Trinity Term
[2021] UKPC 14
Privy Council Appeal No 0109 of 2019

JUDGMENT

Betamax Ltd (Appellant) *v* State Trading Corporation (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Hodge
Lady Arden
Lord Leggatt
Lord Burrows
Lord Thomas

JUDGMENT GIVEN ON

14 June 2021

Heard on 20 and 21 January 2021

Appellant	*Respondent*
Mark Howard QC Salim Moollan QC Siddharth Dhar (Instructed by Fladgate LLP)	Alain Choo-Choy QC James Guthrie QC (Instructed by Royds Withy King (London))

LORD THOMAS:

1. In 2008, Mauritius adopted UNCITRAL's Model Arbitration Law 1985 (as amended in 2006) (the "Model Law") by enacting the International Arbitration Act 2008 (the "International Arbitration Act"). In the award in an international arbitration with which this appeal is concerned (the "Award"), the Arbitrator decided that a contract of affreightment (the "COA") did not contravene legislative provisions relating to procurement and was not illegal. The Supreme Court of Mauritius set aside the Award under section 39(2)(b)(ii) of the International Arbitration Act (article 34 of the Model Law) on the grounds that, in its view, the COA contravened the legislative provisions and the Award conflicted with the public policy of Mauritius. The appeal primarily raises the issue as to the extent of the permissible intervention by a court in an international arbitration under section 39(2)(b)(ii) of the International Arbitration Act / article 34 of the Model Law.

The factual background

2. On 27 November 2009, the appellant ("Betamax") entered into the COA with the respondent ("STC"), a public company which operates as the trading arm of the Government of Mauritius responsible for the import of essential commodities. Under the COA, which was governed by the laws of the Republic of Mauritius, Betamax was to build and operate a tanker and make available for a period of 15 years the freight capacity of the vessel for the transport of STC's petroleum products from Mangalore in India to Port Louis in Mauritius.

3. Betamax is a Mauritian company incorporated on 6 May 2009 as a joint venture vehicle between a Mauritian family and Executive Ship Management Pte Ltd, a Singaporean company, which had been formed for the purpose of financing the construction of the tanker and carrying out the COA. The offices of Executive Ship Management Pte in Singapore and India handled all technical and commercial aspects of the COA, including crewing and ship management.

4. In 2006-8, the Government of Mauritius, as set out in some detail in the Award, evaluated the best means of providing for the shipping of petroleum to Mauritius and thereafter began negotiations with Betamax in 2008-9. With effect from 17 January 2008, a procurement regime entered into force in Mauritius under the Public Procurement Act 2006 (the "PP Act") and the Public Procurement Regulations 2008 (the "PP Regulations 2008") made by the Minister under section 61 of the PP Act. The PP Act and the PP Regulations 2008 were amended in 2009. In the dispute that emerged between the parties, one of the principal issues was whether the PP Act and PP Regulations as they were in force on 27 November 2009 applied to the COA: STC contended that they did; Betamax contended that the COA was exempted from the

provisions. If the PP Act applied to the COA, it would have been a contract which required approval by the Central Procurement Board established under the PP Act. No such approval was given by the Central Procurement Board and entering into the COA would have been unlawful under the PP Act.

5. The vessel was constructed and delivered to Betamax which carried the first cargo under the COA in May 2011.

6. On 30 January 2015, the Cabinet of a new Government in Mauritius which had come to power in December 2014 announced that it would terminate the COA in light of "the unlawful procedure and processes regarding the allocation of the contract". On 4 February 2015, STC gave notice that it was unable to use Betamax's services under the COA any longer. On 7 April 2015, Betamax terminated the COA under its default provisions.

7. The COA contained an arbitration clause which provided that if the dispute could not be resolved through the dispute resolution provisions of the COA:

> "either Party may refer the Dispute by notice to the other to be finally and bindingly determined by an Arbitrator in accordance with the [Singapore International Arbitration Centre (SIAC)] Rules, as amended from time to time...
>
> The Parties will jointly appoint an Arbitrator within twenty (20) Business Days of the referral of the Dispute to arbitration. If an Arbitrator is not appointed within the time limits set forth in the preceding sentence, either Party may request the SIAC to appoint an Arbitrator as quickly as possible (and the SIAC Court shall be the appointing authority under the SIAC Rules)."

8. On 15 May 2015 Betamax filed a notice of arbitration under the COA with the SIAC. A response was filed by STC on 1 June 2015. On 30 June 2015, Dr Michael Pryles AO PBM, a well-known international arbitrator, was appointed sole arbitrator pursuant to the joint nomination of the parties (the "Arbitrator").

9. Betamax claimed damages of over US$150m in the arbitration for breach of the COA. STC advanced a number of objections to the arbitration and the jurisdiction of the Arbitrator and a number of defences to the claim. Its principal contentions were:

(1) The Arbitrator lacked jurisdiction on the basis that the dispute was not arbitrable as the issues involved matters concerning *ordre public* under article 2060 of the Mauritian Code Civile (C Civ) and the arbitration agreement was void under article 2061 C Civ.

(2) If the dispute was arbitrable, STC was not liable as the COA was subject to the PP Act and the PP Regulations. As the COA had been entered into without the approval of the Central Procurement Board, it was illegal and unenforceable.

(3) The COA had been entered into as part of a criminal conspiracy to benefit Betamax at the expense of the Government of Mauritius and was illegal and unenforceable.

(4) The decision of the Cabinet of Mauritius was a *force majeure* event which discharged any obligations under the COA.

10. The arbitration was held under the 2013 Rules of SIAC. Following lengthy procedural issues, a hearing for the taking of evidence was held in Mauritius on 8-10 August 2016. The hearing was followed by further submissions on procedural and evidential issues. The Arbitrator closed the proceedings on 2 June 2017.

11. During the course of the proceedings, it was agreed that although the seat of the arbitration was in Mauritius, the arbitration was an international arbitration for the purposes of the International Arbitration Act, as amended. That was because the condition in section 2(1) of the International Arbitration Act was fulfilled as the ship management obligations under the COA were to be performed in Singapore and India and therefore outside Mauritius.

12. The Arbitrator made the Award on 5 June 2017 which determined:

(1) The Arbitrator had jurisdiction over the dispute under the COA as article 2060 C Civ did not prevent the civil consequences of a breach of public policy being determined in an international arbitration and the arbitration clause was not void under article 2061 Civ.

(2) Betamax was entitled to terminate the COA on 7 April 2015; STC had made clear its intention not to perform the COA.

(3) On the proper interpretation of the PP Act and the PP Regulations, the COA was exempted from the provisions of the PP Act. Therefore the COA had

not been entered into in breach of the provisions of the PP Act and there was no basis for saying that it was illegal.

(4) The COA was not illegal and unenforceable under articles 1131 and 1133 of the C Civ. The Arbitrator concluded that as he had determined the PP Act did not apply to the COA, there was no basis for considering that the COA was otherwise illegal or unenforceable.

(5) Based on an extensive review of the evidence, the COA had not been entered into as a result of any criminal conspiracy.

(6) There was no *force majeure* event or impossibility of performance arising out of the decision made by the Cabinet of the Government of Mauritius on 30 January 2015.

(7) Betamax was entitled to damages in the sum of US$115.3m together with interest and costs.

13. In August and September 2017, applications respectively to set aside and enforce the Award were made to the Supreme Court of Mauritius (the "Supreme Court") as the supervisory court for the arbitration. Under section 42 of the International Arbitration Act, a panel of three designated judges of the Supreme Court is given that jurisdiction. STC's application to set aside the Award was made under section 39(2) of the International Arbitration Act which provides:

> "(2) An arbitral award may be set aside by the Supreme Court only where -
>
> (a) the party making the application furnishes proof that -
>
> (i) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Mauritius law;
>
> (ii) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or

(iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act; or

(b) the Court finds that -

(i) the subject matter of the dispute is not capable of settlement by arbitration under Mauritius Law;

(ii) the award is in conflict with the public policy of Mauritius;

(iii) the making of the award was induced or affected by fraud or corruption; or

(iv) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced."

STC's application to set aside the Award was made on the grounds that the dispute was not arbitrable, that the arbitration agreement was not valid, and that the Award was in conflict with the public policy of Mauritius.

14. On 31 May 2019, the Supreme Court held that the Award was in conflict with the public policy of Mauritius and set it aside under section 39(2)(b)(ii) of the International Arbitration Act. It considered that all three grounds advanced by STC for setting aside the Award were underpinned and dependent upon the question of whether the COA had been subject to the PP Act and PP Regulations and had been entered into in breach of the PP Act. The Supreme Court concluded that, on the clear meaning of the PP Act and the PP Regulations, the COA was not exempted from the provisions of the PP Act and the Arbitrator had been wrong so to hold. As the COA had been entered into

in breach of the PP Act, it was illegal. That illegality was flagrant. The Award should therefore be set aside as it was in conflict with the public policy of Mauritius.

