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# REVIEWING THE STANDARD OF CURIAL REVIEW FOR FINDINGS IN ARBITRATION INVOLVING PUBLIC POLICY

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It has been a decade since the Singapore Court of Appeal in *AJU v AJT* adopted a minimal review approach for an arbitral tribunal's findings, even for findings that have an impact on a public policy issue such as corruption. This paper traces the jurisprudence in this area: from the authorities leading up to *AJU v AJT*, through to the Privy Council's decision in *Betamax* which cited *AJU v AJT*. Through this tracing exercise, this paper seeks to clarify the precise ambit of the minimal review approach under *AJU v AJT*, and argues that the minimal review approach continues to strike the correct balance between the competing public policy concerns of finality in arbitration and the countervailing public policy concerns that find expression in the public policy ground of challenge against arbitral awards.

## I. Introduction

Unsuccessful parties in arbitration proceedings challenge arbitral awards on the basis that they are contrary to public policy.[1] When such a challenge is made before the seat court, they may either be proceedings to set aside the award, or to resist enforcement of the award by the successful party.[2] Before any other court, the unsuccessful party can only resist enforcement on grounds of public policy.[3]

A particular well-known difficulty arises when the issue of public policy is raised by the unsuccessful party in the arbitration itself, and the arbitrator has found against that party on the facts and/or the law. This could involve either an alleged public policy norm under the law governing the substantive dispute, or a public policy norm of another jurisdiction that is argued to be relevant. Where a dispute involves an allegation of the underlying substantive contract being against public policy in

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1 Such a challenge would either be the active remedy of setting aside the award under UNCITRAL, 2006, 64th Plen Mtg, *Model Law on International Commercial Arbitration* (2006), UN Doc A/40/17, annex I & A/61/17, annex I, Art 34(2)(b)(ii) [*Model Law*], or the passive remedy of resisting enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 6 July 1958, Art V(2)(b) [*New York Convention*].

2 The Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV and others* [2014] 1 SLR 372 held that the unsuccessful party had a choice of active and passive remedies against an award before the seat court [*PT First Media*].

3 For convenience, I will refer to the court before which the unsuccessful party challenges the award as the 'challenge court'.

some way, this would be a likely scenario.[4] There are two potentially conflicting public policy objectives:

a. The public policy in favour of finality in arbitration, under which parties who have agreed to arbitrate must abide by the award regardless of whether it is "good, bad or indifferent".[5] Further, a merely perverse or irrational award is not, without more, open to review;[6] versus
b. The public policy invoked as the basis for challenging the award, which may take the form of an argument that the underlying contract is illegal under some allegedly relevant law.

It is important at the outset to distinguish the difficult scenario above from a similar scenario that poses no difficulty whatsoever. The latter scenario is typified by *Soleimany v Soleimany*,[7] where the arbitrator finds illegality but enforces the contract in spite of the illegality. It is patently clear that in the latter scenario, the award is liable to be set aside or have its enforcement refused on public policy grounds.[8] This latter scenario therefore falls outside the scope of the discussion in this paper.

To what extent, then, should the challenge court re-open the arbitrator's findings of fact and law which led to his conclusion that the contract was not against public policy?[9] This paper seeks to answer this question in five parts. Part I is this Introduction. In Part II, this paper seeks to define the scope of the public policy ground of challenge. Part III first briefly describes the three possible approaches to reviewing a tribunal's findings of fact and law when an award is challenged under the public policy ground, namely the maximal, minimal and contextual review approaches. It then looks to clarify the precise ambit of the minimal review approach. Part IV then evaluates the three approaches, arguing that the minimal review approach is the most appropriate approach. Part V concludes.

## II. The Public Policy Ground for Challenging Awards

We begin with defining the scope of the public policy ground of challenge, in particular with how it takes into account foreign laws or public policy. The public policy

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4 *Betamax Ltd v State Trading Corporation* [2021] All ER (D) 77 (PC appeal from Mauritius) at para 52 [*Betamax*].

5 Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 6th ed (London: Sweet & Maxwell, 2015) at para 10.64; *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 151 at para 24.

6 *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 (HC) at para 48 [*Sui Southern Gas*].

7 *Soleimany v Soleimany* [1999] QB 785 [*Soleimany*].

8 *Ibid* at 800E; *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] QB 740 (EWHC) at 767F [*Westacre* (EWHC)]; affirmed in [2000] QB 288 (EWCA) [*Westacre* (EWCA)].

9 A somewhat related, but conceptually different question is the extent to which arbitral tribunals have both the jurisdiction and the obligation to consider whether a contract is against public policy *sua sponte*. For example, see *Lao Holdings v Government of the Lao People's Democratic Republic* [2021] 5 SLR 228 (SICC) at paras 152, 153 [*Lao Holdings*].

ground is narrowly construed,[10] having an international focus.[11] Such an objection operates only where the award would shock the conscience, is clearly injurious to the public good or wholly offensive to the public, or violates the challenge court's most basic notions of morality and justice.[12] As such, not every rule of public policy of the forum falls within the scope of the public policy ground for challenging awards. There is a distinction between mere domestic public policy and the fundamental or international public policy of the forum.[13]

Further, the ground of challenge before the challenge court is concerned with whether the award offends the public policy of the forum only.[14] Thus, in a setting aside proceeding before the seat court, the seat court decides whether the award conflicts with the seat's public policy, and not whether there is a conflict with the public policy of another enforcement court, which may differ.[15]

This is not to say that foreign law or public policy can never be relevant. The challenge court will take cognisance of foreign law and public policy for reasons of international comity.[16] Thus, foreign law or public policy would be relevant if the challenge court's private international law rules give effect to that foreign law or public policy. Indeed, one common ground for alleging that enforcing an award is contrary to the public policy of the challenge court is to argue that the underlying contract is contrary to foreign law or public policy.

