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STRIKING A BALANCE BETWEEN PUBLIC POLICY AND ARBITRATION POLICY IN INTERNATIONAL COMMERCIAL ARBITRATION

AJU v. AJT[1]

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I. INTRODUCTION

2010 was a momentous year for Singapore arbitration law with the High Court's decision in *AJT v. AJU*[2] marking the first time an arbitral award was set aside on the ground of public policy in Singapore. Unsurprisingly, that decision generated some comments.[3] AJU appealed and the Court of Appeal, comprising Chan C.J., Rajah J.A. and Phang J.A., agreed with AJU and reinstated the arbitral award. Although the final result is unquestionably right, the court's reasoning is arguably controversial. This case note queries whether the Court of Appeal had intended to go as far as the judgment seems to suggest. It suggests that in the final analysis, the promotion of arbitration is a policy that has limits, particularly when the State's public policies are involved.[4]

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* LL.B. (Summa), Singapore Management University. I would like to thank the anonymous referee for his/her feedback and comments which undoubtedly improved the quality of this note. Nevertheless, all errors, both fact and law, remain mine.

1 [2011] 4 S.L.R. 739 (C.A.) [*AJU*].

2 [2010] 4 S.L.R. 649 (H.C.) [*AJT*].

3 See Chong Yee Leong, "Commentary on *AJT v. AJU*", online: Singapore International Arbitration Centre <http://www.siac.org.sg/index.php?option=comcontent&view=article&id=219:dispute-resolution-in-the-oil-a-gas-sector&catid=56:articles&Itemid=171> accessed on 18 Sep 2011; Paul Tan, "Public Policy in Singapore: An Unruly Horse Rears its Head—*AJT v. AJU*" (2010) 13(6) International Arbitration Law Review 234; Nicholas Poon, "A Welcome Clarification on the Use of Public Policy and Extent of Curial Intervention in the Setting Aside of an Arbitration Award" [2010] 3(2) Cont. Asia Arb. J. 315.

4 In this regard, see *Larsen Oil and Gas Pte Ltd v. Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 S.L.R. 414 (C.A.), a recent seminal decision of the Court of Appeal which restricted the arbitration of certain types of insolvency-related claims on the basis of public policy.

II. Summary of the Facts and Decisions

The case concerned the validity and enforceability of a settlement agreement ("the Agreement") entered into between the parties. In dispute was whether the Agreement was for an illegal purpose or whether some illegal acts had to be performed by AJU. If the Agreement was enforceable, AJU would be entitled to a settlement sum from AJT. Conversely, if the Agreement was unenforceable, AJT would not be liable to AJU for that sum. The parties agreed to resolve this dispute by arbitration. By way of an interim award ("the Award"), the arbitral tribunal ("the Tribunal") concluded that the Agreement was not illegal and hence valid and enforceable.[5]

Dissatisfied, AJT applied to the High Court to set aside the Tribunal's Award. The High Court disagreed with the Tribunal's findings. Specifically, it held that the Agreement was illegal under Singapore law and Thai law as it was an agreement to stifle prosecution of non-compoundable offences.[6] As such, the Award was set aside on the ground that it was in conflict with Singapore's public policy.

AJU appealed which resulted in the Court of Appeal overturning the High Court's decision and reinstating the Award. The Court of Appeal held that the High Court should not have reopened the Tribunal's finding that the Agreement was valid and enforceable, even though the Singapore courts, as the supervisory courts, had the power to do so.[7] It said that this was not an appropriate case to exercise the court's supervisory power to reopen the Tribunal's findings as the Tribunal had considered the relevant circumstances and had not ignored "palpable and indisputable illegality".[8] Thus, the High Court should not have rejected the Tribunal's findings and substituted its own finding that the Agreement was tainted with illegality.

