letter, [O] replied on 10 March 2008 stating that the Appellant was in breach of the Concluding Agreement in failing to make payment of the Agreed Final Settlement Amount on the Closing Date (*viz*, 7 March 2008) as provided under cll 2 and 3 of the agreement. [O] requested the Appellant to make payment no later than 11 March 2008, which request the Appellant complied with.

10 On 10 June 2008, the Thai prosecution authority sent the Appellant a formal non-prosecution

order in respect of the Forgery Charges against [O] ("the Non-Prosecution Order") on the ground that "the evidence [was] not enough to prosecute". [note: 11]

11 On 18 June 2008, the Appellant, in an effort to allay the continuing concerns of the Respondent, wrote a letter to the Respondent, [O], [P] and [Q] stating that it would not, "whether now or in the future, re-open, reinitiate, restart or otherwise proceed with any or all [of the Charges]" [note: 12] against them. In the same letter, the Appellant requested the Respondent to withdraw and terminate the Arbitration no later than 25 June 2008.

12 However, [O] replied on 25 June 2008 stating that the Appellant had not complied with its obligations under the Concluding Agreement as that agreement was meant to bring an end to the Thai criminal proceedings (as defined at [7] above). [O] took the view that the Non-Prosecution Order was insufficient as the Forgery Charges could still be reactivated by the production of additional evidence from either the Appellant or any other party, even if such evidence might be false. [note: 13]

The issue referred to the Tribunal

13 In the face of the Respondent's refusal to terminate the Arbitration, the Appellant made an application to the Tribunal on 30 June 2008 to terminate the Arbitration under Art 34(1) of the UNCITRAL Arbitration Rules on the ground that the parties had reached a full and final settlement of all the claims which they had against each other. The Respondent responded by challenging the validity of the Concluding Agreement on the grounds of duress, undue influence and illegality. This resulted in the Tribunal issuing Directions Order No 6 on 13 August 2008 directing the Respondent to apply to the (Singapore) High Court by 13 October 2008 to set aside the Concluding Agreement on these alleged grounds. The Respondent failed to comply with that direction, but, on 16 December 2008, it reached agreement with the Appellant to refer the issue of "[w]hether … the Concluding Agreement … should be set aside/declared void on the basis of duress, undue influence and/or illegality" [note: 14] to the Tribunal for determination. The parties "irrevocably" [note: 15] confirmed that the Tribunal had jurisdiction to decide this issue. They also agreed that in the event that the Tribunal held the Concluding Agreement to be valid, the Arbitration would terminate automatically with immediate effect, whereas if the Tribunal held the Concluding Agreement to be void, the Arbitration would continue. The Respondent further confirmed that it would not seek to challenge the validity or enforceability of the Concluding Agreement in any other forum or jurisdiction.

The Tribunal's decision

14 After a five-day hearing, the Tribunal decided that the Concluding Agreement was valid and enforceable. In the Interim Award, the Tribunal made the following findings:

(a) the Concluding Agreement was not illegal and had not been performed illegally by the Appellant;

(b) the Respondent's allegations of duress and undue influence in connection with the signing of the Concluding Agreement were not made out; and

(c) the Respondent's allegation that the Appellant had procured the issue of the Non-Prosecution Order by bribery was likewise unsubstantiated.

In view of its finding that the Concluding Agreement was valid and enforceable, the Tribunal also ruled that the Arbitration was terminated pursuant to the terms agreed by the parties on 16 December

2008.

1 5 *Vis-à-vis* its finding that the Concluding Agreement was not illegal, the Tribunal set out its reasoning in the Interim Award as follows: [note: 16]

> 105 There is no dispute that both parties were advised by their consultants and [were] aware that to discontinue the criminal proceedings of a non-compoundable offence, there ha[d] to be a non[-]prosecution order from the authorities. Clause 5 [of the Concluding Agreement] as it was then drafted [*ie*, as at 4 December 2007] appear[ed] to impose on the [Appellant] the obligation to withdraw and cause a non[-]prosecution order to be issued.
>
> 106 On 18 December 2007, [the Respondent's lawyer] wrote to [the Appellant's lawyer] as follows:
>
> > …
> >
> > … We advise that [the Respondent's] … December 4 … draft be reinstated. [The Appellant] must (i) withdraw the charge (re: the compoundable criminal matter [of fraud]) and (ii) cause a non-prosecution order to be issued (re: the non-compoundable matter i.e. the making/use of forged documentation) **BEFORE** … [the Respondent is] obligated to withdraw the [A]rbitration … and, in the case of [the Appellant], pay the Agreed Final Settlement Amount. The criminal charges against our client in Thailand [*ie*, the Charges as defined at [6] above] must disappear before the remaining obligations of either party takes effect. …
> >
> > As re-worded in your Dec 6 draft, the withdrawal of the Thai criminal charges is a covenant by [the Appellant] to be performed after execution of the Concluding Agreement alongside (i) [the Appellant]'s other covenants to … [*inter alia*] pay the Agreed Final Settlement [Amount] and (ii) [the Respondent]'s obligation to withdraw the … [A]rbitration. This is detrimental to our client as there is no certainty that the withdrawal of criminal charges can be effected (in particular with respect to the non-compoundable matter which rests in the hand[s] of the public prosecutor [*ie* , the Thai prosecution authority]). Our client does not wish to be left in a situation where the public prosecutor proceeds with a criminal matter but our client is nevertheless bound under the Concluding Agreement to accept the amount agreed as the Agreed Final Settlement Amount. This issue is critical for our client. We do not view that having the withdrawal of the criminal charges as a condition precedent harms [the Appellant]. The suggested language is fair for both parties – neither party withdraws [its] arbitration claims and [the Appellant] doesn't have to pay the Agreed Final Settlement Amount until the Thai criminal charges are withdrawn.
> >
> > Please note that in our discussions …, we have emphasized the importance of this issue, especially in light of the fact that withdrawal of the [C]harges does not stop proceedings with respect to the non-compoundable offense. …
> >
> > …
>
> 107 It is thus clear from the above that [the Respondent] knows that the decision in respect of discontinuance of investigations into a non-compoundable offence rests in the hands of the Public Prosecutor. Withdrawal of the [C]omplaint by the [Appellant] therefore would not necessarily stop proceedings on the non-compoundable offence[s] and there is no certainty what the Public Prosecutor's decision would be. [The Respondent's lawyer] rightly sought to protect the [Respondent] by ensuring that the issue of a non-prosecution order should be a condition

precedent to the settlement since no one is certain of the outcome.

108 It appears that further discussions between the parties took place [which resulted in the parties reaching agreement on the provision that later became cl 1 of the Concluding Agreement] …

109 Since the termination of the proceedings lies entirely in the hands of the Public Prosecutor, the only sensible and reasonable agreement [the] parties could make would be that the Concluding Agreement would take effect only upon the receipt of the non-prosecution order from the Thai authorities.

110 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 [Appellant].

111 As drafted, no contractual obligation was imposed on the [Appellant] to produce the non-prosecution order issued or … [to] cause or influence the Public Prosecutor to issue such an order.

112 There has been no suggestion by the [Respondent] that the withdrawal of the complaint on fraud [*ie*, the Fraud Charge] 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 [F]orgery [C]harges 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 [and use of a forged document] with whatever evidence they have or uncover, [the Appellant]'s withdrawal of [the] [C]omplaint cannot be said to be illegal whatsoever.

113 In the circumstances, the Concluding Agreement or its terms thereof cannot be said to be illegal.

[underlining and emphasis in bold in original]

The proceedings in the court below

The Respondent's application to set aside the Interim Award

16 On 2 March 2010, the Respondent applied to the High Court (via OS 230/2010) to set aside the Interim Award on two grounds, namely: (a) the Interim Award was in conflict with the public policy of Singapore and should be set aside under Art 34(2)(b)(ii) of the Model Law read with s 3(1) of the IAA; and (b) the Interim Award had been made in breach of the rules of natural justice (which breach had prejudiced the Respondent's rights) and should be set aside under s 24(*b*) of the IAA.