15. As the arbitration was an international arbitration there was an automatic right of appeal from the Supreme Court to the Judicial Committee of the Privy Council (the "Board") under section 42(2) of the International Arbitration Act. Nevertheless, the practice is for permission to appeal to be sought from the Supreme Court. On 24 June 2019, the Supreme Court granted permission to appeal to the Board. There are three issues on this appeal:

(1) Was the Supreme Court entitled to review the Arbitrator's decision set out in the Award that the COA was not subject to the provisions of the PP Act and PP Regulations and the making of it, without the approval of the Central Procurement Board, was not illegal?

(2) If the Supreme Court was entitled to review that decision of the Arbitrator, was the COA illegal as having been entered into in breach of the PP Act and PP Regulations on their proper interpretation?

(3) If the COA was illegal, was the Award giving effect to the COA in conflict with the public policy of Mauritius?

Issue 1: Was the Supreme Court entitled to review the Arbitrator's decision set out in the Award that the COA was not subject to the provisions of the PP Act and the PP Regulations and the making of it, without the approval of the Central Procurement Board, was not illegal?

16. The first question which the Board addresses is the scope of the power of the Supreme Court under section 39(2)(b)(ii) of the International Arbitration Act to set aside an award on the ground that it is in conflict with the public policy of Mauritius. To do so it is necessary to see how that statutory provision sits within the framework of the International Arbitration Act.

The International Arbitration Act 2008

17. The International Arbitration Act, based as it is on the Model Law, was intended to make Mauritius attractive to users of international commercial arbitration. As the International Arbitration Act makes clear in section 2C(1), it treats international arbitration as distinct from domestic arbitration. The Act was accompanied by *Travaux*

Préparatoires which are recorded as having been prepared for future users of the legislation.

18. A number of principles relevant to the issue in the appeal are clearly set out in the International Arbitration Act:

(1) *Very limited court intervention*. Section 2A enacts the principle of very limited court intervention as set out in article 5 of the Model Law:

> "In matters governed by this Act, no Court shall intervene except where so provided in this Act."

(2) *Finality.* Section 36(7), modelled on section 19B of Singapore's International Arbitration Act and reflecting discussions within the UNCITRAL working group, provides:

> "An award shall be final and binding on the parties and on any person claiming through or under them with respect to the matters determined therein, and may be relied upon by any of the parties in any proceedings before any arbitral tribunal or in any Court of competent jurisdiction."

This provision is reinforced by section 39(1) (enacting part of article 34 of the Model Law) which makes clear that applications to set aside the award are strictly confined:

> "Any recourse against an arbitral award under this Act may be made only by an application to the Supreme Court for setting aside in accordance with this section."

(3) *Exclusion of appeals on questions of law*. The International Arbitration Act requires specific consent for an appeal on a question of law. Under section 3B, the parties must expressly agree to opt in to such an appeal under provisions made in the First Schedule to the International Arbitration Act.

(4) *Jurisdiction and Separability*. In accordance with modern international arbitration law, section 20, enacting article 16 of the Model Law with one change not material to the present appeal, provides for the arbitral tribunal's ability to rule on its own jurisdiction (referred to in the *Travaux Préparatoires* as "competence competence") and for the separability of the arbitration clause:

"(1) An arbitral tribunal may rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement.

(2) An arbitration clause which forms part of a contract shall be treated for the purposes of subsection (1) as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

Procedural provisions for these issues are set out in the Act.

19. Section 2B of the International Arbitration Act sets out the applicable principles of interpretation. It provides that in interpreting the Act and in developing the law applicable to international arbitration in Mauritius:

"(a) regard shall be had to the origin of the Amended Model Law, the corresponding provisions of which are set out in the Third Schedule, and to the need to promote uniformity in the application of the Model Law and the observance of good faith;

(b) any question concerning matters governed by the Amended Model Law which is not expressly settled in that Law shall be settled in conformity with the general principles on which that Law is based; and

(c) recourse may be had to international materials relating to the Amended Model Law and to its interpretation, including -

(i) relevant reports of UNCITRAL;

(ii) relevant reports and analytical commentaries of the UNCITRAL Secretariat;

(iii) relevant case law from other Model Law jurisdictions, including the case law reported by UNCITRAL in its CLOUT database; and

> (iv) textbooks, articles and doctrinal commentaries on the Amended Model Law."

20. The *Travaux Préparatoires* made clear at para 17(a) that:

> "First and foremost, the success of Mauritius as a jurisdiction of choice for international arbitration will be largely dependent on the uniform and consistent application by the Mauritian Courts of modern international arbitration law, and (in particular) on their strong adhesion to the principles of non-interventionism which is at the heart thereof. To this end:
>
> > (i) The Act strictly adopts the Amended Model Law's very limited *voie de recours* against arbitral awards: see section 39, which reproduces article 34 of the Amended Model Law…"

Section 39 is described as enacting "the all-important provisions of article 34 of the Amended Model Law without any significant modifications". The modifications are effected by the addition of the provisions in section 39(2)(b)(iii) and (iv) (fraud or corruption, and breach of the rules of natural justice). These provisions are akin to those enacted in Singapore in section 24 of Singapore's International Arbitration Act.

21. Article 34 of the Model Law, as the UNCITRAL Explanatory Note to the Model Law makes clear, contains an exclusive list of grounds for setting aside an award. This is essentially the same list as that contained in the provision in article 36 of the Model Law for the recognition and enforcement of arbitral awards which was itself taken from article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). As "public policy" is determined in the courts of the state before which proceedings are brought, there may well be differences in the view taken as to the nature and scope of the public policy between a supervisory court which is considering setting aside the award and a court enforcing the award in a different state. However, there is no reason for difference as to the extent of a court's right of intervention in respect of public policy under articles 34 and 36 and the decisions in this respect on enforcement are applicable in respect of applications to set aside.

The jurisdiction of the Arbitrator and his Award

22. There was no dispute before the Supreme Court that it was within the jurisdiction of the Arbitrator to determine whether the COA was exempted from the provisions of

the PP Act and PP Regulations and therefore not illegal. As is evident from the Arbitrator's Award and the argument on the second issue in this appeal, the interpretation of the legislation on which the legality of the COA turned required detailed consideration of the provisions in the light of the amendments made in the period between the enactment of the PP Act in 2006 and the agreement of the COA on 27 November 2009.

23. In the light of the provisions of the International Arbitration Act, particularly those as to jurisdiction, separability, finality, and the unavailability of appeals on points of law, the only route open to the Supreme Court to review the decision of the Arbitrator on the interpretation of the PP Act and PP Regulations was under section 39 of the International Arbitration Act. As is recognised by the provisions of the Model Law and as is apparent from a number of cases in different jurisdictions, the question may arise as to the nature and scope of public policy (see for example the many citations collected by Professor Stavros Brekoulakis in *Public Policy in English Arbitration Law* (2016)). It was common ground that under section 39(2)(b)(ii) of the International Arbitration Act, it is for the Supreme Court to determine the nature and extent of public policy of Mauritius and whether the Award is in conflict with it; the dispute on this issue is the third issue in the appeal. Betamax accepted that if the Arbitrator had determined that the COA was not exempted from the PP Act and therefore entering into the COA would have been unlawful, then it was for the Supreme Court to determine whether the consequences and effect of the illegality were such as to make the Award in conflict with the public policy of Mauritius.

24. However, in Betamax's submission, as the Arbitrator had determined that the COA was exempted 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 under section 39(2)(b)(ii) of the International Arbitration; that issue could not arise before the Supreme Court as it had finally been determined in the arbitration that there was no illegality under the legislative provisions of the PP Act and PP Regulations. STC contended that the question as to whether the COA was exempted from the PP Act was an issue which turned on and was inextricably linked to the issue of the extent and nature of the public policy of Mauritius. The ambit of section 39(2)(b)(ii) of the International Arbitration Act therefore enabled the Supreme Court to review the decision of the Arbitrator on the issue of the interpretation of the provisions of the PP Act and PP Regulations.

25. It is therefore necessary first to determine whether section 39(2)(b)(ii) of the International Arbitration Act permits a challenge to the Award of the Arbitrator on the grounds that the Supreme Court is entitled to decide the interpretation of legislative provisions which determine the legality of the COA, even though the issue of interpretation is within the jurisdiction of the Arbitrator and has been decided in the Award. This is a question, as the decision of the Supreme Court makes clear, distinct from the question as to the nature and scope of public policy in so far as it affects the

consequences of any illegality. It was common ground that where an arbitral tribunal determined that the contract was illegal but that the contract could nonetheless be enforced, a court was entitled to review the question whether an illegal contract should be enforced on an application to set aside or enforce the award as that would ordinarily raise issues of public policy.

