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Betamax v STC: alleged illegality, public policy and the Model Law

Mark Campbell*

Abstract

*Public policy can be raised in the context of setting aside or enforcing an arbitral award, and there is within international commercial arbitration a general consensus that the public policy concept should be defined narrowly. There is one aspect of public policy in particular which highlights the tension between the finality awards and the right of the forum state to uphold its public policy. That is the situation where, in the face of alleged illegality, the arbitral tribunal concludes the underlying contract is lawful and enforceable. The question then arises: should a national court be permitted to re-examine the tribunal's findings in this regard at the point of setting aside or enforcement? Relying on authorities from Singapore and England, the Judicial Committee of the Privy Council in *Betamax v State Trading Corporation* – a case appealed from Mauritius and which concerned an alleged breach of public procurement rules – has held that the answer to that question should be no. The Privy Council's decision will be an important addition to the Model Law jurisprudence on Articles 34(2)(b)(ii) and 36(1)(b)(ii), and one can expect it to be cited and discussed beyond the confines of Mauritius.*

A. Introduction

In the context of setting aside or enforcement proceedings, the public policy of the forum can be raised as a procedural or substantive matter.¹ In the procedural sense, it is about the arbitral process leading to the award. Public policy in the substantive sense is concerned with the content of an award and the transaction to which the award relates. While substantive public policy is sometimes raised in the context of alleged bribery or corruption, it can also be relevant to other instances of illegality. Public policy occupies a space within international commercial arbitration where two important principles collide. On the one hand, there is the finality of arbitral awards. On the other, the role played by national courts in upholding the public policy of the forum state. From the perspective of the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'), the relevant public policy grounds are contained in

* University of Bristol Law School, UK. Email: mark.campbell@bristol.ac.uk.

¹ UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 159–64 (setting aside under Article 34) and 183–85 (refusal of enforcement under Article 36).

Articles 34(2)(b)(ii) and 36(1)(b)(ii); these provisions reflect Article V(2)(b) of the New York Convention 1958.²

It is widely accepted that, within international commercial arbitration, the concept of public policy should be defined narrowly.³ Thus, in one oft-cited example from the Model Law jurisprudence it was said that public policy should only be relevant where the matter in question concerns ‘the most basic notions of morality and justice.’⁴ While public policy is often added to the mix at the point of setting aside or enforcement, its narrow scope is a key reason why attempts to rely upon it tend not to succeed in practice. But when it comes to substantive public policy the issue may not simply be the narrow scope of the public policy concept. There seems to be a consensus that a mere error of fact or law by an arbitrator does not engage public policy.⁵ But what about the case where it is claimed an arbitrator erred in his or her conclusions about the lawfulness of the underlying contract? Should a court be entitled to examine those conclusions on public policy grounds to ensure the relevant legal system is not enforcing an illegal contract? In *Betamax Ltd v State Trading Corporation* (*‘Betamax v STC’*), a recent Privy Council case appealed from Mauritius, that question was answered with a resounding no.⁶ There, an attempt to rely on the public policy of Mauritius in a setting aside application failed without the need to consider the precise scope of public policy in Mauritius. As will be explained, the Privy Council held that the Supreme Court of Mauritius had not been entitled to look beyond the award and re-examine the arbitrator’s findings on the lawfulness of the contract and thus its enforceability. *Betamax v STC* will be an important addition to the Model Law’s jurisprudence on Articles 34 and 36. And beyond the content of the Privy Council’s decision, *Betamax v STC* is notable for another reason. It is a rare instance of the English judiciary (in their guise as the Judicial Committee of the Privy Council) deciding an arbitration matter on the basis of the Model Law.⁷

² There is good reason to assume that the same approach to public policy applies at the setting aside and enforcement stages in both Model Law and non-Model Law contexts. See *AJU v AJT* [2011] SGCA 41, [2011] 4 SLR 739, paras. 30–38, as well as the various English authorities mentioned herein where decisions on setting aside are regarded as relevant to enforcement, and vice versa.

³ Gary B. Born, *International Commercial Arbitration*, 3611–18 and 4000–4027 (3rd ed., Kluwer Law International 2021).

⁴ *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 118 (Litton PJ) (Hong Kong).

⁵ Born, n. 3 above, at 4024–27.

⁶ [2021] UKPC 14.

