

27 July 10

DREW & NAPIER LLC

LEGAL UPDATE

A DREW & NAPIER PUBLICATION

CASE UPDATE

AGREEMENT STIFLING CRIMINAL PROCEEDINGS TAINTED BY ILLEGALITY; ARBITRATION AWARD UPHOLDING SUCH AGREEMENT SET ASIDE

AJT v AJU [2010] SGHC 201

Executive Summary

The Singapore High Court has set aside an arbitration award which upheld an agreement directed towards the stifling of criminal proceedings in respect of a non-compoundable offence.

The court ruled that such an agreement was illegal. To uphold an award which concluded that such an agreement was valid would contravene public policy and would constitute a breach of international comity. The award was therefore set aside.

Background

AJT (the "**Plaintiff**"), a company incorporated in the British Virgin Islands, and AJU (the "**Defendant**"), a company incorporated in Thailand, were in the business of producing television programmes and promoting shows and events.

In August 2006, the Plaintiff commenced arbitration proceedings in the Singapore International Arbitration Centre ("**SIAC**") (the "**Arbitration**") in respect of claims brought by the Plaintiff against the Defendant under an agreement entered into between the Plaintiff's related company and the Defendant.

In November 2006, in the midst of the Arbitration, the Defendant lodged a complaint of fraud, forgery and the use of a forged document against the Plaintiff's sole director and shareholder and another company related to the Plaintiff to the Thai police. Under Thai law, fraud is a compoundable offence but forgery and the use of a forged document are non-compoundable offences.

While police investigations were ongoing, the parties entered into a settlement agreement (the "**Agreement**"). The governing law of the Agreement was Singapore law.

The Agreement provided, among other things, that the Plaintiff should receive evidence of withdrawal of the relevant criminal proceedings. The Defendant proceeded to withdraw its complaint. The Thai police subsequently issued a cessation order in respect of the charges of fraud,

MAIN OFFICE
20 Raffles Place
#17-00 Ocean Towers
Singapore 048620

t +65 6535 0733
f +65 6535 4906
mail@drewnapier.com
www.drewnapier.com

Co. Reg. No. 200102509E

and a non-prosecution order in respect of the charges of forgery and use of the forged document. The Defendant further gave the Plaintiff a letter of guarantee that it would not reinitiate criminal proceedings and requested the Plaintiff to withdraw and terminate the Arbitration.

However, the Plaintiff refused to do so and instead accused the Defendant of failing to comply with its obligations under the Agreement. The Plaintiff challenged the validity and enforcement of the Agreement on grounds of duress, undue influence and illegality.

The parties agreed to refer the issue of whether the Agreement ought to be set aside or declared void on the basis of duress, undue influence and illegality to the arbitral tribunal (the "**Tribunal**").

The Tribunal's decision

The Tribunal rendered an award (the "**Award**") which concluded that the Agreement was not illegal. It was of the view that there was nothing which suggested that the Agreement was for an illegal purpose or that some illegal acts would be performed by the Defendant. There was also nothing to suggest that there was a contractual obligation on the Defendant to produce the non-prosecution order issued or that the Defendant should cause or influence the Thai police to issue such an order.

The Plaintiff then applied to the Singapore High Court to set aside the Award on the basis that the Award was contrary to the public policy of Singapore as:

- (i) the Award sought to uphold the Agreement which sought to stifle prosecution of a non-compoundable offence;
- (ii) the Award sought to enforce a contract that was illegal and unenforceable in Thailand; and
- (iii) bribery and/or corruption of a public authority were involved in the performance of the Agreement.

The High Court's decision

The Award was set aside. The Agreement was illegal both under its governing law (ie. Singapore law) and under the law of the place of performance, Thailand.

The High Court also discussed the legal principles in relation to the setting aside of arbitration awards on the grounds that an award contravened public policy.

Setting aside an award on the ground that it conflicts with public policy

Article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (the "**UNCITRAL Model Law**"), to which Singapore is a signatory, provides that an arbitral award

may be set aside only if the court finds that the award conflicts with the State's public policy.

