

Arbitration Alert

Dear Clients & Friends

Singapore High Court annuls arbitration award on ground of public policy

The recent Singapore High Court decision in *AJT v AJU* [2010] SGHC 201 is a landmark decision as it is the first judgment in Singapore where an arbitration award was successfully set aside under Article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (the “**Model Law**”). Article 34(2)(b)(ii) states that an award may be set aside if the court finds that the award conflicts with public policy.

Background

The arbitration award (the “**Award**”) related to the validity of an agreement between AJT and AJU to terminate an ongoing arbitration proceeding (the “**Arbitration**”) between the parties (the “**Concluding Agreement**”). The Arbitration was initiated with regard to claims brought by AJU against AJT under an agreement entered into between the parties. AJT was a company incorporated under the laws of the British Virgin Islands and AJU was a public company incorporated under the laws of Thailand.

Following the initiation of the Arbitration, AJU made a complaint of fraud in Thailand against the sole director and shareholder of AJT and two other related companies of AJT on the basis of an alleged forged document faxed from the sole shareholder/director of AJT to AJU which had purportedly fraudulently misled AJU (the “**Complaint**”). Pursuant to the Complaint, the Thai police commenced investigations against the sole shareholder/director of AJT and the related companies on charges of joint fraud, joint forgery and use of a forged document. It bears noting that the offence of fraud is a compoundable offence in Thailand while the offence of forgery and the use of a forged document are non-compoundable offences in Thailand.

Whilst investigations were ongoing, the parties entered into the Concluding Agreement. The Concluding Agreement essentially provided for AJT to terminate the Arbitration when AJU received evidence of the withdrawal and/or discontinuation and/or termination of all criminal proceedings against the sole shareholder/director of AJT and the related companies. Under the Concluding Agreement, AJU was also required to make a payment of US\$470,000 to AJT as final settlement of the Arbitration (the “**Settlement Sum**”).

Thereafter, AJU withdrew the Complaint and paid the Settlement Sum. However, AJT subsequently took the view that the Concluding Agreement had no legal effect on grounds of duress and/or undue influence and/or illegality. Hence, AJT refused to terminate the Arbitration. In the premises, AJU made an application before the arbitral tribunal to terminate the arbitration and, at a procedural meeting, the parties consented to the tribunal determining the preliminary question of whether the Concluding Agreement was valid. The tribunal found the Concluding Agreement to be valid and enforceable.

Thereafter, AJT took up the present application before the Singapore High Court to set aside the Award.

The decision of the High Court

In his judgment, Justice Chan Seng Onn held that the Award ought to be set aside as being against public policy on the following grounds:

- the Award sought to uphold an illegal agreement since the Concluding Agreement sought to stifle the prosecution of non-compoundable offences under Thai law; and

- the Award was contrary to the principle of international comity as it 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.

In so holding, Justice Chan undertook an extensive review of both local and international case law and held that the Concluding Agreement was essentially entered into to stifle the prosecution of non-compoundable offences in Thailand and, hence, it was an illegal contract in Singapore.

Further, as the expert witnesses adduced by AJT and AJU during the Arbitration hearing concurred that the Concluding Agreement was contrary to Thai law, Justice Chan ruled that it would also be against the principle of international comity to allow the Award to stand since the Award has the effect of enforcing the Concluding Agreement which was found to be illegal both under Singapore law and Thai law.

Justice Chan's observation on the scope of the public policy principles is noteworthy. In his judgment, Justice Chan 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. 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".

As such, in setting aside the Award, Justice Chan opined that the Arbitral Tribunal had limited itself to a consideration of the Concluding Agreement as drafted without seeking to ascertain the true object, purpose and intention of the parties.

Comment

The case demonstrates that the Singapore court will not hesitate to exercise its supervising power to set aside an arbitral award in appropriate circumstances. As noted by Justice Chan, this would prevent the arbitral process from being abused by litigants and further enhances Singapore's reputation as a world class arbitration centre.

Allen & Gledhill LLP Partner Dinesh Dhillon acted for the successful plaintiff.

Further information

Should you have any queries as to how this may affect your business, please do not hesitate to get in touch with your usual contact at Allen & Gledhill LLP or either of the following:

Dinesh Dhillon
Tel: +65 6890 7822
E-mail: dinesh.dhillon@allenandgledhill.com

Yours faithfully
Allen & Gledhill LLP
Singapore

Allen & Gledhill LLP
T +65 6890 7188 | F +65 6327 3800 | publications@allenandgledhill.com
One Marina Boulevard #28-00 Singapore 018989 | www.allenandgledhill.com

This message is intended to highlight issues and not to be comprehensive, nor to provide legal advice.

If you do not wish to receive this update or other arbitration related electronic communications from Allen & Gledhill LLP, please let us know by e-mailing us at publications@allenandgledhill.com. You will receive one additional e-mail message confirming your removal. If you would like to add any of your colleagues onto our mailing list, please let us know via return e-mail.

Allen & Gledhill LLP (UEN/Registration No. T07LL0925F) is registered in Singapore under the Limited Liability Partnerships Act (Chapter 163A) with limited liability. A list of the Partners and their professional qualifications may be inspected at the address specified above.

CONFIDENTIALITY CAUTION: This message is intended only for the use of the individual or entity to whom it is addressed and is privileged and confidential. If you are not the intended recipient, please notify us immediately by return e-mail, delete this message and you should not disseminate, distribute or copy any information contained herein.