At common law, there are three ways in which foreign law or public policy could be relevant under the public policy ground of challenge.

First (and likely to be most significantly), is the rule in *Foster v Driscoll*:

> [i]f the contracting parties in entering into a contract had at the outset a common intention to use the contract [to] commit an act in a friendly foreign country which is illegal by the law of that country, then the contract will not be enforceable as being contrary to the fundamental public policy of the forum."[17]

This rule of public policy extends to the enforcement of foreign judgments and arbitral awards.[18] It has two important nuances. One, the rule can only be relied on against a party who had known of and participated actively in the foreign illegality.

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10 *Prometheus Marine Pte Ltd v King, Ann Rita* [2017] SGHC 36 at para 106 [*Prometheus Marine*].

11 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 (CA) at para 59 [*PT Asuransi Jasa*]; *AJU v AJT* [2011] 4 SLR 739 (CA) at para 37 [*AJU*].

12 *PT Asuransi Jasa, ibid* at para 59; *Prometheus Marine, supra* note 10 at para 106; *Sui Southern Gas*, *supra* note 6 at paras 47, 48; *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 (SICC) at para 204 [*Gokul*].

13 Yeo Tiong Min, *Halsbury's Laws of Singapore Vol 6(2) - Conflict of Laws (2020 Reissue)* (Singapore: LexisNexis, 2020) at para 75.365 [*Halsbury's—Conflict of Laws*].

14 This was agreed between the parties in *Gokul*, *supra* note 12 at para 194, and clearly correct. See also *Soleimany, supra* note 7 at 800E.

15 See *eg Stati v Kazakhstan* [2017] EWHC 1348 (Comm) at para 84 [*Stati*].

16 *Halsbury's—Conflict of Laws*, *supra* note 13 at para 75.359; *Gokul*, *supra* note 12 at para 201.

17 *Halsbury's—Conflict of Laws*, *ibid* at para 75.365, citing *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 (CA) at paras 45-47 [*Peh Teck Quee*] and *Sheagar s/o TM Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 (CA) at para 124, which in turn cited *Foster v Driscoll* [1929] 1 KB 470 (EWCA) and *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 (UKHL).

18 *Halsbury's—Conflict of Laws*, *ibid* at para 75.214, citing *Soleimany*, *supra* note 7 and *Wu Shun Foods Co Ltd v Ken Ken Foods Manufacturing Pte Ltd* [2002] 2 SLR(R) 720 (HC) at para 48.

Thus, if only one of the parties knew of and participated in the foreign illegality, the other innocent party would not be barred from enforcing the contract or award.[19]

Two, it appears that not all rules of foreign law attract the operation of the rule, at least in the context of challenges to arbitral awards. In deciding whether the rule in *Foster v Driscoll* is engaged, the challenge court would be legitimately concerned with whether the foreign illegality is sufficiently serious such that enforcing the award would fall within the narrow confines of the public policy ground of challenge.[20] This concern has especial force if there are pending challenge proceedings before the very foreign court whose laws are being relied on as founding the challenge before the forum under the rule in *Foster v Driscoll* and where the impugned acts are lawful under the law of the forum. In *CBX v CBZ*, Anselmo Reyes IJ observed that it could not be assumed that a Thai court would refuse to enforce an award that awarded compound interest to the successful party on the basis that the award of compound interest in those circumstances was contrary to Thai law.[21] It would be awkward if the Singapore court refused enforcement on the basis that the award was in conflict with Thai law, only for a Thai court to later hold that the conflict was not sufficiently serious to warrant refusing enforcement under Thai public policy. Thus, the scope of the rule seems confined to "obvious criminal conduct", as a broader formulation would require an unjustifiable level of speculation about how important the foreign law rule is to the public policy of that foreign State.[22]

This clarification of the scope of the rule in *Foster v Driscoll*, at least as it applies to arbitral awards, may provide a better ground for distinguishing the *Omnium v Hilmarton* ("*OTV*") case[23] from *Soleimany*.[24] Briefly, in *Soleimany*, a *dayan* of the *Beth Din* in England enforced an agreement for the share of profits which he expressly found to be for smuggling carpets out of Iran in breach of Iranian revenue and export controls.[25] In the arbitration, the *dayan*[26] applied Jewish law as chosen by the parties.[27] The English Court of Appeal reversed the first instance judge's decision and refused enforcement because it was apparent from the face of the award[28] that there is a foreign illegality that would attract the application of the public policy rule in *Foster v Driscoll*.[29]

The facts of the *OTV* case are hard to distinguish from *Soleimany*.[30] The case concerned the second award between *OTV* and Hilmarton, after the first award had been set aside by the Swiss Federal Tribunal but enforced by the *Cour de Cassation* in France. The underlying contract was for the provision of tax and law consultancy services by Hilmarton to *OTV* in relation to a drainage project in the city

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19 *Royal Boskalis Westminster NV v Mountain* [1999] QB 674.

