THE DOCTRINE OF ILLEGALITY UNDER SECTION 24 OF THE MALAYSIAN CONTRACTS ACT, 1950 - LAYING A SPIRIT TO REST

The case of *Theresa Chong* v *Kin Khoon & Co*[1] is important to Malaysian contract law because to date,[2] it is the only case which attempts an interpretation of section 24, in particular section 24(e) of the Malaysian Contracts Act, 1950,[3] regarding the scope of "public policy". The decision, however, is arguably wanting in many areas, and is reflective of the difficulty which the topic of illegal contracts sometimes pose. The fact that the contract law of Malaysia happens to be "codified" does not necessarily iron out the difficulties and complexities peculiar to an examination of this branch of the law at common law, especially when judges insist on following the common law at the expense of statutory provisions. This article seeks to examine the doctrine of illegality at common law, and the doctrine of illegality as provided under section 24 of the Contracts Act. It is hoped that the examination may shed some light on the scope of "public policy" under section 24(e) of the Contracts Act, especially in the light of recent decisions of the Malaysian courts.

Section 24 of the Contracts Act, 1950 (hereinafter referred to as "the Act") provides that the consideration or object of an agreement is lawful unless -

(a) it is forbidden by a law;
(b) it is of such a nature that, if permitted, it would defeat any law;
(c) it is fraudulent;
(d) it involves or implies injury to the person or property of another; or
(e) the court regards it as immoral, or opposed to public policy.

[1][1976] 2 MLJ 253.
[2]This article examines the law as at September 30, 1991.
[3]Act 136 (Revised 1974).

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Does this mean that Malaysian lawyers are spared from having to swim in the murky waters of this subject? In a recent judgment, the Supreme Court appeared to give this impression when it stated that "the courts in this country are bound by the provisions of section 24 of the Contracts Act which *inter alia* deals with what is forbidden or prohibited by law. Section 24 is explicit and must be applied by the courts."[4]

A perusal of the case law seem to show that sometimes, "explicit" statutory provisions have a tendency to confuse and confound rather than clear the way for a smooth passage. However, before we can embark on a study of the working of section 24 of the Act, a mention of the position at common law is necessary, as most of the cases will show that inspite of the presence of section 24, Malaysian courts have shown a tendency to either ignore it, or pay it scant attention.

I. *Illegality at Common Law*

The study of illegal contracts at common law is fraught with complexity and is reflective of the difficulties and problems which this subject poses. Anson's explanation for this lies in the fact that the illegality may assume different shades: "Illegal objects may range from those which are tainted with gross moral turpitude, eg. murder, to those where the harms to be avoided is relatively small."[5] Thus, the cases on the subject tend to be divided into a number of different categories, for example, contracts which are illegal and contracts which are merely void. The law would treat illegal contracts more strictly than it would contracts that are void. It has been said that where contracts are held to be "illegal", the law will refuse to aid in any way a person who founds his cause

[4]*Chung Khiaw Bank Limited* v *Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675, 682.
[5]*Anson's Law of Contract*, 26th edn, (1984) Oxford Univ Press, p 292.

of action upon such a contract; but where the contract is void, the law simply says that the contract is not to have legal effect.[6]

Likewise, based on the same premise, Cheshire and Fifoot have divided the cases on illegality according to their degree of severity.[7] Contracts which are treated as "illegal" at common law on the grounds of public policy are the following:

(i) a contract to commit a crime, tort or fraud on a third party;

(ii) a contract that is sexually immoral;

(iii) a contract to the prejudice of public safety;

(iv) a contract prejudicial to the administration of justice;

(v) a contract liable to corrupt public life; and

(vi) a contract to defraud the revenue.

Three other types of contracts which also offend public policy but which have been treated more leniently by the courts because they are "inexpedient rather than unprincipled"[8] are as follows:

(i) a contract to oust the jurisdiction of the courts;

(ii) a contract that tends to prejudice the status of marriage; and

(iii) a contract in restraint of trade.