17 Apropos the first ground, the Respondent's case was that: [note: 17]

(a) since the Concluding Agreement was an agreement to stifle the prosecution in Thailand of forgery and the use of a forged document (which were non-compoundable offences under Thai law), the Interim Award in effect sought to enforce an agreement that was illegal and unenforceable in Thailand; and

(b) bribery and/or corruption of the Thai public authorities had been involved in the Appellant's performance of the Concluding Agreement, *ie*, in the Appellant's procurement of the issue of the Non-Prosecution Order.

18 Apropos the second ground, the affidavit filed by the Respondent in support of OS 230/2010 did not elaborate on the nature of the alleged breach of natural justice complained of, resulting in the Judge holding that there was no ground for complaint on this score (see [25] below).

The Judge's decision on the issues raised by the Respondent's application

19 In so far as the relationship between illegality and public policy was concerned, it was common ground between the parties in the court below that the Concluding Agreement would be illegal under both Singapore law and Thai law, as well as in conflict with the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law if:

(a) the Concluding Agreement required the Appellant to stifle the prosecution of the Forgery Charges, which were not compoundable under Thai law; and/or

(b) the Thai prosecution authority had been bribed to issue the Non-Prosecution Order with respect to the Forgery Charges against [O].

In this regard, illegality and public policy are two strands of the same principle which the English courts have equated as mirror concepts (see, *eg*, *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 ("*OTV*") at 225 *per* Timothy Walker J).

20 There was also no dispute in the court below on the principle of law that any agreement to stifle the prosecution of a non-compoundable offence would be illegal (and against public policy) as such an agreement would undermine the administration of justice. The Judge referred to the following authorities on this point: *Windhill Local Board of Health v Vint* (1890) 45 Ch D 351; *Kamini Kumar Basu and others v Birendra Nath Basu and another* AIR 1930 PC 100; *Shripad and another v Sanikatta Co-operative Salt Sale Society and another* AIR 1945 Bombay 82 ("*Shripad*"); *Bhowanipur Banking Corporation, Ltd v Sreemati Durgesh Nandini Dassi* AIR 1941 PC 95; *Ouseph Poulo (since deceased) and after him his legal representatives, and another v The Catholic Union Bank Ltd Head Office, Mala Angadi Vadama Village, Mukundapuram Taluk and others* AIR 1965 SC 166; *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224; and *Teo Yong Seng & Ors v Lim Bweng Tuck & Ors* [1998] SGHC 70. He quoted, *inter alia*, the following passage in *Shripad* (at 84–85), where Lokur J made a clear distinction between a compoundable offence and a non-compoundable offence for the purposes of determining the legality or otherwise of an agreement to stifle the prosecution of an offence:

> … [I]t was not within the power of the plaintiffs to withdraw the complaint. It is so in the case of *all cognizable 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 [the] 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, [and] even an agreement to do anything directed towards its withdrawal is against public policy and cannot be countenanced. … [E]ven if the [complainant] 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]

21 As regards the relationship under Singapore law between contracts involving foreign illegality (*ie*, contracts which involve the doing in a foreign and friendly country of some act which is illegal under the law of that country) and the principle of international comity, the Judge referred to the following authorities: *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 ("*Peh Teck Quee*") at [45]; *Foster v Driscoll and Others* [1929] 1 KB 470; *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301; *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448; and *Kaufman v Gerson* [1904] 1 KB 591. In essence, these cases set out the principle 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" (see *Peh Teck Quee* at [45]).

22 In the light of the Tribunal's finding that the Concluding Agreement was valid and enforceable, public policy was *prima facie* not engaged for the obvious reason that there was (according to the Tribunal) no illegality in either the terms or the performance of the agreement. Hence, the critical issue before the Judge was whether the court, in dealing with an application to set aside an arbitral award founded on a contract which had been held by an arbitral tribunal to be valid and enforceable, could reopen the arbitral tribunal's findings of fact and/or law and decide for itself whether the contract in question was illegal. In this regard, the Judge held, after examining a number of decisions from England, Australia and Singapore as well as a textbook commentary on the IAA, that the court could do so in an appropriate case. He said at [24] of the HC Judgment:

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. [emphasis added]

23 The authorities relied on by the Judge in reaching the above conclusion were the following: *Soleimany v Soleimany* [1999] QB 785 ("*Soleimany*"); *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and Others* [2000] 1 QB 288 ("*Westacre (CA)*"); *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317; Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) ("*Singapore Arbitration Legislation*"); and *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] 3 SLR 661. We will discuss some of these authorities later.

24 Proceeding on the basis that this was an appropriate case for the court to intervene and reopen an arbitral tribunal's finding on the legality of what we will hereafter refer to as the "underlying contract" (*ie*, the contract on which an arbitral award is based), but without providing any explanation of why he considered this an appropriate case for curial intervention (apart from the fact that illegality in the underlying contract had been invoked), the Judge evaluated the evidence of all the witnesses in relation to the Respondent's allegations of illegality. He held that the Tribunal should not have confined its evaluation of the Respondent's case in the Arbitration to a literal and narrow interpretation of the Concluding Agreement, and should instead have considered all the other relevant surrounding circumstances (see [46] of the HC Judgment). He found that, considering all those circumstances, the Respondent could not have agreed to the Appellant's withdrawal of the Complaint (which related to fraud) only, without the Forgery Charges being withdrawn as well because, in his words, "[i]t would have been cold comfort" (see [43] of the HC Judgment) to [O], [P] and [Q] had

the Forgery Charges remained alive. In this regard, the Judge rejected the Tribunal's findings that: (a) the Respondent had wanted the Fraud Charge to be withdrawn and that had been done; and (b) the Respondent had signed the Concluding Agreement with full awareness that the Forgery Charges (which were non-compoundable under Thai law) could not be withdrawn by the Appellant, and had thus effectively agreed that the Non-Prosecution Order would be sufficient as far as "withdrawal" of the Forgery Charges was concerned. The Judge also considered that the draft clause numbered as cl 5 as at 4 December 2007 ("the draft cl 5"), which (in his view) was later replaced by cl 5.3(i) of the Concluding Agreement, showed that the Appellant had agreed to withdraw the Forgery Charges in addition to the Fraud Charge. Accordingly, the Judge held that the Concluding Agreement was illegal as it was an agreement between the parties to stifle the prosecution of non-compoundable offences (see [44] of the HC Judgment). In view of this finding, the Judge ruled that the Interim Award was in conflict with the public policy of Singapore and was to be set aside pursuant to Art 34(2)(b)(ii) of the Model Law.

25 The Judge did not, however, accept the Respondent's allegations of bribery and breach of natural justice. He held at [54] of the HC Judgment:

> … [T]he records show that the Tribunal had adequately dealt with and disposed of [the Respondent]'s submissions. There is no ground for arguing that there had been a breach of natural justice. The [T]ribunal found that the allegation of bribery was not proved. I am not minded to interfere with this finding of fact by the [T]ribunal.

The issues on appeal

26 The Appellant has raised two main issues in this appeal, *ie*:

(a) whether the Judge was correct in going behind the Interim Award and reopening the Tribunal's finding that the Concluding Agreement was valid and enforceable ("Issue (a)"); and

(b) in any event, whether the Judge was correct in finding that the Concluding Agreement was illegal ("Issue (b)").

We will consider these two issues *seriatim* in the discussion which follows. We should also point out that the Respondent has not cross-appealed against the Judge's dismissal of its allegations of breach of natural justice and bribery.

Issue (a): Whether the Judge was correct in reopening the Tribunal's finding on the legality of the Concluding Agreement

The parties' arguments

2 7 *Vis-à-vis* Issue (a), the Appellant argues that the Tribunal's findings should be respected on the basis of the finality principle applicable to arbitral awards – an arbitral award, the Appellant submits, is *prima facie* to be enforced, and it is only in an exceptional case that the court may go behind it. The court's supervisory power should be exercised only in cases where (see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi Jasa*") at [59]):

> … the upholding of an arbitral award would "shock the conscience" …, or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" …, or where it violates the forum's most basic notion of morality and justice …

The Appellant contends that the present case is not such a case.

28 The Appellant also submits that although the Judge cited the decision of the English Court of Appeal ("the English CA") in *Soleimany* as one of the authorities for the principle that the court could, in an appropriate case, reopen an arbitral tribunal's finding on the legality of an underlying contract, the Judge failed to ask himself the following preliminary questions which the English CA had stated should be considered by the court in determining whether the case before it was an appropriate one for curial intervention (see *Soleimany* at 800F–G *per* Waller LJ):

> 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?