20 *Gokul, supra* note 12 at para 206.

21 *CBX v CBZ* [2020] 5 SLR 184 (SICC) at para 59 [*CBX* (SICC)].

22 *Ibid* at para 61. The decision was overturned on appeal in *CBX and another v CBZ and others* [2021] SGCA(I) 3 (see paras 86-93), but this point of law was not discussed.

23 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm) 146 [*OTV*].

24 *Soleimany*, *supra* note 7.

25 *Ibid* at 790F, 794G.

26 The word *dayan* means a judge of the *Beth Din*, which is a Jewish religious court.

27 *Soleimany, supra* note 7 at 789E-789G.

28 *Ibid* at 800E.

29 *Ibid* at 797A.

30 Paul Tan, "AJU v AJT - nail in Soleimany's coffin?" (2011) 14(6) Int Arb L Rev 183 at 185.

of Algiers.[31] Hilmarton's consultancy fees were conditional on the project being awarded to *OTV*.[32] The dispute arose because *OTV* was awarded the contract but refused to pay Hilmarton the balance of the consultancy fees due under the agreement.[33] In *OTV*, the arbitrator expressly found that Hilmarton in performing the contract had "wittingly" breached an Algerian statute prohibiting the intervention of middlemen in public contracts within the ambit of foreign trade.[34] The arbitrator however reasoned, in the face of *OTV*'s public policy defence, that the Algerian statute was a protectionist measure, and could not take priority over the parties' freedom of contract.[35] Timothy Walker J's reasoning in deciding that enforcing the second Swiss award would not be contrary to English public policy appears to have turned on the reasoning that there is no difference between the rule in *Foster v Driscoll* and the *Lemenda* principle discussed below.[36] It is submitted that the reasoning is flawed. The fact that the parties chose Swiss law as the governing law and a Swiss seat cannot have a direct relevance as to whether a fundamental public policy of the (English) forum would be violated if the award was enforced. *OTV* is therefore better rationalised as drawing a distinction between the Iranian revenue controls in *Soleimany* and the Algerian prohibition of middlemen in *OTV* based on the nuance drawn out on *Gokul* and *CBX*.

Indeed, in the English context, the English forum equally gives effect to a protectionist measure protecting local commercial agents by treating the Commercial Agents Directive as part of the mandatory rules of the forum, such that an arbitration agreement or award that does not give effect to the obligations prescribed by that Directive are unenforceable in England as against the public policy of the enforcing English court.[37]

Second, there is the so-called *Lemenda* principle,[38] which was explained by Waller LJ in the *Westacre (EWCA)*[39] in the following terms:[40]

a. English rules of public policy against contracts for the purchase of influence do not fall within the fundamental public policy of England;
b. While contracts for the purchase of influence in England would not be enforced as against domestic English public policy, where the contract is to be performed abroad, the contract would only be unenforceable if such contracts were also against the public policy of the place of performance;

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31 *OTV*, *supra* note 23 at 148B.
32 *Ibid* at 148C.
33 *Ibid* at 148C.
34 *Ibid* at 148G.
35 *Ibid* at 149A.
36 *Ibid* at 149H, 150H.
37 *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB), applying *Ingmar GB Ltd v Eaton Leonard Technologies Ltd* [2001] All ER (EC) 57, a decision of the Court of Justice of the European Union. The Directive is part of the mandatory rules of England due to the application of the principle of effectiveness under European Union law.
38 *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448.
39 *Westacre* (EWCA), *supra* note 8.
40 *Ibid* at 304F-304H. On this issue, the English Court of Appeal was unanimous. Mantell LJ agreed with Waller LJ on "the *Lemenda* Point" at 316D and Sir David Hirst entirely agreed with Mantell LJ at 317C.

c. Similarly, if the contract is contrary to the public policy of the place of performance (as opposed to a foreign illegality), it would only be unenforceable before an English court if the contract was also contrary to English domestic public policy.

In the first instance decision, *Westacre (EWHC)*,[41] Colman J explained that this confluence of public policy at the place of performance and the domestic public policy of the challenge court was necessary for reasons of international comity.[42] Where the particular English public policy did not rise to "such universally-condemned international activities such as terrorism, drug-trafficking, prostitution and paedophilia" *ie* to the level of a fundamental public policy of the forum, refusing enforcement for breach of English domestic public policy alone would amount to imposing English public policy views on the place of performance.

