

January 2024

**Arbitration – Illegality as a Defence – Public Policy –
Article 34 of the UNCITRAL Model****G v N [2023] HKCFI 3366**

The Hong Kong Court of First Instance ("**HKCFI**") stayed an application to set aside the enforcement of an arbitration award and remitted the matter to the arbitrator under Article 34(4) of the UNCITRAL Model Law (as enacted by section 81 of the Hong Kong Arbitration Ordinance, Cap. 609 ("AO")), to give the arbitrator an opportunity to resume the arbitral proceedings and reconsider questions of illegality under Hong Kong law.

Under the AO no appeal of decisions of fact or law made by an arbitrator is permitted (unless Schedule 2 applies). G sought to have the enforcement of the award set aside as the law relating to public policy in Hong Kong changed a few days before the Award was handed down. Although it was contended by N that this set aside application was a thinly veiled appeal, the judge held that the court was entitled to review the Award, not because of any error in fact or law, but the supervisory court had a duty to consider whether the enforcement of the Award was contrary to public policy. In doing so the court is bound to consider public policy as recognised at the date of review. The court may be compelled to set aside an award if the court considers that it would be manifestly unjust and against the public policy of Hong Kong to enforce the Award, whether by reason of disproportionality or the weighing up of different public policies or interests involved.

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What are the practical implications of this case?

Although there is no appeal of findings of fact and law in Hong Kong, Hong Kong courts still have a power and duty to evaluate whether enforcing an award would contravene the public policy of Hong Kong as at the date of review even where there has been a finding related to public policy in the award.

In this particular case, whereas the law previously in Hong Kong followed the guidance set out in *Tinsley v Milligan* [1994] 1 AC 340 ("**Tinsley**") questions as to whether to grant or deny relief after a finding on illegality in Hong Kong, the approach established in *Patel v Mirza* [2017] AC 467 ("**Patel**") as affirmed in *Monat*¹ is now to be adopted. This approach differs in that courts and tribunals are now required to consider a range of factors when considering whether relief should be denied following a finding of illegality.

In *Patel* the English Supreme Court affirmed the Court of Appeal's decision that the illegality found did not bar relief to the claimant. The trio of considerations are (a) considering the purpose of the prohibition transgressed; (b) considering other public policies which may be rendered ineffective by the denial of the claim; and (c) a sense of proportionality.

Therefore, when deciding a case, arbitrators may try to factor in all relevant matters under the public policy of the relevant jurisdiction to strengthen an award's enforceability.

What was the background?

On 5 October 2020, the plaintiff, who was the largest shareholder of, and controller of the board of the defendant, entered into a securities purchase agreement ("**SPA**") with the defendant. The SPA provided that the defendant was to allot 16,051,219 shares to the plaintiff in exchange for the price of US\$146,868,653 ("**Consideration**"). The reasons behind this allotment were that N had decided to make a substantial investment in mainland China. A number of other shareholders in N disagreed with the decision and proposed to call a meeting of shareholders to consider a change in the composition of the board of directors. N arranged for the allotment of shares which would have given G a 43.9% holding in N, thus, allegedly, blocking any change in the composition of the board. The BVI Commercial Court set aside the placement to the plaintiff on the ground that it was executed for an improper purpose under BVI law. The plaintiff appealed but the Eastern Caribbean Court of Appeal confirmed that the allotments to the plaintiff were void. In accordance with the arbitration clause in the SPA, G commenced arbitration in Hong Kong on 12 March 2021, to seek restitution of the Consideration.

The arbitrator dismissed the plaintiff's claim for restitution based on *Tinsley* and the equitable doctrine of unclean hands. However, just a few days before the handing down of the award, the Hong Kong Court of Appeal ("**HKCA**") handed down its decision in *Monat*, holding that *Patel* rather than *Tinsley* represented Hong Kong law on illegality. *Patel* requires the law on illegality to be applied with "a due sense of proportionality".

G brought this application to set aside the Awards and to maintain the Interim Preservation Order which had frozen US\$90,000,000 in N's accounts.

¹ *Monat Investment Ltd v All Person(s) In Occupation of Part of The Remaining Portion of Lot No 591 in Mui Wo DD 4 No 16 Ma Po Tsuen, Mui Wo, Lantau Island* CACV 448/2020 [2023] HKCA 479

What did the court decide?

The Hong Kong court was asked to decide:

1. Whether it had the power to decide that the Tribunal's decision on public policy was erroneous

It is trite law that the tribunal's decisions on fact and law are for the tribunal, and that decision will be final in the absence of fraud, a breach of natural justice or any other vitiating factor. Errors of fact or law made by an arbitrator do not per se engage any public interest.

However, where a party makes a setting aside application under section 81 of the AO, courts in Hong Kong have a power and duty to consider whether the awards are contrary to the public policy of Hong Kong at the current date. The finality of the award is not affected when the role of the court is simply to decide whether there is any conflict between public policy and the award, on the findings of law and fact made by the arbitrator which are not reviewed.

2. What guidelines should be applied when considering public policy of Hong Kong where illegality has been raised as a defence to a claim

The HKCFI decided that *Patel/Monat* represents Hong Kong's current law on whether or not relief should be granted after a finding of illegality.

To judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, the court should exercise a step by step consideration involving the following factors: a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality.

On the facts of this case, instead of pronouncing the court's view on whether the awards are contrary to the public policy of Hong Kong, the HKCFI suspended the setting aside proceedings under section 81 of the AO and remitted the matter to the arbitrator to eliminate the grounds for setting aside.

3. Should the interim preservation order be restored

The HKCFI ruled that given the circumstances where the Award was being remitted to the arbitrator, and considering arguments as to the potential insolvency of N and potential dissipation of assets by N, the interim preservation order would be restored restraining the disposition of the Consideration, pending the decision of the arbitrator.

Case details

- Court: HK Court of First Instance
- Judge: Hon Justice Mimmie Chan
- Date of judgment: 29/12/2023

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