The decision of the Supreme Court

26. The Supreme Court did not approach the application under section 39(2)(b)(ii) of the International Arbitration Act by first considering whether it was permissible to make such a challenge. It first determined the issue of interpretation and held that, by entering into the COA, the parties acted in breach of the PP Act and the COA was illegal in consequence. Then it considered whether the breach of the PP Act was such that it would be contrary to public policy to enforce the Award. The test to be applied in determining whether the nature and consequences of the breach were such as to conflict with public policy was set out by the Supreme Court in the following terms:

> "The breach of the legal provisions must be flagrant, actual and concrete. But it is not any legal breach which would suffice to set aside the enforcement of an award. The threshold is quite high; it should be the breach of a fundamental legal principle, a breach which disregards the essential and broadly recognised values which form part of the basis of the national legal order, and a departure from which will be incompatible with the State's legal and economic system."

It concluded that the breach of the PP Act met this test:

> "In short the PP Act reflects the public policy of Mauritius in prescribing and ensuring high standards of integrity, free and open competition, and protection from fraudulent and corrupt practices in the award of major public contracts with a view to securing the efficient use of the public funds of Mauritius. The scheme of the legislation under the PP Act no doubt prescribes fundamental legal principles, the breach of which would, for the given reasons, be injurious to public good and conflict with principles which are fundamental to the national economic and legal values of Mauritius. The mandatory provisions of the PP Act, which impose the application of the PP Act and the procurement process prescribed by the PP Act 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)(b)(ii) of the International Arbitration Act. It is beyond dispute that such a public procurement legislation constitutes one of the vital pillars of good governance and forms an integral part of the fundamental legal order of Mauritius."

27. It was only after reaching these conclusions that the Supreme Court considered its jurisdiction to determine the question of whether the COA had been entered into in breach of the PP Act. It said:

> "it is incumbent upon this Court whilst exercising jurisdiction pursuant to section 39(2)(b) of the International Arbitration Act to exercise ultimate control over the arbitral process by determining whether the award should be set aside on the basis of a finding by the Court that the award is in conflict with the public policy of Mauritius."

Its judgment on this issue was brief. It concluded that the Supreme Court had a responsibility not only to determine what constituted public policy but whether or not the agreement was illegal. It relied on citations from the decision of the Singapore Court of Appeal in *AJU v AJT* [2011] 4 SLR 739; [2011] SGCA 41, at para 62 and a citation from the judgment of Waller LJ in the Court of Appeal of England and Wales in *Soleimany v Soleimany* [1999] QB 785, 800.

28. After setting out the importance of the COA to Mauritius and the guaranteed payments that Betamax would receive for a 15-year period, the Supreme Court concluded:

> "The enforcement of an illegal contract of such magnitude, in flagrant and concrete breach of public procurement legislation enacted to secure the protection of good governance of public funds, would violate the fundamental legal order of Mauritius. Such a violation breaks through the ceiling of the high threshold which may be imposed by any restrictive notion of public policy.
>
> We have absolutely no difficulty in holding that the public policy of Mauritius prohibits the recognition or enforcement of an award giving effect 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."

STC's submissions on the reasons for the decision of the Supreme Court

29. In STC's submission, there were good reasons, in addition to the brief reasons given by the Supreme Court, that supported the Supreme Court's decision that it was entitled to determine the question of the legality of the COA. When the Supreme Court's inquiry was directed at whether the Award conflicted with the public policy of Mauritius, it was not in any way bound by what the Arbitrator had determined in the Award:

> (1) The principle of finality did not entitle the Supreme Court to review any errors of fact. The same principle applied to errors of law unless the errors engaged public policy considerations, particularly where the issue of illegality was inextricably linked with the nature and scope of the public policy of Mauritius. In those circumstances, section 39 qualified the principle of finality.
>
> (2) If an error was made by an arbitral tribunal as to the public policy of Mauritius, the Supreme Court was entitled to correct it. In the present case, the Supreme Court was therefore entitled not simply to consider the issue of whether the PP Act represented the public policy of Mauritius but also whether the PP Act applied to the COA. Only then could the Supreme Court determine whether the Award, in holding that the PP Act did not apply to the COA, conflicted with public policy. The Supreme Court had been right to rely on the judgment in *AJU* in deciding that it was for it to determine whether the COA was illegal in so far as the illegality of the COA turned on what the public policy of Mauritius was. The scope and nature of the relevant public policy was determinative of and inextricably linked with the issue of illegality.
>
> (3) As the COA was governed by the law of Mauritius, the issue of public policy went to illegality as well as to the question of what the public policy of Mauritius was for the purpose of section 39(2)(b)(ii) of the International Arbitration Act. The interdependence arose from the fact that the law of Mauritius was the governing law of the COA and the application to set aside the Award was being determined under the law of Mauritius by the Supreme Court of Mauritius as the supervisory court for the arbitration.
>
> (4) The power of the Supreme Court to intervene under section 39(2)(b)(ii) of the International Arbitration Act was, properly interpreted, symmetrical. It was common ground that in a case where the decision by the arbitral tribunal had found the agreement was illegal and yet enforced it, a court was entitled to consider whether such an award should be enforced as a matter of public policy under section 39(2)(b)(ii). Where the issue of illegality arose and it was inextricably bound up with the issue of public policy, the court was also entitled

to review the decision that the contract was not illegal as it could not otherwise consider whether the award was in conflict with the public policy of Mauritius. The submission of Betamax to the contrary resulted in asymmetrical powers of intervention.

The relevant case law

30. As the Supreme Court relied on decisions of the Courts of Appeal of Singapore and England and Wales in *AJU* and *Soleimany* respectively, it is convenient first to consider whether this case law provided a basis for the Supreme Court's intervention under section 39(2)(b)(ii) of the International Arbitration Act on the issue of legislative interpretation which had been determined in the Award.

31. Although the decision of the Court of Appeal of Singapore in *AJU* is a decision on the same provision in the Model Law, it is convenient first to consider the decisions in England and Wales as these decisions, which applied the common law and the legislative provisions giving effect to the New York Convention (mirroring those of the Model Law), were considered in *AJU*. *Soleimany*, on which the Supreme Court expressly relied, was an unsuccessful application by a claimant to enforce an award in a dispute between him and another carpet dealer about the share of the profits which they had made from a contract to export carpets from Iran. It was accepted that the export was in breach of Iranian export and revenue controls and hence the contract was illegal. The dispute about the distribution of the profits was referred to arbitration in London before the Beth Din, the court of the Chief Rabbi. It decided that, although the contract for the export of carpets was illegal, it would, applying Jewish law, take no cognisance of the illegality and assess the share of the profits. It made an award in favour of the claimant. Enforcement was refused on the basis that it was clear from the award that the contract was illegal; the parties could not, by procuring an arbitration of the dispute under the contract, conceal that one of them was seeking to enforce an illegal contract. The interposition of the arbitration made no difference. Enforcement was refused.

32. That was the only issue before the Court of Appeal. The decision was based on the principle that a court would not enforce an award in respect of what the arbitral tribunal had accepted was an illegal contract, just as it would not, for reasons of public policy, enforce a contract between highwaymen or bank robbers for the distribution of the profits of their crimes. Waller LJ nonetheless went on to make observations as to what a court should do in cases where an arbitral tribunal had found the contract was not illegal, but one of the parties wished to raise the issue of illegality of the contract in relation to enforcement. It was these observations on which the Supreme Court relied in the present case. Waller LJ said at p 800 of [1999] QB:

> "The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none… In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. We do not propound a definitive solution to this problem, for it does not arise in the present case. So far from finding that the underlying contract was not illegal, the Dayan in the Beth Din found that it was…
>
> In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality."

33. These observations were considered just over a year later by the Court of Appeal in *Westacre Investments Inc v Jugoimport SPDR Holding Co. Ltd.* [1999] QB 740 and [2000] QB 288, a case arising out of an action to enforce an International Chamber of Commerce (ICC) award under the legislative provisions then in force giving effect to the New York Convention. The ICC award on a contract governed by Swiss law had been made by an arbitral tribunal sitting in Geneva. Its enforcement in England and Wales was disputed on the basis that it would be contrary to the public policy of England and Wales; it was alleged that the contract had been one which was intended to be performed through the exercise of improper influence and bribery in Kuwait. Questions in relation to bribery had been considered by the arbitral tribunal. The arbitral tribunal had found that on the evidence presented, the contract did not have this purpose and was not invalid; if there had been bribery, the contract would have been invalid. The respondent appealed to the Swiss Federal Tribunal on the basis that the award was contrary to public policy. The appeal failed, as the Swiss Federal Tribunal had to decide the issues on the facts found by the arbitrators. The challenge in England and Wales was supported by written evidence filed by the respondent setting out additional facts

said to establish that the contract was one for bribery. The challenge then proceeded on the basis of a preliminary issue whether the award was enforceable on the assumption that the respondent could establish the facts it alleged. At first instance, Colman J, in a comprehensive judgment given before the decision in *Soleimany*, decided the award should be enforced. As the arbitral tribunal had jurisdiction to determine the issue of illegality and had determined it on the evidence presented to it, the courts of England and Wales should prima facie enforce the award. Balancing all the considerations of public policy including finality, the prior determination of the issue of illegality before the arbitrators and the need to combat corruption, the award should be enforced. In the Court of Appeal, the majority did not permit the issue to be raised and affirmed Colman J's decision. Waller LJ, who dissented, followed the approach he had suggested in *Soleimany* and would have reopened the issues relating to bribery.

