A CASE OF FORUM ILLEGALITY?

John B. Skilling v. *Consolidated Hotels*[1]

"IT is an elementary principle of law that a court will not enforce a contract which by its own lex fori it would not enforce because it is tainted, with illegality." So said Chua J. in *John B. Skilling* v. *Consolidated Hotels.* That was a case which at first blush seems quite similar to *Raymond Banham* v. *Consolidated Hotels Ltd.*[2] In both cases foreign professional engineers were held to be unable to sue for payment of professional services rendered in Singapore because of failure to register under sections 18 and 19 of the Professional Engineers Act.[3] In *Vernes Asia* v. *Trendale Investment* however, the plaintiff foreign moneylenders who were not registered under the Moneylenders Act[4] were held to be entitled to sue the defendant on a loan contract made in Singapore.

A number of points may be made in connection with the three cases.

(i) Illegality by the law of the forum may be relevant as a limitation on the freedom to choose a proper law of the contract.[6] Arguably, if the contract has its closest and most real connection with Singapore law, and the parties choose another system of law so as to evade or avoid the application of Singapore law, the choice will be disregarded. The contract will then be held unenforceable and illegal, applying the objective proper law, *i.e.* Singapore law. There is in fact no authority as yet on the point; but the weight of academic opinion favours the existence of such a limiting factor.[7]

Now looking at the three Singapore cases, the proper law chosen in two of them, *John B. Skilling* and *Vernes Asia* were the law of Washington and Hong Kong respectively. In *Raymond Banham* there was no express choice of the proper law. In the former two cases, it might have been argued that the proper law should be disregarded. But in the absence of clear intention of both parties to evade Singapore law, such argument should fail, being without merit whatsoever.

(ii) Illegality by the law of the forum may result in unenforceability of a contract, whatever may be its proper law and even if the contract has its closest and most significant relationship with some other system of law under which it would be valid. This was the proposition applied in *John B. Shilling* and sought to be applied in *Vernes Asia.* It might have been applied in *Raymond Banham* if attention had been drawn to the conflictual aspect of the case.

[1] [1979] 2 M.L.J. 2, at p. 3.
[2] 1976] 1 M.L.J. 5.
[3] Cap. 225, 1985 (Rev. Ed.).
[4] Cap. 188, 1985 (Rev. Ed.).
[5] [1988] 1 M.L.J. 358.
[6] See *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277.
[7] Although *Golden Acres* v. *Queensland Estate [* 1969] Qd. R. 378 might be explained as a case on mandatory statute.

The proposition may be traced to *Boissevain* v. *Weil*[8] The respondent in that case was a British subject resident outside the U.K. and entered into a contract of loan in French francs with the appellant, also resident outside the U.K.. The question was whether the loan was recoverable in England in view of the Emergency Powers (Defence) Regulation which prohibited all persons from borrowing, selling or lending any foreign currency, except authorised dealers or with Treasury permission. That the regulation was to extend to all British subjects was made clear by the enabling Act. Severe penalties were imposed for infringement of the regulations. The House of Lords held that the loan could not be enforced in England because the Regulation had extra-territorial force and applied to all British subjects wherever they might be and regardless of whether the proper law was English or foreign.

As may be observed, illegality of the forum presupposes some local connecting factor in the fact situation. The fact that the respondent was a British subject made the illegality pertinent. A second point to note is that so far as statutory illegality is concerned, the construction of the statute is obviously very important. If the regulation had been construed as not having extra-territorial effect, the connection to the forum would have been absent and the contract would seem to have been enforceable.

In this regard, the effect of statutory illegality resembles the effect of a mandatory statute of the forum as in *Kay's Leasing Corp.* v. *Fletcher*.[9] There an action was brought in New South Wales on a hire-purchase agreement made in Victoria and expressed to be governed by the law of Victoria. The N.S.W. Hire-Purchase Act which, if applied would invalidate the agreement, was invoked. The High Court held that the Act had no application because by construction the Act was restricted in scope to hire-purchase contracts made in N.S.W.