The Court of Appeal then went on to make two further points. First, the public policy ground for setting aside awards only applied to "findings of law made by an arbitral tribunal—to the exclusion of findings of fact".[9] Second, the Tribunal's finding that the Agreement was not illegal was a factual one.[10] Therefore, since it was based on a finding of fact, the Tribunal's decision that the Agreement was valid and enforceable was not reviewable. Even if it were an error, such an error would not engage any public policy objection.[11] For completeness, the Court of Appeal considered the status of the Agreement and held that in any event, the Agreement was not tainted with illegality and was therefore valid and enforceable.[12]

III. Comments

On a plain reading of the judgment, the Court of Appeal appears to have circumscribed the Singapore courts' supervisory power to set aside an arbitral award for public policy reasons under s. 24 of the *International Arbitration Act*[13] read with

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5 *AJU, supra* note 1 at para. 14.
6 *AJT*, *supra* note 2 at para. 44.
7 *AJU*, *supra* note 1 at para. 62.
8 *Ibid*. at paras. 64 and 65.
9 *Ibid*. at para. 69.
10 *Ibid*. at paras. 69 and 70.
11 *Ibid*.
12 *Ibid*. at paras. 72 and 74.
13 Cap. 143A, 2002 Rev. Ed. Sing. [*IAA*].

art. 34(2)(b)(ii) of the *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985*[14] by laying down a new principle of law that errors of fact made by the tribunal do not give rise to a public policy objection, save in very limited circumstances.[15] This impression is no doubt buttressed by the court's holding that limiting the scope of the public policy objection would be consistent with the legislative objective of the *IAA* which is to promote international arbitration as an autonomous system of private dispute resolution.[16]

Nevertheless, it is submitted that the Court of Appeal's decision should not be interpreted as establishing such a narrow (or broad depending on how one sees it) proposition of law. Although the underlying legislative policy of the *IAA* must be given effect to, this does not necessarily entail the subordination of State public policy. A balance can be achieved. The court can limit its curial intervention whilst still ensuring that all awards received into the legal order of the State meet the minimum requirements of public policy. Indeed, the proper approach should remain that laid down by the Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*,[17] namely, that errors of law or fact, *per se*, do not engage the public policy of Singapore.[18] If, however, the Court of Appeal did intend to lay down a strict rule that all errors of fact can never attract a public policy objection severe enough to set aside an award, it is respectfully submitted that such a rule is inconsistent with the *IAA*. More importantly, it is inconsistent with and undermines the promotion of international arbitration in Singapore. The remainder of this note assumes that the Court of Appeal intended the strict rule and suggests reasons against the imposition of this rule.

A. *Minimal (not Zero) Curial Intervention in International Arbitration*

In determining whether a ground for setting aside under the *IAA* has been successfully invoked, the court must be mindful of the policy objectives of the *IAA*. Generally, Singapore's policy with regard to international arbitration proceedings governed by the *IAA* is for minimal curial intervention.[19] In *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd*,[20] the Court of Appeal summed up the rationale of minimal curial intervention:[21]

> [M]inimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by

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[14] *Model Law on International Commercial Arbitration*, United Nations Commission on International Trade Law OR, 1985, annex 1, UN Doc. A/40/17 [*Model Law*].

[15] *AJU*, *supra* note 1 at para. 65: "findings of fact made in an IAA award are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factor"; see also para. 69.

[16] *Ibid*. at para. 69.

[17] [2007] 1 S.L.R.(R.) 597 (C.A.) [*PT Asuransi*].

[18] *Ibid*. at para. 57.

[19] *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 S.L.R.(R.) 86 (C.A.) at para. 65 [*Soh Beng Tee*]; *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] 2 S.L.R.(R.) 565 (C.A.) at paras. 29-34. See also *Sing., Parliamentary Debates*, vol. 86, col. 1628 at para. 6 (19 October 2009) (K. Shanmugam, Minister for Law).

[20] *Soh Beng Tee*, *supra* note 19 at para. 65.

[21] *Ibid*. at para. 65.

> encouraging finality… Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts.

It is a fundamental principle that parties that agree to arbitrate their dispute must abide by the decision of the tribunal, good or bad.[22] Hence, Redfern and Hunter opined, "if an arbitral tribunal has jurisdiction and has followed the correct procedures and formalities, the award—good, bad or indifferent—is final and binding on the parties."[23] *Interest reipublicae ut sit finis litium*,[24] it is in the public's interest that there is finality to proceedings. Ostensibly, this principle has withstood the test of time and its fundamentality to international arbitration is indisputable. Indeed, s. 19B(1) of the *IAA* affirms the importance of finality of proceedings by regarding all arbitral awards as final and binding.[25]

B. *State Public Policy*

However, minimal curial intervention is not zero intervention. It is trite law that parties can have recourse against the award made by a tribunal. Most, if not all, national arbitration legislation provide grounds for challenging arbitral awards, with the breach of public policy being one such ground.[26]

