

SINGAPORE COURTS CONTINUE TO SUPPORT ARBITRATION



AJU v AJT [2011] SGCA 41

In a recent decision, the Singapore Court of Appeal has once again demonstrated its pro-arbitration stance. The case is of interest to parties involved with international arbitration in the region, and affirms the Singapore Courts' commitment not to interfere with arbitral awards wherever possible.

In *AJU v AJT* (22 August 2011), the Singapore Court of Appeal overturned the High Court's decision to set aside an interim arbitral award (the "*Interim Award*"). The High Court's decision had been made on the ground that the Interim Award was contrary to Singapore public policy. Article 34(2)(b)(ii) of the UNCITRAL Model Law, which has force of law in Singapore by virtue of Section 3 of the International Arbitration Act, provides that a state's courts may set aside arbitral awards where the award is in conflict with the public policy of that state.

Background

A dispute arose between AJU (the "*Appellant*") and AJT (the "*Respondent*") following the early termination of a contract relating to an annual tennis tournament held in Bangkok. The contract was governed by Hong Kong law, with disputes to be referred to arbitration in Singapore under the UNCITRAL Arbitration Rules. An arbitral tribunal (the "*Tribunal*") was constituted under the banner of the Singapore International Arbitration Centre.

During the course of the dispute, the Appellant complained to the Special Prosecutor's Office of Thailand that the Respondent had forged documents and made fraudulent representations to induce it to enter into the contract. An investigation was initiated.

Under the Thai Criminal Code:

1. Fraud is a "compoundable offence", meaning the victim may require the prosecuting authority to issue a cessation



order preventing prosecution of the offence.

2. Forgery is a “non-compoundable offence”, meaning the victim cannot require the prosecuting authority to terminate a prosecution. Charges may be reactivated upon the production of additional evidence.
3. Agreements to stifle the prosecution of non-compoundable offences are illegal.

The parties subsequently signed an agreement (the “**Concluding Agreement**”), governed by Singapore law, which provided that the Appellant would withdraw its complaint to the Thai Special Prosecutor’s Office and pay a settlement sum to the Respondent, following which the Respondent would terminate the arbitration.

The Appellant paid the settlement sum and withdrew the complaint. The Thai Special Prosecutor’s Office issued a cessation order relating to the fraud charge and a non-prosecution opinion relating to the forgery charge. However the Respondent refused to terminate the arbitration, claiming:

1. The forgery charge (being a non-compoundable offence) could potentially be re-activated on the production of additional evidence from the Appellant or any other party, even if such evidence might be false.
2. The Concluding Agreement had been agreed through duress and undue influence.

3. The cessation order and non-prosecution opinion were issued following bribes paid to Thai officials.

The Appellant argued that a final settlement had been reached under the Concluding Agreement but the Respondent alleged that the Concluding Agreement was illegal, as it was an agreement to stifle the prosecution in Thailand of forgery (a non-compoundable offence) and the use of a forged document.

The Tribunal held that the Concluding Agreement was valid, enforceable and not illegal and published an Interim Award on this basis. It also ruled that the Interim Award served to terminate the arbitration pursuant to the terms agreed by the parties in the Concluding Agreement.

The High Court’s decision

On application by the Respondent, the Singapore High Court set aside the Interim Award and held that the Concluding Agreement was an agreement to prevent prosecution of the offences in Thailand and was illegal both under the governing law (Singapore) and the law of the place of performance (Thailand). It was therefore contrary to the public policy of Singapore.

The general rule in relation to arbitral awards is that they can be appealed only on questions of law and not on questions of fact. On the issue of whether the High Court could re-open the Tribunal’s findings of fact and/or law and decide for itself whether the Concluding Agreement was legal, the judge held that “*in an appropriate case, the court, in exercising its supervisory jurisdiction, may examine*

the facts of the case and decide the issue of illegality”.

The Court of Appeal’s decision

The Appellant appealed to the Court of Appeal, contending:

1. The High Court had erred in law by rejecting the Tribunal’s findings of fact and had failed to give effect to the principle of finality in arbitral awards.
2. The Concluding Agreement was not, on the facts, illegal as the High Court had ruled.

The Court of Appeal agreed and held that the High Court had considered an alleged error of fact, not one of law or public policy. The High Court was wrong to re-open the Tribunal’s finding concerning the legality of the Concluding Agreement. The application of Article 34(2)(b)(ii) of the Model Law does not extend to errors of fact and allows for a decision to be re-opened only when a tribunal has made an error in deciding what constitutes a violation of public policy. The Concluding Agreement was legal.

The Court of Appeal noted that when considering whether to enforce an arbitral award on grounds of public policy, the objection in question must involve either “*exceptional circumstances ... which would justify the court in refusing to enforce the award*” or a violation of “*the most basic notions of morality and justice*”, such as where a tribunal’s “*decision or decision making process is tainted by fraud, breach of natural justice or any other vitiating factor ...*”.

In considering divergent UK



authorities on this point (*Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and Others* [1999] QB 740 and *Soleimany v Soleimany* [1999] QB 785), the Court of Appeal chose to adopt an approach preserving the primacy and autonomy given to arbitral proceedings and upholding the finality of arbitral awards. This was in line with the Singapore International Arbitration Act. A dispute over public policy issues does not automatically entitle the court to re-open findings of fact.

Implications

The decision reinforces the Singapore Courts' determination to uphold the finality of arbitral awards wherever possible. It is clear from the decision that only in exceptional circumstances will the Singapore Courts refuse to enforce an Award on the basis of public policy.

For more information, please contact [Barry Stimpson](#), Partner, on +65 6305 9515 or barry.stimpson@hfw.com, or [Kenneth Hickman](#) (pictured right), Associate, on +65 6305 9535 or kenneth.hickman@hfw.com, or your usual contact at HFW.

For more information, please also contact:

Steven Paull
London Partner
T: +44 (0)20 7264 8255
steven.paull@hfw.com

Guillaume Brajeux
Paris Partner
T: +33 (0)1 44 94 40 50
guillaume.brajeux@hfw.com

Stéphane Selegny
Rouen Partner
T: +33 (0)1 44 94 40 50
stephane.selegny@hfw.com

Konstantinos Adamantopoulos
Brussels Partner
T: +32 2 535 7861
konstantinos.adamantopoulos@hfw.com



Jeremy Davies
Geneva Partner
T: +41 (0)22 322 4810
jeremy.davies@hfw.com

Dimitri Vassos
Piraeus Partner
T: +30 210 429 3978
dimitri.vassos@hfw.com

Edward Newitt
Dubai Partner
T: +971 4 423 0555
edward.newitt@hfw.com

Paul Hatzler
Hong Kong Partner
T: +852 3983 7788
paul.hatzler@hfw.com

Nick Poynder
Shanghai Partner
T: +86 21 5888 7711
nicholas.poynder@hfw.com

Paul Aston
Singapore Partner
T: +65 6305 9538
paul.aston@hfw.com

Gavin Valley
Melbourne Partner
T: +61 (0)3 8601 4523
gavin.valley@hfw.com

Alex Baykitch
Sydney Partner
T: +61 (0)2 9320 4600
alex.baykitch@hfw.com

Julian Sher
Perth Partner
T: +61 (0)8 9422 4701
julian.sher@hfw.com

Jeremy Shebson
São Paulo Partner
T: +55 (11) 3179 2903
jeremy.shebson@hfw.com

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Lawyers for international commerce

HOLMAN FENWICK WILLAN SINGAPORE LLP
3 Church Street
#19-03 Singapore 049483
T: +65 6534 0195
F: +65 6534 5864

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