To the above three types of contracts is appended the epithet "void", "since these contracts are in practice treated by the courts as void either as a whole or at least in part."[9]

[6] *Ibid.*
[7] *Cheshire & Fifoot's Law of Contract*, 11th edn, (1986), Butterworths, p 342.
[8] *Op.cit.*, p 344.
[9] *Ibid.*

Cheshire & Fifoot cited the case of *Bennett* v *Bennett*[10] to justify their classification, wherein Lord Denning sought to explain and distinguish the different gradations in illegality:

> They are not 'illegal' in the sense that a contract to do a prohibited or immoral act is illegal. They are not 'unenforceable' in the sense that a contract within the Statute of Frauds is unenforceable for want of writing. These covenants lie somewhere in between. They are invalid and unenforceable.[11]

It is interesting to note that in both works (Anson and Cheshire & Fifoot), illegality through contravention of statutes or statutory illegality is treated separately. Anson, for instance, prefers to use the single word "illegality" to cover the multitude of instances where the law, for some reason of public policy or as a result of an express prohibition, denies to both of the parties the rights to which he would otherwise be entitled.[12] However, for the purpose of exposition, Anson has classified the cases according to the *source* of illegality, that is, it may arise by statute or by virtue of the principles of common law.

Thus, we have so far, a broad classification based on the *source* of the illegality: statute or common law principles. Within the illegality due to infringement of principles of common law, we have a further classification: contracts may be *illegal* or *void*. The classification of cases on illegality by English writers has been subjected to much criticism. In fact, Anson himself has expressed his reservations on this point, when he noted that "undoubtedly some contracts can thus be classified, but it is both impracticable and impossible to apply this classification over the whole field of the subject. Moreover, confusion is created by the fact that the judges have on many occasions treated the two terms ["void" and "illegal"] as interchangeable."[13]

Treitel is one of the stronger critics of this classification process, and in his work *The Law of Contract*, he dismisses

[10][1952] 1 KB 249.
[11]*Id.* 260.
[12]*Op.cit.* 292.
[13]*Ibid.*

the sanctity of each classification.[14] According to Treitel, there are at least three methods of classification. The first method is based on the nature of the objectionable conduct. The cases were classified into those where the contract was contrary to (a) positive law, (b) morals or good manners, and (c) public policy. According to Treitel, the main difficulty with this categorisation was that, the second category is hard to define and it may overlap with the third. Further, it was arguable that public policy is a ground for invalidating all contracts affected by illegality, and therefore the third category would include the other two. Finally, Treitel argues that the use of the term "public policy" is so broad as to be useless.[15]

The second method of categorisation is based on the source of the rule infringed, that is, a contract is more likely to be invalid for violation of a statute then for violation of a rule of common law. Treitel argues that this distinction is appropriate where a statute in terms prohibits or invalidates a contract, but it is not decisive where the illegality consists in the making or performance of the contract.

The third method is by looking to the legal consequences of the contracts, that is, a classification based on distinguishing between "illegal" and "nugatory" contracts.[16] Treitel argues that this classification cannot lead to any deductions about the legal effects of the contracts as it assumes that we already know what those consequences are.

The classification made by English authors on this subject is quite unfortunate and has contributed to the complexity of this subject at common law. As pointed out by Treitel, there are inconsistencies among the English authors themselves as to which category to place a particular type of infringement.[17] It is not within the scope of this article to embark upon a lengthy argument on this problem, as the emphasis is upon section 24 of the Contracts Act, and to what extent section

[14]Treitel, *The Law of Contract* 5th edn, (1979), Stevens & Sons, Lond., p 316.
[15]*Ibid.*
[16]Adopted by authors such as Cheshire & Fifoot as "illegal" and "void" contracts.
[17]In the example quoted by Treitel, Salmond & Winfield regards an agreement by a married person to marry as "illegal", while Cheshire & Fifoot regards it as "void": see *ibid.*

24 embodies the common law classification. However, this article cannot proceed without adopting some assumption with regard to the common law position on this point. For the purposes of clarity more than anything else, this article will proceed upon the basis that, at common law, contracts may be void due to illegality (illegal contracts) or void due to infringement of public policy (void contracts). This is the classification favoured by Cheshire and Fifoot. What, then, are the effects of (a) a contract which has been declared illegal, and (b) a contract which is only void?