However, what Colman J's reasoning does not address is why the contract being contrary to the public policy of the place of performance, as opposed to being illegal at the place of performance, is an insufficient basis for refusing enforcement. As observed in *Halsbury's Laws of Singapore*, "it is not clear… why foreign public policy is treated as being of a lower order than foreign law in terms of international comity."[43] It was perhaps this gap that led Timothy Walker J in the *OTV* case to refuse to recognise the distinction between a foreign illegality and an act contrary to foreign public policy.[44]

Thirdly, there is a rule concerning supervening foreign illegality.[45] It is however, unclear if the rule applies on the basis that it is part of the proper law of the contract or as part of a rule of the law of the forum that applies regardless of the proper law. The Singapore Court of Appeal has tentatively observed that the rule is unlikely to have its basis in public policy.[46] It therefore falls outside the scope of this paper.

With a clearer picture of the scope of the public policy ground of challenge, we can now proceed to examine the extent to which challenge courts should re-open findings of fact or law of the arbitral tribunal that are relevant to this ground of challenge.

## III. The Minimal Review Approach

In Part III, the three competing approaches to re-opening an arbitral tribunal's findings of fact or law are sketched out. Then, because the Singapore Court of Appeal has endorsed the minimal review approach, a closer look is taken to define the precise ambit of the minimal review approach.

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41 *Westacre* (EWHC), *supra* note 8.

42 *Ibid* at 775D.

43 *Halsbury's—Conflict of Laws*, *supra* note 13 at para 75.365.

44 *OTV, supra* note 23 at 150H.

45 *Ralli Brothers v Compania Naveria y Aznar* [1920] 2 KB 287. However, there still remains some controversy as to whether this case stands for a rule separate from that in *Foster v Driscoll*.

46 *Peh Teck Quee*, *supra* note 17 at para 54.

### A. *Possible Extents of Review*

Judicial and academic opinion on the appropriate extent of review issue reveals a spectrum of views. This spectrum can be described as ranging from *minimal review* on one end to *maximal review* on the other, with *contextual review* lying somewhere in between.[47]

On the *maximal review* approach, the challenge court will always fully review the evidence and the law to determine whether there has been any illegality of sufficient severity such that enforcing the award would be against the fundamental public policy of the forum. On this approach, a full review will take place once the unsuccessful party asserts a recognised public policy ground for refusing enforcement of the award. There is no further requirement for the unsuccessful party to show any fraud, breach of natural justice or other vitiating factor.[48] Nor is there a requirement that the unsuccessful party must rely on facts not before the arbitral tribunal.[49]

The *contextual review* approach is exemplified by the approach of Waller LJ in *Soleimany* and *Westacre (EWCA)*. This involves two stages. First, the court considers whether to re-open the issue of whether the contract (now the award) is unenforceable because it is against public policy to do so. If the answer to the first stage is "yes", the court then reconsiders the issue in full. There is some uncertainty over the threshold set at the first stage. In *Soleimany*, Waller LJ was of the view that the court should inquire to "some extent" if there is *prima facie* evidence from one side that the award is based on an illegal contract.[50] Yet, where the public policy argument has been ventilated before the arbitral tribunal, there will almost always be some *prima facie* evidence that had been considered by the tribunal. Hence, it appears that the contextual approach would almost always involve this inquiry to "*some extent*". While it is clear that there would not be a "full-scale trial" at this stage, it is not clear what the extent of the inquiry is. There is also uncertainty over what ought to be taken into account at this stage of the inquiry. Waller LJ listed evidence to the contrary; *ie* evidence that there was no illegality, the arbitral tribunal's findings, evidence of the arbitral tribunal's incompetence, and evidence of vitiating factors such as bad faith and collusion.[51] There is particular controversy over whether the seriousness of the alleged illegality or contravention of public policy is relevant at this stage.

On the *minimal review* approach, the challenge court will as a general rule adopt the arbitral tribunal's findings on issues of public policy with limited exceptions. These limited exceptions could include (a) the unsuccessful party producing fresh evidence on the issue of public policy, (b) fraud or some other criticism on the fairness of the arbitral proceedings, and (c) potentially certain errors of law. The precise ambit of the minimal review approach is discussed in detail in the next section.

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47 See for instance Michael Hwang SC & Kevin Lim, "Corruption in Arbitration - Law and Reality" (2012) 8(1) Asian Intl Arbitration J 1 [Hwang SC & Lim, "Corruption in Arbitration"].

48 *Cf. Betamax*, *supra* note 4 at para 52.

49 *Cf. Westacre* (EWHC), *supra* note 8 at 768A.

50 *Soleimany, supra* note 7 at 800F; *Westacre* (EWCA), *supra* note 8 at 310E.

51 *Westacre* (EWCA), *ibid* at 317B.

In *AJU*, the Singapore Court of Appeal endorsed the minimal review approach.[52] While this decision has been criticised for being based on common law rather than Model Law authorities,[53] much of that sting has been diluted by the adoption of the minimal review approach by the Privy Council in *Betamax*, which was an appeal from Mauritius, another Model Law jurisdiction.[54]

How minimal, however, is the extent of review under the minimal review approach?