There is no all-encompassing definition of what amounts to a contravention of public policy; each jurisdiction formulates its own definition.[27] There are nevertheless some underlying similarities: for example, illegality[28] or "patent illegality",[29] and more generally, when the upholding of the award would "shock the conscience",[30] or is "clearly injurious to the public good",[31] or where it violates the forum's most basic notion of morality and justice.[32] Public policy encompasses both substantive and procedural aspects.[33] An arbitral procedure infected with corruption, bribery, or perjury, for instance, would ordinarily be a ground for setting aside. In contrast, a substantive public policy objection would include instances such as recognising

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[22] *Strandore Invest A/S and others v. Soh Kim Wat* [2010] SGHC 151 at para. 24 [*Strandore*].

[23] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed., (London: Sweet & Maxwell, 2004) at 422 [*Redfern & Hunter*]. See also *Strandore, supra* note 22 at para. 24.

[24] See *Burchell v. Marsh* 58 U.S. 344 (1855) at 349 (S.C.).

[25] *Supra* note 13, s. 19(B)(4), *IAA*: Unless the award is challenged under a ground provided for in the *IAA* or the *Model Law*.

[26] Gary Born, *International Commercial Arbitration*, vol. 2, 3rd ed. (London: Sweet & Maxwell, 2009) at 2552.

[27] *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Company* [1987] 2 Lloyd's Rep. 246 (C.A.) at 254 [*Deutsche*]. See also International Law Association Committee on International Commercial Arbitration, "Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards" (London Conference, 2000).

[28] *Deutsche*, *supra* note 27.

[29] *Oil & Natural Gas Corporation Ltd v. SAW Pipes Ltd* (2003) 5 S.C.C. 705.

[30] *Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 N.Z.L.R. 554 (H.C.) at para. 80 [*Downer-Hill*].

[31] *Deutsche*, *supra* note 27.

[32] *PT Asuransi*, *supra* note 17 at para. 59.

[33] *Report of the U.N. Commission on International Trade Law on the Work of its 18th Session*, United Nations Commission on International Trade Law OR, UN Doc. A/40/17, (1985) at para. 270. See also *Amaltal Corporation Ltd v. Maruha (NZ) Corporation Ltd* [2003] 2 N.Z.L.R. 92 (C.A.) at para. 43.

an award which enforces an agreement intended to violate the import and export laws of another country;[34] or an agreement to raise money to support the subjects of a government of a friendly foreign nation in their hostilities against their own government.[35]

Although the Court of Appeal in *AJU* rightly noted that the notion of public policy for setting aside purposes has an "international focus",[36] this does not mean that only public policy which is accepted by most nations would qualify as a ground for setting aside.[37] Public policy with an "international focus" simply means that a court should take into account foreign elements when determining if a public policy has been contravened. Thus, Redfern and Hunter proposed that a legitimate public policy for the purpose of setting aside an award must be one which is not only so fundamental to domestic matters, but also to matters with foreign elements.[38] This understanding of public policy is consistent with the intention of the Drafting Committee of the New York Convention, which characterised public policy as "distinctly contrary to the basic principles of the legal system of the *country where the award is invoked*" [emphasis added],[39] as well as numerous international arbitration commentators.[40] Highly respected New York Convention commentator van den Berg also cautioned that "even if public policy is acknowledged to be 'international', its basis is national".[41]

This territoriality aspect of State public policy is precisely why an award which offends the public policy of Canada for being "patently unreasonable" or "clearly irrational"[42] may not found a public policy objection in Singapore.[43] Therefore, only the State courts can be the sole decider of whether an act, conduct or event contravenes public policy as it is the State's public policy which is sought to be protected, and not just some abstract notion of international public policy. Tribunals can apply public policy as determined by the courts, but they cannot create (or obviate) their own public policy for the State.

Invariably, marrying the principle of minimal curial intervention with the courts' role in regulating public policy presents challenges. Nevertheless, parties should not be allowed to hide behind the principle of finality of arbitral awards to enforce a contract that would otherwise not be enforced by the courts on public policy grounds.

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[34] *Foster v. Driscoll* [1929] 1 K.B. 470, 510 (C.A.) [*Foster*]; *Regazzoni v. K.C. Sethia Ltd* [1958] A.C. 301 (H.L.) at 318, 319 and 327 [*Regazzoni*].

