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State Trading Corporation v Betamax Ltd : Case Commentary

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1. Introduction

The case of *State Trading Corporation v Betamax Ltd* generated heated debates on the role of a domestic court in recognising and enforcing a foreign arbitral award.[1] The Supreme Court of Mauritius was faced with the gruelling task of determining whether failure to follow clear procedures delineated in domestic public procurement legislation before the allocation of major contracts by a public body to a private entity may in effect give rise to a public policy ground to refuse the enforcement of an international arbitration award. At the heart of the ruling was an examination of the particular circumstances under which an international arbitration award can be disposed of insofar as its enforcement and recognition would amount to a flagrant interference with the public policy of the state.

In principle, the decision of an international arbitration is binding and final. A thorny question can be raised at the outset: did the Supreme Court of Mauritius overreach its jurisdiction by carrying out a substantive review of the dispute in order to gauge the extent to which the arbitral tribunal was accurate in its reasoning? This decision of the Supreme Court, it would seem, does not align itself with the pro-enforcement bias of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention). However, Article V(2)(b) of the New York Convention, as incorporated in section 39(2)(b)(ii) of the International Arbitration Act 2008 (IAA), empowers the competent authority in the country where recognition and enforcement are sought to effectively refuse a foreign arbitral award if the award would be contrary to the public policy of that country.

[1] *STC v Betamax Ltd* [2019] SCJ 154.

This case commentary will briefly state the facts and the decision of the Supreme Court. It will then provide an analysis on the reasoning of the Supreme Court to interpret the contract illegally entered into by Betamax with the State Trading Corporation (STC) as giving rise to a public policy ground for refusing to enforce the foreign award. It will be highlighted that the contract under which Betamax was seeking remedy for breach was de facto illegal. Insofar as the allocation of major contracts under the Public Procurement Act 2006 (PPA) had a significant impact on the fundamental legal and economic order of the country, the Supreme Court used its inherent jurisdiction to establish that the public procurement process was part and parcel of the public policy of Mauritius. In so doing, it triggered the public policy exception as a 'safety valve' to impede intrusion on state sovereignty to the extent that the foreign award was incompatible with the enforcing state's legal structure.[2]

2. The facts in brief

Betamax Limited entered into a contract of affreightment (CoA) with STC on 27 November 2009 for the transportation of petroleum products from India to Mauritius. Betamax was under a contractual obligation to procure, own, operate and maintain a vessel that would allow for the importation of oil products for STC for a fixed period of 15 years. However, this contract was terminated by way of Cabinet Decision by the Government of Mauritius on 30 January 2015 on the basis that the contract was fraught with illegality insofar as proper procedures had not been followed under domestic public procurement law for the award of a major contract. Betamax relied on an arbitration clause contained in the initial contract to resort to international arbitration proceedings in order to seek damages from STC for breach of contract.

An Arbitral Tribunal which heard the dispute gave an award in favour of Betamax on the ground that the contract was exempt from the requirements of the PPA by virtue of another regulation, which purportedly did not place STC under a legal obligation to follow normal procedures for the allocation of a public procurement contract. On 7 September 2017, the

[2] The drafters of the New York Convention redrafted this article several times with the objective of creating a safety valve for when the award may conflict with the public policy of the enforcing state and at the same time ensure that this does not largely hinder the pro-enforcement bias of the Convention: see R Wolff (ed) *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards - Commentary* (1st ed, Hart Publishing 2012) para 485 and 486.

Supreme Court of Mauritius made a provisional order for the recognition and enforcement of the award against STC. As a result, STC made two separate applications to the Supreme Court to have the provisional order and the award set aside.

3. The contract between Betamax and STC

The PPA is the applicable legislation dealing with the award of contracts between public and private bodies in Mauritius. Section 14(4)(b) of the PPA provides that a public body shall not award a major contract unless the award has been approved by the Central Procurement Board (CPB). Section 35 of the Finance (Miscellaneous Provisions) Act 2009 brought significant amendments to the PPA such that a public body was under a legal obligation to act in accordance with the PPA for any major contracts exceeding Rs 100M, including (i) contracts for goods, civil engineering works and capital goods, (ii) consultancy services, and (iii) other services. The Public Procurement (Amendment No 2) Regulations 2009 provided that a public organisation may be exempt from the requirements of the PPA under specific conditions. It was incumbent upon the Supreme Court to determine whether the CoA was governed by the PPA or the 2009 Regulations as this would shed light on the validity of the contract.

Regulation 2(A) of the 2009 Regulations, crucially, stated that nothing in these regulations should be construed as excluding the application of the PPA to a public body referred to in the First Schedule to these regulations and the Schedule to the PPA in respect of a procurement contract to which the public body intends to be a party and which is specified in column 2 of the Schedule to the PPA. In other words, notwithstanding the exception for exempt organisations in the 2009 Regulations, the PPA is still applicable to any contract exceeding Rs 100M. The Supreme Court thought that the subject matter of the CoA undoubtedly fell under either the definition of goods or services incidental to the supply of goods. And it established that the procurement process did indeed apply to the CoA, with the consequence that it was for 'all intents and purposes a contract which had been illegally awarded in breach of the PPA.'[3]

4. The public policy exception

[3] *STC v Betamax* (n 1) p 31.