(a) *Illegal Contracts*

Illegality, at common law, is perceived from at least three angles:

(i) the very contract itself is unlawful in its formation or at its inception. This may be the result, for example, of an explicit prohibition of the making of that very contract. For example, in *Re Mahmoud and Ispahani,*[18] a certain statutory order provided that no person should buy or sell certain specified articles, including linseed, unless he was licensed to do so. The plaintiff had agreed to sell linseed oil to the defendant, who refused to take delivery and was sued for non-acceptance of the goods. The defendant had no licence, but led the plaintiff, who held a licence, to believe that he had one. The court enforced the prohibition, although this meant allowing the defendant to rely on his own illegality, as each party was forbidden to enter into the contract by statute. The plaintiff could not rely upon his honest belief that the defendant held a licence in order to make the defendant liable for his promise. Therefore, the effect of a contract illegal at its formation or inception is that it is void *ab initio,* and no remedy is available to either party. Likewise, property to goods cannot pass under a contract, illegal at its inception. However, common law has recognized a few exceptions to this, namely, if the plaintiff can form a cause of action entirely independent of the contract thereby not having

[18][1921] 2 KB 716.

to disclose the illegality;[19] where the parties are not in *pari delicto,* that is, where at least one of the parties to the contract has no knowledge of the illegal nature of the transaction, the court may allow him to recover whatever he may have transferred to the other party;[20] and where a party repents while the contract is still executory, that is, a party should take proceedings to recover whatever he has transferred before the illegal purpose has been substantially performed.[21]

(ii) Where the contract is *ex facie* lawful, but both parties intend to exploit it for an illegal purpose. The effect is that the contract is illegal in its inception as in case (i) above even though it might appear to be perfectly innocent. The contract cannot be enforced by either party and neither party may obtain any remedy under it.

(iii) Where the contract is *ex facie* lawful, but only one party intends to exploit it for an illegal purpose. In this case, the innocent party may have his rights under the contract intact. All the normal contractual remedies are available to the innocent party - he may enforce the contract, sue on a quantum meruit and he may recover property that he has transferred to the guilty party.[22]

(b) *Void Contracts*

Cheshire & Fifoot lists three types of contract as being void at common law on the grounds of public policy. They are contracts to oust the jurisdiction of the courts, contracts prejudicial to the status of marriage and contracts in restraint of trade. These three types of contract are merely void, and not illegal. The effect, in most cases, is that they are valid contracts, whereby the offending term or terms only are declared void and unenforceable. Therefore, the rights of the respective parties remains intact and parties can enforce the

[19] *Bowmakers Ltd* v *Barnet Instruments Ltd* [1945] KB 65.
[20] *Smith* v *Cuff* (1817) 6 M & S 160.
[21] *Kearley* v *Thomson* (1890) 24 QBD 742; *Taylor* v *Bowers* [1876] 1 QBD 291.
[22] *Pearce* v *Books* (1886) LR 1 Exch 213; *Lloyd* v *Johnson* (1798) 1 Bos & Pul 340; *Clay* v *Yates* (1856) 1 H & N 73; *Oom* v *Bruce* (1810) 2 East 225; *Marles* v *Philip Trent & Sons Ltd (No 2)* [1954] 1 KB 138.

contract and sue for damages upon breach of other terms of the contract.[23] Similarly, monies paid or property transferred by one party to the other is recoverable. Unlike illegal contracts, where the entire contract is void in toto and parties are without remedy, contracts which are void do not become void in toto. The contract can be left standing if the lawful and unoffending terms of the contract can be severed from the offending term or terms. This practice called "severance" is not allowed in the case of contracts which are illegal.[24]

Therefore, from a common law perspective, the distinction made between contracts which are illegal and contracts which are merely void, is not illusory. The categorization takes into account the respective severity of the nature of each type of contract, and the more severe the effect is mirrored by the legal repercussion which follows. Therefore, a contract to commit a crime or which blatantly infringes a statutory provision is illegal and totally void; but a contract which has the effect of restraining a person's trade or occupation is not totally void at all - it may be a perfectly valid contract if the restraint was found to be reasonable. Even if the restraint was found to be unreasonable, the contract need not be nullified if the offending portion of it can be severed from the rest of the contract.

II. *Illegality under the Malaysian Contracts Act, 1950*

It is now sought to examine, to what extent the above common law position is reflected in the Malaysian Contracts Act, in particular, under section 24.