[35] *De Wiitz v. Hendricks* (1824) 2 Bind. 314.

[36] *AJU*, *supra* note 1 at para. 37.

[37] Edward Ti, "Why Egregious Errors of Law May Yet Justify a Refusal of Enforcement under the New York Convention" [2009] Sing. J.L.S. 592 at 603.

[38] *Redfern & Hunter*, *supra* note 23 at 423.

[39] United Nations Commission on International Trade Law OR, *Report of the Committee on the Enforcement of International Arbitral Awards*, UN Doc. E/2704 and E/AC.42/4/Rev.1. See also Jean-Francois Poudret & Sebastien Besson, *Comparative Law of International Arbitration*, 2nd ed. (London: Sweet & Maxwell, 2007) at 856; Mayer & Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Awards* (2003) 19 Arbitration International 249 at 251, 252.

[40] Emmanuel Gaillard & John Savage, eds., *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (The Hague: Kluwer Law, 1999) at para. 1647; Julian Lew, Stefan Kroll & Loukas Mistelis, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law, 2003) at paras. 17-33.

[41] Albert Jan van den Berg, *New York Arbitration Convention 1958* (The Hague: Kluwer Law, 1981) at 360.

[42] *AG for Canada v. SD Myers Inc* [2004] 3 F.C.R. 368 (F.C.) at para. 56.

[43] *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 S.L.R. 1 (H.C.) at para. 48 [*Sui Southern*].

This is not to say that parties to an arbitration agreement should not be held to their bargain of minimal curial intervention. Insofar as an arbitration agreement is a mutual promise to resolve disputes outside of court, such a promise should be enforced.[44] However, such policy considerations are not immutable. Where the State's public policy may be contravened in the course of the promotion of arbitration policy, a balance needs to be achieved. This does not mean that State public policy will always trump the policy of promoting international arbitration; this depends on the particular public policy in question[45] and its importance vis-à-vis the promotion of international arbitration as a competing policy.

C. *Distinction Between Errors of Law and Fact: Splitting Hairs?*

There is no doubt that errors of law are reviewable. That is not in issue. What is in issue is whether errors of fact *may*, in appropriate situations, found a public policy objection. If *AJU* were to stand for the proposition that *all* errors of fact—save for the exceptions of "fraud", "breach of natural justice" or "some other recognized vitiating factor"[46]—are not reviewable even where they allegedly give rise to a breach of public policy, a party can endeavour to commit acts which would be a breach of public policy yet reap the rewards of such a breach by slipping in a favourable arbitration clause. It is entirely plausible that such scheming parties can agree to appoint arbitrators who are not well-versed in the nuances of conflict of laws, illegality and public policy, and who may therefore hold in favour of their nefarious scheme. Arbitrations are conducted in a wide variety of situations,[47] and inevitably, the competency of tribunals also straddles a wide spectrum. If the policy of promoting international arbitration is to be construed as being so immutable and unyielding, the propensity for parties to exploit public policy will be significantly heightened. In short, refusing to re-open any finding of fact made by any tribunal is a dangerous precedent that will impede the domestic court's ability to regulate State policies and uphold justice.

This strict and arguably draconian rule does not seem to have any support in case law. Despite the fact that the public policy ground for setting aside the award is derived from the *Model Law*, it appears that no authority from jurisdictions adopting the *Model Law* was cited to the Court of Appeal. All of the foreign cases relied upon by either party were from the United Kingdom where the U.K. Arbitration Act 1996—which is not *in pari materia* with the *Model Law*—governs arbitration proceedings. On the contrary, at least two *Model Law* jurisdictions have expressly stated that an error of fact may found a public policy ground for setting aside an

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[44] *Tay Soon Kee v. AG* [2007] 3 S.L.R.(R.) 133 (C.A.) at para. 109: "The very concept of an ordered society depends on parties observing the law in general and the promises validly made under law to each other in particular. This is not only obvious and axiomatic; it is utterly essential to a proper functioning of society itself."

[45] For example, Singapore courts will not enforce a gambling contract on the basis that it is contrary to public policy: *Poh Soon Kiat v. Desert Palace Inc (trading as Caesars Palace)* [2010] 1 S.L.R. 1129 (C.A.). However, it may enforce an award giving effect to a gambling contract on the basis that Singapore's domestic public policy on gambling is not so fundamental that enforcing a gambling contract made pursuant to an award would shock the public's morality and conscience.