### B. *The Precise Ambit of Minimal Review*

It is now settled that, under the minimal review approach, the arbitral tribunal's findings of fact are not open to review,[55] even when those factual findings result in the unsuccessful party's arguments public policy arguments being dismissed by the tribunal. Thus, in *Westacre*, Jugoimport argued that their arrangement with Westacre was contrary to public policy *inter alia* because it had been for procuring sales through bribery in the sense that Westacre had bribed persons in Kuwait for the purpose of persuading those persons to exercise their influence in favour of Kuwait entering into a contract with Jugoimport.[56] The arbitral tribunal, however, found by a majority that although bribery would have rendered the agreement invalid,[57] bribery had not been established.[58]

This minimal curial intervention[59] extends to the true interpretation of a contract.[60] While the interpretation of a contract is a question of mixed law and fact, the overall process of interpretation includes two things—first, the meaning of the words; and secondly, the effect to be given to that meaning.[61] The ascertainment of what the words used mean in their context is a question of fact.[62] Thus, where an arbitral tribunal has construed an agreement as not obliging a party to produce a non-prosecution order or influence a foreign public prosecutor to do so[63] (and therefore not an agreement to stifle a prosecution which would be contrary to Singapore's fundamental public policy as the seat court),[64] the challenge court is not entitled to re-open the issue of contractual interpretation.[65] In other words, if a rule of public policy is not engaged based on an arbitral tribunal's findings of fact, those findings cannot be re-opened to re-engage that rule.[66]

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52 *AJU, supra* note 11 at para 60.

53 Nicholas Poon, "Striking a Balance Between Public Policy and Arbitration Policy in International Commercial Arbitration" [2012] SJLS 185.

54 *Betamax, supra* note 4.

55 *AJU*, *supra* note 11 at paras 66, 68; *Betamax, ibid* at para 52.

56 *Westacre* (EWCA), *supra* note 8 at 295A, 295B.

57 *Ibid* at 295C.

58 *Ibid* at 295B.

59 *AJU, supra* note 11 at para 66.

60 *Ibid*.

61 *Chatenay v Brazilian Submarine Telegraph Co Ltd* [1891] 1 QB 79 (UKCA) at 85.

62 *Simpson v Margitson* (1847) 11 QB 23.

63 *AJU, supra* note 11 at para 15.

64 *Ibid* at para 20.

65 *Ibid* at para 65.

66 *Lao Holdings*, *supra* note 9 at para 141.

The minimal review approach also extends to questions of foreign law, which the challenge court would consider a question of fact (at least where it is a common law court).[67] Thus, where the arbitrator allegedly erred on a question of foreign law in finding that an impugned contract is not illegal under foreign law, the Singapore International Commercial Court has held that the arbitrator's conclusions on foreign law are issues of fact before the Singapore court and cannot be re-opened following *AJU*.[68]

The scope of review of alleged errors of law under the minimal review approach is rather more vexed. This refers to alleged errors concerning the law of the challenge court. This question involves how some eight paragraphs of *AJU* should be read, a subject touched upon only by a handful of subsequent decisions.

As a starting point, it is settled that the principle of finality in arbitration generally extends to both the arbitral tribunal's findings of fact and law. Thus, the Singapore Court of Appeal observed in *PT Asuransi Jasa* that errors of law or fact made by an arbitral tribunal are *per se* final and binding on the parties and may not be appealed against or set aside by a court except as provided for in Singapore's International Arbitration Act ("*IAA SG*").[69]

Further, with respect to the available grounds for challenging awards, errors of law and fact in and of themselves do not fall within the narrow scope of the public policy ground of challenge. Unless an arbitral tribunal's decision on an issue of fact or law or decision-making process is tainted by fraud, breach of natural justice or any other vitiating factor, any errors of fact or law made by an arbitral tribunal *per se* do not attract the operation of the public policy ground of challenge.[70]

To this general settled position, the Singapore Court of Appeal added a caveat that is in parts difficult to follow. There is *dicta* in these passages that suggest that all questions of Singapore law relevant to an issue of public policy are open to *de novo* review by the Singapore court as a challenge court.[71] However, this would arguably be inconsistent with the outcome of *AJU* itself, where the Singapore Court of Appeal held that the interpretation of a Singapore law agreement should not be reviewed by the Singapore court, and would not be consistent with the general position taken in *PT Asuransi Jasa*.

It is unlikely that the Singapore Court of Appeal intended to depart from its position in *PT Asuransi Jasa*, a decision it had cited only a few paragraphs earlier.[72] Its statement that a Singapore court has supervisory power to correct an arbitral tribunal's decision on illegality made applying Singapore law[73] must be read together with the qualifier that this entitlement applies to the arbitral tribunal's decision on "what the public policy of Singapore is".[74] This is consistent with the example of

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67 Lord Collins of Mapesbury *et al*, eds. *Dicey, Morris and Collins on The Conflict of Laws*, 15th ed (London: Sweet & Maxwell, 2012) at para 9-002 [*Dicey*].

68 *Gokul, supra* note 12 at para 188.

69 *PT Asuransi Jasa*, *supra* note 11 at para 57; *International Arbitration Act* (Cap 143A, 2002 Rev Ed Sing) [*IAA SG*].

70 *AJU, supra* note 11 at para 66.

71 *Ibid* at para 69.

72 *Ibid* at para 66.

73 *Ibid* at para 62.

74 *Ibid* at para 62.