The Appellant contends that whenever it is alleged that an arbitral award is based on an illegal underlying contract, the court should (as a preliminary step) consider whether it is proper to give full faith and credit to the arbitral award by asking itself the four questions quoted above. If the answers to these four questions are "Yes", "Yes", "No" and "No" respectively, the court should cease its inquiry into the alleged illegality of the underlying contract there and then. The Appellant submits that the Judge failed to ask himself the aforesaid preliminary questions, and instead adopted an approach which amounted to entertaining an appeal against what was merely an alleged error of fact, contrary to the public policy of the IAA and the Model Law of according finality to arbitral awards.

29 The Respondent's case, on the other hand, is that the court, when considering an application to set aside an arbitral award on public policy grounds, should *always* embark on a detailed analysis of the evidence in order to determine if the case for setting aside the arbitral award on the particular public policy ground invoked has been proved (citing *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 and *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573). According to the Respondent, the only precondition to be met is that the objection raised must *prima facie* be a legitimate public policy ground for setting aside an arbitral award (citing *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 and *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1). Once this threshold requirement of identifying a legitimate public policy objection to an arbitral award is met, a full rehearing of the evidence should immediately follow. The Respondent submits that even if the public policy objection in question has already been raised before and decided by the arbitral tribunal, there should be no room for excessive deference to be accorded to the arbitral tribunal's decision (citing the English CA case of *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] 2 WLR 805 at [21]). The Respondent contends that the very principle underlying the existence of the public policy ground for setting aside arbitral awards in Art 34(2)(b)(ii) of the Model Law entails that the court should conduct a full hearing, and not merely a cursory or minimal review, of the public policy objections to an arbitral award if this ground is not to be rendered otiose.

The separate regimes in the IAA for enforcing foreign arbitral awards and setting aside "IAA awards"

30 We preface our analysis of Issue (a) with the observation that the IAA provides separate regimes for, respectively, the enforcement of foreign arbitral awards (*ie*, arbitral awards made by arbitral tribunals in States other than the State in which the arbitral awards concerned are sought to be enforced ("the Enforcing State")) and the setting aside of "award[s]" as defined in s 2(1) of the IAA (referred to hereafter as "IAA awards"). The regime for setting aside IAA awards ("the setting

aside regime") is contained in Pt II of the IAA, the relevant provisions of which are the following:

> **Enforcement of awards**
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> **19**. An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.
>
> …
>
> **Effect of award**
>
> **19B**.—(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
>
> …
>
> (4) This section shall not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.

31 The relevant provisions in the IAA by which an IAA award can be challenged (pursuant to the right set out in s 19B(4)) are: (a) s 3(1), which gives the Model Law (with the exception of ch VIII thereof, which is not relevant in the present appeal) the force of law in Singapore; and (b) s 24, which sets out two additional grounds (other than the grounds listed in Art 34(2) of the Model Law) for setting aside an IAA award.

32 As for the Model Law, the relevant provision governing recourse to a court is Art 34, the material parts of which (for the purposes of this appeal) are the following:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) An arbitral award may be set aside by the court … only if:
>
> …
>
> (b) the court finds that:
>
> …
>
> (ii) the award is in conflict with the public policy of [the Enforcing] State.
>
> …

33 The regime for enforcing foreign arbitral awards in Singapore ("the enforcement regime") is set out in Pt III of the IAA, the relevant provisions of which are as follows:

> **Recognition and enforcement of foreign awards**

29.—(1) Subject to this Part, a foreign award may be enforced in a court either by action or in the same manner as an award of an arbitrator made in Singapore is enforceable under section 19.

(2) Any foreign award which is enforceable under subsection (1) shall be recognised as binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.

…

Refusal of enforcement

31.—(1) In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the party against whom the enforcement is sought may request that the enforcement be refused, and the enforcement in any of the cases mentioned in subsections (2) and (4) may be refused but not otherwise.

…

(4) In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that —

…

(*b*) enforcement of the award would be contrary to the public policy of Singapore.

…

34 It can be seen from the terms of s 19B(4) of the IAA, read with Art 34(2)(b)(ii) of the Model Law, and s 31(4)(*b*) of the IAA (which is based on Art 5(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958 by the United Nations Conference on International Commercial Arbitration at its 24th meeting ("the New York Convention")) that both the setting aside regime and the enforcement regime provide for "the public policy" of Singapore as a basis on which an IAA award may be set aside (under the former regime) and a foreign arbitral award denied enforcement (under the latter regime). The question arises as to whether the public policy of Singapore under the two regimes is the same. Although this question is peripheral to the issues to be decided in this appeal, it is necessary for us to address it as all the authorities relied upon by the Judge in support of his ruling that in an appropriate case, the court could reopen an arbitral tribunal's findings of fact and/or law on the legality of an underlying contract were concerned with the *enforcement* of *foreign* arbitral awards, rather than with (as in the present case) the *setting aside* of *arbitral awards made by arbitral tribunals in the Enforcing State itself*. For example, *Soleimany* concerned the enforcement in England of an award made by a Jewish religious court (known as a "Beth Din") which was akin to an arbitral award, while *Westacre (CA)* concerned the enforcement in England of an arbitral award made by an International Chamber of Commerce ("ICC") arbitral tribunal in Geneva.

35 We might add, further, that the Judge, in analysing the concept of "public policy" in Art 34(2)(b)(ii) of the Model Law, did refer to *PT Asuransi Jasa*, which is a decision of this court on (*inter alia*) the meaning of the phrase "the public policy of [the] State" in that Article. However, the Judge did not draw a distinction between the public policy of Singapore under that Article and the public policy of Singapore under s 31(4)(*b*) of the IAA, and appeared to have proceeded on the basis that there

was no difference in the concept of public policy for the purposes of these two provisions.

36 In this connection, we note that the authors of *Singapore Arbitration Legislation* take the view that the threshold for invoking public policy to resist enforcement of a foreign arbitral award (pursuant to s 31(4)(*b*) of the IAA) is more stringent than that for invoking public policy to set aside an IAA award (pursuant to s 19B(4) of the IAA read with Art 34(2)(b)(ii) of the Model Law). They opine that (at p 75):

> The public policy defence refers to the public policy of Singapore. It is important to emphasise, however, that *the worldwide jurisprudence on the Model Law has confirmed that "public policy" for the purposes of the New York Convention has an international focus, and is really concerned with the most serious forms of transgression*. [emphasis added]

They reiterate this view (at pp 117–118) in commenting on the scope of the public policy objection under Art 34(2)(b)(ii) of the Model Law, read with s 19B(4) of the IAA, as follows:

> Public policy is considered at length in the Notes to IAA, s. 31(4). It is there commented that *public policy for the purposes of enforcement of a New York Convention award* [*ie*, a foreign arbitral award, for the purposes of the present appeal] *is not concerned purely with local issues, but is a far narrower concept which relates to conduct which is reprehensible by any standard. As far as a challenge to [an IAA] award is concerned, public policy may be a wider concept*. However, the principles set out in the Notes to IAA, s. 31(4) hold good, and it is not open to the court to reopen a decision by the arbitrators that there was no relevant illegality [in the underlying contract]. [emphasis added]

37 We do not agree with this view. This court decided in *PT Asuransi Jasa* that the concept of public policy in Art 34(2)(b)(ii) of the Model Law has what the authors of *Singapore Arbitration Legislation* have described (at p 75) as "an international focus" (see [59] of *PT Asuransi Jasa*). What this court did not decide in that case (because the question did not arise) was whether the concept of public policy in Art 34(2)(b)(ii) of the Model Law was the same as that in s 31(4)(*b*) of the IAA. As mentioned at [34] above, this question has arisen (albeit peripherally) in the present case because of the Judge's reliance on case law relating to the enforcement regime in deciding the Respondent's application in OS 230/2010, which falls under the setting aside regime. In our view, there is no difference between these two regimes as far as the concept of public policy is concerned because the legislative purpose of the IAA is to treat all IAA awards as having an international focus (see s 5(1) of the IAA, which provides that in the absence of a written agreement to the contrary between the parties to an arbitration, Pt II of the Act (*ie*, the Part governing IAA awards) and the Model Law shall apply only to "*international* arbitration" [emphasis added] as defined in ss 5(2) and 5(3)).

