**STATE TRADING CORPORATION v BETAMAX LTD**

**2019 SCJ 154**

**Record Nos. 115455**

**THE SUPREME COURT OF MAURITIUS**

**In the matter of:-**

**State Trading Corporation**

**Applicant**

**v.**

**Betamax Ltd**

**Respondent**

**AND**

**Record No. 115564**

**In the matter of:-**

**State Trading Corporation**

**Applicant**

**v.**

**Betamax Ltd**

**Respondent**

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**JUDGMENT**

A dispute arose between the parties in respect of the termination of their Contract of Affreightment (CoA). The matter was referred for arbitration to the Singapore International Arbitration Centre. On 5 June 2017, the sole arbitrator of the Arbitration Tribunal Mr Michael Pryles made the following award ("the Award"):

"*314. For the foregoing reasons the Tribunal finds and awards as follows:*

*(a) the Tribunal has jurisdiction to hear and decide the claims in this arbitration;*

*(b) STC is to pay Betamax damages in the amount of USD 115,267,199 for its default under the CoA;*

*(c) STC is to pay Betamax's costs in the amounts of USD 2,823,547.20, SGD 39,466 and GBP 880,296;*

*(d) STC is to bear the costs of the arbitration, fixed in the amount of SGD 465,223.58; and*

*(e) STC is to pay simple interest at the rate of 3% per annum of the amounts in paragraphs 314(b), 314(c) and 314(d) from the date of this award to the date of full payment.*

*315. All other claims and requests made by the parties in this arbitration have been rejected."*

On 7 September 2017, the respondent ("Betamax") obtained an *ex parte* provisional order from the Supreme Court of Mauritius for the recognition and enforcement of the Award ("the provisional order").

There are now 2 applications by the applicant, the State Trading Corporation (STC). In the first application (SCR No. 115455), STC is moving to set aside the arbitral award pursuant to sections 39(2)(a)(i), 39(2)(b)(i) and/or 39(2)(b)(ii) of the Mauritius International Arbitration Act 2008 ("the IAA").

In the second application (SCR No. 115564), STC is moving to set aside the provisional order and is also moving for a stay of the enforcement of the Award pending the determination of the first application.

Both applications were heard together and a single judgment shall accordingly be filed in each record.

*The background facts*

We shall first set out the essential facts which gave rise to the present case.

The STC has been set up as a body corporate under the State Trading Corporation Act 1982 and operated at the material time under the aegis of the Ministry responsible in Mauritius for Industry, Commerce and Shipping. It is a trading arm of the Government of Mauritius responsible for the importation in Mauritius of essential commodities which include petroleum products.

Betamax is one of a group of about 20 companies owned by the Bhunjun family. Their activities have historically been focused on property development and the construction industry. Betamax was incorporated on 6 May 2009 and its immediate parent company is Betonix Ltd which manufactures readymix concrete.

On 27 November 2009, STC and Betamax entered into a contract of Affreightment as a result of which Betamax would replace Pratibha Shipping Co. Ltd and ST Shipping for the transport of the whole of Mauritius oil imports from India.

According to the CoA, Betamax was required to procure, own, operate and maintain a vessel called the Red Eagle and would make available to STC the full freight capacity of the vessel for the transportation of petroleum products from Mangalore, India to the port of discharge in Port Louis.

STC was bound under the CoA to:

(a) hire and pay for 100% of the freight capacity of the vessel for a period of 15 years; and
(b) grant Betamax a right of first refusal to transport the quantity of petroleum products which STC would import into Mauritius but which exceed the freight capacity of the vessel.

As regards the freight payable under the CoA, Betamax expected to receive USD 17.6 million for the first year which sum would increase annually by a percentage which would escalate throughout the 15-year term of the CoA. The arrangement under the CoA was such that Betamax would be paid for 100% of the freight capacity of the Red Eagle regardless of whether the Red Eagle did in fact carry a full load. This payment would be in addition to the right of first refusal for any additional petroleum products which STC would import in excess of the Red Eagle's freight capacity. Through this arrangement, Betamax's acquisition of the Red Eagle would be financed by STC, which by extension meant the State of Mauritius.

On 30 January 2015, the Government of Mauritius, by Cabinet decision, terminated any further operation of the CoA. It considered that there had been serious breaches of the law in the procurement process for the award of the CoA. On 4 February 2015, STC informed Betamax that STC was *"unable to avail itself of [Betamax's] services for the transport of petroleum products from New Mangalore any longer"*.

On 5 February 2015, Betamax served a notice on STC to comply with its contractual obligations within 60 days.

On 7 April 2015, Betamax sent a termination notice to STC invoking an *"Event of default"* under Clause 10.6.1 of the CoA.

On 15 May 2015, Betamax initiated arbitration process against STC seeking compensation and damages for wrongful termination of the CoA.

*The Arbitration Issues*

The issues submitted by the parties for the determination of the Arbitral Tribunal were as follows:-

(i) Did the Tribunal have jurisdiction over the dispute submitted to it (including whether the dispute was arbitrable)?

(ii) Was Betamax entitled to terminate the CoA on 7 April 2015 pursuant to clause 10.6.1 of the CoA?

(iii) Was the CoA (including the Arbitration Agreement therein) illegal and unenforceable on the ground that it was entered into in breach of the Public Procurement Act 2006 ("the PPA")?

(iv) Was the CoA (including the Arbitration Agreement therein) illegal and unenforceable pursuant to articles 1131 and 1133 of the Code Civil Mauricien ("Civil Code")?

(v) Was the CoA (including the Arbitration Agreement therein) therefore null and void pursuant to Articles 1111 and 1116 of the Civil Code?

(vi) Was the CoA illegal and unenforceable by reason of it having been entered into as part of a conspiracy to benefit Betamax at the expense and to the detriment of the Republic of Mauritius?

(vii) Was STC able to rely on the alleged impossibility of performance of the CoA?

(viii) Was Betamax entitled to recover damages and, if so, in what amount?

The essential points which were pressed by STC before the Arbitral Tribunal were that the Tribunal did not have jurisdiction over a dispute which was not arbitrable; the CoA, including the Arbitration Agreement therein, was illegal and unenforceable since the CoA had been entered into in breach of the PPA and the Mauritius Civil Code; and Betamax could not rely on the terms of the CoA to claim damages against the STC as it would be tantamount to enforcing an illegal contract which had been awarded in violation of the mandatory requirements of the PPA and which was against "*l'ordre public*".

The reply of Betamax was that when the CoA was awarded on 27 November 2009, the CoA fell within the exemption prescribed under Public Procurement legislation in Mauritius in respect of Contracts for services incidental to the purchase or distribution of goods purchased for resale. The STC was thus an "*exempt organisation*" by virtue of the above exemption which was introduced by the Public Procurement (Amendment No. 2) Regulations 2009 (GN No. 68 of 2009), hereinafter referred to as "the PP Regulations 2009", and which was in force at the time of the contract. The CoA therefore fell outside the scope of application of the PPA as a result of which neither its legality nor its enforceability can be questioned.

It has also been the stand of Betamax that by virtue of section 2C(1) of the IAA, domestic legislation, and for that purpose both the PPA and the Mauritius Civil Code, would not apply to an international arbitration for which there is a distinct legal regime expressly provided for under the IAA.

*The Arbitrator's Findings*

The Arbitrator accepted the argument of Betamax that the CoA was not governed by the PPA and was therefore neither illegal nor invalid for any of the reasons invoked by STC.

The Arbitrator's findings may be summed up as follows:

1. The STC was an exempt organisation at the material time of the CoA on 27 November 2009 by virtue of the PP Regulations 2009.
2. Since the STC was an exempt organisation, the provisions of the PPA relating to procurement process would not apply to the CoA. As a result, all the points raised by STC to the effect that the CoA and the arbitration clause would be illegal and unenforceable as being in breach of the PPA, would not stand.
3. "*Ordre public*" in article 2060 of the Civil Code must be interpreted in a manner relevant to, and compatible with, International Arbitration. It cannot as a result exclude arbitration where the arbitrator, as in the present case, is called upon to determine only the civil consequences of a possible breach of a public policy rule or of a criminal act.
4. There is no reason why Article 2061 of the Civil Code should apply to invalidate the arbitration clause in the CoA. Since the PPA does not apply to the CoA, due to the exemption provided by PP Regulations 2009, the provisions of Article 2061 of the Civil Code would not apply in order to invalidate the arbitration clause in

the CoA and Article 1003 of the Civil Code would effectively cater for such an arbitration clause.

5. There was no 'impossibility of performance' of the CoA by STC. The termination of the CoA was neither irresistible nor unforeseeable as STC was not compelled to follow the direction of Government to terminate the CoA.
6. The STC had failed to discharge the burden of showing that the CoA was agreed as part of a conspiracy to commit an unlawful act.
7. Betamax was accordingly entitled to recover damages from STC for the wrongful termination of the CoA.