[46] *AJU*, *supra* note 1 at para. 65.

[47] *Soleimany v. Soleimany* [1999] Q.B. 785 (C.A.) at 800 [*Soleimany*].

award. In *Downer-Hill Joint Venture v. Government of Fiji*,[48] the High Court of New Zealand had to consider whether an error of law or fact in an award could cause the award to be contrary to public policy. The court held that under its arbitration legislation, "[a] serious and fundamental error of law *or fact* could result in an award being contrary to the public policy of New Zealand" [emphasis added].[49] If the factual finding complained of was not based on any logical probative evidence, and a substantial miscarriage of justice would result if the award stood because the impugned finding was fundamental to the reasoning or outcome of the award, then the award may be set aside.[50] Similarly, in a German case, the Higher Regional Court of Cologne set aside the award on the basis that it was so clearly based on completely distorted facts that its enforcement would violate generally accepted fundamental judicial principles.[51]

The approach taken by the New Zealand and German courts is sensible. A rule that an award containing an error of fact which may not amount to fraud or breach of natural justice but is nevertheless unenforceable for public policy reasons is logical. This is because it preserves the general rule that errors of law or fact *per se* do not amount to a breach of public policy, but yet recognizes the very real possibility that errors of fact are capable of producing results which if enforced, would shock the conscience of the court and offend public morality.

Unfortunately, there do not appear to be many other cases which have discussed the relationship between errors of fact, errors of law, and challenging an arbitral award. Another case which did discuss this point briefly is *IPCO (Nigeria Ltd) v. Nigerian National Petroleum Corporation*, a decision of the English High Court.[52] The relevant facts are simply that there was an arbitration in Nigeria which resulted in an award in favour of IPCO to the tune of approximately US$152 million. IPCO then sought to enforce the award in the United Kingdom. NNPC resisted enforcement on several grounds, one of which was that the tribunal had made several errors, including errors of fact, which led to an award so exaggerated in size. NNPC argued that the enforcement of such an award against a state company would be contrary to public policy.[53] Gross J. dismissed this argument summarily, stating, "[w]ere it soundly based, a mere error of fact, if sufficiently large, could result in the setting aside of an award. That cannot be right and I say no more of this topic."[54]

While Gross J.'s approach is undoubtedly correct in law and on policy grounds in most cases, it cannot be an absolute rule. This is particularly so when public policy objections are involved. The court cannot close its eyes and turn its back on a public policy violation simply because the alleged violation is premised on a finding of fact made by a tribunal. An act which would be considered a breach of a State's public policy where the dispute is brought before a court does not

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[48] *Downer-Hill*, *supra* note 30.

[49] *Ibid*., quoting from the headnotes.

[50] *Ibid*. See also, Tómas Kennedy-Grant, "The New Zealand Experience of the UNCITRAL Model Law: A Review of the Position as at 31 December 2007" (2008) 4(1) Asian International Arbitration Journal 1 at 28.

[51] See Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd ed. (London: Sweet & Maxwell, 2010) at 402.

[52] [2005] EWHC 726 (Comm.).

[53] *Ibid*. at para. 51.

[54] *Ibid*.

cease to be a breach of public policy simply because a tribunal has decided otherwise. Thus, where parties agree to ship jute bags from India to Genoa with the intention of later reselling to South Africa in order to avoid an Indian prohibition against export of goods to South Africa,[55] or where parties enter into a partnership agreement for the main purpose of deriving profit from the commission of a criminal offence in a friendly foreign nation,[56] it should not matter how the parties subsequently choose to resolve their disputes. Such agreements should not be enforced by the courts, directly or indirectly. There is no juridical or practical rationale why the promotion of international arbitration as a policy is so important such that what would ordinarily "be contrary to [the State's] obligation of international comity… and offend against [the State's] notions of public morality"[57] ceases to be so simply because the tribunal has found the issue to the contrary, and records it so as a finding of fact. The tribunal's error cannot, of itself, unilaterally alter the definition of public policy. To hold otherwise would be to place an excessive premium on form over substance. As Abraham Lincoln famously joked, calling a tail a leg is an error that does not result in a five-legged dog.[58]

Indeed, the Court of Appeal in *AJU* seemed to have impliedly reserved the right to overrule a tribunal's finding of fact in certain cases. It said:[59]

> *the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is*, *and in turn*, *whether or not the Concluding Agreement is illegal*, however eminent the Tribunal's members may be [emphasis added].