(a) *The Statutory Scheme Examined*

It is proposed to embark on the study of illegality in Malaysia by first of all examining the statutory provisions in the Act relating to the subject.

[23] *Re Prudential Assurance Co's Trust Deed* [1934] Ch 338; *Wallis* v *Day* (1837) 2 M & W 273; *Bennett* v *Bennett* [1952] 1 All ER 413.
[24] *Op.cit.* 404. See also *Bennett* v *Bennett* [1952] 1 KB 249, 253-254; *Alexander* v *Rayson* [1936] 1 KB 169; *Napier* v *National Business Agency Ltd* [1951] 2 All ER 264.

Section 2(h) declares that an agreement enforceable by law is a contract. Conversely, section 2(g) declares that an agreement not enforceable by law is said to be void.

Section 10(1) states that all agreements are contracts if they are made by the free consent of parties competent to contract, *for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.*

Up to this stage, the effect of the above three provisions may be summed up in the following manner:

(i) An agreement is a valid and binding contract if it is enforceable by law.

(ii) An agreement is enforceable by law if it is made for a lawful consideration and with a lawful object.

(iii) Therefore, an agreement in which the consideration or object is unlawful is not enforceable by law. An agreement which is not enforceable by law is a *void agreement.*

(iv) An agreement, which is made for lawful consideration and with a lawful object, may nevertheless be unenforceable by law and therefore void if the provisions of the Act has expressly declared it to be void.

A point to note at this juncture is that the statute does not use the term "illegal" to describe the effect of an agreement which is made for a consideration or object which is unlawful. The term "void" seem to be generic here, in the sense that all agreements which are not enforceable by law, whether due to unlawful consideration or object or otherwise, are declared "void".

The main provision regarding illegality is section 24, which states that the consideration or object of an agreement is lawful unless -

(a) it is forbidden by a law;
(b) it is of such a nature that, if permitted, it would defeat any law;
(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or
(e) the court regards it as immoral, or opposed to public policy.

The section states further: "In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Using Cheshire & Fifoot's classification mentioned in the earlier part of this article, it would appear that if one were to give a broad interpretation to section 24, it may include within its purview all types of contract which have been classified as "illegal" and therefore void *ab initio* at common law. Paragraph (a) for instance would cover contracts which are in direct contravention of statute, in the sense that its consideration or object is forbidden by *a law*. Paragraph (b) would cover a situation where the contract may not be in direct contravention of a statute, but, if carried out, may have the effect of indirectly contravening it. Illustration (i) to section 24 provides a clear explanation of this.[25] Paragraphs (c) and (d) could encompass contracts to commit a crime, tort or fraud on a third party, while paragraph (e) would cover a contract that is sexually immoral. Contracts prejudicial to public safety, prejudicial to the administration of justice or that tends to corruption in public life may be covered under either paragraphs (d) or (e), as being contracts opposed to public policy. A contract to defraud the revenue may be covered under paragraph (c) or again, under paragraph (e) as being opposed to public policy.

Therefore, at this juncture, it can be said that section 24 encompasses all the types of contracts which have been

[25]A's estate is sold for arrears of revenue under a written law, by which the defaulter is prohibited from purchasing the estate. B, upon on understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

classified as "illegal" at common law.[26] The effect of such contracts has been expressly stated to be "void". At common law, these contracts are treated as "void *ab initio*". It can be logically surmised that the term "void" as used in section 24 can only mean "void *ab initio* ", for if the legislature had intended the term to mean otherwise, it would have so stated.[27] What about the second category of contracts which are void at common law on the grounds of public policy? Upon a reading of section 24, it would appear that section 24, in particular section 24(e) is wide enough to encompass these contracts. It may be argued quite easily that a contract to oust the jurisdiction of the courts, a contract that tends to prejudice the status of marriage and a contract in restraint of trade are all against public policy and are therefore void. This would mean, however, that there would be no distinction at all between illegal and void contracts in Malaysia. It would mean that in Malaysia, no account is taken of the fact that there are different degrees of severity involved in this area and that the legal effect should be commensurate with that degree of severity. At the outset this appears to be harsh and totally unjustified. Fortunately for the Malaysian legal system, this is not the case.