38 It follows that case law on the enforcement regime is relevant in the present case even though it involves the setting aside regime. In this regard, the prevailing approach of our courts is that where enforcement of a foreign arbitral award is resisted on public policy grounds, the public policy objection in question must involve either "exceptional circumstances … which would justify the court in refusing to enforce the award" (see *Re An Arbitration Between Hainan Machinery Import and Export Corp and Donald & McArthy Pte Ltd* [1995] 3 SLR(R) 354 at [45], which was cited with approval in, *inter alia*, *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 ("*Aloe Vera Inc*") at [75] and *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 ("*Galsworthy Ltd*") at [17]), or a violation of "the most basic notions of morality and justice" (see *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at 211, which was likewise relied on in *Aloe Vera Inc* (at [40]) and *Galsworthy Ltd* (at [17])).

39 With this background in mind, we now proceed to consider Issue (a) proper.

Our decision on Issue (a)

40 As mentioned at [27]–[28] above, the Appellant's case in this appeal is that: (a) the finality principle in international arbitration should be respected; (b) where an arbitral award is challenged on the ground of illegality in the underlying contract despite the arbitral tribunal having ruled that there was no such illegality, it is only in an exceptional case that the court may go behind the arbitral award and reopen the arbitral tribunal's finding; and (c) the present case is not an exceptional case. In contrast, the Respondent's case goes to the other extreme. According to the Respondent, once there is a challenge to the legality of the underlying contract, the court should conduct a full rehearing of the evidence put before the arbitral tribunal to determine for itself whether the arbitral tribunal was correct in ruling that the underlying contract was legal. The Judge adopted an approach that does not appear to be based on either of these two propositions. He held that "[i]n an *appropriate* case" [emphasis added] (see [24] of the HC Judgment), the court could reopen an arbitral tribunal's finding on the legality of the underlying contract and decide that issue for itself (see [22] above). In our view, an "appropriate" case must, by definition, include an exceptional case, although whether it includes non-exceptional cases is not clear from the HC Judgment since the Judge did not elaborate on what he considered to be an appropriate case. However, the present case must, by his test, be an appropriate case since he reopened the Tribunal's findings. Whatever the test of appropriateness entails, it clearly is derived from the judgment of the English CA in *Soleimany*. Before we discuss that decision, we should first examine the decision of Colman J on a similar issue in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and Others* [1999] QB 740 ("*Westacre (HC)*"), which was considered by the English CA in *Soleimany*.

The leading English case authorities

(1) The decision in *Westacre (HC)*

41 In *Westacre (HC)*, the dispute arose out of a contract governed by Swiss law ("the Westacre contract"), under which the claimant in the arbitration was to procure for the respondents in the arbitration contracts to sell military hardware to the Government of Kuwait (for convenience, we will hereafter refer to the claimant in an arbitration as the "plaintiff" and the respondent in an arbitration as the "defendant"). The Westacre contract was to be performed in Kuwait. A dispute arose as to the fees payable to the plaintiff, and the matter was referred to arbitration before an ICC arbitral tribunal in Geneva. In the arbitral proceedings, the defendants alleged that under the Westacre contract, the plaintiff was to exercise personal influence and, if necessary, pay bribes to secure sales contracts for them; accordingly, the Westacre contract was contrary to public policy. The ICC arbitral tribunal held that the defendants' allegations were not made out and made an award in favour of the plaintiff ("the Swiss award"). The defendants' application to the Swiss Federal Tribunal to overturn the Swiss award failed because the Swiss Federal Tribunal held that the Swiss award had been correctly made. Subsequently, the plaintiff obtained leave from an English court to enforce the Swiss award in England. The defendants resisted enforcement in England on the same grounds that had been rejected by the ICC arbitral tribunal and the Swiss Federal Tribunal. An order was made for the trial of the preliminary issue of whether the defendants' pleaded case disclosed no defence to the enforcement of the Swiss award. In the course of the hearing, the defendants applied for leave to re-amend their points of defence to allege that a number of witnesses called by the plaintiff at the arbitration had perjured themselves, and that since the Swiss award had been procured by fraud and/or manifestly dishonest evidence, it was contrary to public policy to enforce it. The defendants' allegations of perjury were based on the affidavit of one Miodrag Milosavljevic ("MM") sworn on 13 December 1995 ("MM's affidavit"), which had already been referred to and relied on in the

defendants' pleaded case.

42 Colman J dismissed the defendants' application for leave to re-amend their points of defence; he also held, *vis-à-vis* the preliminary issue, that the defendants' pleaded case disclosed no defence to the enforcement of the Swiss award in England. In an elaborate judgment, Colman J examined the relevant authorities on whether an arbitral award based on an underlying contract which was allegedly illegal under its governing law or the law of the place of performance or English law (as the law of the Enforcing State) could be enforced in England and summarised their effect in six principles (see *Westacre (HC)* at 767C–768A). The first four principles are not relevant to the present case (because the parties agreed to vest jurisdiction in the Tribunal to decide the issue of whether the Concluding Agreement should be set aside on the basis of, *inter alia*, illegality (see [13] above)). The last two principles are relevant, and they are as follows (see 767G–768A of *Westacre (HC)*):

> (v) If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, prima facie the court would enforce the resulting award. (vi) If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, *on the basis of facts not placed before the arbitrators*, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular. [emphasis added]

43 Colman J pointed out (at 772G–H) that if the court had been asked to enforce *the Westacre contract* directly, such enforcement would have been refused on the basis of international comity as that contract was illegal under Kuwaiti law. However, he continued, what the court was being asked to do was not to enforce the Westacre contract directly, but to enforce *the Swiss award* pursuant to the New York Convention, and in that regard, "enforcement [did] not substantially depend on the public policy of Kuwait but of [England]" (at 773A). On this basis, Colman J held (at 773A–E):

> … [I]t is necessary to take into account the importance of sustaining the finality of international arbitration awards in a jurisdiction which is the venue of more international arbitrations than anywhere else in the world. I have already referred to the developing jurisprudence on the separability of arbitration agreements [from their underlying contracts] in the context of allegations of illegality. In *E. D. & F. Man (Sugar) Ltd. v. Yani Haryanto (No. 2)* [1991] 1 Lloyd's Rep. 429 Neill L.J. expressly contemplated [at 436] that in the case of a drug-trafficking contract where a foreign judgment was sought to be enforced, the English court would go behind the judgment in the interests of public policy. However, although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking. On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption. Accordingly, the defendants' primary point does not bring them within the public policy exception to enforcement of the [Swiss] award under section 5(3) of the Arbitration Act 1975 [*viz*, the then English equivalent of s 31(4) of the IAA]. That conclusion is not to be read as in any sense indicating that the Commercial Court is prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption is referred to high calibre I.C.C. arbitrators and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.

44 Colman J also dealt with the defendants' alternative argument that since a contract for the

purchase of personal influence over government officials falling short of the use of bribery was contrary to the public policy of Kuwait, enforcement of such a contract would be contrary to English public policy and, thus, the plaintiff should not be permitted to enforce the Swiss award (which was based on such a contract) in England. Colman J rejected this argument on the ground that (at 775B–C):

> Outside the field of such universally-condemned international activities as terrorism, drug-trafficking, prostitution and paedophilia [and, we may add, human-trafficking], it is difficult to see why anything short of corruption or fraud in international commerce should invite the attention of English public policy in relation to contracts which are not performed within the jurisdiction of the English courts. That it should be the policy of the English courts to deter the exercise of personal influence short of corruption and fraud to obtain valuable contracts in foreign countries in which such activity is not contrary to public policy by refusing to enforce contracts would involve an unjustifiable in-road into the principle of pacta sunt servanda.

For these reasons (as well as those outlined at [43] above), Colman J held, *vis-à-vis* the preliminary issue, that the defendants' pleaded case did not disclose any defence to the enforcement of the Swiss award in England.