The reference to "whether or not the Concluding Agreement is illegal" can only make sense if it is interpreted as a reservation of the court's right to determine the legality of the Concluding Agreement. Such a determination is a finding of fact. It is therefore at least arguable that the Court of Appeal had considered the potential need to intervene in certain findings of fact. Notably, the Court of Appeal went on to suggest that if the underlying contract was tainted with the same kind of illegality as in *Soleimany*, the outcome might be very different.[60] Indeed, if the Court of Appeal engaged in a fact-finding exercise and found, as a matter of fact, that the Agreement involved the bribery of police officials in Thailand, it is difficult to envisage the Court of Appeal still insisting that it would not substitute the Tribunal's finding and set aside the Award, solely on the basis that the erroneous finding was a finding of fact. Courts have held and affirmed that an agreement to bribe a public official to procure the renewal of an oil contract with the government is against general principles of morality and public policy.[61] If such an agreement is against general principles of morality in court proceedings,[62] it must necessarily also be against general principles

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[55] See *Regazzoni*, *supra* note 34.

[56] See *Foster*, *supra* note 34.

[57] *Ibid*. at 510.

[58] Abraham Lincoln is said to have asked, "If I call a tail a leg, how many legs does a dog have?" He then answered, "Five? No, four. Calling a tail a leg does not make it so."

[59] *AJU*, *supra* note 1 at para. 62.

[60] *Ibid*. at para. 64.

[61] See *Lemenda Trading Co Ltd v. African Middle East Petroleum Co Ltd* [1988] Q.B. 448 (H.C.) [*Lemenda*]; *Tekron Resources Ltd v. Guinea Investment Co Ltd* [2004] 2 Lloyd's Rep. 26 (H.C.).

[62] *Lemenda*, *supra* note 61 at 461.

of morality in setting aside proceedings, even if a tribunal had made an error of fact in determining that there was no bribery.

It may be suggested that this line of reasoning brings into question the reviewability of the competency of tribunals, and surely the competency of tribunals is not a ground for challenging an award, even on public policy grounds. Such a suggestion is indeed plausible. Unorthodox, even heretical, as it may sound, there is no principled or policy reason why a blatantly incompetent arbitrator who has committed grave errors of fact cannot have his award set aside. One can postulate many extreme, fantastical examples which may not comport with reality but the existence of these possibilities, remote as they are, reinforces the notion that there cannot be a strict rule precluding all errors of fact from sustaining a challenge on an award, particularly those which result in a violation of public policy. While parties should be held to their bargain in deciding to arbitrate, a bargain which is so unjust, that if upheld would shock the public's conscience, is not one that the courts should be seen to sanction or promote.

D. PT Asuransi *as the Correct Approach*

Thus, the approach laid down in *PT Asuransi* remains the most coherent and sound. Errors of fact *per se* would not attract the public policy ground. "*Per se*" is a vital qualification because it is insufficient to merely plead an error of law or fact.[63] If a party can demonstrate first, that there is an error of fact, and second, that upholding the award which contains such an error of fact is a breach of public policy, the court should exercise its supervisory jurisdiction to set aside the award.

Interestingly, just prior to *AJU*, the Court of Appeal in *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*[64] appeared to affirm this unassailable right of the supervisory court to overrule the tribunal, even where the tribunal had determined the issue. The main issue in that case was whether under the terms of the arbitration agreement, the tribunal should reconsider the merits of the dispute even though a specialist board had already determined the issue. The tribunal earlier held that they were not obliged to reconsider the issue and simply made an award enforcing the terms of the specialist board's decision. The Court of Appeal took the view that on a proper construction of the arbitration reference, the tribunal was obliged to reconsider the dispute and since the tribunal did not re-examine the merits of the dispute, the court held that it had exceeded its jurisdiction and that the award should be set aside.[65]

This decision is patently correct for the simple reason that a tribunal which does not have jurisdiction cannot cloak itself with jurisdiction simply by claiming that it has. It is also irrelevant whether the tribunal's claim to jurisdiction was founded on an error of law or fact. As Park explains, "an excess of jurisdiction would seem to be