34. These decisions were considered by the Singapore Court of Appeal in *AJU*. The parties had entered into a settlement agreement, referred to as the Concluding Agreement, governed by Singapore law with a SIAC arbitration clause. The arbitral tribunal rejected the respondent's case that the Concluding Agreement was an attempt to stifle a prosecution in Thailand. It held that consequently the Concluding Agreement was not illegal in Thailand or in Singapore nor contrary to the public policy of Thailand and Singapore. It therefore upheld the validity of the Concluding Agreement. On the respondent's application to the High Court of Singapore to set aside the award under article 34(2)(b)(ii) of the Model Law (enacted by Singapore's International Arbitration Act), it was common ground that an agreement to stifle a prosecution was illegal under Singapore and Thai law and contrary to public policy, and that no issue of public policy arose unless the court could reopen the arbitral tribunal's findings and determine for itself whether the Concluding Agreement was illegal. The High Court decided it should reopen the decision of the arbitral tribunal on the basis that the arbitral tribunal had not considered all the surrounding circumstances and had confined itself to a narrow interpretation of the Concluding Agreement; looked at properly, the Concluding Agreement was one to stifle a prosecution and therefore illegal. The award would be set aside.

35. The Court of Appeal, in its judgment given by Chan Sek Keong CJ, reversed the decision. After reviewing the judgments in *Soleimany* and *Westacre* extensively, the Court of Appeal concluded at para 60 that it did not agree with the approach taken by Waller LJ in *Soleimany*. The decision of Colman J and the majority in *Westacre* was consonant with the legislative policy in Singapore's International Arbitration Act. It held that the arbitral tribunal had not ignored illegality (paras 63-65); the arbitral tribunal, whilst accepting that an agreement with the objective of stifling a prosecution would be illegal, had reached the conclusion that the Concluding Agreement was not an agreement to stifle a prosecution. Although the judge had reached a different opinion on the Concluding Agreement based on his view of the surrounding circumstances, the arbitral tribunal had considered the surrounding circumstances. This was not an appropriate case for the judge to reopen the finding that the Concluding Agreement was valid and enforceable.

36. Although the Court of Appeal had reached this conclusion, it considered at para 66 that it was necessary for it to clarify the general principle laid down in an earlier decision of the Singapore Court of Appeal, *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 1, where Chan Sek Cheong CJ had also given the judgment of the court. After referring to the decision of the Supreme Court of India in *Oil & Natural Gas Corporation Ltd v SAW Pipes Ltd* [2003] SC 3629, he said at para 57 of *PT Asuransi*:

> "In our view, the legislative intent of the Indian Act reflected in the Indian decision is not reflected in the Act which, in contrast, gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under section 24 of the Act and article 34 of the Model Law. While we accept that an arbitral award is final and binding on the parties under section 19B of the Act, we are of the view that the Act will be internally inconsistent if the public policy provision in article 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact, *per se,* do not engage the public policy of Singapore under article 34(2)(b)(ii) of the Model Law when they cannot be set aside under article 34(2)(a)(iii) of the Model Law."

In *AJU*, after referring to this paragraph, the Court of Appeal observed at para 66:

> "This passage recognises the reality that where an arbitral tribunal has jurisdiction to decide any issue of fact and/or law, it may decide the issue correctly or incorrectly. Unless its decision or decision-making process is tainted by fraud, breach of natural justice or any other vitiating factor, any errors made by an arbitral tribunal are not *per se* contrary to public policy."

37. Although the Court of Appeal had decided that the award should not be set aside and reached the conclusion set out as to the effect of the passage in its judgment in *PT Asuransi Jasa*, the Court of Appeal thought it necessary to clarify the statement that "errors of law or fact, *per se,* do not engage the public policy of Singapore". Earlier in the judgment, in the passage relied on by the Supreme Court, the Court of Appeal had said (para 62):

> "… since the law applied by the Tribunal was Singapore law, the question that arises is whether, if a Singapore court disagrees with the Tribunal's finding that the Concluding Agreement is not illegal under Singapore law, the court's supervisory power extends to correcting the Tribunal's decision on this issue of illegality. In our view, the answer to this question must be in the affirmative as the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is and, in turn, whether or not the Concluding Agreement is illegal (illegality and public policy being … mirror concepts in this regard), however eminent the Tribunal's members may be. Accordingly, we agree with the Judge that the court is entitled to decide for itself whether the Concluding Agreement is illegal and to set aside the Interim Award if it is tainted with illegality, just as in *Soleimany*, the English Court of Appeal refused to enforce the Beth Din's award as it was tainted with illegality."

38. At paras 67-69, the Court of Appeal went on to say:

> "It is a question of law what the public policy of Singapore is. An arbitral award can be set aside if the arbitral tribunal makes an error of *law* in this regard, as expressly provided by section 19B(4) of the International Arbitration Act, read with article 34(2)(b)(ii) of the Model Law. Thus, in the present case, if the Concluding Agreement had been governed by Thai law instead of Singapore law, and if the Tribunal had held that the agreement was indeed illegal under Thai law (as the respondent alleged) *but could nonetheless be enforced in Singapore because it was not contrary to Singapore's public policy*, this finding - viz, that it was not against the public policy of Singapore to enforce an agreement which was illegal under its governing law - would be a finding of law which, if it were erroneous, could be set aside under article 34(2)(b)(ii) of the Model Law (read with section 19B(4) of the International Arbitration Act).
>
> …
>
> Taking the present case as an example, we have held that the respondent is bound by the Tribunal's factual finding that the Concluding Agreement did not require the appellant to do anything illegal under Thai law and was therefore not an illegal contract. If the Tribunal had made the converse finding of fact instead - ie, if the Tribunal had found as a fact that the Concluding Agreement

> did indeed require the appellant to engage in illegal conduct in Thailand and was therefore an illegal contract - and if the Tribunal had erred in this regard, the appellant would equally have been bound by this finding as it would have no recourse under the International Arbitration Act (read together with the Model Law) against such an error of fact."

39. It is not easy to reconcile the statements contained in these paragraphs which, given the decision in the case, were no more than observations. It has not been questioned that it is for the court to determine the nature and extent of the public policy of the state; and that, if an arbitral tribunal decides that an agreement is illegal, but makes an award which enforces the agreement, the court is entitled to set aside the award under section 39(2)(b)(ii) of the International Arbitration Act as conflicting with public policy. That was the actual position in *Soleimany*. In *AJU,* the judge had reversed the determination in the award on the interpretation of the Concluding Agreement governed by Singapore law, held it was illegal and set the award aside. The Court of Appeal held that the judge should not have reopened the finding on the legality of the Concluding Agreement in these circumstances and should not have set it aside. The better view of the observations in the judgment in *AJU* which are set out above is that they did no more than affirm the position that: (a) in the absence of fraud or other vitiating factors (as set out in section 24 of Singapore's International Arbitration Act - the equivalent of sections 39(2)(b)(ii) and (iv) of the International Arbitration Act) a decision of fact or law within the jurisdiction of the arbitral tribunal was final and binding; and (b) the determination of the nature and extent of public policy was a question of Singapore law for determination by the courts of Singapore. The observations in para 62 referring to it being in the power of the courts under article 34(2)(b)(ii) to review the determination in the award of the legality of the agreement went further than was necessary for the decision in the case and are inconsistent with the judgment read as a whole. As had been observed in *PT Asuransi Jasa*, to read article 34 broadly in this way would be inconsistent with the principle of finality in respect of matters determined by the arbitral tribunal within its jurisdiction.