*General Legal Framework applicable to International Arbitration*

1. It is not in dispute that the arbitration in the present matter was an "*international arbitration"*, governed by the IAA 2008 which came into force on 1 January 2009.
2. The IAA is based on the UNCITRAL (The United Nations Commission on International Trade Law) Model as amended in 2006 ("the Amended Model Law").
3. The IAA was enacted to apply to international arbitration. Initially, section 3(9) and (10) of the IAA 2008 provided that in applying and interpreting the Act and in developing the law applicable to international arbitration in Mauritius recourse shall be had to the corresponding provisions of the Amended Model Law and the principles upon which that law is based and is interpreted. As a result "*no recourse shall be had to, and no account shall be taken of, existing statutes, precedents, practices, principles or rules of law or procedure relating to domestic arbitration*" [Section 3(10)]. Following the amendment brought by the International Arbitration (Miscellaneous Provisions) Act 2013 which came into operation on 1 June 2013, the disconnection of international arbitration from domestic arbitration and regime is further highlighted in the new section 2C(1) of the IAA which reads as follows:

> *"(1) In applying and interpreting this Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act, and in developing the law applicable to international arbitration in Mauritius, no recourse shall be had to, and no account shall be taken of, the law or procedure relating to domestic arbitration*".

4. The present proceedings are also governed by the Supreme Court (International Arbitration Claims) Rules 2013, which is a new body of rules distinct from the set of rules which apply to domestic arbitration.

*The grounds in support of the application*

The STC raises 3 grounds in support of its application to have the award set aside pursuant to section 39 of the IAA which substantially incorporates the provisions of Article 34 of the Amended Model Law.

The first ground is that the subject matter of the dispute is not capable of settlement by arbitration under Mauritius Law. It is made pursuant to section 39(2)(b)(i) of the IAA which reads as follows:

> *"(2) An arbitral award may be set aside by the Supreme Court only where –*
>
> *(a) …*
>
> *(b) the Court finds that –*
>
> *(i) the subject matter of the dispute is not capable of settlement by arbitration under Mauritius Law."*

The second ground is that the arbitration agreement is not valid under Mauritius Law. It is made pursuant to section 39(2)(a)(i) of the IAA which reads as follows:

> *"(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;"* ***(Underlining ours)***

The third ground is that the Award is in conflict with the public policy of Mauritius pursuant to section 39(2)(b)(ii) of the IAA which reads as follows in that respect:

> *"(2) An arbitral award may be set aside by the Supreme Court only where –*
>
> *(b) the Court finds that –*
>
> *(i) …*
>
> *(ii) the award is in conflict with the public policy of Mauritius."*

The STC is moving that the provisional order of enforcement obtained by Betamax on 7 September 2017 be set aside on the same grounds as above. The STC contends in addition that there was no reason for Betamax to obtain the provisional order on an *ex parte*

basis and that Betamax had failed to make a full and frank disclosure before obtaining the provisional order.

Before turning to the merits of the grounds raised in support of both applications, we shall first deal with a preliminary issue which was raised by Counsel for Betamax.

At the outset of the hearing, Counsel for Betamax submitted that the STC's application to set aside the provisional order cannot be entertained by the Court inasmuch as it had not been made within the 14-day time limit stipulated under Rule 15(7)(a) of the Supreme Court (International Arbitration Claims) Rules 2013 ("the Rules").

After hearing arguments, we set aside the point raised by Counsel for Betamax.

The provisional order was made and served on STC on 7 September 2017. On 19 September 2017, STC lodged its application to set aside the provisional order with the Court's registry.

On 20 September 2017, the Chief Justice issued a circular ordering that the case be mentioned before Court on 22 September 2017, on which date the STC made its motion to set aside the provisional order.

Rule 15(7) of the Rules provides that:

> *"15(7) (a) Within 14 days after service of the enforcement claim motion and of the provisional order upon him … , a respondent may apply to set aside the provisional order.*
>
> *(b) The award shall not be enforced until after -*
>
> *(i) the end of the period referred to in paragraph (a); or*
> *(ii) any application made by the respondent within that period has been finally disposed of."*

It was submitted by Counsel for Betamax that, in accordance with the Rules, the time limit for making the application would expire on 21 September 2017 and the application to set aside the provisional order was accordingly time-barred when it was made beyond the 14-day time limit on 22 September 2017.

Rule 15(7)(a) enjoins the respondent to *"apply"* to set aside the provisional order within 14 days after service of the provisional order.

The first question which arises is when did STC, as respondent, apply to set aside the provisional order. Was it on 19 September 2017 when STC lodged its application with the Court's registry? Or was it when the motion was made in Court on 22 September 2017?

Quite significantly, Rule 15(7)(a) does not require the respondent to "move" the Court. Nor are there words in the Rules requiring that the application must necessarily be made in Court. We are unable to construe the word "*apply"* in Rule 15(7)(a) as importing a requirement that an application to set aside a provisional order would be considered valid and effective only when it is made in open Court. We are of the view that the effective date of such an application would be the date on which it is officially lodged with the Court's registry.

The cases of **Panday v The Judicial and Legal Service Commission [2007SCJ 54]** and **Duval v Seetaram & Anor** [1991 MR 61], relied upon by Counsel for Betamax in support of his submissions, relate to the procedure regarding motions in respect of civil cases which are called on fixed motion days, whether during term time or court vacation, before the Supreme Court. They would not find their application with regard to an application made pursuant to the IAA and the Rules made thereunder, which prescribe a specific and different procedure for any such application in relation to setting aside of an international arbitration award.

We consider therefore that the respondent was within the time limit of 14 days prescribed under Rule 15(7)(a) when it lodged its application with the Court's Registry on 19 September 2017.

Independently of the above, however, we consider that even if it were to be construed that the application was made outside the time limit on 22 September 2017, the respondent should still not be precluded from pursuing its application for the following reasons:

1. The delay would be minimal as the time limit would have been exceeded by one day only.
2. There is no indication of any consequential prejudice to Betamax which arises as a result of the matter being called before Court 1 day later.

3. The STC had done the needful to lodge the application with the Court's registry on 19 September 2017 which was within the time limit. The matter then came within the exclusive control of the Court administration which fixes, by taking into account the current Court's business and load of cases, the date on which the case should be called before a special Court consisting of a panel of 3 Designated Judges.
4. There is nothing in the Rules which indicates that (i) compliance with the time limit of 14 days must be construed as being imperative or obligatory; and (ii) any failure to comply with the time limit is fatal.

In the circumstances, the mandatory application of a 14-day time limit would not be warranted. It would amount to a manifestly unjustified curtailing of the respondent's right to the protection of the law and access to justice as enshrined in section 10 of the Constitution.

We shall now turn to the submissions of Counsel in relation to the 3 grounds in support of the application.

*Submissions*

*First Ground – The subject matter of the dispute is not capable of settlement by arbitration under Mauritius law - Breach of section 39(2)(b)(i) of the IAA*

(i) STC

It was submitted in support of the first ground by learned Counsel for STC that the arbitrability of the dispute is a matter to be determined by Mauritian law. By virtue of Article 2060 of the Mauritian Civil Code, parties cannot agree to refer to arbitration disputes which involve matters which are *"d'ordre public"*. The PPA is a public procurement law. Counsel argued that the CoA between the parties was in breach of the PPA which is a law *"d'ordre public"*. The PPA embodies the public policy of Mauritius with regard to the principles and procedures applicable to public procurement. The PPA explicitly prohibits the conclusion of major contracts by and with public bodies without the approval of the Central Procurement Board (CPB). Since the subject matter of the dispute raised matters relating to procurement process and alleged breaches of the PPA, the subject matter of the dispute would be *"d'ordre public"* and would not therefore be capable of settlement by arbitration under Mauritius law.

(ii) Betamax

It was submitted by learned Counsel for Betamax that the dispute between the parties was purely a commercial dispute which is capable of settlement under Mauritius Law. There was a strong presumption of arbitrability and there is nothing in the dispute resolution provisions of the CoA to rebut the presumption that the parties intended all disputes to be arbitrable.