45 With regard to the defendants' application for leave to re-amend their points of defence to add the giving of perjured evidence as an additional ground for resisting enforcement of the Swiss award in England, Colman J reviewed the authorities and held that the defendants' application should not be allowed. His reasoning was as follows (see 784A–F of *Westacre (HC)*):

> Where a party to a foreign New York Convention arbitration award alleges at the enforcement stage that [the award] has been obtained by perjured evidence[,] that party will not normally be permitted to adduce in the English courts additional evidence to make good that allegation unless it is established that: (i) the evidence sought to be adduced is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing; and (ii) the evidence was not available or reasonably obtainable either (a) at the time of the hearing of the arbitration; or (b) at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrators' award if such procedure were available. Where the additional evidence has already been deployed before the court of supervisory jurisdiction for the purpose of an application for the setting aside or remission of the award but the application has failed, the public policy of finality would normally require that the English courts should not permit that further evidence to be adduced at the stage of enforcement. The defendants have not established that they could justify the introduction of the evidence in M.M.'s affidavit either on the basis that such evidence could not reasonably have been obtained at the time of the arbitration or subsequently in time to engage Swiss court procedures for challenging the [Swiss] award on the basis that the [plaintiff] had adduced perjured evidence. The procedure available under Swiss law for "revision" of an award on the grounds that it has been obtained by perjured evidence must be invoked within a time limit of 90 days from the discovery of the dishonest evidence, according to a letter of advice provided to the [plaintiff] by a Swiss lawyer, M. Andre Gillioz. This was clearly not done. That being so, I have no doubt that, notwithstanding the apparent strength of the evidence of M.M. on which they would rely, the defendants should not be permitted to reopen under the public policy exception to enforcement under section 5(3) of the Act of 1975 [*ie*, the Arbitration Act 1975 (c 3) (UK)] the issues of fact already determined by the arbitrators. Accordingly, the defendants' application for leave further to re-amend their points of defence must be refused.

(2) English cases after *Westacre (HC)*

46 Colman J's judgment was considered by the English CA in *Soleimany* (which was decided shortly after *Westacre (HC)*). In *Soleimany*, the English CA set aside an order giving the plaintiff leave to enforce in England an award of the Beth Din on the ground that the award was contrary to English public policy as it purported to enforce an underlying contract that was illegal under the law of Iran, the law of the place of performance (the underlying contract was for carpets to be illegally exported from Iran and then sold in other countries). The award was made according to Jewish law, under which the illegality of the underlying contract did not affect the rights of the parties. The English CA held that the interposition of the Beth Din's award did not isolate the plaintiff's claim from the illegality that gave rise to it. At 800A–C of *Soleimany*, Waller LJ, delivering the judgment of the English CA, said:

> … Where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it. …
>
> 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. …

47 In *Soleimany*, the English CA held that it was plain on the face of the award that the Beth Din was enforcing an underlying contract which was unlawful under the law of the place of performance. At 797B, Waller LJ said:

> We stress that we are dealing with a judgment which *finds as a fact* that it was the common intention [of the contracting parties] to commit an illegal act, but enforces the contract. ***Different considerations may apply where there is a finding by the foreign court to the contrary or simply no such finding, and one party now seeks a finding from the enforcing court*** . Thus our conclusion would be that if the [Beth Din's] award were a judgment of a foreign court, the English court would not enforce it. [emphasis in original in italics; emphasis added in bold italics]

48 As to what different considerations might apply where the arbitral tribunal had found that there was no illegality in the underlying contract, Waller LJ said at 800D–H:

> The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none. Or perhaps they have made a non-speaking award, and have not been asked to give reasons. In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. We do not propound a definitive solution to this problem, for it does not arise in the present case. So far from finding that the underlying contract was not illegal, … the Beth Din found that it was.
>
> It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. 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*.

[emphasis added]

49 Continuing his *obiter* discussion of the relevant considerations when enforcement of an arbitral award was resisted on the basis of illegality in the underlying contract despite the arbitral tribunal's ruling that there was no such illegality, and in reference to the six principles stated by Colman J in *Westacre (HC)* at 767C–768A, Waller LJ expressed his agreement with the fourth principle (namely, that the court would not permit an arbitral tribunal "to ignore palpable and indisputable illegality" (*per* Colman J in *Westacre (HC)* at 767F) in the underlying contract), and also the fifth principle (namely, that if the arbitral tribunal had jurisdiction to decide whether the underlying contract was illegal and had gone on to find that the contract was not illegal, the arbitral award would *prima facie* be enforced by the court). However, Waller LJ disagreed with the sixth principle (namely, that where an arbitral award was challenged at the enforcement stage on the basis of illegality in the underlying contract despite the arbitral tribunal having found that the contract was legal, it was *only* in cases where the challenge was based on *facts not placed before the arbitral tribunal* that the court would intervene and reopen the arbitral tribunal's finding). Waller LJ adopted a broader approach than that of Colman J, stating (at 803B–C of *Soleimany*):

… *[I]n an appropriate case*[,] it [*ie*, the court] may inquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. *We thus differ from Colman J., who limited his sixth proposition to cases where there were relevant facts not put before the arbitrator*. [emphasis added]

50 After considering two other authorities for completeness, Waller LJ said (at 803G–804A):

Finally, under this head, we should state explicitly what may already be apparent: when considering illegality of the underlying contract, we do not confine ourselves to English law. 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. That is well established[,] as appears from the citations earlier in this judgment. This rule applies as much to the enforcement of an arbitration award as to the direct enforcement of a contract in legal proceedings.

The award in this case, which purports to enforce an illegal contract, is not enforceable in England and Wales. …

51 In *Westacre (CA*) (*viz*, the appeal from Colman J's decision in *Westacre (HC)*), Waller LJ reiterated his *obiter* statement in *Soleimany* that where enforcement of an arbitral award was resisted on the ground of illegality in the underlying contract, the court could, in an appropriate case, reopen the arbitral tribunal's finding that there was no such illegality. He disagreed with Colman J's decision not to allow the defendants to reopen, in the enforcement proceedings in England, the ICC arbitral

tribunal's finding that the Westacre contract did not involve or contemplate any bribery on the plaintiff's part. Citing the English CA's decision in *E D & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429, Waller LJ said (at 314D–315C of *Westacre (CA)*):

> That case in my judgment is important. It demonstrates that even if a party had obtained a declaration from the English court as to the validity of a contract in a situation in which the defendant had not raised a public policy issue in relation, for example, to the fact that the contract was for the importation of drugs, the English court would not allow the plaintiff to rely on an issue estoppel to prevent "argument on principles of public policy which are of the greatest importance." The position may be different if the public policy issue relates to a rule of [another country's] domestic law.
>
> It thus supports the view that was being expressed obiter in *Soleimany v. Soleimany* [1999] Q.B. 785, that *there will be circumstances in which, despite the prima facie position of an award preventing a party [from] 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.
>
> [Colman J in *Westacre (HC)*] performed the balancing exercise and narrowly came down on the side of upholding the finality of the [Swiss] award. It would seem that if the case had concerned a drug-trafficking contract he might well have taken a different view but he placed "commercial corruption" at a different level of opprobrium from drug-trafficking.
>
> I have reached a different conclusion to that of [Colman J]. I disagree with him as to the appropriate level of opprobrium at which to place commercial corruption. … I believe it important that the English court is not seen to be turning a blind eye to corruption on this scale. I believe that if unanswered the case at present made on M.M.'s affidavit would be conclusive against [the plaintiff] being entitled to enforce the [Westacre contract] and thus the [Swiss] award as a matter of English public policy. I also believe that [Colman J] did not sufficiently consider the extent to which the case now presented on bribery was examined by the arbitration tribunal. When one examines the circumstances of this case one can see that in truth the bribery issue has not been ventilated properly before the Swiss arbitral tribunal. …
>
> [emphasis added]

52 In contrast, the other two members of the English CA in *Westacre (CA)* disagreed with Waller LJ's view that it was appropriate to permit the defendants to reopen the ICC arbitral tribunal's findings on the defendants' allegations of bribery. They also disagreed with Waller LJ's *obiter* comments in *Soleimany*. Mantell LJ said at 316D–317C of *Westacre (CA)*:

> … I … agree that the preliminary issue raises two separate questions: is it open to the defendants in the enforcement proceedings to challenge the arbitrators' findings of fact on the bribery issue, and secondly, if so and if [the defendants are] successful in proving the assertions set out in [MM's affidavit], should the English court enforce the [Swiss] award? Clearly the questions have to be addressed in that order and the key question is the first. On that key question I regret to

say that I am unable to agree with Waller L.J. …

It is of crucial importance to evaluate both the majority decision in the arbitration and the ruling of the Swiss Federal Tribunal, Swiss Law being both the proper law of the [Westacre] contract and the curial law of the arbitration and Switzerland, like the United Kingdom, being a party to the New York Convention. From the [Swiss] award itself[,] it is clear that bribery was a central issue. The allegation was made, entertained and rejected. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the [Swiss] award.