⁷ The Judicial Committee of the Privy Council acts as the final court of appeal for Mauritius. Mauritius has been a ‘Model Law country’ since 2008.

B. Facts, award and the decision of the Supreme Court of Mauritius

Betamax Ltd ('Betamax') is a Mauritian company. State Trading Corporation ('STC') is the trading arm of the Government of Mauritius. In November 2009 Betamax and STC entered into a contract of affreightment ('CoA') whereby Betamax would transport petroleum products from Mangalore in India to Mauritius. In January 2015 a new government in Mauritius gave notice 'that it would terminate the CoA in light of "the unlawful procedure and processes regarding the allocation of the contract"'.⁸ STC then informed Betamax that it no longer required the services to be provided by Betamax under the CoA. Betamax subsequently terminated the CoA on the basis of default provisions within the agreement. The matter was referred to arbitration, and in his award dated 5 June 2017 the arbitrator awarded Betamax US\$115.3m in damages.⁹ During the arbitration STC had contended the CoA was illegal and, therefore, unenforceable because of a failure to comply with the relevant public procurement legislation in Mauritius: namely, the Public Procurement Act 2006 and the Public Procurement Regulations 2008. The arbitrator, in a brief section of the award, held that the Mauritian public procurement processes did not apply to the CoA on the basis of an exemption afforded by the legislation.

Betamax applied to the courts in Mauritius to enforce the award against STC, with STC responding in two ways. One was an application to have the order for enforcement discharged; the other was an application to have the award itself set aside. In the Supreme Court of Mauritius, STC advanced three grounds.¹⁰ First, the dispute was not arbitrable according to the laws of Mauritius. Second, the arbitration was not valid under the laws of Mauritius. Third, the award was in conflict with the public policy of Mauritius. In its judgment of 31 May 2019, the Supreme Court of Mauritius held that the award should be set aside on the public policy ground: that is, Article 39(2)(b)(ii) of the International Arbitration Act 2008. In doing so, the Court disagreed with the arbitrator that the CoA was exempt from the public procurement legislation. The CoA was, therefore, illegal and unenforceable and, given the circumstances, in conflict with the public policy of Mauritius. The Court had referred to a 'flagrant and concrete breach' of the law.¹¹

⁸ *Betamax v STC*, n. 6 above, at para. 6.

⁹ *Betamax v STC*, n. 6 above, at para. 12. The parties were in agreement that the arbitration was an international (rather than a domestic) arbitration and that the seat was Mauritius: para. 11. The 2013 Rules of the Singapore International Arbitration Centre applied: paras. 7 and 10.

¹⁰ These three grounds relied respectively on ss. 39(2)(b)(i), 39(2)(a)(i), and 39(2)(b)(ii) of the International Arbitration Act 2008, provisions which in turn reflect arts. 34(2)(b)(i), 34(2)(a)(i), and 34(2)(b)(ii) of the Model Law.

¹¹ *Betamax v STC*, n. 6 above, at para. 28.

C. The decision of the Privy Council

Betamax's appeal to the Privy Council was allowed, with the court agreeing the award should be enforced rather than set aside.¹² The judgment was delivered by Lord Thomas. The Privy Council had been invited to consider three questions. First, was the court entitled to examine the arbitrator's conclusion the CoA was not subject to the public procurement legislation of Mauritius and that the contract was, therefore, lawful? Second, if the court was entitled to review the arbitrator's findings on the legality of the CoA was the CoA in fact subject to the public procurement legislation? Third, if the CoA was unlawful, would enforcing the CoA conflict with the public policy of Mauritius? The main focus of the judgment was the first question which was answered in the negative. In other words, the Supreme Court of Mauritius had not been entitled to examine the arbitrator's decision on the applicability of Mauritian public procurement legislation and thus the CoA's legality.¹³ Having reached that conclusion, the second and third questions fell away as live issues. Lord Thomas, nevertheless, went on to examine the public procurement legislation relevant to the dispute and agreed with the arbitrator (disagreeing with the Supreme Court of Mauritius) that the CoA was exempt from the legislation and, therefore, not illegal.¹⁴ Observing that this task of statutory interpretation was a challenging one, Lord Thomas noted that the matter involved 'difficult legislative provisions' which 'had been amended in a far from straightforward manner.'¹⁵ On the third question, the Privy Council chose, for two reasons, to express no view.¹⁶ One was that the scope of public policy is best judged in a situation where the unlawfulness of the contract has been established. The other was that an assessment of the public policy of Mauritius by the Privy Council would require careful attention to the views of the Supreme Court of Mauritius.