Counsel submitted that the provisions of the Civil Code, including Article 2060 of the Civil Code, would not apply to an international arbitration. The provisions of the Civil Code apply only to domestic arbitration and domestic legislation has been specifically excluded by section 2C of the IAA **(*Supra*)**. The legislator**,** in enacting the IAA, clearly intended that there should be 2 distinct regimes governing domestic and international arbitrations. Counsel referred to the following extract from the *"Travaux Préparatoires"* to buttress his argument that the IAA:

> *"establishes two distinct and entirely separate regimes for domestic arbitration and for international arbitration. It covers only the latter. … Section 2C [formerly Section 3(10)] is of great importance, and is intended to disconnect the law of international arbitration in Mauritius (which is to be developed by reference to international standards as set out in Section 2B [formerly Section 3(9)] from domestic Mauritius law (and in particular from domestic Mauritius arbitration law)."* **["Travaux Préparatoires – The Mauritian International Arbitration Act 2008 – Texts and Materials (Attorney-General's Office, Government of Mauritius, 2016 p. 159)"]**

It was further submitted that even if Article 2060 were to apply, *"ordre public"* would not in any event be engaged. There is no question *"d'ordre public"* which arose for the consideration of the Arbitrator. The PPA is an economic policy law and the Arbitrator was not prevented by any concept *"d'ordre public"* from determining the civil consequences of a breach of the PPA, if any. It was thus submitted that the reasoning of the Arbitrator in concluding that the dispute is capable of settlement by arbitration, which is encapsulated in the following passage, is sound:

> *"Reading Article 2060 C.Civ as permitting arbitration where the tribunal is called upon only to determine the civil consequences of a possible breach of a public policy rule, or criminal act, is consistent with the development of international practice, approaches and jurisprudence. In the light of such developments it would be surprising indeed if the courts in Mauritius adopted a parochial and narrow interpretation of arbitrability which precluded*

*reference to international jurisprudence. The Tribunal is not persuaded that this is the approach in Mauritius."*

Counsel finally submitted on this score that the dispute between the parties was contractual in nature and the Arbitrator had jurisdiction, and could not be precluded from determining the dispute, pursuant to the parties' Arbitration Agreement under the CoA.

*The second Ground – The Arbitration Agreement is not valid under Mauritius law - Breach of section 39(2)(a)(i) of the IAA*

(i) STC

Counsel for STC, in support of his argument under the second ground, referred to Article 2061 of the Civil Code which provides that an arbitration agreement is valid unless otherwise provided by law. He submitted that the arbitration agreement in the CoA is not valid under Mauritius law because the CoA was in itself unlawful for having been entered into in breach of the PPA.

Counsel submitted that the CoA is illegal and it is a contract which has been entered into in breach of section 14 of the PPA. Since the STC was a *"public body"* and the CoA was a *"major contract"* within the meaning of the PPA, such a contract could only have been awarded with the approval of the CPB following the procurement process prescribed for such a contract under the PPA.

Furthermore, it was open to the parties to incorporate an arbitration clause only by virtue of Regulation 67 of the Public Procurement Regulations 2008 [GN 7 of 2008] ("the PPR 2008"). Since the CoA was in breach of the PPA and the Regulations made thereunder, the CoA as well as the arbitration clause contained therein were unlawful. The Arbitration Agreement was accordingly not valid under Mauritius law and the parties to the CoA could not therefore lawfully and validly refer their dispute to arbitration.

(ii) Betamax

The submissions of Counsel for Betamax in reply to the second ground may be summed up as follows:

1. The provisions of the Civil Code as well as any other domestic legislation are, as already submitted, inapplicable because the arbitration was an "international arbitration" solely within the exclusive purview of the IAA.

2. Even if article 2061 of the Civil Code were applicable, it would not apply to the arbitration clause in the CoA. Article 2061 must be read in conjunction with Article 1003 of the Mauritian Code of Civil Procedure which contains wide provisions covering any contractual situation in which parties have agreed to have recourse to arbitration as laid down in the case of **Dr C.M. Pillay & Ors v A.L.P Appavou & Anor** [2005 SCJ 286] which was followed in **Oxenham v France Maritime Agency Ltée** [2013 SCJ 205].

3. Regulation 67 of the PPR 2008 is irrelevant. Betamax does not rely on Regulation 67 in support of the validity of the Arbitration Agreement. The overriding stand taken by Betamax is that the PPA did not apply to the CoA. It follows therefore that any Regulations made under the PPA would not be applicable.

4. Since the PPA did not apply to the CoA, Betamax could rely on Article 1003 of the Code of Civil Procedure which caters for such an arbitration agreement as is contained in Clause 12.4 of the CoA.

5. The House of Lords, in **Fiona Trust & Holding Corporation & Ors v Privalov & Ors (2007) UKHL 40**, has laid down that *"the principle of separability enacted in section 7 of the Arbitration Act 1996, means that the invalidity or rescission of a main contract does not necessarily entail the invalidity or rescission of the arbitration agreement."*

In the Award, the Arbitrator determined that since the PPA did not apply to the CoA, there was no impediment to Betamax relying upon Article 1003 of the Code of Civil Procedure to justify the validity of the Arbitration Agreement contained in the CoA.

*The Third Ground – The Award is in conflict with the public policy of Mauritius - Breach of section 39(2)(b)(ii) of the Act*

(i) STC

The question as to whether the CoA is governed by the PPA in fact lies at the root of the arguments in support of the grounds raised on behalf of STC. Counsel for STC indeed submitted in relation to the third ground that it would be contrary to the public policy of Mauritius to recognise or enforce an award which seeks to enforce a contract which has been entered into in breach of the PPA. Counsel submitted that the Award seeks to enforce the terms of the CoA, which is an illegal contract, since it has been entered into in breach of the PPA and the PP Regulations 2009. The Award would thus be blatantly in conflict with the public policy of Mauritius and should not be given any legal recognition.

Counsel argued that to allow the enforcement of the award of a major contract, which is in flagrant breach of the mandatory requirements of the PPA for a public, transparent and competitive procurement process, would be in conflict with the public policy of Mauritius as contemplated by section 39(2)(b)(ii) of the IAA.

Counsel for STC went on to submit that giving effect to the terms of the CoA would be a violation of the public policy of Mauritius, however construed, and would only serve to cause harm to the State beside allowing Betamax to profit from its own egregious wrongdoing in entering into a major contract.

(ii) Betamax

Counsel for Betamax replied that this ground would only arise if the CoA is found to be in breach of the PPA. Counsel for Betamax submitted that if the Court concludes that there is no basis for interfering with the Arbitrator's decision that the CoA was not entered into in breach of the PPA, this ground of challenge to the Award must automatically fail. The question as to whether the recognition or enforcement of the Award would be contrary to the public policy of Mauritius would therefore only arise if it is established that the PPA applied to the CoA and that the CoA was awarded in breach of the PPA.

Counsel submitted that STC's argument is misconceived for the following reasons:

1. The Court's function on an application to set aside an award is to conduct an extrinsic review of the award in terms of its compliance with international public policy and not to determine whether the Tribunal's decision was wrong in law.
2. In any event, the Arbitral Tribunal's decision that the PPA did not apply to the CoA is correct.
3. In the eventuality that it is found that there is a breach of the PPA, it is the international public policy of Mauritius and not its domestic public policy which should be considered and it has not been established that there is any such breach.
4. In so far as there are competing public policy considerations, the public policy of promoting Mauritius as a jurisdiction of choice in the field of International Arbitration should prevail.

The primary submission of Betamax is that the PPA did not apply to the CoA which was entered into on 27 November 2009. Counsel submitted that the Arbitrator's conclusion that the PPA did not apply to the CoA is unimpeachable, as a result of which none of the grounds relied upon by the STC in respect of both applications would be tenable. Any alleged breach of any of the requirements of the PPA would be of no consequence to the validity and legality of the CoA, unless it is established that the PPA applied to the CoA on 27 November 2009.

*Does the PPA apply to the CoA?*

An examination of the issues raised under all the 3 grounds indicates that the question as to whether the CoA was entered in breach of the PPA underpins the 3 grounds for setting aside the Award upon which STC relies.

*Exempt organisation*

It has however been strongly argued by Betamax that the PPA did not apply to the CoA since the STC was at all material times an *"exempt organisation"* excluded from the application of the PPA in particular by virtue of the PP Regulations 2009 which came into operation on 2 July 2009.

The submission in support of that contention by Counsel for Betamax may be summed up as follows:

1. Section 2 of the PPA defines the expression "*public body*" as not including an *"exempt organisation"*. According to the same section, *"exempt organisation"* means *"a body which is, by regulations, excluded from the application of this Act"*.
2. STC became an *"exempt organisation"* excluded from the application of the PPA by the PP Regulations 2009 which came into force on 2 July 2009.
3. Regulation 3 of the said Regulations amended the definition of *"exempt organisation"* so that it read as follows:

   *"exempt organisation" means a public body which is excluded from the application of the Act in relation to contracts referred to in the First Schedule;"*

4. For that purpose, the STC is an *"exempt organisation"* whenever it enters into a type of contract as described in the First Schedule to the PP Regulations 2009 which read as follows:-

*"**FIRST SCHEDULE***

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

Counsel for Betamax submitted that, by virtue of the PP Regulations 2009, STC became an *"exempt organisation"* as *"a public body which is excluded from the application of the Act (PPA) in relation to contracts referred to in the First Schedule"*. The First Schedule excluded the STC from the application of the PPA in respect of contracts for *"goods purchased for resale, including services incidental to the purchase or distribution of such goods"*.