However, in the obiter passage cited by Waller L.J. from the judgment in *Soleimany v. Soleimany* [1999] Q.B. 785, 800, it seems to have been suggested that some kind of preliminary inquiry short of a full scale trial should be embarked upon whenever "there is prima facie evidence from one side that the award is based on an illegal contract …" For my part I have some difficulty with the concept and even greater concerns about its application in practice, but, for the moment and uncritically accepting the guidelines offered, it seems to me that any such preliminary inquiry in the circumstances of the present case must inevitably lead to the same conclusion, namely, that *the attempt to reopen the facts should be rebuffed*. I so conclude by reference to the criteria given by way of example in *Soleimany v. Soleimany* itself. First, there was evidence before the tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the [Swiss] award. The seriousness of the alleged illegality to which Waller L.J. gives weight is not, in my judgment, a factor to be considered at the stage of deciding whether or not to mount a full-scale inquiry. It is something to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality which can only be performed in response to the second question, if it arises, namely, should the [Swiss] award be enforced?

Accordingly I would dismiss the appeal.

[emphasis added]

53 In a similar vein, Sir David Hirst said in his judgment in *Westacre (CA)* (at 317C–D):

I also would dismiss this appeal for the reasons given by Mantell L.J., with which I entirely agree. I would only add that, had the second question [*viz*, the question of whether, if the defendants were successful in proving the allegations in MM's affidavit, the English courts should enforce the Swiss award] arisen, I would have answered it in favour of the plaintiff for the same reasons as those given by Colman J. [in *Westacre (HC)* at] 771–773. Here, in my judgment, Colman J. struck the correct balance, and, in doing so, contrary to Waller L.J.'s view, gave ample weight to the opprobrium attaching to commercial corruption: see especially [*Westacre (HC)*] at p. 771H–773A.

54 In *Westacre (CA)*, there was the additional factor that the Swiss award had been affirmed by the Swiss Federal Tribunal. In the subsequent case of *OTV*, this additional factor was absent. In that case, which concerned (*inter alia*) an application to set aside an order granting leave for a Swiss arbitral award to be enforced in England, the defendant ("Omnium") had appointed the plaintiff ("H Co") to provide consultancy services in connection with a drainage project in Algiers. The agreement between the parties ("the OTV agreement") provided that Omnium was to pay H Co certain fees on condition that Omnium was awarded the contract for the drainage project. The arbitration clause in

the OTV agreement chose: (a) Swiss law as the proper law of the agreement; (b) dispute resolution by ICC arbitration; and (c) the curial law of Geneva, the seat of the arbitration. The condition prescribed in the OTV agreement was met, but Omnium paid H Co only half of the agreed fees. H Co brought arbitral proceedings to recover the balance of its fees. The arbitrator made an award in H Co's favour. He found that: (a) the work performed by H Co consisted of lobbying (which did not involve bribing) Algerian public officials for the drainage project to be awarded to Omnium; and (b) although such activities wittingly breached an Algerian statute which prohibited the use of middlemen in connection with any public contract or any contract relating to foreign trade, and although the OTV agreement was unlawful under Algerian law (the law of the place of performance), it was not unlawful under Swiss law (the governing law of the agreement).

55 H Co applied to enforce the arbitral award in England and obtained an *ex parte* order from the English High Court giving effect to the award. Omnium applied to set aside the *ex parte* order, and also sought an order that the arbitral award be refused enforcement in England under s 103 of the Arbitration Act 1996 (c 23) (UK) (which is substantially the same as s 31 of the IAA). Omnium's case was that the arbitral award should not be enforced in England because enforcement would be in conflict with English public policy as the OTV agreement was unlawful in its place of performance (*viz*, Algiers).

56 Walker J dismissed Omnium's application, stating (at 224):

> … [T]he very point which [Omnium] now puts forward as a reason for refusal of enforcement in England was (1) ruled upon on the face of the award, and (2) rejected by the application of the law chosen by the parties, (3) on the basis of a finding of fact that no corrupt practices were involved.
>
> It may well be that an English arbitral tribunal, chosen by the parties, and applying English law as chosen by the parties, would have reached a different result. It may well be that such a tribunal would have dismissed [H Co]'s claim, applying the full rigour of the principle stated by Viscount Simonds in *Regazzoni v. K. C. Sethia (1944) Ltd*., [1957] 2 Lloyd's Rep. 289 at p. 294, col. 2; [1958] A.C. 301 at p. 317 thus:
>
> > … whether or not the proper law of the contract is English law, an English Court will not enforce a contract, or award damages for its breach if its performance will involve the doing of an act in a foreign and friendly State which violates the law of that State.
>
> …
>
> But I am not adjudicating upon the underlying contract. I am deciding whether or not an arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced.

57 At 225 of *OTV*, Walker J distinguished *Soleimany* as follows:

> … [Omnium's] reliance on *Soleimany* … was in my view misplaced. In that case, it was apparent from the face of the award that the arbitrator was dealing with an illicit enterprise for smuggling

carpets out of Iran. It was quite simply a smuggling contract. The case thus clearly fell into the category of cases where as a matter of public policy no award would be enforced by an English Court, and the whole of the judgment … has to be read in that context. The element of corruption or illicit practice was present [in *Soleimany*] which, on the arbitrator's unchallengeable finding of fact in this case, was not present here.

The two divergent approaches in England

58 It can be seen from the foregoing discussion that thus far, the English courts have adopted two divergent approaches *vis-à-vis* the circumstances in which the court may reopen an arbitral tribunal's decision that an underlying contract is legal. On the one hand, there is the approach taken by Colman J in *Westacre (HC)* and the majority of the English CA in *Westacre (CA)*; on the other hand, there is the more liberal (and "interventionist") approach taken in *Soleimany* and by Waller LJ in *Westacre (CA)*. As noted in Shai Wade, "Westacre v. Soleimany: What Policy? Which Public?" [1999] Int ALR 97 ("Wade's article"), although *Soleimany* adopted many aspects of the decision in *Westacre (HC)*, it also (at p 99):

> … promote[d] a rather different approach to the balance to be struck between the public policy of upholding arbitration awards and the policy against unsavoury international trade practices. In the judgment of the [English CA] in [that] case, which was delivered by Waller L.J., the limits to the principle of the separability of an illegal underlying agreement [from an arbitral award] were decidedly more strict. While *Soleimany* accepts that there are cases in which an arbitrator would have jurisdiction to decide on questions of illegality (such as [in *Westacre (HC)*] itself), the emphasis in the judgment is exemplified by the statement …:
>
> > "The English court would not recognise an agreement between the highwaymen to arbitrate their differences any more than it would recognise their initial agreement to split the proceeds."
>
> In exercising its supervisory role over the enforcement of arbitral awards, the court was:
>
> > "concerned to preserve the integrity of its process and to see that it is not abused. The parties … cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract" …

59 In contrast, in *Westacre (CA)*, the majority of the English CA (namely, Mantell LJ and Sir David) rejected the approach taken in *Soleimany* (and by Waller LJ in *Westacre (CA)* itself), and chose "a return to the emphasis normally placed on the continued unhindered operation of the New York Convention as an overriding policy in matters concerning international arbitration" (see Wade's article at p 100).

60 With respect, we do not agree with the approach taken in *Soleimany* and by Waller LJ in *Westacre (CA)*. In our view, it is the majority's approach in the latter case (which endorses Colman J's approach in *Westacre (HC)*) which is consonant with the legislative policy of the IAA of giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards (whether foreign arbitral awards or IAA awards).