Turning now to the three Singapore cases, we find that they share one common connecting factor: the contemplated and actual place in which the services were to be and were rendered was Singapore. In *John B. Skilling* and *Raymond Banham* the contracts, as might be expected, were held to be unenforceable because of non-compliance with the mandatory statutory requirements. However, the opposite conclusion was reached in *Vernes Asia.* Why? Because of the presence of the additional requirement of "residence" in s.5(1) of the Moneylenders Act, whereas there is no such requirement of "residence" for purposes of registration under the Professional Engineers Act. In the words of Grimberg J.C.:

> "Section 5(2) of the Act applies to moneylenders who both reside and carry on business in Singapore. It does not mean, when read with subsection (1), that a moneylender who neither resides nor carries on business in Singapore is unable to enter into a lawful and enforceable loan agreement with a borrower in Singapore. Section 5 of the Act defines the scope of the Act. It limits its operation, and the protection it offers to borrowers, to loan transactions concluded by them with money-lenders residing and carrying on

[8] [1949] 1 K.B. 482; affd. [1950] A.C. 327.
[9] (1964) 116 C.L.R. 124.

> business in Singapore. If borrowers choose to do business with moneylenders who reside and carry on business elsewhere, they do so without the protection that the Act affords ..."[10]

The above reasoning cannot be faulted. Since the statute requires "residence" and since the moneylender was non-resident in Singapore, there was no connecting factor that would render operative the illegality.

Nevertheless, one may view the result with some disquiet. It is almost axiomatic that the Moneylenders Act serves to protect ignorant borrowers from unconscionable moneylenders. Suppose an unconscionable moneylender resident in Bythinia lends money to a Singaporean under Bythinian law which neither requires registration nor a memorandum of contract to be furnished to the borrower. It is small consolation to say that if the Singaporean chooses to do business with foreign moneylenders, he takes the risk of no protection.

From the point of view of policy, it is very hard to see why the defendant "customers" in *John B. Skilling* and *Raymond Banham* could invoke the protection of the Act, but not the borrower in *Vernes Asia.* Too much is made to turn on the requirement of "residence" in the Moneylenders Act.

It is suggested that a pure statutory construction approach to illegality by the *lexfori* can be inappropriate. Many statutes have been drafted in ignorance of conflictual problems. They frequently state their field of application loosely and imprecisely. A pure statutory construction approach would be afflicted with the undesirable consequences of applying an Act that might never have been addressed to conflictual situations.

Moreoever, it would not be very consistent with the true reason for not enforcing or enforcing a contract in such circumstances. The true reason is not illegality by the law of forum. Rather it is that the forum must give effect to its own distinctive policy. In so giving effect to the public policy of the forum, the court should consider that the legitimate public policy of another country may be frustrated" and besides that there may be unjust enrichment or avoidance of a bad bargain. This, it is suggested, would be better then merely construing the statute.

This suggestion has some support from the local case of *Ralli* v. *Angullia*[12] which concerned an action brought in Singapore to enforce an Indian judgment upholding what seemed to be a contract of wager. Amongst other things, it was contended that that judgment could not be enforced because of section 7 of the Civil Law Ordinance 1909 which provided for unenforceability of contracts of wager. Now the Court of Appeal did first approach the issue as one of statutory

[10] [1988] 1 M.L.J. 358, at p. 360.

[11] Thus, suppose a licensor in an exporting country is required to observe certain export restrictions upon its foreign licensee. Suppose the licensor seeks a declaration that his contract in breach of the restrictions is invalid. Giving effect to the public policy of the forum may well frustrate the public policy of the importing country as well as permit the licensor to escape a bad bargain. There is no reason why in a conflictual situation a court may not regard the public policy of another country.

[12] (1917) 15S.S.L.R. 33.

construction; namely, whether section 7 covered Indian contracts as well as local contracts.[13] But the Court was clear section 7 could not have extra-territorial effect and went on to consider whether section 7 nevertheless manifested a policy of law which would prevent enforcement of the Indian judgment.[14] It is this broader approach as opposed to a pure statutory interpretation exercise which could have been adopted in *Vernes Asia.* That is to say, the Court in *Vernes Asia* could have asked the question: Notwithstanding the Moneylenders Act does not apply to non-resident Moneylenders, is it opposed to the policy of the law to allow an action on contract in question by the unregistered moneylender? If yes, this will effectively mean that no foreign moneylender can safely lend to a Singaporean unless he take steps to establish residence in Singapore. And there is nothing unreasonable about that.

TAN YOCK LIN*

The Court was prepared to assume that a foreign judgment could be treated on the same footing as a contract for purposes of applying section 7.

[14] The holding was that section 7 did not manifest such a policy. Moreover, a foreign judgment stood on a better footing than the contract on which it is derived.

* Lecturer, Faculty of Law, National University of Singapore.