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

On the facts of the case, while the Tribunal determined that the Agreement was not illegal, this was not conclusive. Where appropriate, a court, in exercising its supervisory jurisdiction, may examine the facts of the case and decide the issue of illegality.

Agreements to stifle prosecution

The court emphasised that agreements to stifle prosecution undermine the public interest in the maintenance of justice, particularly in the realm of law and order.

In determining what constitutes an agreement to stifle prosecution, the test is whether "*any part of the consideration of an agreement consists of a promise to do some act directed towards the stifling of criminal proceedings in respect of a non-compoundable offence, that agreement is against public policy.*"

In this case, the parties to the Agreement understood that the Defendant was obliged to withdraw the complaints in their entirety. In the court's view, even if the complainant has no power to withdraw the prosecution for non-compoundable offences, an agreement consenting to or requiring any action directed at the charge's withdrawal will still be against public policy.

The principle of international comity

By holding that the Agreement involved no illegality, the Tribunal had effectively validated an agreement entered into by the parties with the intention and purpose of doing an act which undermined the administration of justice in Thailand.

To uphold the Award would constitute a breach of international comity. The illegality of the Agreement under Thai law was borne out by evidence of the parties' witnesses, who gave evidence that the Agreement would be void under Thai law on the basis that it was contrary to public policy or good morals.

The Award also ought to be set aside under Article 34(2)(b)(ii) of the UNCITRAL Model Law on the ground that it conflicted with the public policy of Singapore, as the parties' intention and object contemplated by the Agreement were contrary to Singapore's obligation of international comity.

Comment

This case is useful in illustrating what evidence a party will need to adduce to persuade the court that a particular agreement is tainted by illegality.

An interesting feature of this case is that, in having regard to whether the Agreement was tainted by illegality, the court was prepared to look beyond the four corners of the Agreement. The court took into account evidence of the surrounding circumstances such as the earlier drafts of the Agreement and the email communications between the parties.

Any party wishing to set aside an agreement on the ground of illegality should therefore be prepared to substantiate its position with the relevant evidence.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the litigation and dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' profiles on our [website](#)), or:

Lim Shack Keong

Director (Litigation and Dispute Resolution)

T: +65 6531 2442

E: shackkeong.lim@drewnapier.com

The contents of this update are only intended to provide general information on the subject covered. Nothing in this publication should be treated as specific professional legal advice concerning any particular business, operational or other situations with which you might be faced. Drew & Napier LLC accepts no liability for, and does not guarantee the accuracy of, the information contained in this publication, and does not accept any liability for any loss or damage arising from any reliance thereon.

OUR BUSINESS GROUPS AND PRACTICE AREAS

BANKING/GENERAL FINANCE

David Ang
T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

Valerie Kwok
T +65 6531 2222
F +65 6535 4864
E valerie.kwok@drewnapier.com

Sandy Foo
T +65 6531 4118
F +65 6535 4864
E sandy.foo@drewnapier.com

BIOMEDICAL SCIENCES

Tony Yeo
T +65 6531 2512
F +65 6220 0324
E tony.yeo@drewnapier.com

BUILDING & CONSTRUCTION

Tan Liam Beng
T +65 6531 4139
F +65 6533 3591
E liambeng.tan@drewnapier.com

CAPITAL MARKETS

Sin Boon Ann
T +65 6531 2206
F +65 6535 4906
E boonann.sin@drewnapier.com

Petrus Huang
T +65 6531 2208
F +65 6535 4906
E petrus.huang@drewnapier.com

CHINA BUSINESS GROUP

David Chin
T +65 6531 2304
F +65 6535 1952
E david.chin@drewnapier.com

COMPETITION LAW

Cavinder Bull, SC (contentious)
T +65 6531 2416
F +65 6533 3591
E cavinder.bull@drewnapier.com

Lim Chong Kin (non-contentious)