Application of the relevant legal principles to the present case

61 In *Westacre (HC)*, Colman J said (at 769E) that since the parties had selected arbitration by an impressively competent international body (*viz*, the ICC), the English courts would be entitled to

assume that the arbitrators appointed were of undoubted competence and ability, and well able to understand and determine the particular issue of illegality arising in that case. This premise applies *a fortiori* in the present case, given that: (a) the parties selected arbitration by the SIAC (an equally competent international body); (b) the Tribunal consisted of experienced members of the local Bar; and (c) the Tribunal decided the issue of illegality according to Singapore law. For these reasons, a Singapore court would all the more be entitled to assume that the members of the Tribunal had adequate knowledge of Singapore law.

62 Be that as it may, since the law applied by the Tribunal was Singapore law, the question that arises is whether, if a Singapore court disagrees with the Tribunal's finding that the Concluding Agreement is not illegal under Singapore law, the court's supervisory power extends to correcting the Tribunal's decision on this issue of illegality. In our view, the answer to this question must be in the affirmative as the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is and, in turn, whether or not the Concluding Agreement is illegal (illegality and public policy being, as pointed out at [19] above, mirror concepts in this regard), however eminent the Tribunal's members may be. Accordingly, we agree with the Judge that the court is entitled to decide for itself whether the Concluding Agreement is illegal and to set aside the Interim Award if it is tainted with illegality, just as in *Soleimany*, the English CA refused to enforce the Beth Din's award as it was tainted with illegality.

63 However, this conclusion does not mean that in every case where illegality in the underlying contract is invoked, the court is entitled to reopen the arbitral tribunal's finding that the underlying contract is not illegal. In the present case, it was not disputed that the Tribunal's decision took into account the principle that an agreement to stifle the prosecution of non-compoundable offences would be illegal and contrary to public policy; indeed, the Tribunal made the Interim Award on that basis. As we stated earlier, the Judge also applied the same principle of law. What the Judge and the Tribunal differed on were the facts upon which their respective findings on the legality (or otherwise) of the Concluding Agreement were based. The Tribunal held that a plain reading of the Concluding Agreement did not disclose any illegality. In contrast, the Judge held that the Tribunal should not have given a literal meaning to the words of the Concluding Agreement and should instead have considered all the relevant surrounding circumstances, which circumstances, in his view, pointed to the Concluding Agreement being illegal. With respect, we do not think the Judge's criticism of the Tribunal's approach is justified because, as the record shows, the Tribunal did consider the relevant surrounding circumstances. For instance, it took into account the fact that: (a) the Respondent wanted the Complaint to be withdrawn as it thought the Complaint had simply been trumped up by the Appellant; and (b) the Respondent signed the Concluding Agreement even though it knew that the Appellant's withdrawal of the Complaint would terminate only criminal proceedings in respect of the Fraud Charge, but not criminal proceedings in respect of the Forgery Charges. It would seem that the Respondent's refusal to abide by the Concluding Agreement actually stemmed from its belief that the Appellant had procured the issue of the Non-Prosecution Order through bribery, an allegation which the Tribunal rejected and which the Judge also rejected.

64 In our view, this was not an appropriate case for the Judge to reopen the Tribunal's finding that the Concluding Agreement was valid and enforceable. The Tribunal did not ignore palpable and indisputable illegality (as the Beth Din did in *Soleimany*). The Concluding Agreement does not, on its face, suggest that the Appellant was required to do anything other than to receive evidence of the withdrawal and/or discontinuance and/or termination of "the Criminal Proceedings" (as defined in cl 1 of the Concluding Agreement) from the Thai prosecution authority or other relevant authority. In itself, cl 1 of the Concluding Agreement merely defines the date on which various obligations on the part of the Appellant and the Respondent will be triggered (*eg*, the Appellant's obligation to pay the Agreed Final Settlement Amount pursuant to cll 2 and 3, and the Respondent's obligation to terminate

the Arbitration pursuant to cl 5.1). It does not suggest, much less require, the doing of any illegal act by either the Appellant or the Respondent to trigger each other's obligations. Furthermore, the Tribunal found that as a matter of Thai law, it was not possible for the Appellant to withdraw, discontinue or terminate the Forgery Charges, and that *the Respondent was aware of this (through the objections of its Thai lawyers) when it signed the Concluding Agreement* (see especially para 107 of the Interim Award). [note: 18] It was for this reason that the Tribunal found as a fact that the Appellant could not have agreed to do something that was impossible under Thai law, and held that the Concluding Agreement could reasonably be interpreted in that light. Hence, there was no mutual intention that the Appellant would be required to withdraw, discontinue or terminate the Forgery Charges as that simply could not be done under Thai law. In short, this case is not a *Soleimany*-type case involving an underlying contract clearly tainted by illegality, but a *Westacre (CA)* or *OTV*-type case, where the respective arbitral tribunals found that the underlying contracts in question did not involve the giving of bribes to, but merely the lobbying of, government officials, which lobbying was not contrary to English public policy (*ie*, the public policy of the Enforcing State).

65 In our view, the Judge was not entitled to reject the Tribunal's findings and substitute his own findings for them. On the facts of this case, s 19B(1) of the IAA calls for the court to give deference to the factual findings of the Tribunal. The policy of the IAA is to treat IAA awards in the same way as it treats foreign arbitral awards where public policy objections to arbitral awards are concerned, even though, in the case of IAA awards, the seat of the arbitration is Singapore and the governing law of the arbitration is Singapore law. Arbitration under the IAA is international arbitration, and not domestic arbitration. That is why s 19B(1) provides that an IAA award is final and binding on the parties, subject only to narrow grounds for curial intervention. This means that findings of fact made in an IAA award are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factor.

66 In this connection, we would reiterate the point which this court made in *PT Asuransi Jasa* at [53]–[57], *viz*, that even if an arbitral tribunal's findings of law and/or fact are wrong, such errors would not *per se* engage the public policy of Singapore. In particular, we would draw attention to the following passage from [57] of that judgment:

> … [T]he [IAA] … gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the [IAA] is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the [IAA] and Art 34 of the Model Law. While we accept that an arbitral award is final and binding on the parties under s 19B of the [IAA], we are of the view that *the [IAA] will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact*, per se*, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law*. [emphasis added]

This passage recognises the reality that where an arbitral tribunal has jurisdiction to decide any issue of fact and/or law, it may decide the issue correctly or incorrectly. Unless its decision or decision-making process is tainted by fraud, breach of natural justice or any other vitiating factor, any errors made by an arbitral tribunal are not *per se* contrary to public policy.

67 That said, since s 19B(4) of the IAA, read with Art 34(2)(b)(ii) of the Model Law, expressly provides that an arbitral award can be challenged on public policy grounds, it is necessary for us to

clarify the application of the general principle laid down in *PT Asuransi Jasa* (at [57]) that "errors of law or fact, *per se*, do not engage the public policy of Singapore". It is a question of law what the public policy of Singapore is. An arbitral award can be set aside if the arbitral tribunal makes an error of *law* in this regard, as expressly provided by s 19B(4) of the IAA, read with Art 34(2)(b)(ii) of the Model Law. Thus, in the present case, if the Concluding Agreement had been governed by Thai law instead of Singapore law, and if the Tribunal had held that the agreement was indeed illegal under Thai law (as the Respondent alleged) *but could nonetheless be enforced in Singapore because it was not contrary to Singapore's public policy*, this finding – *viz*, that it was not against the public policy of Singapore to enforce an agreement which was illegal under its governing law – would be a finding of law which, if it were erroneous, could be set aside under Art 34(2)(b)(ii) of the Model Law (read with s 19B(4) of the IAA).

68 In contrast, Art 34(2)(b)(ii) of the Model Law does not apply to errors of *fact*. As Colman J said in *Westacre (HC)* (at 769E–F) *vis-à-vis* errors of fact in arbitral awards:

> In so far as [the issue referred to arbitration] involves [the] determination of questions of fact, that is an everyday feature of international arbitration. *The opportunity for erroneous and uncorrectable findings of fact arises in all international arbitration*. [emphasis added]

In a similar vein, Quentin Loh JC pointed out at [24] of *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 151 (which concerned an application under s 29(1) of the IAA for leave to enforce a Danish arbitral award in Singapore):

> It is worth remembering that just as parties who have chosen arbitration must live with their arbitrator, 'good, bad or indifferent,' our courts may be called upon to enforce 'bad' awards from another jurisdiction.