Section 27 provides that every agreement in restraint of the marriage of any person, other than a minor during his or her minority, is void. The effect would appear to be similar to agreements falling under section 24, but for one important fact, that is, an exception is provided under section 27 whereby an agreement in restraint of marriage would not be void where it affects a minor.

Section 28 provides that every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void. An agreement in restraint of trade is, *to that extent*, void. The words "to that extent" cannot mean anything more than to the extent of

[26]To this extent, the learned authors of *Pollock & Mulla on the Indian Contract and Specific Relief Acts*, 10th edn, (1986) Bombay, Tripathi Pte Ltd were correct when they wrote. "S. 23 [in *pari materia* with s. 24 of Malaysian Contracts Act] of the Contract Act was inspired by the common law of England and should be construed in that light": See para 227.

[27]For example, "void to that extent", as in section 28 of the Act.

the restraint, and construed in this light, the result is that the *entire* agreement is *not* void; it is only void *to the extent of the restraint*. Therefore, other parts of the agreement which are not objectionable in the sense that it does not have the effect of restraining a person from exercising a lawful trade, profession or business may be enforceable. This mirrors the common law position.

The provision goes further to provide three specific exceptions whereby an agreement in restraint of trade may be valid. They are where a person sells the goodwill of a business, between partners upon or in anticipation of a dissolution of the partnership and between partners during the continuance of the partnership.

Section 29 provides that every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. The legal effect of this provision is similar to section 28, that is, the entire agreement is not void *ab initio*; it is void only "to that extent". Further, section 29 applies to an agreement whereby a party is "restricted absolutely" from enforcing his rights. Therefore, the provision itself inherently provides the exception where an agreement to oust the jurisdiction of the court may be valid. In addition to this, there are three specific exceptions under the provision, namely, two exceptions regarding reference to arbitration and a third exception regarding ouster clauses in Government Scholarship contracts.

From the above, it can be seen that the legal effect of a contract coming within any of the above three categories is not necessarily void *ab initio*. The provisions provide exemptions wherein the contract concerned may be valid. This would appear to mirror the common law position of these same contracts. The scheme, when viewed as a whole, therefore would seem to present the following scenario: contracts which are illegal and void *ab initio* at common law would be covered under section 24, where the legal position is also similar in Malaysia, that is, they are void *ab initio* with no exceptions. Contracts which the common law has declared to be void on the grounds of public policy are covered under

other provisions of the Act, in particular sections 27, 28 and 29, and the legal effect of these contracts are that they are not all void *ab initio*, they are only void to the extent of the objectionable part and where they come within any of the specific exceptions provided under the respective provisions, they are valid. In retrospect, therefore, the Malaysian position on illegality and void agreements as entrenched in the Contracts Act is similar to the common law position. Perhaps this is the rationale underlying the otherwise peculiar arrangement in the Contracts Act, whereby contracts in restraint of marriage, contracts in restraint of trade and contracts to oust the jurisdiction of the courts have been placed under the sub-heading "void agreements", while section 24 is placed outside this sub heading. Could this be due to the fact that it was the intention of the legislature that section 24 would cover "illegal agreements"?[28]

(b) *Illegal and Void Agreements under the Contracts Act -an examination of judicial attitudes*

Although there are many Malaysian cases on illegality, sadly, they do not shed much light on the scope of section 24 of the Act. Instead, some of them even confuse the situation further. Most of the cases, especially the early cases, make little reference to the different paragraphs of section 24 when pronouncing the illegality of any particular transaction. As such, it is difficult to gauge the precise scope and effectiveness of section 24 in particular, and of the doctrine of illegal and void agreements in general under the Contracts Act.

Most of the cases concern the contravention of Statutes. In *Hee Cheng* v *Krishnan,*[29] the plaintiff claimed specific performance or alternatively damages for a breach of contract

[28]Several Indian authors on the Indian Contract Act seem to confirm this, for example, Chitaley and Appu Rao, *The Indian Contract Act*, Vol 2, s 23 N5; Singhal & Subrahmanyan's *Indian Contract Act*, 2nd edn (1980) Law Book Co, at p 542: "The consequences of an illegal contract are usually more drastic than the consequences of a merely void contract"; *Dutt on Contract*, 4th edn (1969) Eastern Law House, at p 260.