Counsel submitted that the CoA was entered into on 27 November 2009, i.e. after the entry into force of the PP Regulations 2009. In the light of the definition of *"goods"* and *"other services"* under section 2 of the PPA, the CoA was a contract for *"services incidental to the purchase or distribution of such goods"*, i.e. *"goods purchased for resale"* within the purview of the exemption prescribed under the First Schedule to the PP Regulations 2009.

Counsel argued that the fact that the CoA was primarily a contract for the provision of freight services and that it also involved the acquisition, construction, financing, management and operation of the vessel did not mean that it was not a contract for services incidental to the purchase or distribution of goods purchased for resale. The subject matter of the CoA

involved the provision of services which were incidental to the purchase and distribution in Mauritius of the petroleum products which were goods purchased for resale.

Counsel accordingly submitted that the STC was *"an exempt organisation"* by virtue of the above provisions of the PP Regulations 2009 as a result of which the CoA would not be governed by the PPA. Counsel added that the conclusive finding of the Arbitrator that the PPA is not applicable to the CoA is therefore unimpeachable.

It was submitted, on the other hand, by Counsel for STC that the PP Regulations 2009 did not apply since the CoA was not a contract for *"services incidental to the purchase or distribution of goods for resale"* and did not therefore fall within the exemption of an *"exempt organisation"* under the PP Regulations 2009.

It was submitted that, as a matter of ordinary and plain construction, the exemption under the First Schedule to the PP Regulations 2009 would only cover:

(a) a contract for the purchase by STC of goods intended for resale (without incidental services); and
(b) a contract for the purchase by STC of goods intended for resale where such purchase also involved the purchase of services incidental to the purchase or distribution of such goods.

It was argued that the exemption would apply only to a contract whose essential subject matter was the purchase of goods intended for resale. In the present case, the CoA did not make any purchase by STC from Betamax of any goods for resale. It was a contract for the provision of freight services by Betamax to STC involving the acquisition, construction, financing, management and operation of a tanker by Betamax. It was not a contract for the purchase or distribution of petroleum products. The Arbitrator was therefore wrong to assert that the *"CoA provided for the purchase and distribution of petroleum products"*. The CoA did not therefore fall within the exemption prescribed in the PP Regulations 2009.

It was further submitted that even if the said exemption were to be construed as including contracts for services only, where the services are *"incidental to"* the purchase or distribution of goods for resale, the CoA would still not be covered by the exemption. Section 2 of the PPA, in its definition of *"goods"*, includes *"services incidental to the supply of the goods such as freight and insurance"*. In the present case, the services relating to the

acquisition, construction, financing, management and operation of the vessel would not constitute a service contract *"incidental to"* the supply or purchase of petroleum products.

Counsel went on to submit that the PPA is a significant piece of legislation which plays an important role in protecting the interests of Mauritius. Exemptions to it should be read narrowly in order to secure its implementation. Section 14(4)(b) of the PPA provides that a public body shall not award a major contract unless the award has been approved by the CPB. Section 14(5) of the PPA provides that no person shall sign a major contract with a public body unless the award has been approved by the CPB. Failure by the parties to comply with these mandatory requirements of the PPA rendered the CoA and its Arbitration Agreement illegal and unenforceable.

Counsel for STC also submitted that the First Schedule to the PP Regulations 2009 is subject to the provisions of Regulation 2(A) inserted by the same Regulations. Regulation 2(A) provides that it is the Schedule to the Act (PPA) which should apply in respect of any contract exceeding Rs 100 million to which the STC is a party. Counsel thus argued that the exemption provided for under the First Schedule to the Regulations would not be applicable since the CoA is in respect of a contract exceeding Rs 100 million and could only be awarded in conformity with the PPA.

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. But before dealing with this question for exemption under the PP Regulations 2009, the first question which arises is whether Betamax may in the first place invoke for that purpose the application of those Regulations to the CoA. In other words, is it open to Betamax to avail itself of the PP Regulations 2009 in order to claim that STC, in relation to the CoA, is an *"exempt organisation"* in view of the provisions of Regulation 2A inserted by the same Regulations.

*Does Regulation 2A oust the application of the PP Regulations 2009?*

As it has been seen, it is the case for Betamax that the PPA did not apply to the CoA by virtue of the exemption laid down in the PP Regulations 2009, which makes of the STC an *"exempt organisation"* from the procurement process of the PPA in respect of the CoA.

But it has been submitted on behalf of STC that in view of Regulation 2A, the PP Regulations 2009 would not be applicable so that the CoA was governed only by the PPA and not by the PP Regulations 2009. Betamax is not as a result entitled to claim any exemption from the procurement process on the basis that STC was at the material time an *"exempt organisation"* pursuant to the PP Regulations 2009.

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

Before delving any further into the matter, it is appropriate at this juncture to carry out an overview of all the relevant legislation, both under the PPA and the Regulations made thereunder, which should be considered in connection with the present matter. Such an exercise is vital in order to identify with precision and certainty the legislative provisions which would be applicable to the contract entered into by the parties (the CoA) at the material time i.e. on 27 November 2009.

*Legislation*

**A. The Act [PPA]**

1. The Public Procurement Act 2006 which received the Presidential Assent on 27 December 2006, came into operation on 17 January 2008 by Proclamation No. 25 of 2007.

2. In the Schedule to the PPA 2006, the STC was listed as a public body which had to comply with the Act in respect of the following types of major contracts exceeding the corresponding prescribed amount:

| | |
|---|---|
| *"Goods, Civil Engineering Works & Capital Goods* | *Rs 25 million* |
| *Consultancy Services* | *Rs 5 million* |
| *Other Services* | *Rs 10 million"* |

3. The Public Procurement (Amendment of Schedule) (No. 2) Regulations 2008 [GN No. 198 of 2008], which amended the Schedule to the PPA 2006, came into operation with effect from 20 September 2008.

   (a) As a result of the above, the STC was removed from Part IV of the Schedule to the Act so that henceforth, under Part V of the Schedule to the Act, the STC was required to act in compliance with the PPA for the following types of contracts:

   *"All Contracts Rs 50 million"*

   (b) As a result, it became incumbent as from that date for the STC to proceed in conformity with the provisions of the PPA 2006 for all contracts exceeding Rs 50 million.

4. The PPA 2006 was then amended by section 35 of the Finance (Miscellaneous Provisions) Act 2009 [Act No. 14 of 2009] which came into force on 30 July 2009.

5. Section 35 of the Finance (Miscellaneous Provisions) Act 2009 (Act No. 14 of 2009) amended the Public Procurement Act 2006 in the following respects which are materially relevant to the present matter.

   (a) Section 35(a) amended the definition of *"public body"* in section 2 of the PPA 2006, by deleting its item(c), thereby removing *"an exempt organisation"* from the definition of *"public body"*.

   (b) Section 3(2) of the PPA was amended by inserting after the words *"public body"* the words *",other than an exempt organisation"*. Section 3(2) of the PPA thus sets out the scope of application of the Act by providing that *"This Act applies to any other procurement effected by a public body, other than an exempt organisation".*

   (c) Section 35(h) repealed the existing Schedule to the PPA and replaced it by a new Schedule. As a result, by virtue of Part V of this amended Schedule (Fourth Schedule to Act No. 14 of 2009), the STC was bound as a public body to act in conformity with the PPA in respect of the following types of major contracts exceeding the corresponding prescribed amount:

| "***Column 1*** | ***Column 2*** | ***Column 3*** |
|---|---|---|
| … … | | |
| State Trading Corporation | *Goods, Civil Engineering Works & Capital Goods* | *Rs100million* |
| | *Consultancy Services* | *Rs100million* |
| | *Other Services* | *Rs100million"* |

The above provisions of the PPA, including the amended Schedule to the Act, came into force on 30 July 2009 [Govt. Gazette No. 69 of 30 July 2009] as a result of which they were applicable to the CoA which is dated 27 November 2009.

6. The following definitions which are found in section 2 of the PPA are pertinent to the determination of the issues raised in the present matter:

> *"public body" –*
> *(a) means any Ministry or the Government department;*
> *(b) includes –*
> *(i) a local authority;*
> *(ii) a parastatal body; and*
> *(iii) such other bodies as may be specified in the Schedule.*
>
> *"exempt organisation" means a body which is, by regulations, excluded from the application of this Act;*
>
> *"major contract" means a contract for the procurement of goods or services or the execution of works –*
>
> *(a) to which a public body is or proposes to be a party; and*
> *(b) the estimate of the fair and reasonable value of which exceeds the prescribed amount;*
>
> *"prescribed amount" means the amount specified in column 3 of the Schedule corresponding to the public body specified in column 1 in relation to the type of contract specified in column 2 of that Schedule;*
>
> *"procurement" means the acquisition by a public body, by purchase, lease or any other contractual means, of goods, works, or consultancy or other services;*
>
> *"goods" means 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;* ***(Underlining Ours)***
>
> *"other services" means any services other than consultancy services or services incidental to the supply of goods or execution of works;"* ***(Underlining Ours)***

## B. The Regulations

The Public Procurement Regulations 2008 [GN No. 7 of 2008] came into operation on 17 January 2008, i.e. at the same time as the PPA 2006. They included the following definition of an *"exempt organisation*":

> *"exempt organisation" means a public body, as specified in the First Schedule, which is excluded from the application of the Act;"*

The First Schedule to these Regulations prescribed at that time only one exempt organisation, i.e. the Independent Commission Against Corruption ('ICAC').

