

Betamax Ltd v State Trading Corp

By [Aidan Casey QC](#) & [Hannah Fry](#)



Aidan Casey QC and Hannah Fry review the Privy Council's decision in *Betamax Ltd v State Trading Corp* concerning the circumstances in which an international arbitration award may be set aside on the grounds of public policy, where questions of illegality of the relevant contract are in issue. James Guthrie QC of 3HareCourt acted for the Respondent, State Trading Corporation.

The Privy Council clarifies the circumstances in which an arbitral award may be set aside on the grounds of public policy: *Betamax Ltd v State Trading Corporation (Mauritius)*

The Privy Council has given [judgment](#) in [Betamax Ltd v State Trading Corporation \(Mauritius\)](#) [2021] UKPC 14, which is now the leading authority on the circumstances in which an international arbitral award may be set aside on the grounds that it conflicts with public policy, in cases where the public policy arguments arise from allegations that the underlying contract was itself tainted with illegality.

The appeal arose under section 39(2)(b)(ii) of Mauritius' International Arbitration Act 2008,

which is based on article 34 of the UNICITRAL Model Arbitration Law.

In summary, the Privy Council held that the Supreme Court was not entitled to review the decision of the arbitrator on the legality of the contract under Mauritian public procurement laws (and, in particular, whether the contract fell within complex provisions exempting certain types of contract from the relevant requirements). The proper question for the court under section 39(2)(b)(ii) was whether, on the findings of law and fact made in the award, there was any conflict between the award and public policy. In this case, the interpretation of the public procurement legislation in question did not give rise to any issue of public policy; the issue was simply whether the contract was exempted from the legislation.

The Key Facts

The underlying dispute concerned a contract of affreightment entered into on 27 November 2009 (**“the Contract”**) between Betamax Ltd (**“Betamax”**) and State Trading Corporation (**“STC”**), whereby Betamax agreed to build and operate a tanker and use it to transport STC’s petroleum products from India to Mauritius. The Contract was governed by the laws of the Republic of Mauritius and provided for arbitration under the SIAC Rules.

On 30 January 2015, the Cabinet of a new Government in Mauritius announced that it would terminate the Contract on the basis that the award of the contract was in breach of the Public Procurement Act 2006 and the Public Procurement Regulations 2008 (**“the Procurement Legislation”**). The Procurement Legislation included somewhat complex and convoluted provisions, introduced by a series of amendments, dealing with certain exemptions from the Legislation.

On 4 February 2015, STC gave notice that it was unable to use Betamax’s services under the Contract any longer. On 7 April 2015, Betamax terminated the Contract under its default provisions.

The Arbitration

On 15 May 2015, Betamax filed a notice of arbitration against STC, claiming damages of over US\$150m for breach of the Contract. STC objected on various grounds including that the Contract was subject to the Procurement Legislation, and as the Contract had been entered into without the approval of the Central Procurement Board, the Contract was illegal and unenforceable.

The Arbitrator made the Award on 5 June 2017. The Award determined that Betamax was entitled

to \$115.3m in damages and that, on the correct interpretation of certain of the exemption provisions, the Procurement Legislation did not apply to the Contract and therefore there was no basis for concluding that the Contract was illegal.

Supreme Court of Mauritius

STC applied to set aside the Award under section 39(2)(b)(ii) of the International Arbitration Act on the basis that the Award conflicted with the public policy of Mauritius. The Supreme Court concluded that the Contract was not exempted from the Procurement Legislation and that the Arbitrator had been wrong so to hold. As the Contract had been entered into in breach of the Procurement Legislation, it was illegal and the illegality was flagrant. Therefore the Award was set aside as it was in conflict with the public policy of Mauritius.

On 24 June 2019, the Supreme Court granted permission to appeal to the Board on three issues:

1. Was the Supreme Court entitled to review the arbitrator’s decision that the Contract was not subject to the Procurement Legislation and that the making of it, without the approval of the Central Procurement Board, was not illegal?
2. If the Supreme Court was so entitled, was the Supreme Court correct in concluding that the Contract was illegal?
3. If the Contract was illegal, was the Award in conflict with the public policy of Mauritius?