*Soleimany* given in the same paragraph. As aforementioned, *Soleimany* concerned an arbitration where the arbitrator made an express finding of foreign illegality within the rule in *Foster v Driscoll* but ignored it on the basis that the governing law, Jewish law, did not give effect to foreign laws. *Soleimany* was therefore about ignoring the public policy of the supervisory jurisdiction, which is arguably more serious than erring about the content of that public policy.The distinction between the tribunal's decision on facts and on the law drawn by the Singapore Court of Appeal[75] was based on its finding that the first instance judge and the arbitrators had applied the same principle of law, but differed on their assessment of the facts.[76] It was not intended to be a statement of general principle.

Instead, when examining whether questions of law are open to review, the Singapore Court of Appeal began from the general position in *PT Asuransi Jasa* that an arbitral tribunal's findings of law *are per* se not open to review since they are generally final and binding, and errors of either law or fact by themselves are not contrary to Singapore's fundamental public policy.[77] The court then added a qualifier because it observed "[i]t is a question of law what the public policy of Singapore is", but in its view "[a]n arbitral award can be set aside if the arbitral tribunal makes an error of law *in this regard*"[emphasis added].[78] Thus, it is only when the arbitral tribunal errs on the specific category of questions of law covering the content of Singapore's fundamental public policy that the Singapore court is entitled to intervene on the basis of an error of law. This is consistent with the Singapore Court of Appeal's example of an arbitral tribunal enforcing a contract illegal under its foreign proper law on the basis that enforcing such a contract is not against Singapore's public policy.

A "question of fact" in the context of the Singapore Court of Appeal's judgment in *AJU* is set out in contrast to that specific question of law.[79] It is therefore submitted that the Singapore Court of Appeal in *AJU* did not draw a distinction between the findings of law or an arbitral tribunal and its findings of fact. Instead, it drew a distinction between a sub-set of findings of law—specifically about the content of the fundamental public policy of Singapore (as the challenge court)—and all other findings made by the arbitral tribunal, whether of fact or law.[80]

This is further supported by the Singapore Court of Appeal's comments in the *Rakna Arakshaka* ("*RALL*") case.[81] That case concerned disputes over an agreement between Avant Garde, a private company, and RALL, a state-owned company, for the provision of maritime security services to vessels at risk of piracy. The agreement was governed by Sri Lankan law and provided for SIAC arbitration in Singapore. Avant Garde obtained an award against RALL for breach of the agreement, and

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75 *Ibid* at para 69; relied on in subsequent Singapore cases such as *Gokul, supra* note 12 and *CBX* (SICC), *supra* note 21.

76 *AJU*, *ibid* at para 63.

77 *Ibid* at para 66.

78 *Ibid* at para 67.

79 *Ibid* at para 68.

80 This is also how Michael Hwang SC and Kevin Lim read *AJU*. See Hwang SC & Lim, "Corruption in Arbitration", *supra* note 47 at 84.

81 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 (CA) [*RALL*].

RALL applied to set aside the award. One of RALL's grounds of challenge was that the award was against Singapore public policy.[82] Specifically, RALL alleged that the agreement was procured by bribery on the part of Avant Garde.

Standing in the way of RALL's challenge were two problems: (a) RALL did not put the issue of illegality under the governing law before the arbitral tribunal, and (b) the tribunal considered the issue of illegality and public policy *sua sponte* and found no signs of either.[83] The Singapore Court of Appeal in *RALL* considered RALL's public policy challenge through the lens of illegality under the proper law of the contract. The arbitral tribunal had found that there was no illegality or contravention of public policy. As a result, the court was of the view that no question of "*the applicability and scope of Singapore public policy*" even arose.[84] It is significant that the Court of Appeal in *RALL* expressly limited its potential examination to that question. By implication, all other questions of law or fact decided by the tribunal would not be open to review.

The ambit of the minimal review approach was most recently expounded on in *Betamax*.[85] *Betamax* also concerned an agreement between a private company and a state-owned enterprise entered into in 2009.[86] This was a contract of affreightment under which Betamax was to provide the freight capacity of a vessel to STC for 15 years.[87] The agreement was governed by the laws of Mauritius[88] and provided for SIAC arbitration[89] in Mauritius.[90] A new government was elected in Mauritius in January 2015. The newly elected government asserted that the agreement had been entered into in breach of public procurement laws enacted in 2006 and amended in 2009. The STC then duly gave notice to Betamax that it could no longer make use of Betamax's services under the agreement.[91] Betamax treated this as a repudiation of the agreement and terminated the agreement under its default provisions, and commenced arbitration against STC.[92]

In the arbitration, one of STC's defences was that the agreement was entered into without complying with the approval requirements under Mauritius' public procurement legislation, and therefore illegal and unenforceable.[93] Before the arbitrator, this would primarily have been an issue of applying the governing law of the agreement. The arbitrator decided that on the proper interpretation of the public procurement legislation in question, the agreement was exempt from the approval requirements. It therefore followed that the agreement was not illegal.[94] STC applied to the Supreme Court of Mauritius *inter alia* under the public policy ground to set aside the award.

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82 *Ibid* at para 99.
83 *Ibid* at para 100.
84 *Ibid*.
85 *Betamax*, *supra* note 4.
86 *Ibid* at para 2.
87 *Ibid*.
88 *Ibid*.
89 *Ibid* at para 7.
90 *Ibid* at para 11.
91 *Ibid* at para 6.
92 *Ibid*.
93 *Ibid* at para 9(2).
94 *Ibid* at para 12(3).