The above Regulations – The Public Procurement Regulations 2008 – were amended by the PP Regulations 2009 (Supra) which came into operation on 2 July 2009 by their publication in Government Gazette No. 59 of 2009.

The PP Regulations 2009 bring in a new definition of *"exempt organisation*" which now means *"a public body which is excluded from the application of the Act in relation to contracts referred to in the First Schedule"*.

It is essentially upon these Regulations, the PP Regulations 2009, that Betamax is relying in support of its contention that STC was an *"exempt organisation"* when it entered into the contract (CoA) with Betamax on 27 November 2009.

*Did the Regulations (PP Regulations 2009) make of the STC "an exempt organisation" which excluded the STC from the application of the Act (PPA)?*

Before attempting any answer to the question as to whether the STC is an *"exempt organisation"* under the PP Regulations 2009, it would have to be decided in the first place whether the PP Regulations 2009 were at all applicable in view of Regulation 2A inserted by the same Regulations, which retained the application of the Act (PPA) with respect to certain types of contracts.

Regulation 2A reads as follows:

> *"**2A. Application of Act to exempt organisations***
>
> *Nothing in these regulations shall be construed as excluding the application of the Act to a public body referred to in the First Schedule to these regulations and the Schedule to the 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 Act*." **(emphasis added)**

What Regulation 2A is plainly stating is that the PP Regulations 2009, which provide for *"exempt organisations"*, cannot operate to exclude the application of the PPA in respect of a procurement contract which is specified in column 2 of the Schedule to the PPA.

In other words, there can be no exemption from the procurement process of the PPA 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 PPA. The CoA would then be subject to the application of the PPA and the procurement process prescribed therein.

The interpretation and scope of application of Regulation 2A does not present any difficulty. The language used plainly conveys that PP Regulations 2009 cannot be construed, and thus cannot operate, to exclude the application of the PPA to the CoA if the CoA falls within the definition of the type of contract specified in column 2 of the Schedule to the PPA.

The plain and ordinary meaning of the emphatic opening words – *"Nothing in these Regulations shall be construed as excluding the application of the Act …"* means that the application of PPR Regulations 2009 would be unquestionably ousted by the application of the Act (PPA) where the State Trading Corporation as a public body intends to be a party to the type of contract specified in column 2 of the Schedule to the Act (PPA).

For the avoidance of any doubt which may subsist as to the application of Regulation 2A to such a contract, it is apposite to note:

1. Regulation 2A is found in the same PP Regulations 2009 which in its Regulation 3 and its Schedule to the Regulations provide for an *"exempt organisation"*, i.e an organisation exempt from the application of the PPA.
2. Regulation 2A is inserted as Regulation 4 immediately after Regulation 3, under the heading "***Application of Act to exempt organisations***".
3. A plain reading of Regulation 2A indicates that the sole objective it seeks to achieve is to exclude from "*exempt organisation*", *"a public body referred to in the First Schedule to these regulations"* and *"the Schedule to the Act*" (which includes in both instances the STC) subject to only 2 conditions, i.e. *"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 Act".*
4. It is the Act (PPA) and not the PP Regulations 2009 which would apply where the STC as a public body intends to be a party to the type of contract described in column 2 of the Schedule to the PPA.

It emerges quite ineluctably therefore that the key question for the applicability of the PPA to the CoA is whether the CoA did on 27 November 2009 fall within the ambit of a procurement contract as specified in column 2 of the Schedule to the PPA.

For that purpose, we shall reproduce the relevant part under Part V of the Schedule to the PPA, which specifies the types of contracts by the STC which are subjected to the procurement process under the PPA.

*PART V*

| *Column 1*<br>***Public body*** | *Column 2*<br>***Type of contract*** | *Column 3*<br>***Prescribed amount*** |
|---|---|---|
| *…..…*<br>*……..*<br>*State Trading Corporation* | *Goods, Civil Engineering Works &Capital Goods* | *Rs 100 million* |
| | *Consultancy Services* | *Rs 100 million* |
| | *Other Services* | *Rs 100 million* |

It has been seen that, as at 27 November 2009, Regulation 2A excluded the application of PP Regulations 2009 to any procurement contract specified in column 2 of the Schedule to the PPA 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 PPA and its procurement process.

The definition of *"other services"* under section 2 of the PPA ***(Supra)*** means "*any services other than consultancy services or services incidental to the supply of goods …"*

> *"Goods*" is very broadly defined and means *"objects of every kind and description, including commodities, raw materials, manufactured products and equipment … , as well as services incidental to the supply of the goods such as freight and insurance*" **(emphasis added)**

"*Goods"* for that purpose encompasses not only physical objects of any kind or description but also "*services"* which are *"incidental to the supply of the goods such as freight and insurance".*

"*Freight"* as a service incidental to the supply of the goods therefore falls within the definition of "*goods"* for the purposes of the PPA. It is significant to note the following:

1. Goods are not limited only to physical goods but have been extended to cover services as described.
2. Freight is further specifically identified by the legislator as being one of the type of services which should be covered. *"Freight"* and "*insurance*" have in fact been expressly included as "*services incidental to the supply of the goods".* The services incidental to the supply of goods however are not limited to freight and insurance only. They are merely illustrative of the services that are incidental to the supply of the goods. They are not limitative and do not limit the incidental services only to '*freight'* and '*insurance'*. But the legislator has expressly taken the pain of specifying that "*freight"* and "*insurance"* are instances of incidental services to the supply of goods within the definition and ambit of *"goods"* under the PPA.
3. By resorting to the use of the words *"as well as"*, it is being unequivocally expressed by the legislator that "*goods"* are not meant to be limited only to physical goods as described in the first part of the definition but would also extend to a contract for any "*services"* which are incidental to the supply of the goods as described in the definition of *"goods"* and which would unquestionably apply to such goods as petroleum products.

The subject matter of the CoA which is essentially in respect of freight as a service incidental to the supply of petroleum products therefore falls directly and squarely within the definition of "*goods"* under the PPA. As a result, "*goods"* would, for the purposes of column 2 of the Schedule to the PPA, extend and apply in the present matter to a contract for the acquisition of freight which exceeds 100 million rupees. That should have been enough to bring the CoA within the ambit of the PPA and consequently subject the CoA to the legal requirements prescribed under the PPA for the award of such a contract.

But there is more. Independently of the above, the net is cast wide in respect of services in view of the manner in which services are encompassed both by "*goods"* and "*other services*" under column 2 of the Schedule to the PPA. If the services are in respect of "*services incidental to the supply of the goods"*, it would be captured by the definition of "*goods".* If the contract for services is construed to be in respect of *"services other than for services incidental to the supply of goods",* it would still not escape the specifications of the type of contract contemplated in column 2, as it would be covered by "*other services"* under column 2. If therefore, for any reason, "*freight*" or any other services which may be included in the contract, are considered or construed to be outside the ambit of "*services incidental to the supply of the goods"* under the definition of "*goods"*, they would be inextricably caught by

the residual definition of "*other services"* which precisely captures "*any services other than consultancy services or services incidental to the supply of goods …".*

In other words, the definition of "*goods" and "other services"*, which are both listed under column 2 of the Schedule to the PPA, would serve to capture a contract for "*goods"* as well as for any services, other than consultancy services, whether they are incidental to the supply of the goods or not. The only condition being that the value of the contract must exceed 100 million rupees in respect of either "*goods"* or "*other services"* respectively.

It has thus been unequivocally established that the CoA is a type of contract which is specified in column 2 of the Schedule to the PPA. It is apposite to recall the stand of Betamax itself with regard to the CoA as being a "contract for services*"* in the course of submissions which were made albeit in relation to the exemption under the Schedule to the Regulations (PP Regulations 2009) –

> *"145. First, it must be the case that the acquisition, construction, financing, management and operation of the Red Eagle involved the provision of services because otherwise they would fall outside the expression "Other Services" in the PPA. This was accepted by STC, which expressly and correctly pleaded that the CoA was a contract for services."*

As a result, by virtue of the clear provisions of Regulation 2A of the PP Regulations 2009, the STC could not be an *"exempt organisation"* which would exclude the application of the PPA to the award of the CoA. The parties were therefore legally bound to act in conformity with the requirements laid down in the PPA in respect of a procurement contract which was of a type which fell under column 2 of the Schedule to the PPA and which exceeded the prescribed amount of 100 million rupees.