[29][1955] MLJ 103.

entered into between him and the defendant for the purchase of a house built upon a piece of land in respect of which a Temporary Occupation Licence was issued. This licence was issued under Regulation 40 of the Land Rules 1930 and Rule 41 stated: "No licence for the temporary occupation of State land shall be transferable."

The court decided that the alleged contract amounted to an attempt to sell and to purchase the defendant's rights under the Temporary Occupation Licence and was therefore unlawful by reason of section 24 of the Contracts (Malay States) Ordinance, 1950. However, the court did not elaborate as to the basis of the unlawfulness, that is, that the object of the agreement would be one which is (a) forbidden by a law, or at least it would be (b) of such a nature that, if permitted, it would defeat any law.

This habit of the court in making a general reference to section 24 without reference to its explicit heads continued for a long time though a number of cases.[30] Some cases make no reference to section 24 at all. For example, in *Menaka* v *Lum Kum Chum*,[31] the appellant was a registered moneylender. Through her attorney she lent some money to the respondent on the security of a charge of certain lands belonging to the respondent. The loan was made by the attorney on behalf of the appellant personally. The appellant applied for an order for the sale of the lands to satisfy the principal sum and interest. The respondent objected to the application on the ground that the loan, not being made in the registered name of the moneylender, the moneylender had contravened the provisions of section 8(b) and (c) of the Moneylenders Ordinance, 1951.

The Privy Council decided that the appellant had contravened section 8(c) of the Moneylenders Ordinance and therefore, the contract and security were unenforceable. "As the contract is not enforceable by law, it is void under section 2(g) of the Contracts (Malay States) Ordinance, 1950."[32] Section 2 of

[30]See, for example, *Chai Sau Yin* v *Liew Kwee Sam* [1960] MLJ 122 (CA); [1962] MLJ 152 (PC); *Hashim bin Adam* v *Daya Utama Sdn Bhd* [1980] 1 MLJ 125; *Govindji & Co* v *Soon Hin Huat* [1982] 1 MLJ 255.
[31][1977] 1 MLJ 91.
[32]per Lord Fraser of Tullybelton, *id.* 94.

the Contracts Act defines certain key terms which form the very basis of the study of the law of contract. Thus, under section 2(h), an agreement enforceable by law is said to be a contract, whereas, under section 2(g), an agreement not enforceable by law is said to be void.[33] It should be noted here that the Privy Council started with the premise that the contract was unenforceable, therefore it was void. In actual fact, the contravention of statute made the contract void by virtue of the fact that its consideration or object was forbidden by a law, and a void contract cannot be enforced. This trend of referring to section 2(g) of the Contracts Act was repeated in the case of *Manang Lim Native Sdn Bhd* v *Manang Selaman*[34] with more unfortunate result. There, having said that the agreement entered into between the respondent and appellant was made in contravention of section 8(b) of the Sarawak Land Code, the Court continued: "As such it was deemed to have been entered into for an illegal consideration and was therefore a void agreement within the meaning of section 2(g) of the Contracts Act, 1950."[35]

This unfortunate trend was broken by the case of *Theresa Chong* v *Kin Khoon & Co.*[36] It may be said that this is the earliest case to attempt an interpretation of section 24, in particular section 24(e), and it is still correct to say that this is the only reported case where the scope of public policy under the Contracts Act 1950 was considered in detail by any Malaysian Court.[37] In this case the appellant acted as a remisier but was not registered as required under the stock exchange by-laws, which provided for a penalty for non-registration.

The Court held that the contract which the appellant made with brokers was not illegal on the basis of a contravention of public policy as the contract did not fit into any of the traditional pigeon holes of public policy under the common law. With one stroke of the pen, the scope of public policy

[33]See Part II (a) above.
[34][1986] 1 MLJ 379.
[35]per Seah SCJ, *id.* 381.
[36][1976] 2 MLJ 253.
[37]See Sinnadurai, V., "Public Policy under the Contracts Act 1950" [1981] JMCL 1.

under section 24(e) of the Contracts Act became tied up with the common law heads of public policy. While the desirability or otherwise of this judgment is of course open to question,[38] it cannot be doubted that for section 24(e) at least, its scope of application has been defined.