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[63] *Bernhardt v. Polygraphic Co* 350 U.S. 198 (1956) at 203.
[64] [2011] 4 S.L.R. 305 (C.A.).
[65] *Ibid*. at paras. 82-85.

an excess of jurisdiction whether based on the wrong facts or the wrong law".[66] Lord Mance went one step further in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*[67] by holding that the "the tribunal's own view of its jurisdiction has no legal or evidential value".[68] Whilst Lord Mance may be more extreme than most in light of the spirit of minimal curial intervention in international arbitration, the fact remains that it is the court's role and prerogative to determine for itself whether a ground for challenging an award, be it jurisdiction or public policy, has been made out. The tribunal's decision on that same issue may be a useful guide, but nothing more.[69] To borrow a phrase used by Lord Mance, the party which the tribunal decided in favour of starts with the "advantage of service, [but] it does not also start fifteen or thirty love up."[70] *A fortiori*, in proceedings which have an effect on a State's public policy, the court has an even greater moral and consequently legal impetus and prerogative to review the challenge against an award with a fresh and untainted lens. Nevertheless, the court may, after considering the reasons and factors for the tribunal's decision, respect the decision of the tribunal if it is of the view that the tribunal had acted competently and even if there are errors of fact, the enforcement of the award would not be inconsistent with the State's public policy. Only then would the court have fulfilled its overarching role as the exclusive gatekeeper of the State's public policy.

IV. Conclusion

In conclusion, it is suggested that the approach in *PT Asuransi* is preferable to the strict rule in *AJU* (assuming that is the only plausible construction of the case). Errors of law or fact *per se* would not satisfy the public policy ground of challenge, but if a party can demonstrate first, that there is an error of law or fact, and second, that upholding the award and its underlying claim or defence which contains such an error of law or fact would result in a breach of public policy, the court should exercise its supervisory jurisdiction to set aside the award.[71] Ultimately, the twin policy objectives of safeguarding public policy and promoting arbitration are not mutually exclusive. The State's policy to promote international arbitration must be respected by the courts, and to that end the extent of curial intervention must be curtailed. However, this should not result in the exploitation of arbitration as a medium to circumvent the court's protection of the State's fundamental public policy.

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[66] William Park, "Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators" (1997) 8 American Review of International Arbitration 133 at 135, 136. See *Transport-en Handels-maatschappij "Vekoma" B.V. v. Maran Coal Corporation*, decision of Civil Division I, 17 August 1995, reprinted in (1996) 14(4) ASA Bulletin 673.

[67] *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 [*Dallah*].

[68] *Ibid*. at para. 30. Lord Mance said the tribunal's view has no value "however full was the evidence before it and however carefully deliberated was its conclusion" and irrespective of the "tribunal's 'eminence', 'high standing and great experience' ".

[69] Where the issue of public policy was not presented before and determined by the arbitral tribunal, the court would naturally approach the issue afresh: see for instance *Sui Southern*, *supra* note 43.

[70] *Dallah*, *supra* note 67 at para. 30. See also Lord Collin's judgment in *Dallah*, in particular, at para. 97.

[71] Incidentally, applying this approach to *AJU*, the Award would still have been upheld since the court found that the Agreement was not illegal: *AJU*, *supra* note 1 at paras. 72-74.

As Waller L.J. astutely pointed out in *Soleimany*, the court will not "enforce an award made on a joint venture agreement between bank robbers";[72] there are conceivably countless more egregious forms of conduct which the State needs to guard against. It may not be easy to regulate an unruly horse such as public policy.[73] However, as Lord Denning once remarked, "with a good man in the saddle, the unruly horse can be kept in control".[74] Striking the right balance may not be easy, but striking a balance is necessary.[75]

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[72] *Soleimany*, *supra* note 47 at 799, 800.

[73] *Richardson v. Mellish* (1824) 2 Bing. 229 (C.C.P.) at 252.

[74] *Enderby Town Football Club Ltd v. The Football Association Ltd* [1971] Ch. 591 (C.A.) at 606, 607.

[75] For an example of when the balance has been rightfully and properly struck, see *Larsen Oil and Gas Pte Ltd v. Petroprod Ltd* (*in official liquidation in the Cayman Islands and in the compulsory liquidation in Singapore*), *supra* note 4.