40. In *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA Civ 838; [2018] 2 Lloyd's Rep 133, the Court of Appeal of England and Wales considered both *Soleimany* and *Westacre*. The Supreme Court in the present case did not refer to *RBRG Trading*. The appeal arose out of proceedings for the enforcement of a CIETAC (China International Economic and Trade Arbitration Commission) award under section 103 of the Arbitration Act 1996 (the legislation currently giving effect to the New York Convention). The CIETAC award was made under a contract of sale governed by Chinese law; it awarded damages to the sellers for breach of the contract by purchasers under which payment for the goods was to be by letter of credit. The challenge was made on the basis that the enforcement of the award would be contrary to public policy on both a narrow ground that the seller's claim was based on the presentation of forged bills of lading under the letter of credit, and on a broader ground that the courts of England and Wales would not assist a party which had committed

fraud. The presentation by the sellers of forged bills of lading had been considered in the arbitration, but the arbitral tribunal had found that the presentation was not causative of the breach by the purchasers and that the purchasers had not been deceived. An application to the Chinese courts had failed. In rejecting the challenge to enforcement, Hamblen LJ, in giving the judgment of the Court of Appeal, expressed the court's view at para 25(2):

> "Where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts the English court should not allow the facts to be reopened, save possibly in exceptional circumstances. In this connection, I consider that the views expressed on this issue by the majority of the court in *Westacre* are to be preferred to those put forward by Waller LJ in the same case and in *Soleimany.*"

In considering whether and, if so, to what extent public policy was engaged, the Court of Appeal said that the degree of connection between the claim sought to be enforced and the relevant illegality would be important. On the facts of the case, the connection between the seller's fraud in presenting forged bills of lading and the enforcement of the award in favour of them was not sufficient to engage public policy or, if public policy was engaged, to justify refusal of enforcement. The court would not go behind the findings of the arbitral tribunal.

41. The Board was also referred to decisions involving infringements of EU law (including the decisions of the Court of Justice of the European Union in *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I 3055 and *Claro v Centro Movil Milenium SL* [2006] ECR I 10421). However, the considerations relating to the EU legal order and circumstances in those decisions are so different from international commercial arbitration that the Board does not consider them to be of material assistance.

Conclusion on the first issue

42. The International Arbitration Act sets out the clear principles applicable in international arbitration to the jurisdiction of the arbitral tribunal to determine its own jurisdiction, the separability of the arbitration agreement, the finality of awards and the limited scope for intervention by the court.

43. In treating international arbitration as distinct from domestic arbitration, the policy of the International Arbitration Act is to treat setting aside or enforcement of awards made under the International Arbitration Act in the same way as it treats the enforcement of foreign awards. The Award which is the subject of this appeal, even

though the seat of the arbitration was in Mauritius, is an award in an international arbitration.

44. It is common ground that it was within the jurisdiction of the Arbitrator to determine the issue of the interpretation of the legislative provisions and whether the provisions had the effect of making the COA illegal. The Board therefore approaches the scope of the court's power under section 39(2)(b)(ii) on the basis that decisions on issues of law as well as fact were for determination by the Arbitrator in the Award. As there was no opt in to permit an appeal on questions of law, the Supreme Court had no power to review that decision unless it could do so under section 39(2)(b)(ii) of the International Arbitration Act.

45. In the present case the determination of the legality of the COA turned on detailed questions of interpretation of difficult legislative provisions which are set out in detail in relation to the second issue in the appeal. As the Supreme Court observed after setting out the arguments before it:

> "The able arguments which have been submitted by both Counsel have indeed brought into sharp focus the difficulties in interpreting whether the COA falls within the definition of the type of contract which would qualify for exemption under the Schedule to the PP Regulations 2009."

46. The questions of interpretation gave rise to no issue of public policy. It was undisputed that the purpose of the PP Act and PP Regulations was to bring public procurement under clear control and to make certain contracts subject to the approval of the Central Procurement Board, so that procurement was transparent and corruption was deterred. The issue in relation to legality was simply whether the COA was exempted from the provisions - a question of the detailed interpretation of provisions that had been amended in a far from straightforward manner.

47. In these circumstances, the argument advanced by STC, if correct, would enable section 39(2)(b)(ii) 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. That is because the argument has as its premise that, where the law governing the contract and the curial law are the same law, the question of the legality of a contract (either on its terms or its compliance with state regulation or other legislative provisions) gives rise to public policy considerations in relation to the award. The acceptance of this premise would involve a significant expansion of section 39(2)(b)(ii) of the International Arbitration Agreement. It 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, despite the clear provisions of the International Arbitration Act. As the alleged illegality of a contract not infrequently arises in relation to the interpretation of regulations or other legislative provisions said to be applicable to the contract, the ambit of the court's intervention would be increased significantly by this route to a review of an award under section 39(2)(b)(ii) of the International Arbitration Act.

48. This would be inconsistent with the purpose of the International Arbitration Act and the Model Law. The Model Law is premised on the principle that where a matter has been submitted to an arbitral tribunal and is within the jurisdiction of the arbitral tribunal, the arbitral tribunal's decision is final whether the issue is one of law or fact. The parties have so agreed in their contract to submit the dispute to arbitration. It is therefore the policy of modern international arbitration law 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.

49. The intervention of the court is specifically limited to setting aside the award on the grounds set out in section 39(2) of the International Arbitration Act. In relation to the issue of whether the award conflicts with public policy, the court's intervention proceeds on the court's application of public policy to the findings (whether of fact or law) made in the award. To read section 39(2)(b) more widely would be contrary to the clear provisions as to the finality of awards. The provision can be given full application by respecting the finality of the matters determined by the award and confining the ambit of the section to the public policy of the state in relation to the award. The question for the court under section 39(2)(b)(ii) is whether, on the findings of law and fact made in the award, there is any conflict between the award and public policy. For example, if the Arbitrator had held that the COA had been concluded in breach of the PP Act, but the contract was enforceable as it was not contrary to public policy, the court would be entitled to determine under section 39(2)(b)(ii) whether that decision by the Arbitrator conflicted with the public policy of Mauritius. 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 relating to the meaning and effect of the contract or whether it complies with a regulatory or legislative scheme.

50. This conclusion accords entirely with the actual decisions in the four cases which are considered in this judgment. In one (*Soleimany*), 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. In the other three cases, the arbitral tribunal had determined in the award that there was no illegality; the court did not overturn those determinations.

51. In both *Soleimany* and *AJU*, the courts went further in the observations made. In *Soleimany*, the observations give guidance, though not propounding a definitive solution, as to what the position might be where a challenge was made to the finding of illegality. In *AJU*, the Court of Appeal of Singapore sought to "clarify" the general principle it had propounded that errors of law or fact did not per se engage the public policy of Singapore. The guidance given in *Soleimany* has rightly not been followed. In *AJU*, the observations are best understood as affirming the finality of awards on both fact and law, whilst making it clear that the issue of public policy is a question of law for the court if the court has to decide whether the award itself conflicts with public policy. It is the Board's view that, if the observations are to be read as suggesting that the court can review the decision of an arbitral tribunal on the issue of the legality of a contract under article 34 of the Model Law (section 39(2)(b)(ii) of the International Arbitration Act), the observations were incorrect.

52. The issue in this appeal is the scope of section 39(2)(b)(ii) of the International Arbitration Act in relation to a decision of an arbitral tribunal which decided that a contract was not illegal on the basis of its interpretation of legislative provisions and regulations that were applicable to a contract. There may be unusual circumstances where different considerations may apply. More likely, as appears from the decided cases and observations made in them, are cases where the arbitral tribunal has expressly considered issues which have required the arbitral tribunal to inquire into circumstances suggesting illegality and set out their reasons for holding as a matter of fact and of law that there was no illegality. In cases of that kind, the arbitral tribunal's decision on fact and on law is a decision for the arbitral tribunal, if within its jurisdiction; if it holds that the contract is not illegal, then that decision will be final, in the absence of fraud, a breach of natural justice or any other vitiating factor. There may be some exceptional cases, where the court under the Model Law provision may be entitled to review the decision on legality, but it is not easy to think of such a case arising in practice. In the light of experience, it would not be helpful to seek in this appeal to go further by delineating possible circumstances or making observations about them. There would be a risk that such observations could be deployed in the cases which are in practice likely to arise in misguided attempts to expand the ambit of intervention under section 39(2)(b)(ii) of the International Arbitration Act / article 34 of the Model Law.

53. The Board therefore considers that the Supreme Court was in error in reviewing the decision of the Arbitrator that the COA was exempt from the provisions of the PP Act and PP Regulations. That decision was final and binding on the parties and therefore no issue arose under section 39(2)(b)(ii) of the International Arbitration Act as to whether the Award was in conflict with the public policy of Mauritius.

Issue 2: If the Supreme Court was entitled to review the decision of the Arbitrator, was the COA illegal as having been entered into in breach of the PP Act and PP Regulations on their proper interpretation?

54. Given the Board's conclusion on issue 1, issue 2 does not arise. The Board will nonetheless set out the reasons for its view that the Arbitrator was correct in the conclusion he reached that the COA was exempted from the PP Act and PP Regulations and was therefore not illegal under those provisions.

The legislative provisions relating to procurement

55. As has been set out, between the enactment of the PP Act in 2006 and the making of the COA on 27 November 2009, the PP Act and the PP Regulations were amended. It was common ground that for the purpose of determining whether the COA was exempt from the PP Act, the relevant provisions were those in force on 27 November 2009 when the COA was entered into. It was agreed that at that time:

(1) STC was a public body for the purposes of the PP Act.

(2) The COA would have been a major contract within section 2 of the PP Act if not exempted and therefore would have required the approval of the Central Procurement Board.