In ruling that the Supreme Court of Mauritius had not been entitled to assess the arbitrator's decision on the lawfulness of the contract, the Privy Council examined a number of authorities and relied on three in particular.¹⁷ One was *AJU v AJT*, a setting aside application decided by the Singapore Court of Appeal.¹⁸ The other two were decisions on cross-border enforcement from the English Court of Appeal: *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd*¹⁹ and *RBRG Trading (UK) Ltd v Sinocore International Co Ltd*.²⁰ In each of

¹² *Betamax v STC*, n. 6 above, at para. 96.

¹³ *Betamax v STC*, n. 6 above, at paras. 42–53.

¹⁴ *Betamax v STC*, n. 6 above, at para. 54–94.

¹⁵ *Betamax v STC*, n. 6 above, at paras. 45 and 46.

¹⁶ *Betamax v STC*, n. 6 above, at para. 95.

¹⁷ *Betamax v STC*, n. 6 above, at paras. 30–41.

¹⁸ *AJU v AJT*, n. 2 above.

¹⁹ [2000] QB 288.

²⁰ [2018] EWCA Civ 838, [2018] 2 Lloyd's Rep. 133.

these three authorities, the conclusion had been that the courts should not re-examine the tribunal's findings on the lawfulness of the transaction: Several points are apparent from the Privy Council's analysis of relevant authorities. First, the judgment also considers the English Court of Appeal's decision in *Soleimany v Soleimany* where the court did refuse to enforce an award in on public policy grounds.²¹ *Soleimany* is, however, distinguishable from *AJU*, *Westacre* and *Sinocore*. In *Soleimany* the tribunal acknowledged the underlying illegality of the transaction while still rendering an award to enforce the contract. *AJU* and *Westacre* are, on the other hand, much closer to the facts of *Betamax v STC* in that the tribunal had considered the illegality point but rejected it. In *Sinocore*, the tribunal concluded that the fraud by the award creditor (presenting forged bills of lading) was not 'causative', and that it was crucial to consider 'the degree of connection between the claim sought to be enforced and the relevant illegality'.²² Second, the Privy Council's decision and reasoning in *Betamax* represents another rejection of the approach taken by Waller LJ in his dissenting judgment in *Westacre* and in earlier obiter comments in *Soleimany*. Waller LJ's approach would have allowed for some examination of the tribunal's findings in the context of alleged illegality. Third, Lord Thomas considered dicta from *AJU* that one might argue conflicts with the main line of reasoning in the case, albeit going beyond that which was necessary on the particular facts.²³ In doing so, he played down any suggestion from *AJU* that 'in the absence of fraud or other vitiating factors'²⁴ the Singapore Court of Appeal's decision would, in the name of public policy, permit a court to review findings of fact or law relevant to the lawfulness of a contract.

D. Comment

First, as far as the legal system of Mauritius is concerned, the decision of the Privy Council lays down an important marker on the interpretation and application of the International Arbitration Act 2008, not only on substantive public policy but more generally. Lord Thomas acknowledged that the Act, which is 'based ... on the Model Law, was intended to make Mauritius attractive to users of international commercial arbitration' and that it 'treats international arbitration as distinct from domestic arbitration.'²⁵ The latter point can be particularly important when it comes to public policy in the context of an international

²¹ [1999] QB 785. It was common ground between the parties in *Betamax v STC* that a court was entitled to consider public policy in a case such as *Soleimany*: para. 25.

²² *RBRG v Sinocore*. n. 20 above, at para. 25(4).

²³ *Betamax v STC*, n. 6 above, at paras. 34–39 (especially para. 39).

²⁴ *Betamax v STC*, n. 6 above, at para. 39.