STC argued, and the Supreme Court of Mauritius agreed, that the public procurement legislation engaged the fundamental public policy of Mauritius in ensuring transparent public procurement, and therefore that the question of law on the interpretation of the public procurement legislation could be re-opened by the supervisory court.[95] The Supreme Court of Mauritius cited *AJU* in support of its decision. On appeal, the Privy Council reversed the decision of the Supreme Court of Mauritius, holding that it was not entitled to re-open the arbitrator's interpretation of the public procurement legislation.

The Privy Council also read *AJU* as deciding that (a) in the absence of fraud or other vitiating factors, a decision of fact or law within the jurisdiction of an arbitral tribunal is final and binding, and (b) the determination of the nature and extent of public policy of the challenge court was a question of the law of the forum for the challenge court to determine.[96] In the Privy Council's view, the interpretation of the public procurement legislation gave rise to no issues of public policy[97] even though the provisions were difficult to interpret because they had been amended in a far from straightforward manner.[98] The Privy Council too rejected the contextual approach of Waller LJ in *Soleimany* and *Westacre (EWCA)*, holding that an arbitrator's finding within his jurisdiction that a contract is not illegal is binding absent fraud or other vitiating factors, which is not open to review.[99]

The issue decided by the arbitrator in *Betamax* that was impugned was a pure question of law—a question of statutory interpretation. Nonetheless, it is submitted that the Privy Council's decision must be correct.

First and foremost, the rule of public policy applied by the arbitrator and that applied by the Supreme Court of Mauritius was the same, namely that if a contract is contrary to a statutory provision in its governing law, that contract is unenforceable. Where the arbitrator and the court differed was on whether the contract was contrary to invoked legislation on its true interpretation. The facts of the case are therefore strikingly similar to those in *AJU*, where both the arbitral tribunal and the judge approached the dispute on the basis that a contract to stifle a foreign prosecution would be contrary to Singapore's public policy, but differed on whether the contract amounted to an intention to stifle such a prosecution.

Second, as the Privy Council noted,[100] to decide otherwise would allow any issue of statutory interpretation decided by an arbitrator to be re-opened under the public policy ground. Every legislative provision is based on advancing some public policy interest, such as an interest in transparency and preventing corruption in public procurement or consumer protection. Arguments can readily be made that a contract contravenes a legislative provision on one interpretation of the contract and one interpretation of the legislative provision. Arbitrators routinely decide such issues. If the public policy ground could be relied on to re-open either the arbitra-

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95 *Ibid* at paras 26, 28.
96 *Ibid* at para 39.
97 *Ibid* at para 46.
98 *Ibid*.
99 *Ibid* at para 52.
100 *Ibid* at para 47.

tor's decision on the correct interpretation of the contract as in *AJU* or the correct interpretation of the legislation as in *Betamax*, a far wider number of awards would be susceptible to challenge than a narrow conception of the public policy ground countenances.

Third, allowing issues of law to be re-opened would mean that the scope of curial review is broader where the applicable law to the issue happens to be the law of the challenge court. For instance, in *Betamax*, the issue could not have arisen in the same manner if the agreement had no connection to Mauritius other than the seat of arbitration. If the agreement were between a private company and a Singapore state-owned entity and governed by Singapore law, the arbitrator's interpretation of Singaporean public procurement legislation would be an unreviewable finding of fact before the Mauritian supervisory court.

However, this would further in effect convert the public policy ground of challenge, which is rooted in the Model Law and the New York Convention, into a provision for appeals on points of law which neither international instrument contemplates. This is in fact in conflict with both instruments, which instead enjoin acceding jurisdictions to treat arbitral awards as final and binding.

Fourth, allowing issues of law to be re-opened under the public policy ground would in addition paradoxically provide a wider ground for recourse than the express right of appeal available only to unsuccessful parties in domestic arbitration. It would also result in the public policy ground, which is also available against domestic awards,[101] having a wider scope of application than the right to appeal in that context. In domestic arbitrations, the right to appeal on a point of law is limited by statute[102] and at common law.[103] These limitations form no part of the public policy ground of challenge.

Fifth, if the public policy ground is expanded to allow review of all issues of statutory interpretation, it would in practice result in the scope of review being different depending on whether the challenge court is a supervisory court or an enforcement court only. Yet, the breadth of the ground ought to be the same regardless of the challenge court's role. In practice, apart from the law of the challenge court being the law governing the contract, arbitral tribunals are far more likely to consider the application of the laws of the seat rather than those of a potential enforcement court. This is because there could be several potential enforcement fora and it is difficult to predict *ex ante* where those places may be.[104] By contrast, the seat of the arbitration is ascertainable *ex ante*, and a contravention of the seat's fundamental public policy would lead to the award being set aside and generally become unenforceable everywhere.[105] Thus, if all issues of local statutory interpretation were open to review, the challenge court would end up with wider powers of intervention when it is the seat court, as opposed to when it is only the enforcement court. This would also raise awkward questions about whether its powers of intervention are different for each

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[101] See *eg*, *Arbitration Act* (Cap 10, 2002 Rev Ed Sing), s 48 [*Singapore Arbitration Act*].