(3) The Central Procurement Board did not approve the award of the contract.

The sole question was whether the COA fell within the scope of the exemptions from the PP Act.

The legislation as in force in 2008

56. The PP Act applied to all procurement by public bodies. The definition of procurement was wide as set out in the definition section, section 2:

> "'procurement' means the acquisition by a public body by any contractual means of goods, works, consultant services or other services;

> 'procurement contract' means a contract between a public body and a supplier, contractor or consultant resulting from procurement proceedings…"

57. Detailed provisions were made in the PP Act for the procurement process, including procurement methods (sections 15-25), the bidding process (sections 26-42), appeals (sections 43-45), the contents of procurement contracts (sections 46-48) and provisions as to integrity (sections 49-53). The PP Act also established a procurement policy office (sections 4-7) and a Central Procurement Board (sections 8-14).

58. Specific provisions were made for major contracts. Section 14 provided that any major contract into which a public body proposed to enter be approved by the Central Procurement Board. Section 2 of the PP Act defined a major contract as one to which a public body proposed to be a party and where the estimate of the fair and reasonable value exceeded the "prescribed amount":

> (1) the "prescribed amount" was the amount "specified in column 3 of the Schedule [to the PP Act] corresponding to the public body specified in column 1 in relation to the type of contract specified in column 2".
>
> (2) The Schedule to the PP Act as originally enacted was divided into Parts I-V, each Part dealing with the various public bodies. STC was listed with 19 other public bodies in column 1 of Part IV. Columns 1, 2 and 3 read in respect of STC:

Column 1 Public body	Column 2 Type of contract	Column 3 Prescribed amount
State Trading Corporation	Goods, Civil Engineering Works & Capital Goods	Rs 25 million
	Consultancy Services	Rs 5 million
	Other Services	Rs 10 million

> (3) The term "goods" was defined in section 2 of the PP Act as meaning:
>
> "objects of every kind and description including commodities, raw materials, manufactured products and equipment, industrial plant, objects in solid, liquid or gaseous form, electricity, as well as services incidental to the supply of the goods such as freight and insurance…"

59. The PP Act as enacted provided for two exemptions from its provisions:

(1) Procurement to protect national security or defence. This was provided for in section 3:

> "(1) Notwithstanding any other enactment, this Act does not apply to procurement undertaken to protect national security or defence, where -
>
> (a) the Prime Minister so determines by notice in the Gazette; and
>
> (b) the procurement is undertaken by the most competitive method of procurement available in the circumstances.
>
> (2) This Act applies to any other procurement effected by a public body."

(2) Procurement by an exempt organisation. Provision for this exemption was made in section 2 by the definition of public body and exempt organisation:

> "'public body' (a) means any Ministry or other agency of the Government; (b) includes - (i) a local authority; (ii) a parastatal body; and (iii) such other bodies specified in the Schedule; but (c) does not include an exempt organisation…"
>
> 'exempt organisation' means a body which is, by Regulations, excluded from the application of this Act…"

60. Provision was made for procurement by an exempt organisation by the Public Procurement Regulations 2008 (GN No 7 of 2008) (the "PP Regulations 2008") which came into force at the time the PP Act came into force on 17 January 2008. Regulation 2 of the PP Regulations 2008 defined "exempt organisation" to mean:

> "a public body, as specified in the First Schedule [to the PP Regulations 2008], which is excluded from the application of the [PP] Act…"

The only body specified in the First Schedule to the PP Regulations 2008 was the Independent Commission Against Corruption.

61. Accordingly, as STC was a public body to which the PP Act applied when the PP Act came into force, the COA would then have been a major contract as it would have been over the prescribed amount in Part IV of the Schedule to the PP Act. It would have required approval by the Central Procurement Board.

The amendments made in 2009

62. The dispute between the parties arose as to the effect of a series of amendments made in 2009 to the PP Act and the PP Regulations 2008. It is convenient to take these chronologically.

63. The first set of amendments was made on 29 June 2009 when the Public Procurement (Amendment No 2) Regulations 2009 (GN No 68 of 2009) (the "PP Amendment Regulations") were made by the Minister amending the PP Regulations 2008 with effect from 2 July 2009 in three relevant respects:

> (1) By Regulation 3 of the PP Amendment Regulations, the definition of exempt organisation in Regulation 2 of the PP Regulations 2008 was replaced by a new definition:
>
> > "a public body which is excluded from the application of the [PP] Act in relation to contracts referred to in the First Schedule…"

The effect of this change was that instead of the exemption being granted to the one public body specified for all procurement (as was the position under the PP Regulations 2008), the definition in the PP Amendment Regulations provided that exemption was to be granted for specific types of contract for different organisations as set out in the Schedule to the PP Amendment Regulations.

> (2) The First Schedule to the PP Regulations 2008 was revoked by Regulation 5 and replaced by the Schedule to the PP Amendment Regulations. The Schedule to the PP Amendment Regulations was divided into a number of parts but with only two columns: the first of the columns was headed "Public body" and the second of the columns was headed "Type of contract". There was no column in respect of the value of the contract.

Part I of the Schedule included STC and other bodies (Agricultural Marketing Board, Central Electricity Board and the Outer Islands Development Board). As applied to STC, Part I of the Schedule to the PP Amendment Regulations read as follows:

Public body	Type of contract
State Trading Corporation	Goods purchased for resale, including services incidental to the purchase or distribution of such goods.

The definition of type of contract for STC was different to the contract specified in column 2 of the Schedule to the PP Act; it was narrower in scope, but it had similarities as it included "services incidental".

Part II of the Schedule listed the Independent Commission Against Corruption in a manner that left its position the same as it had been under the PP Regulations 2008 as originally made:

Public body	Type of contract
Independent Commission Against Corruption	All contracts.

(3) By Regulation 4 of the PP Amendment Regulations, a new regulation, Regulation 2A, was inserted into the PP Regulations 2008:

> "Nothing in these regulations shall be construed as excluding the application of the [PP] Act to a public body referred to in the First Schedule to these regulations and the Schedule to the [PP] Act 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 [PP] Act."

64. The second set of amendments was made on 30 July 2009 when section 35 of the Finance (Miscellaneous Provisions) Act 2009 and Schedule 4 to that Act amended the PP Act.

(1) The way public body was defined in the PP Act was changed. Section 2 of the PP Act was amended by deleting from the definition of public body "an exempt organisation" and by amending section 3(2) so that that sub-section read:

> "This Act applies to any other procurement effected by a public body, other than an exempt organisation…"

The definition of "exempt organisation" remained unchanged (see para 59(2) above).

(2) The Schedule to the PP Act was replaced with a new Schedule to the PP Act. The new Schedule retained the same columns as the original Schedule. STC was listed with the Central Electricity Board and Mauritius Broadcasting Corporation in Part V of the new Schedule which set out the type of contact and prescribed amount as:

Column 1 Public body	Column 2 Type of contract	Column 3 Prescribed amount
State Trading Corporation	Goods, Civil Engineering Works & Capital Goods	Rs 100 million
	Consultancy Services	Rs 100 million
	Other Services	Rs 100 million

The legislative scheme in November 2009

65. Therefore, at the time that the COA was entered into:

(1) The PP Act applied to all procurement (except for national security and defence) effected by a public body other than an exempt organisation (section 3 of the PP Act as amended in 2009).

(2) An exempt organisation was defined by reference to the PP Regulations 2008 as amended in 2009. It is convenient to call the PP Regulations 2008 as amended by the PP Amendment Regulations the PP Regulations 2009 because the Arbitrator and the Supreme Court referred to them in this way.

(3) Regulation 2 of the PP Regulations 2009 defined exempt organisations as "a public body which is excluded from the application of the [PP] Act in relation to contracts referred to in the First Schedule" to the PP Regulations 2009.

(4) The First Schedule to the PP Regulations 2009 listed STC in respect of contracts for:

> "Goods purchased for resale, including services incidental to the purchase or distribution of such goods."

(5) The PP Regulations 2009 incorporated Regulation 2A:

> "Nothing in these regulations shall be construed as excluding the application of the [PP] Act to a public body referred to in the First Schedule to these regulations and the Schedule to the [PP] Act 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 [PP] Act."

(6) The reference to the Schedule to the PP Act was the Schedule to the PP Act as amended in 2009. Read in respect of STC, it stated:

Column 1 Public body	Column 2 Type of contract	Column 3 Prescribed amount
State Trading Corporation	Goods, Civil Engineering Works & Capital Goods	Rs 100 million
	Consultancy Services	Rs 100 million
	Other Services	Rs 100 million

The interpretation of the legislative provisions in the Award

66. The Arbitrator considered that there were two questions before him in relation to the issue as to whether the COA was subject to the requirement of approval by the Central Procurement Board:

(1) whether the COA was within the exemption as a contract for goods purchased for resale, including services incidental to the purchase or distribution of such goods under the PP Regulations 2009; and

(2) whether, even if the COA was within that exemption, it was brought within the requirements of the PP Act by Regulation 2A of the PP Regulations 2009.