We shall also examine the analysis and finding of the Arbitrator on that issue which is found at para. 159 to para. 161 of his Award and which are reproduced *verbatim* hereunder:

> ***"D Was the exclusion nevertheless not available to Betamax under Regulation 2A?***
>
> *159. In its rejoinder, STC alleges in the alternative that even if the CoA falls within the exemption, it is nevertheless captured by regulation 2A of the Regulations, which reads:*

*"Nothing in these Regulations shall be construed as excluding the application of the [PPA to a public body referred to in the First Schedule to these regulations and the Schedule to the [PPA] in respect of a procurement contract to which the public body intends to be a party and which is specified in column 2 of the Schedule to the [PPA]."*

*160. Column 2 of Part V (the relevant part which applies to STC) of the Schedule to the PPA (as amended by section 35(h) of the Finance (Miscellaneous Provisions) Act 2009) refers to contracts for "Goods, Civil Engineering Works and Capital Goods, Consultancy Services and Other Services" with a prescribed amount of MUR 100 million.*

*161. In order for regulation 2A to apply, the CoA must therefore be a contract for "Other Services". As the Tribunal has found that the CoA is a contract for "Goods purchased for resale, including services incidental to the purchase or distribution of such goods" within the exclusion, the CoA is not a contract for "Other services". To the extent that the STC continues to rely on this argument, it is therefore rejected."*

That is all that the Arbitrator had to say in that connection. The Arbitrator erred in deciding the application of Regulation 2A by considering solely whether the CoA was a contract for "*other services"* or not. The finding of the Arbitrator is flawed since he utterly failed to take into account and completely ignored the definition of "*goods*" which encompasses the subject matter of the CoA as already set out earlier in this judgment. The arbitrator failed in particular to give any consideration to the definition of "*goods"* being extended to cover specifically "*freight"* which was the subject matter of the CoA. He also failed to consider whether the subject matter of the CoA would fall within the purview and definition of *"other services"* under column 2 of the Schedule to the Act.

Betamax came up with an ingenious argument to counter the submission of STC with regard to the application of Regulation 2A to the CoA. Counsel for Betamax made the following submission in that respect:

"*As already stated, Regulation 2A of the Public Procurement Regulations 2008 was inserted by the Public Procurement (Amendment No. 2) Regulations 2009 (by Regulation 4). These are the very same Regulations which (by Regulation 5) brought into effect the Schedule thereto containing the relevant exclusion. It is inconceivable, therefore, that Regulation 2A of the Public Procurement Regulations 2008 is in some way to be construed as overriding the relevant exclusion in the Schedule to the Public Procurement (Amendment No. 2) Regulations 2009. The provisions must be read together*

*and effect given to both. The true explanation for Regulation 2A is that it is intended to be a saving provision which makes clear that the PPA would continue to apply to the relevant public bodies in respect of procurement contracts specified in the Schedule to the PPA intended to be entered into by them, other than the contracts listed in the First Schedule to the Public Procurement Regulations 2008. Properly construed in that way the two sets of provisions sit perfectly together."* **(Underlining Ours)**

That argument is misconceived for a number of reasons. There is indeed no doubt that Regulation 2A is intended to be a saving provision. But it is a saving provision which saves the application of the Act and not the application of the PP Regulations 2009. Regulation 2A in fact constitutes a saving provision which ensures that the application of the Act prevails over anything contained in the PP Regulations 2009 with regard to exemption in respect of a column 2 contract as specified in the Schedule to the Act. Regulation 2A is drafted in imperative terms and it applies to the whole of the PP Regulations 2009, including those provisions which cater for a public body to be exempted from the application of the Act. Its plain and literal meaning is that no part of the Regulations shall or may be invoked to exclude the application of the Act (PPA) where a public body like the STC intends to be a party to a column 2 procurement contract.

Regulation 2A is drafted in clear, straightforward and unequivocal terms which present no ambiguity for its application. There is no reason to depart from its ordinary and literal meaning. There is no room to resort to any speculative interpretation which would import into Regulation 2A anything which it does not say.

The PP Regulations 2009 came into operation by GN 68 of 2009 on 2 July 2009. When the legislator amended the Schedule to the Act on 30 July 2009 [section 35(h) of the Finance (Miscellaneous Provisions) Act 2009 (supra)] in order to specify in column 2 the types of contracts to which the Act must apply, the legislator must be taken to have been fully aware of the PP Regulations 2009 and the saving provisions contained in their Regulation 2A securing the application of the Act to the types of contracts inserted in column 2. But the legislator chose to leave Regulation 2A untouched so that Regulation 2A continued *en toute connaissance de cause* to apply to any column 2 contract for the prescribed amount. This is yet another clear indication, if any is required, that it was intended by the legislator that the provisions of the Act must continue to prevail over those of the PP Regulations 2009 in respect of any column 2 procurement contract to which a public body like the STC intended to be a party.

Regulation 2A indeed does not place on the same footing the application of the provisions of the Schedule to the Act (PPA) and the Schedule to the PP Regulations 2009 in respect of a procurement contract to which the STC as a public body intended to be a party.

The first test is simply whether the contract is one which falls within the specifications of column 2 of the Schedule to the PPA.

If the answer is in the affirmative, that is the end of the matter as the PPA and its procurement process applies to the contract. The PP Regulations 2009 and its provisions with regard to *"exempt organisations"* are purely and simply excluded by the operation of Regulation 2A where the contract falls within column 2 of the Schedule to the PPA and meets the prescribed amount.

If the answer is in the negative, i.e. the contract is not of the type specified in column 2 of the Schedule to the Act, it is only then that a further test would have to be applied in order to determine whether it satisfies the "*exempt organisation"* criteria with regard to the type of contract as laid down in the First Schedule to the PP Regulations 2009.

The 2 sets of provisions do not therefore sit perfectly together as suggested in the argument of Counsel for Betamax. Regulation 2A in fact emphatically provides that there cannot be any exemption pursuant to the PP Regulations 2009, which are expressly excluded where there is an intended contract by STC which is of the type specified in column 2 of the PPA.

On the other hand, the provisions of the PPA, which enjoin a public body like the STC to be bound by the procurement process laid down in the PPA in respect of an intended column 2 contract within the purview of the Schedule to the PPA, are free-standing provisions. Unlike the PP Regulations 2009, they are not subject to any constraint imposed by any reference or cross reference to any other legislation.

This is not the case for the 'exemption', which is being claimed pursuant to the PP Regulations 2009 coupled with section 3(2) of the PPA, which is shackled by its own Regulation 2A. 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 PPA. 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.

The CoA was accordingly a contract which was subject to the legal requirements of the PPA in conformity with section 3(2) of the PPA which specifically provides that "*this Act shall apply to any other procurement effected by a public body, other than an exempt organisation".*

*Non-compliance of the CoA with the PPA*

It can hardly be disputed that the CoA failed to comply with the requirements of the PPA.

It is not in dispute that, for the purposes of the PPA –

(1) the STC is a "*public body*";
(2) the CoA was a "*major contract*"; a major contract is defined, under section 2 of the PPA, as a contract for the procurement of goods or services or the execution of works to which a public body is, or proposes to be, a party and the estimate of the fair and reasonable value of which, as in the present matter, exceeds Rs 100 million; and
(3) the CoA was not awarded following the procurement process and the approval of the Central Procurement Board as laid down in the PPA.

It is in fact not in dispute that there had been no compliance with section 14(3) of the PPA which required that '*the Central Procurement Board shall approve the award of every major contract*'.

There has also been a failure to comply with the provisions of both sections 14(4) and 14(5) of the PPA which provide as follows:

*"(4) No public body shall –*

*(a) advertise, invite, solicit or call for bids in respect of a major contract unless authorised by the Board; or*
*(b) award a major contract unless the award has been approved by the Board.*

*(5) No person shall sign a major contract with a public body unless the award has been approved by the Board.*"

The CoA was to all intents and purposes a contract which had been illegally awarded in breach of the PPA.

*Public Policy*

Counsel for Betamax went on to submit that even if the CoA is found to be in breach of the PPA for any of the reasons invoked by STC, the Court should still not grant the application to set aside the award pursuant to section 39 of the IAA. Counsel argued that it would not be contrary to the public policy of Mauritius to recognise or enforce the CoA although it could have been entered into in breach of the PPA.