T +65 6531 4110
F +65 6535 4864
E chongkin.lim@drewnapier.com

CORPORATE

David Ang
T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

OTHER OFFICES

Drewmarks Patents & Designs (Malaysia) Sdn Bhd
9th floor
Bangunan Getah Asli (Menara)
148 Jalan Ampang
50450 Kuala Lumpur, Malaysia
T +603 2162 2522/2162 2529
F +603 2162 2804
E drewmark@tm.net.my

CORPORATE (cont'd)

Sin Boon Ann
T +65 6531 2206
F +65 6535 4906
E boonann.sin@drewnapier.com

Yeo Wee Kiong
T +65 6531 2500
F +65 6535 4864
E weekiong.yeo@drewnapier.com

CORPORATE INSOLVENCY & RESTRUCTURING

Sushil Nair
T +65 6531 2410
F +65 6533 9029
E sushil.nair@drewnapier.com

Manoj Sandrasegara
T +65 6531 4156
F +65 6533 9029
E manoj.sandra@drewnapier.com

EMPLOYMENT & IMMIGRATION

Indranee Rajah, SC
T +65 6531 4100
F +65 6532 7149
E indranee.rajah@drewnapier.com

FAMILY & MATRIMONIAL

Randolph Khoo
T +65 6531 2418
F +65 6532 7149
E randolph.khoo@drewnapier.com

FUND MANAGEMENT, REIT & PRIVATE EQUITY

Petrus Huang
T +65 6531 2208
F +65 6535 4906
E petrus.huang@drewnapier.com

INSURANCE & REINSURANCE

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

INTELLECTUAL PROPERTY

Dedar Singh Gill
T +65 6531 2507
F +65 6533 0694
E dedar.singh@drewnapier.com

Cecilia Girvin
T +65 6531 2510
F +65 6533 0694
E cecilia.girvin@drewnapier.com

INTERNATIONAL ARBITRATION

Davinder Singh, SC
T +65 6531 2403
F +65 6532 7149
E davinder.singh@drewnapier.com

Jimmy Yim, SC
T +65 6531 2504/2505
F +65 6533 9029
E jimmy.yim@drewnapier.com

LITIGATION

Davinder Singh, SC
T +65 6531 2403
F +65 6532 7149
E davinder.singh@drewnapier.com

Jimmy Yim, SC
T +65 6531 2504/2505
F +65 6533 9029
E jimmy.yim@drewnapier.com

Indranee Rajah, SC
T +65 6531 4100
F +65 6532 7149
E indranee.rajah@drewnapier.com

PROJECT FINANCE
Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

Valerie Kwok
T +65 6531 2222
F +65 6535 4864
E valerie.kwok@drewnapier.com

Sandy Foo
T +65 6531 4118
F +65 6535 4864
E sandy.foo@drewnapier.com

PROPERTY
Zennifa Rahim
T +65 6531 2392
F +65 6535 1952
E zennifa.rahim@drewnapier.com

SHIPPING & INT'L TRADE
Ian Koh
T +65 6531 2436
F +65 6533 3591
E ian.koh@drewnapier.com

TAX & PRIVATE CLIENT SERVICES
Ong Sim Ho
T +65 6531 2250
F +65 6535 4864
E simho.ong@drewnapier.com

TMT
Lim Chong Kin
T +65 6531 4110
F +65 6535 4864
E chongkin.lim@drewnapier.com

TRANSNATIONAL & CROSS-BORDER WORK
Julian Kwek
T +65 6531 2485
F +65 6533 9029
E julian.kwek@drewnapier.com

PT Drewmarks Konsultama

Correspondence address:
20 Raffles Place
#17-00 Ocean Towers
Singapore 048620
T +65 6531 2503/6531 2504
F +65 6533 0694
E ip@drewnapier.com

DrewCorp Services Pte Ltd

20 Raffles Place
#09-01 Ocean Towers
Singapore 048620
ROC No. 200102492H
T +65 6531 2266
F +65 6533 1542 / 6533 7649
E services@drewcorpservices.com