²⁵ *Betamax v STC*, n. 6 above, at para. 17.

commercial arbitration. Lord Thomas also emphasised a number of key principles underpinning the Model Law that are expressly mentioned in the Act (and Model Law), including: the limitation on court intervention, the finality of awards and the need for a uniform approach to the Model Law's interpretation.²⁶

Second, the decision and reasoning of the Privy Council provides an authoritative (albeit potentially controversial) addition to the case law on substantive public policy, not only in the Model Law context but more generally. *Betamax v STC* is likely, therefore, to be considered beyond the confines of Mauritius. As well as a clear statement of legal principles and analysis of relevant authorities, the decision from a panel of senior English appeal judges should carry significant weight. Given the reliance on case law such as *AJU* (Singapore) and *Westacre* and *Sinocore* (England), one can assume that the restrictive approach to substantive public policy taken by the courts in Singapore and England thus far will have been bolstered by *Betamax v STC*. As the authorities from England and Singapore indicate, the law on substantive public policy is restrictive not simply with regard to the narrow definition of public policy. For, the approach endorsed by the Privy Council indicates that (absent fraud or some other significant issue with due process) an arbitrator's decision on the lawfulness of a contract should, in effect, be treated as non-justiciable before a national court. *Betamax v STC* confirms at the highest level a reluctance to apply the more 'contextual' approach that has been advocated by Hwang and Lim and which reflects the obiter views of Waller LJ in *Soleimany* and *Westacre*.²⁷ One could, perhaps, draw an analogy here (albeit an imperfect one) with documentary credits and the autonomy of credit principle which restricts significantly the circumstances in which one can look beyond a documentary tender that on its face complies with the credit.²⁸ In a similar vein, where there is an award confirming the lawfulness of the relevant contract, the approach taken in *Betamax v STC* (and the authorities on which it relies) effectively prohibits a national court at the point of setting aside or enforcement from looking beyond the award itself. Exceptions to this position will be limited in both number and scope.²⁹

²⁶ *Betamax v STC*, n. 6 above, at paras. 18–21. There is a limited exception to the finality principle in the International Arbitration Act 2008, s. 3B which allows for an appeal to the courts in Mauritius on a question of law subject to the express consent of the parties: para. 18(3). That exception was not relevant, however, in *Betamax v STC*: para. 44.

²⁷ Michael Hwang and Joshua Lim, *Corruption in Arbitration – Law and Reality* 8 Asian Int. Arbitr. J. 1, 108–112 (2012).

²⁸ Ewan McKendrick, *Goode and McKendrick on Commercial Law*, 35.52–35.57 (6th ed., Penguin 2021). The autonomy principle is reflected in the Uniform Customs and Practices for Documentary Credits (UCP 600), arts. 4 and 5.

²⁹ *Betamax v STC*, n. 6 above, at para. 52.

Third, the reluctance of courts to re-open the merits of a dispute on public policy grounds puts the onus on arbitral tribunals to pay proper attention to allegations of illegality affecting the underlying transaction. There is good reason to treat an allegation of bribery or corruption or (as in *Betamax v STC*) some other instance of illegality as coming within the tribunal's jurisdiction so long as it is relevant to the merits of the dispute.³⁰ The need to take such allegations seriously is not in doubt given their impact on the integrity of international commerce. If an arbitrator's findings on the lawfulness of a contract are unlikely to be subject to subsequent court review, that heightens the professional (and moral) responsibility of an arbitrator to ensure that, as far as possible, he or she is reaching appropriate conclusions on the merits. An approach to substantive public policy which emphasises the finality of awards in preventing a re-examination of the merits, should be a reason for arbitrators to pay careful attention to allegations of illegality rather than a cause for complacency. Blessing has said that 'the international arbitrator is not the guardian of the interests of foreign States' but neither is he or she merely 'the "obedient servant" of the parties.'³¹ While arbitrators are not responsible for upholding the public policy of nation states, it nevertheless behoves them to respond in ways that are professional and transparent where illegality is raised by a party or is apparent from the circumstances. From one perspective the approach exemplified by *Betamax* could be criticised as an abrogation by national courts of their responsibility to address instances of alleged illegality.³² Yet, from another perspective, one might view *Betamax v STC* and associated case law as representing not the abrogation of responsibility but the need to place trust in the work of arbitral tribunals given the importance attached to the finality of awards. Were international arbitrators to be seen as convenient conduits for the enforcement of illegality, national courts might be forced to reconsider the dynamic between the finality of awards and their obligation to uphold the forum state's public policy. Finding an appropriate balance between considerations such as the finality of awards and a state's public policy is about charting the relationship, and division of labour, between arbitral tribunals and national courts. These can be challenging decisions of legal policy for judges to make, decisions with important consequences for perceptions about international commercial arbitration in general as well as perceptions about particular arbitral seats.

³⁰ Hwang and Lim, n. 27 above, at 14–22. See also *Betamax v STC*, n. 6 above, at paras. 22 and 52.