A point to note about *Theresa Chong* however, is that apart from the pronouncement on the need for the case to fit into the common law heads of public policy, the court went on to state that not being registered as a remisier is not contrary to public policy because the by-laws of the stock exchange are the by-laws of a private body which have no force of law.[39]

Following from this argument, it would appear that if the by-law had the force of law, or conversely, if it was an Act of Parliament which had been contravened, the non-registration could then be in contravention of public policy. However, it may also be argued that the non-registration would be in contravention of statute, and in the light of section 24, could be caught under section 24(a) or (b).

In *Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar* v *Dato James Ling Beng King*,[40] a contract for the sale and purchase of shares was entered into between the plaintiff and defendant. At the date of contract, there was no approval for the sale of the said shares from the Minister of Finance, as required under section 23A of the Banking Act 1973. The High Court decided that the plaintiff in this case could not obtain specific performance of the contract in view of section 24(e) of the Contracts Act, as "it is obviously a matter of public policy that the prior approval of the Minister of Finance under section 23A of the Banking Act must be obtained before any agreement or arrangement is entered into for the acquisition of an aggregate of five percentum holding in any licensed bank."[41] The problem

[38]As it has been ably debated by Sinnadurai V., *supra.*, fn. 37. See also the cases of *Hamzah bin Musa* v *Fatimah Zaharah binti Mohamad Jalal* [1982] 1 MLJ 361 and *David Hey* v *New Kok Ann Realty Sdn Bhd* [1985] 1 MLJ 167.
[39]*Id* 256.
[40][1989] 2 MLJ 249.
[41]per Gunn Chit Tuan J: *id.* 252.

with this statement is that, it is not just a matter of public policy that the prior approval of the Minister of Finance be obtained - it is a matter of law. If it is argued that it is against public policy to contravene a law, in the light of section 24, paragraphs (a) and (b) would be superfluous. It can also be argued that all the paragraphs from (a) to (d) would be superfluous, for neither can an object of fraud or injury to the person or property of another be served by the doctrine of public policy.[42]

The above confusion ought now to be put to rest with the Supreme Court decision in *Chung Khiaw Bank Ltd* v *Hotel Rasa Sayang Sdn Bhd & Anor*.[43] This case is concerned with loan agreements and securities executed by the appellants and respondents, the effect of which could amount to the respondents assisting in the financing of the purchase of its own shares by providing security for the grant of a loan made by the appellant. This would be in contravention of section 67 of the Companies Act, 1965.

In upholding the illegality of the transaction, the Supreme Court made several pronouncements, among which is the following:

> The provisions of s 24 of our Contracts Act ... are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paragraphs (a), (b) and (e) of s 24 shall be unlawful and the agreement which ensues shall be unlawful and void. Paragraph (a) deals with what is forbidden or prohibited by law; paragraph (b) deals with what could defeat the object of any law; and paragraph (e) deals with public policy.
>
> Paragraphs (a)-(b) and (e) of s 24 of the Contracts Act should be read disjunctively. S 24 of the Contracts Act is explicit and that if an agreement is forbidden by law or prohibited by law or of such nature that it would defeat the law, that agreement is unlawful and void. If the agreement is prohibited by law or forbidden by law or of such nature that it would defeat the law then the question of

[42]See, for example *B-Trak Sdn Bhd* v *Bingkul Timber Agencies Sdn Bhd & Anor* [1969] 1 MLJ 124, 127: "The purpose or object of an agreement is lawful unless it comes under s 24(a)-(e), it then is against public policy and it should not be enforced."

[43][1990] 1 CLJ 675.

> public policy does not arise at all. The question of public policy arises only in paragraph (e) where the court considers an agreement to be immoral or otherwise opposed to public policy.[44]

It can be said that the case of *Chung Khiaw Bank* represents the first attempt at judicial pronouncement on the scope of section 24 in a comprehensive manner.[45]

The following propositions appear to emerge from the Supreme Court decision in *Chung Khiaw Bank:*

(1) That paragraphs (a) to (e) of section 24 should be read disjunctively. By stating that section 24(a)-(b) and (e) should be read disjunctively, it would make little sense if section 24(c) and (d) were not. The "explicitness" of section 24 would also require that each paragraph thereof should be treated differently. This will then remove the possible absurd situation that the entire paragraphs (a)-(d) of section 24 could be superfluous in the light of the wider scope provided under section 24(e).

