



***Betamax v STC* – when may an arbitral award be set aside or enforcement refused?**

COMMENTARY BY [STUART ISAACS QC](#), 21ST JUNE 2021

The important and much anticipated judgment of the Privy Council in *Betamax Ltd v State Trading Corporation* [2021] UKPC 14, on an appeal from the Supreme Court of Mauritius, puts right several errors into which the Supreme Court fell in terms of both the circumstances generally in which a court may set aside or refuse enforcement of an arbitral award and the issue whether the award in the particular case was in fact illegal and hence contrary to the public policy of Mauritius. The decision has been welcomed by the international community at large. The reaction to it in Mauritius has been more mixed.

The facts of the case are straightforward. Betamax is part of a substantial group of Mauritius companies. STC is a trading arm of the Government of Mauritius set up by statute and entrusted with the responsibility for importing essential commodities such as petroleum products and LPG for use and trade in Mauritius. In November 2009, the parties entered into a 15 year contract of affreightment (“COA”) under which Betamax agreed to transport Mauritius’ entire petroleum product requirements from a refinery in India on a vessel specially designed for that purpose. At the time the COA was concluded, the then coalition government of Mauritius at all times maintained the legality and promoted the economic benefits of the COA. However, following a general election in 2014, there was a change of government. The new government included a party which, during the election campaign, for the first time claimed that the COA had been entered into in breach of the Public Procurement Act 2008 (“PPA”) and undertook, if elected, to terminate the COA. Soon after the election of the new government, STC made it clear that it did not intend to

continue to perform the COA and failed and refused to perform it further. Betamax accordingly gave notice of termination whereby it accepted STC's repudiation and failure and refusal to perform as bringing the COA to an end.

Betamax initiated arbitration proceedings in the Singapore International Arbitration Centre claiming damages and interest of over \$150 million – a sum representing about 1.5% of Mauritius' GDP. Importantly, although the SIAC Rules applied, the governing law of the COA was Mauritius law and the seat of the arbitration was Port Louis, Mauritius. Mauritius' International Arbitration Act (the "IAA") was applicable because the ship management obligations under the COA were to be performed in Singapore and India.

Before the sole arbitrator, Dr Michael Pryles, Betamax's claim succeeded. He held *inter alia* that, on the proper construction of the PPA and its associated Regulations, the PPA had no application; and that, therefore, there was no basis for STC's argument that the COA was illegal.

The Supreme Court set aside the award under section 39(2)(b)(ii) of the IAA on the ground that the award was in conflict with the public policy of Mauritius since, contrary to what the arbitrator had held, the COA had been entered into in breach of the PPA and was therefore illegal and that the illegality was flagrant. At the time of the Supreme Court's judgment, rendered some two years after the award, enforcement proceedings in India were ongoing.

Revealingly, the Supreme Court reached its conclusion as to the illegality of the COA without first considering whether it was open to it to review the arbitrator's decision – a matter to which it gave only the most cursory consideration.

The general importance of the Privy Council's judgment results from two particular aspects of the case. First, the IAA implements the UNCITRAL Model Law on International Commercial Arbitration. Section 39 of the IAA mirrors Article 34 of the Model Law. Second, the IAA treats the setting aside and enforcement of awards made under it in the same way as it treats the enforcement of foreign awards. The judgment is therefore significant since it indicates the likely approach of the English

courts towards applications to enforce a foreign arbitration award in England and may be applied similarly in other common law jurisdictions such as Singapore.

Following a review of the IAA's relevant provisions, the Privy Council accepted Betamax's submission, which the Supreme Court had rejected, that since the arbitrator has determined that the COA was exempted from the scope of the PPA and there was no illegality, it was not open to the Supreme Court to determine the question whether the award conflicted with the public policy of Mauritius: it had been finally determined in the arbitration that there was no illegality. The question of the illegality of the COA depended on the detailed interpretation of the provisions of the PPA and its associated Regulations. The questions of interpretation gave rise to no issue of public policy. The Privy Council rejected the Supreme Court's reliance on the Singapore Court of Appeal's decision in *AJU v AJT* [2011] SGCA 41 and an *obiter* statement of Waller LJ in the English Court of Appeal's decision in *Soleimany v Soleimany* [1999] QB 785.

As the Privy Council pointed out, at [47], STC's argument, if correct, would enable section 39(2)(b)(ii) of the IAA "to be used as a means of reviewing any decision of an arbitral tribunal in an award on an issue of interpretation of the contract or of legislative provisions where, on one of the alternative interpretations of the contract or the legislative provisions, the result was that the agreement was illegal". Such a result would be inconsistent with the purpose of the IAA and the Model Law.

In the light of the Privy Council's decision that the Supreme Court had lacked the power to set aside the arbitral award, it was unnecessary for it to decide the questions whether the COA was illegal and, if so, whether the award giving effect to it was in conflict with the public policy of Mauritius. Nevertheless, and perhaps unusually, the Privy Council went on to decide that the arbitrator was correct in concluding, as Betamax had submitted, that the COA was exempted from the PPA and its associated Regulations and was therefore not illegal under those provisions. Understandably, the Privy Council then avoided answering the question whether, if the COA had been illegal, the award giving effect to it was in conflict with the public

policy of Mauritius: when such an issue actually arises, it would be one on which "close regard to the Supreme Court's determination" would be necessary.

[Stuart Isaacs QC](#) represented Betamax in the arbitration and before the Supreme Court. Wilberforce Chambers' Arbitration Breakfast Briefing on the appeal to the Privy Council [may be viewed here](#).

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