Counsel for Betamax argued, by reference in particular to French jurisprudence, that the prevalent trend in international arbitration has developed a very restrictive approach to public policy control. The Court's function, on an application to set aside the award, is essentially limited to conducting an extrinsic review of the award in terms of its compliance with international public policy and not to determine whether the Tribunal's decision was wrong in law. Counsel for Betamax cited the following extract from **Redfern & Hunter on International Arbitration (6th edition 2015)** at para. 11.74:

> "*The national court at the place of enforcement thus has a limited role. Its function is not to decide whether or not the award is correct, as a matter of fact and law…*"

Counsel for Betamax also quoted the following passage from the **UNCITRAL 2012 Digest of Case Law on the Model law on International Commercial Arbitration** which considers at para. 136 the application of article 34(2)(b)(ii) of the Amended Model Law, the provisions of which correspond to section 39(2)(b)(ii) of the Mauritian IAA:

> "*It was generally acknowledged in court decisions dealing with substantive public policy that article 34(2)(b)(ii) does not permit a review of the merits of a case. The awards should not be set aside in order to correct a possible breach of equity or wrong decision, except where the decision was incompatible with a fundamental aspect of justice."*

Counsel for Betamax submitted that it is the international public policy of Mauritius and not its domestic public policy which is relevant for determining whether the recognition or enforcement of the Award would be contrary to the public policy of Mauritius within the meaning of section 39(2)(b)(ii) of the IAA.

Counsel sought reliance on what the Supreme Court of Mauritius stated in **Cruz City 1 Mauritius Holdings v Unitech Ltd & Anor** [2014 SCJ 100]:

> "*It is public policy in the international context that will matter and not the public policy that would normally apply when challenging a domestic award.*"

The Supreme Court also stated by reference to **Redfern and Hunter on International Arbitration (*Supra)*** and the **Droit de l'arbitrage Interne et International** by **Christophe Seraglini and Jerome Ortscheidt** that the international public policy of a State is "*that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award*".

Counsel added that in so far as there are 2 conflicting aspects of public policy of Mauritius which are involved, namely the promotion of the use of Mauritius as a jurisdiction of choice in the field of international arbitration, and the protective mechanisms to be followed under the Mauritian procurement laws in respect of major procurement contracts, the former should prevail over the latter.

Counsel for STC, on the other hand, submitted that the Award, which seeks to enforce a contract which has violated the procurement laws of Mauritius, is plainly in conflict with the public policy of Mauritius and cannot be legally enforced in Mauritius pursuant to section 39(2)(b)(ii) of the IAA.

Counsel for STC carried out an extensive review of the PPA to buttress his argument that the PPA encapsulates the public policy of Mauritius in so far as it regulates the procurement process for any major contract awarded by a public body. This is essential to preserve competition, to prevent and minimize any possible fraudulent and corrupt practice, to protect public funds and to uphold the high standards of integrity and transparency within the public procurement process.

Counsel submitted that section 39(2)(b)(ii) of the IAA expressly refers to the "*public policy of Mauritius"*. The starting point for determining public policy must therefore be the public policy of Mauritius, not international trends or views of what "*public policy*" entails. Counsel added that the draftsmen of the Amended Model Law deliberately decided not to incorporate the concept of international policy into Article 34 of the Amended Model Law and to leave it to the supervisory Courts of each State to determine the appropriate scope of the State's public policy.

Counsel argued that there are compelling reasons that it would be in breach of the public policy of Mauritius that the CoA, which has been entered in violation of the PPA, should be given any legal recognition. Giving effect to the terms of the CoA, by ordering STC to pay damages to Betamax, would only serve to allow Betamax to benefit from its own wrongdoing in entering into a major contract in flagrant breach of the mandatory requirements of the national procurement laws.

It was finally submitted that even if international trend is to be taken in consideration, there is an established body of authority in many jurisdictions that laws analogous to public procurement laws (e.g competition law) constitute public policy and a breach thereof would provide a basis for annulling an arbitral award. **[Eco Swiss China Time Ltd v Benetton International NV [1999] Case No. C-126/97 (ECJ) and Arbitration Act 1996 by Robert Merkin and Louis Flannery 5th ed. 2014, p31].**

*Public policy - a restrictive approach*

The laws of many States, reflecting the policy of the New York Convention, have limited provisions for challenging an arbitral award and have what is generally referred to as "*a pro-enforcement bias".*

For States like Mauritius, which have adopted the Amended Model Law, an arbitral award may be set aside if the national court finds that the award is in conflict with the public policy of that State. Section 39(2)(b)(ii) of the IAA does not refer to international public policy but expressly provides that the arbitral award may be set aside where the Court finds that "*the award is in conflict with the public policy of Mauritius" **(Underlining ours**).* It is clear therefore that the public policy is the public policy of the enforcing State. Each State has its own concept of what is required by its public policy for that purpose. This Court has, in **Cruz City (*Supra*)**, highlighted the role of this Court in that connection by stating "*very importantly, by virtue of the public policy exception provided in the law governing arbitration and*

*enforcement of the award it is obvious that this Court has the power to exercise ultimate control over the arbitral process where it is considered to be against the public policy of this country".*

*France*

A narrower concept of "international public policy" has been adopted by some States. In France, for instance, it has been enacted in Article 1514 of the French Code of Civil Procedure (as amended) and Article 1520(5) of the French Code of Civil Procedure that an international arbitral award may be set aside in France "*if the recognition or enforcement of the award is contrary to international public policy".*

The restrictive approach adopted by the French Courts is amply reflected in the case of **SNF SAS v Cytec industries BV (Holland), Cour de Cassation, Ch. Civ. 1ère, 4 Juin 2008**, in which the French Court held that it would refuse enforcement of an arbitral award based on public policy only where it showed obvious signs of breaking public policy, saying that the breach should be '*flagrant, actual and concrete'*.

Portugal has a similar provision as the French Code of Civil Procedure which has been enacted in Article 1096(f) of its Code of Civil Procedure.

*United States*

Although it is a well-established principle in the United States that an exception exists for setting aside awards on public policy grounds, public policy as a basis for vacating an award is quite narrow **[United Paperworkers Int'l Union v Misco Inc., 484 US, 29,42 (U.S, S. Ct, 1987)] – and Grace & Co. v Local Union 759,461 U.S 757, 766 (U.S S. Ct 1983)].**

Public policy can generally be invoked only where recognition of a decision would undermine the public interest, the public confidence in the administration of the law or security for individual rights or "*be repugnant to fundamental notions of what is decent and just in the State where enforcement is sought"* **[Tahan v Hodgson, 662 F.2d 862, 864 (D.C. Cir 1981)]**.

An award will only be held to violate public policy in the United States if it produces a result that the parties to the contract could not lawfully have agreed upon directly **[E. Assoc. Coal Corp. v United Mine Workers of Am 531 U.S 57, 62-63, 67 (US. S. Ct 2000)].**

*Switzerland*

According to the Swiss Federal Supreme Court, public policy denotes fundamental legal principles, a departure from which would be incompatible with the legal and economic system **[Ozmak Makina Ve Elektrik Anayi AS v Swiss Voest Alpine Industrieanlagenbau GmBH - Case No. 4p-143/2001 20 ASA Bulletin 311]**. The Swiss Federal Tribunal in a Judgment of 6 January 2010 DFT 4A – 260/2009 at para. 3.1, states that an award may be set aside on public policy grounds,

> "*if it disregards the essential and broadly recognized values which, according to Swiss concepts, should be the basis of any legal order."*

*Germany*

Similarly, in Germany it has been held that an award will violate public policy if it conflicts with fundamental notions of justice or conflicts with principles that are fundamental national or economic values **[Karlsruhe Court of Appeal Oberlandesgericht Karlsruhe, 10Sch 04/01 14 September 2001].**

German Courts have indeed decided that it is not sufficient that the award infringes mandatory provisions, but only such mandatory provisions which are essential for the society as a whole and are part of public policy, whether national or international. **[Bundesgerichtshof, Germany III ZB 17/08 30 October 2008].**

*India*

In **Renusagar Power Company Limited v General Electric Company AIR 1994 SC 860**, the Supreme Court of India, while considering an application to resist enforcement of a foreign award on the ground of public policy, ruled that the term should be narrowly construed to refer to "*(i) the fundamental policy of India, (ii) interests of India, or (iii) justice and morality."*

The Indian Supreme Court considered, in **ONGC v Saw Pipes Ltd (2003) SC 2629** that an award is contrary to public policy if it is "*patently illegal".* The same principle was applied by the Supreme Court in the case of **Venture Global Engineering v Satyam Computer Services Limited, AIR 2008 SC 1061** to set aside a foreign award. But in **Fittydent International GmbH v Brawn Laboratories Ltd, C.S. (O.S) 2447/2000** and I.A. 12332/2008 and **Penn Raquet v Mayor International, 2011 (122) DRJ 117,** the Delhi High Court adopted the narrow construction of public policy with respect to foreign arbitral awards as enunciated in **Renusagar (*Supra*)**.