67. On the first question, the Arbitrator decided that, on the proper interpretation of the legislative provisions, the COA was exempted under the PP Regulations 2009. The COA was a contract for services relating to the acquisition, construction, financing, management and operation of a tanker to transport petroleum products being purchased by STC for resale. On the ordinary meaning of "incidental to", those additional services were incidental to the purchase and distribution of petroleum products. The COA was such a contract and therefore within the type of contract set out in the Schedule to the PP Regulations 2009 ("Goods purchased for resale, including services incidental to the purchase or distribution of such goods") and therefore exempted by the definition in Regulation 2 of the PP Regulations 2009.

68. As regards the second question, he noted that the argument on Regulation 2A had only been raised by STC in its rejoinder. He dealt with the issue briefly concluding that Regulation 2A could only apply if the COA was a contract for "other services". As he had held it was a contract for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods" within the exemption, it was not a contract for other services.

69. The Arbitrator then considered the question as to whether the contract was illegal and unenforceable under articles 131 and 1133 C Civ. As he had concluded that the PP Act did not apply, there had been no breach of the PP Act. The COA was not illegal or unenforceable under articles 1131 and 1133 of C Civ.

The decision of the Supreme Court

70. The Supreme Court approached the issue as to the application of the PP Act to the COA by first considering whether it was open to Betamax to rely on the PP Regulations 2009 to establish it was an exempt organisation in the light of Regulation 2A. The question in its view was whether the COA was governed by the PP Act or by the PP Regulations 2009:

> "The first pivotal issue therefore which has to be determined is whether the COA is governed by the PP Act or by the PP Regulations 2009. Is it the PP Regulations 2009, by virtue of which the COA may be exempt from the PP Act and the procurement process prescribed under the PP Act? Or, have the PP Regulations 2009 themselves been ousted by their Regulation 2A as a result of which it is the PP Act which would be applicable to the COA?"

71. Therefore, before considering whether STC was an exempt organisation in respect of the COA under the PP Regulations 2009, it was necessary to decide if the PP Regulations 2009 were applicable at all because Regulation 2A retained the application of the PP Act to certain types of contract. It concluded:

> "What Regulation 2A is plainly stating is that the 2009 Regulations, which provide for '*exempt organisations',* cannot operate to exclude the application of the PP Act in respect of a procurement contract which is specified in column 2 of the Schedule to the PP Act. In other words, there can be no exemption from the procurement process of the PP Act by virtue of the PP Regulations 2009 if the COA is a type of contract which falls within the scope of application of column 2 of the Schedule to the PP Act. The COA would then be subject to the application of the PP Act and the procurement process prescribed therein."

72. The Supreme Court then considered the Schedule to the PP Act (as amended) and held:

> "It has been seen that, as at 27 November 2009, Regulation 2A excluded the application of the PP Regulations 2009 to any procurement contract specified in column 2 of the Schedule to the PP Act to which the STC as a public body intended to be a party. Thus any contract for acquisition by the STC of '*goods*' or '*other services*', for the prescribed amount of 100 million rupees or more, would be excluded from the PP Regulations 2009 and would be subject to the PP Act and its procurement process."

73. As the subject matter of the COA was essentially in respect of freight as a service incidental to the supply of petroleum products, it was within the definition of goods in section 2 of the PP Act and was therefore a contract of a type specified in column 2 of Part V of the Schedule to the PP Act (as it had been amended in 2009). In addition, even if it were not within the extended definition of goods, it would be a contract for "other services" within column 2 as, in the Supreme Court's view, this term would encompass any services other than consultancy services.

74. The Supreme Court therefore held that the Arbitrator had been wrong in his decision. Betamax was also wrong in its arguments that: (a) Regulation 2A was simply a saving provision which made clear that the PP Act would continue to apply to the relevant public bodies in respect of procurement contracts entered into other than the contracts specified in the First Schedule; and (b) Regulation 2A could not have been intended to override the specific provisions of the PP Regulations 2009.

75. Although the Supreme Court accepted that Regulation 2A was a saving provision, it saved the application of the PP Act and not the PP Regulations 2009. It ensured that the Act prevailed over anything in the PP Regulations 2009:

> "The plain meaning and force of the wording used in Regulation 2A annihilate the application of any exemption under the Regulations in relation to any of the contracts referred to in the First Schedule to the Regulations, where the intended contract by the public body is one which falls within the specifications set out in column 2 of the Schedule to the PP Act. The STC could not therefore by virtue of Regulation 2A qualify as an '*exempt organisation*' under the PP Regulations 2009 in respect of the COA."

As the COA was not exempted, the COA was a contract that had been illegally awarded in breach of the PP Act.

76. The Supreme Court, in view of its conclusion on this issue, did not then go on to consider the question as to whether the COA was a contract within the scope of the exemption in the PP Regulations 2009 as a contract for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods", though, as set out at para 73, it considered that the COA was a contract for goods within the Schedule to the PP Act.

The two questions of legislative interpretation on this appeal

77. On this appeal, two questions arise as to the proper interpretation of the legislation:

> (1) Did Regulation 2A of the PP Regulations 2009 deprive Regulation 2 and the Schedule to the PP Regulations 2009 of any effect in relation to the entering into of the COA?
>
> (2) If it did not, was the COA a contract for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods" within the Schedule to the PP Regulations 2009?

Did Regulation 2A deprive Regulation 2 of any effect in relation to the entering into of the COA?

The contentions of STC on Regulation 2A

78. In supporting the conclusion reached by the Supreme Court as to the effect of Regulation 2A, STC advanced a more nuanced argument by seeking to explain how Regulation 2A and the other provisions of the PP Regulations 2009 could be read together:

> (1) The PP Act and the processes specified in it applied to procurement by all public bodies save for the limited categories set out in section 3(1) (national security and defence) and for "exempt organisations".
>
> (2) The purpose of the Schedule to the PP Act was limited to defining the types and values of contract that qualified as major contracts which were subject to additional requirements for such contracts. It was not intended to be a list of public bodies or of contracts to which the PP Act itself applied, as the PP Act applied to procurement by all public bodies with two limited exceptions (national security and defence and exempt organisations).
>
> (3) The First Schedule to the PP Regulations 2009 identified types of contract in respect of particular public bodies, irrespective of value; there was no column for value.
>
> (4) The effect of the new definition of "exempt organisations" substituted by Regulation 2 of the PP Regulations 2009 would, if unqualified, therefore exempt high value contracts of the type specified from the scope of the whole of the PP Act regime; it simply identified the public body and the contracts.
>
> (5) Regulation 2A was therefore needed to restrict the scope of the amendment introduced by Regulation 2 and by the Schedule to the PP Regulations 2009. Its purpose and effect was to ensure that the requirements of the PP Act in respect of major contracts were continued as that had been the essential purpose of the Schedule to the PP Act. By specifying column 2 of the Schedule to the PP Act, Regulation 2A applied the requirements to contracts in respect of the type covered by the Schedule, that is to say the types of contracts which were over the specified amount. For example, in the case of STC it covered contracts in column 2 (goods etc) which were above the prescribed amounts in column 3. The drafter must be presumed to have known that the essential function of the Schedule to the PP Act was to define the contracts which

would qualify as major contracts. The reference to column 2 of the Schedule to the Act in Regulation 2A was intended as a reference to the contracts in column 2 of the Schedule to the Act that exceeded the prescribed amount in the Schedule to the PP Act.

(6) Read in this way, Regulation 2A provided content to Regulation 2 of the PP Regulations 2009 and to the Schedule to the PP Regulations 2009, as public bodies identified in the Schedule to the PP Regulations 2009 were exempted from the PP Act in respect of contracts identified in the Schedule to the PP Regulations 2009 which (i) were not referred to in the Schedule to the PP Act or (ii) in respect of contracts identified in the PP Act but which were not major contracts as they were below the prescribed amount.

(7) This accorded with the obvious intention that the PP Act should apply to major contracts. Prior to the PP Regulations 2009, only the Independent Commission Against Corruption had been exempted from the Act. The amendments made in 2009 were intended to be limited in scope and there was no reason to think that the legislature had intended to remove the requirements in respect of major contracts.

(8) It was therefore wrong to say that the Supreme Court's interpretation negated the effect of the amendment made by Regulation 2 of the PP Regulations 2009. It reduced the scope of the exemption as was intended, but provided for an exemption from the requirements of the PP Act in respect of contracts which were not major contracts or which were not identified in the Schedule to the PP Act.

(9) In contrast, Betamax's interpretation denuded Regulation 2A of any effect.