69 In our view, limiting the application of the public policy objection in Art 34(2)(b)(ii) of the Model Law to findings of *law* made by an arbitral tribunal – to the *exclusion* of findings of *fact* (save for the exceptions outlined at [65] above) – would be consistent with the legislative objective of the IAA that, as far as possible, the international arbitration regime should exist as an autonomous system of private dispute resolution to meet the needs of the international business community. Further, such an approach would also be fair to both the successful party and the losing party in an arbitration. Taking the present case as an example, we have held that the Respondent is bound by the Tribunal's factual finding that the Concluding Agreement did not require the Appellant to do anything illegal under Thai law and was therefore not an illegal contract. If the Tribunal had made the converse finding of fact instead – *ie*, if the Tribunal had found as a fact that the Concluding Agreement did indeed require the Appellant to engage in illegal conduct in Thailand and was therefore an illegal contract – and if the Tribunal had erred in this regard, the Appellant would equally have been bound by this finding as it would have no recourse under the IAA (read together with the Model Law) against such an error of fact.

70 To summarise our ruling on Issue (a), the Tribunal's findings in the present case as to the intention of the Appellant and the Respondent when they signed the Concluding Agreement, which intention was reflected in cl 1 thereof, are findings of fact which are not correctable as they are final and binding on both parties. Public policy, based on the alleged illegality of the Concluding Agreement, was not engaged by such findings of fact. Hence, the Judge should not have reopened the Tribunal's findings.

71 Before we conclude our discussion of Issue (a), there is one other point which we wish to make. This concerns the High Court case of *Rockeby biomed Ltd v Alpha Advisory Pte Ltd* [2011]

SGHC 155 ("*Rockeby*"), which, like the present case, involved an application to set aside an IAA award on the basis of illegality in the underlying contract. The arbitral award in that case stemmed from a consultancy agreement under which the plaintiff was to advise the defendant on its plan to secure a listing on Singapore's stock exchange. In the arbitration, the plaintiff claimed various sums allegedly owed by the defendant under the consultancy agreement. The defendant resisted the claim on the ground that the plaintiff was not exempt from the licensing requirements set out in Pt IV of the Securities and Futures Act (Cap 289, 2006 Rev Ed) as the advice given by him did not meet the criterion of being "advice [that was] not specifically given for the making of any offer of securities to the public by the accredited investor to whom the advice was given" (see para 7(1)(*b*)(i) of the Second Schedule to the Securities and Futures (Licensing and Conduct of Business) Regulations (Cap 289, Rg 10, 2004 Rev Ed)). Accordingly, the defendant contended, the plaintiff was an unlicensed financial advisor and, therefore, the consultancy agreement was illegal as well as null and void. The arbitrator ruled against the defendant on both counts. The defendant then applied to the High Court to set aside the arbitral award on the basis that it offended the public policy of Singapore as it upheld an illegal contract. In dealing with the defendant's application, the court cited the HC Judgment with approval and adopted the same approach as that of the Judge, stating that "[i]n deciding the issue of illegality, [it] ha[d] the power to examine the facts of the case afresh" (see [19] of *Rockeby*). This is *inconsistent* with the approach which we have set out in this judgment.

Issue (b): Whether the Judge was correct in finding that the Concluding Agreement was illegal

72 Although we have found (*vis-à-vis* Issue (a)) that the public policy of Singapore was not engaged in the present case and that this was therefore an inappropriate case for the Judge to reopen the Tribunal's findings, we will now consider, for the sake of completeness, Issue (b), *viz*, whether the Judge was correct in holding – contrary to the Tribunal's finding – that the Concluding Agreement was illegal.

73 As we mentioned earlier (at, *inter alia*, [63] above), the Judge interpreted the Concluding Agreement as requiring the Appellant to take action to stop the prosecution of the Forgery Charges (which were non-compoundable under Thai law) and, on this basis, held that the agreement was illegal. In our view, this interpretation is, with respect, not justified for the following reasons. First, the Judge interpreted the Concluding Agreement (which was not illegal on its face) on the basis that "agreements of an illegal nature [were] unlikely to be expressly stated[;] [i]nferences ha[d] to be made from the surrounding circumstances" (see [46] of the HC Judgment). This is tantamount to assuming a fact which has yet to be proved. Second, none of the provisions of the Concluding Agreement required the Appellant to take any unlawful action to stop the Thai criminal proceedings. In particular, cl 1 merely referred to the Appellant receiving evidence from the Thai prosecution authority (or other relevant authority) of the withdrawal and/or discontinuation and/or termination of those proceedings. Third, the Judge relied on the draft cl 5 (as defined at [24] above) as evidence of the parties' agreement to achieve an illegal purpose when the very fact that that provision was subsequently discarded would suggest the contrary. In any case, although the draft cl 5 expressly stated that as a condition precedent to the performance of each party's obligations, the Appellant was to "take such action as [was] necessary to withdraw and/or discontinue certain criminal proceedings … filed … by [the Appellant] against [Q], [P] and [O] with [the Thai prosecution authority]", [note: 19] it did not necessarily follow that the action which the Appellant had to take would invariably involve some kind of unlawful action. As mentioned earlier, the Respondent's allegation that the Appellant had procured the issue of the Non-Prosecution Order by bribery was rejected by the Tribunal, and this finding was affirmed by the Judge (see [25] above). Fourth, the Judge failed to consider that there was no reason for the Respondent to have entered into an illegal agreement as it would surely have wanted to be paid the Agreed Final Settlement Amount of

US$470,000: why should the Respondent have taken the risk of entering into an agreement which the Appellant could have resiled from at any time on the ground of illegality?

74 The Appellant submitted that the Concluding Agreement was clearly a valid and legal commercial agreement between the parties, with each party trying to secure for itself the best deal out of the disputes which they had referred to arbitration. We would agree to the extent that the Concluding Agreement did not state anything which was illegal on its face. We would add that the Respondent's conduct in demanding payment of the Agreed Final Settlement Amount before subsequently raising the alleged illegality of the Concluding Agreement may be evidence of bad faith on the Respondent's part and indicates that the Respondent may have invoked illegality to set aside the Interim Award as an afterthought.

Conclusion

75 For the reasons given above, we hold that the Judge erred in reopening the Tribunal's finding of fact that the Concluding Agreement "[did] not suggest whatsoever that the … [a]greement was for an illegal purpose or that some illegal acts would be performed by the [Appellant]" [note: 20] and, for that reason, was not an illegal contract under either Singapore law or Thai law. No issue of public policy arose that entitled the Respondent to invoke Art 34(2)(b)(ii) of the Model Law (read with s 19B(4) of the IAA). The Judge also erred in fact in ruling that the Concluding Agreement was illegal.

76 Accordingly, we allow this appeal with costs here and below as well as the usual consequential orders.

[note: 1] See the Core Bundle of Documents filed on 30 September 2010 ("CB") at vol 2, pp 101–110.

[note: 2] *Id* at vol 2, pp 184–206.

[note: 3] *Id* at vol 2, p 199.

[note: 4] *Id* at vol 2, p 81 and pp 141–145.

[note: 5] *Id* at vol 2, p 102.

[note: 6] *Ibid*.

[note: 7] See CB at vol 2, p 103.

[note: 8] *Id* at vol 2, pp 146–148.

[note: 9] *Id* at vol 2, p 112.

[note: 10] *Ibid*.

[note: 11] See CB at vol 2, p 116.

[note: 12] *Id* at vol 2, p 117.

[note: 13] *Id* at vol 2, pp 118–119.

[note: 14] *Id* at vol 2, pp 78–79.

[note: 15] *Id* at vol 2, p 79.

[note: 16] *Id* at vol 2, pp 67–71.

[note: 17] See para 21 of the Respondent's written submissions dated 27 April 2010 for OS 230/2010 (at CB vol 2, p 249).

[note: 18] See CB at vol 2, p 69.

[note: 19] *Id* at vol 2, p 94.

[note: 20] See para 110 of the Interim Award (at CB vol 2, p 70).

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