*Canada*

In Canada, the Supreme Court has ruled that it is not every violation of a mandatory provision which amounts to a violation of public policy. Only provisions of law that are fundamental to the legal order or basic morality of a State are grounds for a public policy violation. [**Desputeaux v Editions Chouette (1987) Inc. Supreme Court, Canada [2003] 1 S.C.R. 178 Smart Sys. Techs. Inc. v Domotique Secant [2008] Q.J. No. 1782 (Québec Court of Appeal].** The Ontario Superior Court of Justice held that, for an award to offend public policy it "…*must fundamentally offend the most basic and explicit principles of justice and fairness … ...*"

*Singapore*

In Singapore, an award may be set aside, based on the illegality of the parties' underlying contract, if it would "*shock the conscience"* or is "*clearly injurious to public good or (---) wholly offensive to the ordinary reasonable and fully informed member of the public, or where it violates the forum's most basic notion of morality and justice".* **[PT Asuransi Jasa Indonesia (Persero) v Dexia Bank S.A, Court of Appeal, Singapore, 1 December 2006, [2006] SGCA 41 para. 59]** and **[Rockeby Biomed Ltd v Alpha Advisory Pte Ltd, [2011] SGHC 1155, 16].**

The High Court of Singapore in **AJT v AJU [2010] SGHC 201** explained that the enforcement of an award may be contrary to public policy by virtue of the illegality of the underlying contract:

> "*145. Awards enforcing contracts which are illegal under the applicable law, or otherwise leading to illegal actions, may be contrary to public policy. According to a court in Singapore, a party trying to rely on such an illegality, where the latter has been rejected by the arbitral tribunal, has to furnish the proofs that the underlying contract was illegal, and that the "error was of such a nature that enforcement of the award" would be "clearly injurious to the public good" or would contravene "fundamental notions and principles of justice."*

*Hungary*

The Hungarian Supreme Court held that public policy involves a value judgment of the law in general and of "*changes in content both in time and space, always depending on respective social order and political-moral sentiment".* **[Supreme Court, Hungary, BH 2003, 127 at 5c].**

*Fundamental legal order*

An overview of the above decisions indicates that many leading jurisdictions have repeatedly underscored the narrow character of public policy as a basis for the setting aside of an international arbitral award. The notion of public policy is more restricted when applied against enforcement of international arbitration awards. The narrower category of international public policy as opposed to purely domestic policy is confined to the violation of fundamental concepts of the legal order in the State concerned. Public policy as a ground for setting aside an international arbitration award has been generally limited to cases of clear violations of mandatory legal rules which are fundamental to the legal order of the State.

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.

Learned Counsel for Betamax in the course of his final submissions accepted the formulation implicit in the submissions of Counsel for STC that the relevant public policy has to be looked at narrowly and that it is a limited concept which refers to a sufficiently fundamental law whose violation can justify refusal. But he went on to argue that even if assuming there had been any infringement of the PPA in the present matter, it does not constitute a sufficient violation of Mauritius public policy to justify the setting aside of the Award.

It is strikingly evident from an examination of the provisions of the PPA that it is a public procurement law with very stringent conditions designed to achieve the highest standards of integrity, transparence and fairness in the public procurement process of Mauritius. The PPA regulates the conduct and functions of the public institutions involved in that process. These include the Procurement Policy office [sections 4, 6 and 7] and the Central Procurement Board [sections 8, 11, 12 and 14]. The PPA prescribes, in its part IV, detailed provisions of the procurement methods which are meant to ensure the implementation of an open and transparent bidding process for the award of major public contracts [sections 15 and 16].

The PPA does not only promote free and fair competition for the efficient use of public funds in the award of major public contracts. The PPA also contains detailed provisions to secure the integrity of the bidding process which is vital to thwart any risk of fraudulent and corrupt practice in the award of major contracts funded by public funds. The PPA criminalises any act of undue influence and any person who fails to comply with the Act commits an offence which is punishable by a fine not exceeding 50,000 rupees and to penal servitude for a term not exceeding 8 years [section 60].

The PPA severely limits exclusion from application of the Act. There are only exceptional circumstances which may exclude the transparent and open procurement process prescribed under the PPA. These are clearly spelt out for instance in sections 3, 14, 19, 21 and 25 of the PPA. In order to ensure and to maintain the integrity and transparency of the procurement process, the Act regulates for that purpose not only the functions of the institutions involved and the conduct of the public officials but also the conduct of bidders and suppliers involved in the procurement process [sections 50, 51, 52, 53 and 55]. Such provisions of the PPA no doubt prescribe in the public interest the public policy of Mauritius with regard to the procurement process as well as the conduct of public institutions and officials involved in the procurement process.

The scheme of the procurement legislation under the PPA leaves no doubt as to the fact that the PPA reflects the public policy of Mauritius with regard to the public procurement process to be adopted for the award of a major contract. The PPA thus provides the legislative framework for a fair, transparent and competitive procurement system in order:

(i) to translate into effective reality the fundamental good governance principles in an area of public finance and administration which may be prone to undue influence and corruption;
(ii) to protect and ensure in the public interest the efficient use of public funds;
(iii) to reflect the adoption of international best practices which are vital for instilling confidence in the system, both nationally and internationally.

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

As indicated earlier in this judgment, it is incumbent upon this Court whilst exercising jurisdiction pursuant to section 39(2)(b) of the IAA 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.

In **AJU v AJT [2011] 4 SLR 739**, the Singapore Court of Appeal highlighted the Court's responsibility in determining what constitutes public policy and also in determining whether or not the concluding agreement is illegal and the Award is tainted with illegality under Singapore law. The Court stated the following in that connection:

> *"Be that as it may, 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, as pointed out at [19] above, 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 CA refused to enforce the Beth Din's award as it was tainted with illegality."*

The issue of illegality of the underlying contract was specifically considered by the English Court of Appeal in **Soleimany v Soleimany [1994] Q.B 785, 800**. The Court made the following observation on setting aside an award seeking to enforce a contract in violation of Iranian laws:

> *"… Where public policy is involved, the interposition of an arbitration award does not insulate the successful party's claim from the illegality which gave*

*rise to it …. The reason, in our judgment, is plain enough. The Court declines to enforce an illegal contract, … not for the sake of the defendant, nor (if it comes to the point) for the sake of the plaintiff. The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it*."
**(Underlining Ours)**

The CoA was a contract in respect of the transportation of petroleum products, which is a vital commodity for Mauritius which has to rely for the whole of its supply by way of importation from abroad. The CoA involves the obligation to pay a huge amount of money emanating from public funds with a commitment with regard to the whole of the freight spanning over a period of 15 years.

The award of the CoA entitled Betamax –

(i) to a freight rate fixed at USD 17.19 per metric tonne, excluding port dues, costs, taxes and bunkering costs which were to be borne by the STC; and
(ii) to a predetermined annual increase in the freight rate at the rate of 1% for the first 5 years, 1.5% for the 6th to 10th year and 2% for the 11th to 15th year.

As a result of that contract, Betamax was expected to receive USD 17.6 million for the first year. Betamax was also guaranteed payment at the above-mentioned fixed freight rate (a) for 100% of the freight capacity of its vessel, regardless of whether the vessel carried a full load; (b) for an uninterrupted period of 15 years as from September 2010; and (c) together with the pre-set escalating rates which meant that Betamax would be shielded from any downward fluctuations in freight rates.

Besides the guarantee of a 15-year captive cargo, Betamax was also granted a right of first refusal for any additional petroleum products which STC would import in excess of the vessel's capacity.

The whole of the secured obligations under the CoA was irrevocably and mandatorily guaranteed in favour of Betamax by the State of Mauritius. According to the terms of the guarantee, *"the State irrevocably and unconditionally guarantees to jointly and severally with STC, as co-principal debtor, the due and punctual performance of the secured obligations*

*and undertakes that it shall promptly pay any sum of money which STC has failed to pay to [Betamax] pursuant to the relevant provisions of the "Contract of Affreightment".*"

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.

For the given reasons we find that the Award is contrary to the public policy of Mauritius within the meaning of section 39(2)(b)(ii) of the IAA, and the Award is accordingly set aside. We also as a result set aside the provisional order for the recognition and enforcement of the Award which was granted on 7 September 2017.

**A. Caunhye**
**Senior Puisne Judge**

**N. Devat**
**Judge**

**D. Chan Kan Cheong**
**Judge**

**31 May 2019**

**Judgment delivered by Hon. A. Caunhye, Senior Puisne Judge**

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|---|---|---|
| **Applicant in both cases** | **:** | **Mr J. Guthrie, QC**<br>**Mr A. Choo Choy, QC**<br>**Mr R. Chetty, SC**<br>**Ms U. Bhurtun, of Counsel**<br>**Mr Y. Reesaul, of Counsel**<br>**Ms J. Somar, of Counsel**<br>**Mr A. Robert, SA** |
| **Respondent in both cases** | **:** | **Mr S. Issacs, QC**<br>**Mr R. Pursem, SC**<br>**Ms E. Walker, of Counsel**<br>**Mr B. Nursimulu, of Counsel**<br>**Mr R. Bucktowonsing, SA** |