Conclusion on Regulation 2A

79. It is common ground that Regulation 2A of the PP Regulations 2009 operated as a saving provision:

(1) On the interpretation advanced by STC and as accepted by the Supreme Court, it operated to bring most of what was exempted by Regulation 2 and the Schedule to the PP Regulations 2009 back into the PP Act regime;

(2) On the interpretation advanced by Betamax, it made it clear that the PP Act applied to public bodies in respect of contracts within the Schedule to the PP Act that had not been exempted in the Schedule to the PP Regulations 2009.

80. The Supreme Court's view, as explained above, was that as column 2 of Part 5 of the Schedule to the PP Act (as amended) set out in respect of STC contracts for goods and other services, Regulation 2A operated to exclude the COA from exemption. As the Supreme Court accepted, this interpretation of Regulation 2A largely rendered the exemptions provided for in the other amendments meaningless or, as the Supreme Court pithily expressed it in the passage quoted at para 75 above, "annihilated" their effect.

81. This cannot be the correct interpretation as, on this basis, the PP Regulations 2009 would have contained provisions that were incompatible with each other. Moreover, STC's more nuanced argument that the provisions are not incompatible with each other makes little sense for two reasons.

82. First, if the purpose had been to ensure major contracts were excluded from the exemption, there would have been a much simpler way of providing for this in clear language. Furthermore, Regulation 2A would have referred not simply to column 2 of the Schedule to the PP Act (the type of contract) but also to column 3 of that Schedule (the prescribed amount), as on this basis it would have been column 3 that was more important.

83. Secondly, the contracts to be exempted by the Schedule to the PP Regulations 2009 were on analysis a narrower category of types of contract within the contracts specified in the Schedule to the PP Act. In the case of STC, the category exempted in the Schedule to the PP Regulations 2009 was contracts for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods" rather than all contracts in respect of goods as set out in the Schedule to the PP Act. As the category of type of contract was wider in the Schedule to the PP Act than in the Schedule to the PP Regulations 2009, using Regulation 2A would have been a strange way of reducing the effect of the exemption intended by the specific provisions of the PP Regulations 2009.

84. Under the PP Regulations 2008, the only exempt body was the Independent Commission Against Corruption; that exemption applied to all its contracts. Under the amendments made by Regulations 3 and 5 of the PP Amendment Regulations, a different approach was adopted. Many more bodies were exempted, but only in respect of the contracts specified in the Schedule to the PP Amendment Regulations. It is difficult to understand what the purpose of Regulations 3 and 5 of the PP Amendment Regulations was if the Supreme Court's interpretation of the effect of Regulation 4 of

the PP Amendment Regulations in inserting Regulation 2A was the correct interpretation.

85. It would also appear that the interpretation placed on Regulation 2A by the Supreme Court would have meant that the Independent Commission Against Corruption, which was entirely exempted by the PP Regulations 2008, would have lost some of the exemption. Although the Independent Commission Against Corruption is referred to in the Schedule to the PP Regulations 2008, it is not expressly mentioned in the Schedule to the PP Act as amended in 2009. However, Part I of the Schedule refers in column 1 to "parastatal bodies" not specified in the other Parts of the Schedule; in respect of parastatal bodies, the type of contract in column 2 is listed as "all contracts" and in column 3 the prescribed amount is Rs 15m. Parastatal bodies are not expressly defined in the PP Act but are defined in Regulation 2 of the PP Regulations 2008 as "an organisation established under an enactment whether body corporate or not and which depends wholly or partly on government funding". If this definition is taken as a generally applicable definition, the Independent Commission Against Corruption is a parastatal body and would therefore have lost some of the exemptions it had previously enjoyed on the Supreme Court's interpretation.

86. As explained earlier, the new approach in the PP Regulations 2009 was to exempt public bodies in respect only of specified contracts rather than the blanket exemption applied to the one public body mentioned in the PP Regulations 2008 (the Independent Commission Against Corruption). Given that approach, the purpose of inserting Regulation 2A was, in the Board's view, to make it clear that the PP Act remained applicable in respect of all contracts made by those public bodies other than the contracts specified in the PP Regulations 2009. That saving may have been thought necessary as there was a change to the definition of "public bodies" (previously, it had been used on the basis that the only organisation that was exempted by the PP Regulations 2008 was exempted from all its contracts). On this interpretation the addition of Regulation 2A may not have been strictly necessary, but it provides for consistency and avoids conflict between the different provisions in the PP Act and the PP Regulations 2009.

87. This interpretation is also consistent with the subsequent amendment to the PP Act in July 2009 in the way in which exempt organisations were defined. Under the PP Act as it was enacted originally, an exempt organisation was excluded from the definition of public body. The amendment to the PP Act in 2009 brought exempt bodies within the definition of public body, thus emphasising, consistently with the new approach of the PP Regulations 2009, that the PP Act applied to all public bodies in respect of all procurement unless a specific type of contract was exempted.

88. Another view that could be taken of the purpose of Regulation 2A as a saving provision achieves the same result. The PP Act only permitted the full exemption of a

public body in the definition section (section 2) as originally enacted and in section 3(2) when amended. It did not contemplate the exemption of a public body only in respect of some of its contracts. Provision was made for the exemption of some contracts by Regulation 2 of the PP Regulations 2009. Regulation 2A therefore operated to make it clear that the full exemption in the PP Act did not apply to Regulation 2 of the PP Regulations 2009 but otherwise applied to all other procurements other than those listed in the Schedule to the PP Regulations 2009.

89. For these reasons, the Board concludes that Regulation 2A did not have the effect which the Supreme Court held. Therefore, the issue was simply whether the COA was a contract for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods" as set out in the Schedule to the PP Regulations 2009.

Was the COA a contract for goods purchased for resale, including services incidental to the purchase or distribution of such goods?

STC's contention

90. STC's contention was that the COA was not within the description of a contract for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods". It was a contract for the transportation of petroleum products. It was therefore not a contract for the purchase of such products for resale and the services were not incidental to the purchase of such products under such a contract; the goods had to be purchased under a contract that was exempted, not another contract such as the COA.

The Board's conclusion

91. The COA was exempted, Regulation 2A apart, if the COA was a contract for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods".

92. Section 5(6) of the Interpretation and General Clauses Act 1974 provides that a definition in an Act must be applied to subsidiary legislation. The definition of goods in the PP Act must therefore be applied to the same term in the PP Regulations 2009. Although the type of contract in the PP Regulations 2009 was narrowed to contracts for goods purchased for resale, the wide definition of "goods" in the PP Act had to be applied. Included within the term "goods" in the definition in the PP Act were not only what can be described as physical goods but services incidental to the supply of the goods (see para 58(3) above); the illustrations given were freight and insurance. In the PP Act, these services were treated as distinct from physical goods (as described in this

judgment) and, for the purposes of the definition, were "goods" quite irrespective of whether the services were incidental to the particular contract for the supply of goods. Provided the services were of a kind incidental to the supply of goods, the services could be provided under an entirely different contact to the contract for the supply of the physical goods.

93. The phrase "purchase or distribution" in the Schedule to the PP Regulations 2009 in relation to services, simply reflected the narrower category of contracts. In the Board's view, it is therefore clear that the exemption was to apply to any contracts for services incidental to the purchase or distribution of goods purchased for resale. According to the language of the PP Regulations 2009, it was not restricted to services provided under the same contract for the purchase of the physical goods. This conclusion follows both from the context of the PP Act, in which the phrase in the PP Regulations 2009 must be interpreted, and from the language of the PP Regulations 2009. What is required is that the service was incidental to the goods purchased for resale; it is not required that the service is incidental to the specific contract under which goods were purchased for resale. As STC was purchasing petroleum for resale and as the COA was a contract for the supply of freight incidental to that purchase for resale, it was within the exemption provided for in the Schedule to the PP Regulations 2009.

Conclusion on issue 2

94. Therefore, it follows that even if the Supreme Court had been correct in its interpretation of section 39(2)(b)(ii) of the International Arbitration Act, it was wrong in its decision on the meaning of the PP Act and PP Regulations. The Arbitrator reached the right conclusion in the Award on the exemption of the COA from the procurement regime.

Issue 3: If the COA was illegal, was the Award giving effect to the COA in conflict with the public policy of Mauritius?

95. As the Board is of the view that the Supreme Court was not entitled to review the finding in the Award on illegality and that the COA was not in any event illegal, it is neither necessary nor helpful to address the third issue in the appeal. Considerations in relation to the scope and extent of public policy in relation to an illegal contract are best considered in circumstances where the illegality is established and its seriousness can be judged in that context. Moreover, a determination of the public policy of the Republic of Mauritius in relation to any such illegality is an issue on which it would be necessary, particularly in relation to public procurement, to have close regard to the determination of the Supreme Court when such an issue actually arises. The Board therefore does not consider it desirable to lengthen this judgment by consideration of this issue.

Overall conclusion

96. The Board therefore allows the appeal, sets aside the Order of the Supreme Court and allows the application of Betamax to enforce the Award.