(2) Having stated the above, the Supreme Court has, in actual fact indirectly rewritten the scope of public policy under section 24(e). If the paragraphs of section 24 were to be read disjunctively, it follows that paragraph (e) was meant to cover situations not envisaged by paragraphs (a) to (d). Therefore, the scope of public policy under section 24(e) cannot be linked to the common law heads of public policy, as some of these common law heads of public policy may be adequately provided for under the preceding paragraphs. For example, contract to commit a crime, tort or fraud on a third party may be covered by paragraphs (c) and (d). Under paragraph (c) for instance, where the object or consideration is fraudulent, it may also encompass the common law head of public policy relating to contracts to defraud the revenue.[46]

[44]per Hashim Yeop Sani CJ (Malaya): *id.* 682.
[45]An earlier case, *Hopewell Construction Co Ltd v Eastern & Oriental Hotel (1951) Sdn Bhd* [1988] 2 MLJ 621, discussed the prerequisite for the application of section 24(b) of the Act, i.e., in order to render a contract void under section 24(b) of the Contracts Act 1950, there must be a sufficient nexus between the provisions of the statute concerned and the contract.
[46]Refer Part II (a) above, "The Statutory Scheme Examined".

Sexual immorality, a distinct category under the common law, is expressly provided for under section 24(e), and it is separate from public policy. To link the doctrine of public policy under section 24(e) to the common law heads of public policy would nullify the very explicitness of section 24, making the provision quite meaningless, apart from section 24(e) itself.

At this juncture, it is pertinent to echo the words of Sinnadurai V., "the drafters intended section 24 to cover any situation which the court feels to be contrary to the public policy of the Malaysian community: They did not intend it to have an identical meaning to the English law."[47] However, this writer beg to differ from the learned author in respect of one of the reasons given for the above stated conclusion. The reason was that the intention of the drafters was evidenced by the fact that they had specifically enacted certain provisions in the Contract Act declaring certain agreements which, under the common law were against public policy, to be void. The learned author then cited section 28 on agreements in restraint of trade as an example; also section 27 on agreements in restraint of marriage. It is to be noted that these agreements come under the heading of agreements *void* as being contrary to public policy under the common law; they are not agreements which are *illegal* as being contrary to public policy. If section 24 of the Contracts Act embraces the doctrine of illegality, then, the common law heads of public policy under section 24(e) must refer to the heads of public policy, the contravention of which, the common law has declared to be illegal, and not merely void. It is whether section 24(e) is in superfluity with these common law heads of public policy that has to be examined, and not with the heads of public policy, the contravention of which, the common law has declared to be void.[48] In the light of the Supreme Court decision in *Chung*

[47]See *supra*, fn. 37, at p 20.
[48]See *supra*, *Illegality at Common Law*. See also, *Dutt on Contract*, 4th edn (1969), Eastern Law House, at p 260: "A transaction, to be void as being against public policy, must be found as a fact, in its inception to amount to or involve an illegality ...".

Khiaw Bank, there would be a superfluity if the doctrine of public policy under section 24(e) were to be linked to the common law heads of public policy for illegal contracts. To this extent therefore, Malaysian courts should now follow the Supreme Court decision in *Chung Khiaw Bank*, and the case of *Theresa Chong* ought to be laid to rest.

Conclusion

The Supreme Court decision in *Chung Khiaw Bank* is a trail-blazer of sorts. It is to be applauded for making the attempt at interpreting a local statute which is in application, rather than meekly submitting to common law. In the process, it becomes a valuable precedent as it opens the door to the creation of a Malaysian jurisprudence and common law. It is hoped that lawyers and judges will, from now on, accept the challenge posed by Hashim Yeop Sani CJ (Malaya), to create appropriate heads of public policy in consonant with the Malaysian community:

> S. 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country ....
>
> The provision of s. 24 of our Contracts Act is a statutory direction. It may well have originated from some old common law principle but that principle has now been converted into a statutory provision.[49]

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[49] *Id.* 682. Even in England, the requirement of adherence to established heads of public policy have begun to be problematic - see, for instance, *Lemenda Trading Co Ltd* v *African Middle East Petroleum Co Ltd* [1988] 1 All ER 513.