The Supreme Court undertook a comparative review of several jurisdictions where courts have resisted enforcement of foreign arbitration awards inasmuch as they interfered with the public policy of the state. It was not in contention that when determining whether to set aside an arbitration award, a domestic court can only extraneously assess the compliance of the award with the public policy of the state insofar as its function is limited to decide on the recognition and enforcement of the award and not on the accuracy of the decision of the arbitrator.[4] It would evidently defeat the purpose of international arbitration if every award could be challenged on substantive domestic public policy grounds such as a mistake of law by the arbitral tribunal.

However, the Supreme Court preferred the view that section 39(2)(b)(ii) IAA does in fact empower the enforcing court to set aside an award of an international arbitration if the award was in conflict with the public policy of Mauritius. The PPA encapsulates the public policy of Mauritius insofar as it regulates the procurement process for any major contract awarded by a public body. The Supreme Court stressed that in *Soleimany v Soleimany* the English Court of Appeal observed that

> Where public policy is involved, the interposition of an arbitration award does not insulate the successful party's claim from the illegality which gave rise to it … The reason, in our judgment, is plain enough. The Court declines to enforce an illegal contract, … not for the sake of the defendant, nor (if it comes to the point) for the sake of the plaintiff. The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.[5]

This meant that it is for the enforcing court to determine whether enforcing an illegal contract constitutes an affront to the public policy of the state. The Supreme Court thus held that 'the public policy of Mauritius prohibits the recognition or enforcement of an award giving effect

[4] N Blackaby, C Partasides QC, A Redfern, and M Hunter, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015).
[5] *Soleimany v Soleimany* [1994] QB 785, 800.

to such an illegal contract which shakes the very foundations of the public financial structure and administration of Mauritius in a manner which unquestionably violates the fundamental legal order of Mauritius.'[6]

For the most part, the extrinsic review that the domestic court is empowered to conduct relates to the *international* public policy of the state only. This becomes apparent if it is acknowledged that the IAA creates a distinct regime for international arbitration in Mauritius. The Supreme Court of Mauritius echoed a similar point in *Cruz City 1 Mauritius Holdings v Unitech Ltd & Anor* by holding that it is public policy 'in the international context that will matter and not the public policy that would normally apply when challenging a domestic award.'[7] And the comparative analysis in *STC v Betamax* led the Supreme Court to the conclusion that *international* as opposed to *domestic* public policy is more apt to be applied restrictively in order to refuse enforcement of foreign arbitration awards: it 'is confined to the violation of fundamental concepts of the legal order in the State concerned.'[8] The public policy exception can thus be triggered for the clear violation of mandatory legal rules in relation to the public procurement process considered to be fundamental to the legal order of Mauritius.

However, it was not clear how the Supreme Court differentiated international from purely domestic public policy. Does the notion that international public policy and domestic public policy are two sides of the same coin sound counterintuitive? Can it be said that public policy in the domestic and international contexts seem like opposite, not complementary, processes?

5. Domestic and international public policy

Public policy can be defined as 'some moral, social or economic principle so sacrosanct … as to require its maintenance at all costs and without exception,[9] or 'the forum state's most basic

[6] *STC v Betamax* (n 1), p 41.
[7] [2014] SCJ 100.
[8] *STC v Betamax* (n 1), p 37.
[9] P North and JJ Fawcett, *Cheshire & North's Private International Law* (13th ed, OUP 1999) p 1.

notions of morality and justice'.[10] The ultimate test for domestic or national public policy stems from legal rules and values that are so fundamental that an encroachment would be tantamount to an unconscionable violation of justice and morality. National public policy thus encompasses the fundamental rules and norms undergirding the fabric of the state in question. On the other hand, international public policy is more restrictive in its scope and embraces only the most basic values of a state's national public policy. It may for example include bribery, fraud or corruption.

A domestic court from which a foreign arbitration is sought to be recognised and enforced can thus be more open to enforce the award insofar as it is conscious that the legal system and public policy of more than one state is at stake. However, it is important to highlight that international public policy is merely a subset of the domestic public policy of the state insofar as it is usually viewed through the prism of domestic laws and benchmarks when handling international arbitration awards. While it is termed as *international public policy*, it is still the public policy of the state where enforcement is sought.

