

State Trading Corporation v Betamax Ltd

[Supreme Court of Mauritius]

2019 SCJ 154

Facts: This is an application to set aside a provisional order obtained *ex parte* by Betamax Ltd for the recognition and enforcement of an arbitral award as well as 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 International Arbitration Act 2008 (“IAA”) that is:

- (a) the subject matter of the dispute is not capable of settlement by arbitration under Mauritius Law;
- (b) the agreement is not valid under Mauritius Law; and
- (c) the award is in conflict with the public policy of Mauritius.

On 27 November 2009, State Trading Corporation (STC) and Betamax Ltd entered into a contract of Affreightment (CoA) which was terminated by the Government of Mauritius, by Cabinet decision. Subsequently, Betamax initiated arbitration proceedings against STC seeking compensation and damages for wrongful termination of the CoA. The arbitrator delivered an arbitral award in favour of Betamax. The arbitral award is being challenged by the STC on the aforesaid grounds.

In resisting the application, Betamax Ltd argued that the application was time barred 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.

Held: A full bench of the Supreme Court dismissed the preliminary objection and held that:

- (1) The word “apply” in Rule 15(7)(a) cannot be construed to import a requirement that an application to set aside a provisional order would be considered valid and effective only when it is made by motion in open Court;
- (2) Non-compliance with Rule 15(7)(a) is not automatically fatal to the application.

On the merits, the Supreme Court upheld the application and held that:

- (1) By virtue of Regulation 2A of the Public Procurement Regulations 2009, the STC could not be an “exempt organisation” as the CoA was a contract which fell within the specifications set out in column 2 of the First Schedule to the PPA. The parties were

therefore legally bound to act in conformity with the requirements laid down in the Public Procurement Act in respect of a procurement contract;

- (2) The CoA was a contract which had been illegally awarded in breach of section 14 of the PPA;
- (3) 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”
- (4) 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;
- (5) There is a high threshold to satisfy if the award is challenged on the grounds of public policy namely that the breach of the fundamental legal provisions such as the PPA, must be flagrant, actual and concrete;
- (6) Having regard to the magnitude of the CoA, its enforcement, 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.
- (7) The arbitral award which sought 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.

This summary is provided to assist in understanding the Court’s decision and does not constitute legal advice. The full judgment of the Court is the only authoritative document.

Short summary

This is an application to set aside an arbitral award pursuant to sections 39(2)(a)(i), 39(2)(b)(i) and/or 39(2)(b)(ii) of the IAA. The Award was held to be contrary to the public policy of Mauritius within the meaning of section 39(2)(b)(ii) of the IAA as it was borne out of an illegal contract obtained in breach of the PPA. The Award was accordingly set aside.