³¹ Marc Blessing, *Mandatory Rules versus Party Autonomy in International Arbitration*, 14 J. Int. Arbitr. 23, 40 (1997).

³² And hence, as Hwang and Lim have argued, the advantage of a 'contextual' approach allowing for a (limited) review of the tribunal's findings on the lawfulness of a contract in some circumstances; likewise, with Waller LJ in *Soleimany and Westacre*.

Fourth, *Betamax v STC* is a (slightly) different case from many of the other cases in which substantive public policy is raised. There are two reasons for saying that. One is that the party alleging illegality was a state-owned entity of the state whose public policy was invoked in the setting aside proceedings; in other words, the agreement in question was not simply between two or more private commercial concerns with the public policy of the seat intervening in an impartial manner. The other is that ultimately the public policy focus was not on illegality as a consequence of bribery or corruption per se, but illegality as a consequence of the alleged non-compliance with public procurement legislation.³³ The limited opportunity for substantive public policy arguments to gain traction has an added dimension where one of the parties is a state-owned entity. *Betamax v STC* demonstrates that, in agreeing to international commercial arbitration, the state to a large extent loses control of public policy considerations relating to a contract to which one of its entities is party. Assuming the arbitrator decides the contract in question is lawful, it will be rare for a court, following the *Betamax* approach, to assess a contract in light of applicable public procurement rules or some other relevant legislation. Does that suggest state-owned entities should be cautious about agreeing to international commercial arbitration as the means of dispute resolution? Does an authority such as *Betamax* provide an incentive for state-owned entities to seek exclusive jurisdiction for the courts of the relevant state, or will the benefits of arbitration outweigh concerns about the state's ability to invoke its public policy?

E. Conclusion

In the context of setting aside or enforcement proceedings, the public policy ground – Articles 34(2)(b)(ii) and 36(1)(b)(i) of the Model Law and Article V(2)(b) of the New York Convention 1958 – is often a long-shot. A final throw of the dice by the award debtor. That can be attributed, in large part, to the consensus around a narrow definition of public policy that exists within international commercial arbitration. Given the relationship of the *Betamax*/STC transaction to the public procurement legislation of Mauritius, STC might have been forgiven for thinking the odds of having the award set aside on the basis of public policy were more favourable than they turned out to be. Reflecting the approach adopted in Singapore and England to date, the Privy Council in *Betamax v STC* has made it clear that, where substantive public policy is the issue, it is not simply about the narrow scope of the public policy concept under the Model

³³ In the arbitral proceedings, however, STC had argued that the CoA had been procured by a criminal conspiracy: *Betamax v STC*, n. 6 above, at para. 9(2).

Law. For, before the legal analysis can reach the point where the public policy concept is applied to the facts by a national court, an award debtor will have to demonstrate one of two things. Either some illegality apparent from the award which the tribunal is willing to enforce, or some other reason why the court should re-examine the tribunal's findings on the lawfulness of the contract and its enforcement. The former is likely to be rare in practice, the latter limited to proof of fraud, breach of natural justice or some similar vitiating factor. It will not be enough to claim merely that the arbitrator erred in fact or law in deciding the underlying contract was not illegal. Where a party wishes to rely on illegality as a substantive public policy matter, there are potentially four main questions. (1) Is the alleged illegality apparent from the award itself? (2) If the alleged illegality is not apparent from the award, is the court entitled to re-examine the tribunal's decision on the merits? (3) Does the alleged illegality conflict with the forum state's public policy, with public policy interpreted narrowly?³⁴ (4) If the alleged illegality does conflict with the forum state's public policy, should the court exercise its power to set aside the award or refuse its enforcement? Assuming that (1) is answered in the negative, the take home message from *Betamax v STC* is that (2) should almost always be answered in the negative as well. If *Betamax v STC* does indeed represent the correct approach, it will be rare for (3) and (4) even to require an answer. And that will be so even where one of the parties is a state-owned entity and the public policy in question is the public policy of that particular state.

³⁴ An interesting question here is what should happen if the transaction is lawful under its governing law, but illegal under the law of seat or the forum where enforcement is sought? A restrictive approach to public policy – focussing on international rather domestic public policy – is likely to mean that in many (if not most) cases the award will be enforced. This point was noted by Hamblen LJ in *RBRG v Sincore*, n. 20, at para. 25(4).