The Supreme Court of Mauritius did not clearly indicate whether it was applying domestic or international public policy in triggering the safety valve contained in section 39(2)(b)(ii) IAA in order to reject the foreign award on a substantive ground. It can be admitted that a domestic court may not always be clear and consistent in its approach. The Supreme Court did mention that some provisions of the PPA 'no doubt prescribe in the public interest the *public policy of Mauritius* with regard to the procurement process as well as the conduct of public institutions and officials involved in the procurement process.'[11] This is difficult to reconcile with the earlier observation of the Supreme Court that resisting a foreign award is based solely on *international* public policy which is confined to the violation of fundamental concepts of the legal order in the State concerned.[12]

The better view should be that there must be a clear demarcation line between domestic and international public policy. While the line between the two has been blurred in some states such as Mauritius, other states such as Portugal keep a clear separation between them in their

[10] *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F 2d 969 (US Court of Appeals 2d Cir 1974).
[11] *STC v Betamax* (n 1) p 38-39 emphasis added.
[12] Ibid p 37.

national legislation which provides that an international award will be refused enforcement only to the extent that it is irreconcilable with the *international* public policy of the state.[13] Although the Supreme Court found that as provided in section 39(2)(b)(ii) IAA it is the public policy of Mauritius which should be taken into account, it is still not clear what would then amount to international public policy.

The conclusion that the Supreme Court reached in that it has ultimate control over the arbitral process by determining whether the award should be set aside on the basis of a finding by the Supreme Court that the award is in conflict with the public policy of Mauritius is perfectly sound. However, the exercise of this jurisdiction should be on the basis of the substantive or mandatory law of the state. This will avoid unnecessary confusion and provide the court with the ability to look beyond the surface to reveal the underlying breach of public policy.

6. Mandatory laws

The particular strand referred to as substantive public policy recognises that there are certain fundamental laws that cannot be undermined by the parties to an international arbitration or by the powers exercised by the arbitrator. A violation of fundamental state policies as incorporated in mandatory laws may allow for a limited substantive review of the award. A prime example of a mandatory law is in relation to European Union competition law, the violation of which has been held to be a public policy violation that can enable EU Member States courts to resist the enforcement of foreign awards.[14] It should be stressed that not all mandatory laws will be regarded as sufficiently fundamental to amount to public policy. For instance, German courts have signalled that only laws undergirding fundamental rules and principles such as competition law can enable a court to reject a foreign award as this type of mandatory law is fundamental to the legal order of the state.[15]

It would seem therefore that the public policy of Mauritius will be impinged on if the enforcement of a foreign award would be conflicting with mandatory rules which safeguard

[13] Portuguese Law on Voluntary Arbitration, DR I (14 December 2011) 5726 et seq.
[14] *See Eco Swiss China Time Ltd. v. Benetton International NV*, Court of Justice of the European Union, June 1, 1999, Case C-126/97 [1999] ECRI-3055, para 37-39.
[15] See S Kroll, Recognition and Enforcement of Awards, para 1061 - Foreign Awards, p. 137 in *Arbitration in Germany: The Model Law in Practice* (2nd ed, Kluwer Law International 2014).

the fundamental principles of the public and economic order of Mauritius, or which protect the most basic notions of fairness and justice. The Supreme Court mentioned something to the same effect:

> The mandatory provisions of the PPA, which impose the application of the PPA and the procurement process prescribed by the PPA in respect of the CoA, constitute fundamental pillars of good governance in Mauritius and are thus undoubtedly part of the public policy of Mauritius within the meaning of section 39(2)(ii) of the IAA.[16]

It should be highlighted that the Supreme Court in its ratio decidendi avoided the pitfall of expressly stating that it is the domestic or international public policy which has been violated. It is suggested that it construed - albeit implicitly - the law relating to the public procurement process as the mandatory law which affected the fundamental legal order of the state. This interpretation is more amenable to promote Mauritius as arbitration-friendly inasmuch as the foreign arbitral award is not deemed to have been set aside or refused enforcement on the basis of domestic or international public policy grounds. The latter would be perceived as decisions on the merits of the case: a violation of 'an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions contained in foreign awards in recognition or enforcement proceedings.'[17]

7. Conclusion

The case centred on whether the Supreme Court can exercise its jurisdiction under section 39(2)(b)(ii) IAA to construe that the underlying illegality of a contract can give rise to a violation of the fundamental legal and economic policies of Mauritius. At a general level, it has been observed that the use of terminologies such as domestic and international public policy might hamper the robustness of the international arbitration process. It does not provide key criteria that can be employed by an enforcing court to determine whether a substantive review of the foreign arbitration is warranted if the public policy of a state has been breached. The better view, it has been suggested, is that the enforcing court, when

[16] *STC v Betamax* (n 1) p 39.
[17] GB Born 'Chapter 17: Recognition and Enforcement of International Arbitral Awards', in *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International 2015) p 388.

triggering the safety valve under section 39(2)(b)(ii) IAA, ought to assess whether the foreign arbitration is incompatible with a mandatory domestic law encompassing fundamental legal and economic concepts which are reflections of the public policy of the state. Betamax Ltd has been granted leave to appeal the decision to the Privy Council. Whether Mauritius remains in the long term a jurisdiction of choice for international arbitration may only be confirmed after the decision of the Privy Council.