The Privy Council’s Decision

The Privy Council allowed Betamax’s appeal and held that the Award ought to be enforced. Lord Thomas gave the judgment of the Board. In summary, the Privy Council held that:

- The Supreme Court was not entitled to review the decision of the arbitrator on the legality of the Contract under Mauritian public procurement laws. It was not correct to argue that the illegality issues were inextricably intertwined with the public policy issues that fell to be decided by the court, such that the court was entitled to review that part of the Award.
- Rather, the proper question for the court under section 39(2)(b)(ii) was whether, on the findings of law and fact made in the award, there was any conflict between the award and public policy.
- In this case, the interpretation of the Procurement Legislation in question did not give rise to any issue of public policy; the issue was simply whether the Contract was exempted from the Procurement Legislation.
- The effect of section 39(2)(b)(ii) is simply to reserve to the court this limited supervisory role which requires the court to respect the finality of the award. It cannot, under the guise of public policy, reopen issues to the meaning and effect of the contract or whether it complies with a regulatory or legislative scheme.

As a result of the Board's conclusion on issue one, it was unnecessary to consider issues two and three. In any event, somewhat unusually, the Board went on to explain why it agreed with the arbitrator that the Contract was exempted from the Procurement Legislation and therefore was not illegal.

Comment & Practical Implications

Clarification as to when an arbitral award may be set aside on the grounds of public policy, where questions of illegality arise

First, the Privy Council's decision provides welcome clarification on when an arbitral award may be set aside on the grounds of public policy where questions of illegality arise:

1. Where an arbitral tribunal expressly considers issues of illegality and has set out its reasons (as to fact and/or law) for deciding that a contract was not illegal, then that decision will be final, in the absence of fraud or a breach of natural justice.
2. However, if an arbitral tribunal concludes that a contract was illegal but that nonetheless it should be enforced, then a supervising court can consider whether the award conflicts with public policy. But this is not inconsistent with the situation where the tribunal concludes there was no illegality: in both cases the court approaches its task on the basis of the findings of law and fact made in the award, and those findings do not fall to be reviewed by the court.

This decision gives important guidance to parties across the globe. First, this will affect the many countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration as section 39(2)(b)(ii) of the International Arbitration Act is based on Article 34 of the Model Law. Second, it signals the likely approach of courts to enforcement of international arbitration awards in commonwealth jurisdictions.

A key take-away for parties is that if a tribunal has expressly found that a contract is not illegal, that decision is likely (subject of course to the detail of the relevant legislation in the relevant jurisdiction) to be final absent any other vitiating factor independent of considerations of illegality.

Reconciliation of previous authorities

Second, the Privy Council's decision reconciles previous English and Singaporean authorities, and

such authorities are consistent with the Board's findings.

In *Soleimany v Soleimany* [1999] QB 785, the illegality of the contract was made clear in the award; the court therefore was entitled to determine that enforcement should be refused on public policy grounds, on the basis of and accepting the findings made in the award.

In *Westacre Investments Inc v Jugoinport SPDR Holding Co. Ltd* [1999] QB 740 and [2000] QB 288; *AJU v AJT* [2011] 4 SLR 739 [2011] SGCA 41; and *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA Civ 838 [2018] 2 Lloyd's Rep 133, the arbitral tribunal had determined in the award that there was no illegality; the court did not overturn those determinations.

A pragmatic and pro-arbitration approach

Third, the Board's restrictive approach to setting aside awards on the grounds of public policy is to be welcomed by the arbitration community.

If the Supreme Court were entitled to review the decision of the arbitrator on the legality of the Contract under the Procurement Legislation, it would enable section 39(2)(b)(ii) to be used as a means of reviewing any decision of an arbitral tribunal where, on one of the alternative interpretations of the contract, the result was that the agreement was illegal. The Board held that this would involve a "significant expansion of section 39(2)(b)(ii)" and "would result in there being in effect an appeal on an issue of law wherever one party had alleged illegality in the arbitration, but the arbitral tribunal had rejected the contention."

Also, the Board's interpretation is consistent with the purpose of the International Arbitration Act and the Model Law. In conclusion, the Board held, "It is the policy of modern international arbitration to uphold the finality of the arbitral tribunal's decision on the contract made within the arbitral tribunal's jurisdiction, whether right or wrong in fact or in law, absent the specified vitiating factors".

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