[102] *Ibid*, s 49.

[103] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 (UKHL).

[104] Serge Lazareff, "Mandatory Extraterritorial Application of National Law" (1995) 11 Arb Intl 137 at 140.

[105] *PT First Media*, *supra* note 2.

barrel under the choice-of-remedies approach to international awards made in the forum.

Finally, unsuccessful parties should be placed in the same position in a challenge court regardless of whether they are arguing that the arbitral tribunal erred on a point of the law of the challenge court in enforcing or refusing to enforce a contract.[106] It is relatively settled that if a claimant in arbitration is unsuccessful because the arbitral tribunal rules that the contract is unenforceable because the contract is illegal or contrary to the public policy under either the governing law of the agreement or the law of the seat of arbitration, the unsuccessful claimant has no recourse against those findings of law and/or fact. Why then should an unsuccessful respondent be in a better position with respect to a reverse finding? Both parties should be equally bound by the arbitrator's findings. Even where the alleged error of law is with regard to the content of the challenge court's public policy, either party should be entitled to challenge the award since the court cannot abrogate its judicial power to decide what the public policy of the forum is.[107] In this respect, it is also respectfully submitted that Reyes IJ's view in *CBX (SICC)* concerning this asymmetry[108] ought not to be followed because it is inconsistent with *AJU*.[109]

### C. *Evidence not Placed Before the Arbitral Tribunal*

A final issue with respect to the scope of review of an arbitral tribunal's decision on illegality or public policy is the extent to which the unsuccessful party may rely on evidence which was not placed before the arbitral tribunal to re-open that decision. This issue takes us back to the *Westacre* case, where the unsuccessful party Jugoimport sought to rely on an affidavit of Miodrag Milosavljevic as evidence that the consultancy agreement between Jugoimport and Westacre contemplated Westacre bribing Kuwaiti government officials. Jugoimport also sought to rely on expert evidence on Kuwaiti law and public policy.[110]

The majority in *Westacre (EWCA)* expressed the view that only "fresh evidence" could be considered in determining whether to re-open an issue of fact decided by the arbitral tribunal.[111] In this context, "fresh evidence" is likely an implied reference to the *Ladd v Marshall* conditions that the evidence was not reasonably available at the time of the arbitration and must have a material bearing on the issue in dispute.

In contrast, the degree to which evidence that was reasonably available at the time of arbitration may be considered to re-open an arbitral tribunal's decision on illegality or public policy under the contextual review approach appears to be no different from the maximal review approach. It appears from Waller LJ's judgments

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[106] *Betamax, supra* note 4 at para 49.
[107] *AJU, supra* note 11 at para 62.
[108] *CBX* (SICC)*, supra* note 21 at para 67.
[109] *AJU, supra* note 11 at para 69.
[110] *Westacre* (EWHC), *supra* note 8 at 772F, 775G.
[111] *Westacre* (EWCA), *supra* note 8 at 316G.

in both *Soleimany* and *Westacre (EWCA)* that the focus of the inquiry is on the quality of the evidence with respect to the issue of illegality or public policy, rather than whether that evidence was either actually before the tribunal or reasonably available to be placed before the tribunal.[112] Indeed, Waller LJ in *Soleimany* and *Westacre (EWCA)* expressly rejected Colman J's view in *Westacre (EWHC)* that the evidence at least had to be new in the sense that it was not placed before the arbitral tribunal.[113] It therefore appears that on the issue of what conditions need be fulfilled before evidence that was not before the arbitral tribunal can be used to re-open that tribunal's decision, there is no difference between the contextual and maximal approaches. Any difference would only lie in the extent of initial review using that evidence.

## IV. The Minimal Review Standard is Appropriate

While the maximal review approach was at one point adopted in France and other parts of Europe, it has since been abandoned in favour of the minimal review approach.[114] Overall, it has fallen out of favour. Under the maximal review approach, the mere allegation that enforcing the award would infringe a countervailing public policy of the challenge court would warrant a full review. As such, it does not attempt to strike a balance between finality in international arbitration and the countervailing public policy interest invoked at the time of challenge. Instead, the maximal review standard always favours protecting the countervailing public policy interest. It is therefore not an appropriate standard for striking a balance between the two public policy goals in tension.

As between the minimal review standard and the contextual review standard, the main argument against minimal review and in favour of contextual review is that the minimal review standard does not offer sufficient protection to the countervailing public policy interests. But is this really the case? This assertion can be tested by considering eight scenarios.

This scenario analysis will make *ex ante* assumptions about whether there is factually (or legally) a contravention of the challenge court's fundamental public policy*; eg* if the underlying contract is procured with bribery. In reality, the factual (or legal) issue would be in dispute both before the arbitral tribunal and the challenge court. Further, neither the arbitral tribunal nor the challenge court could know with certainty at the outset whether there is in fact such a contravention. The *ex ante* assumption is therefore made to assess the likelihood of harm to the challenge court's fundamental public policy resulting from a wrong determination by the arbitral tribunal being upheld by the challenge court when applying each standard of review.

The 8 scenarios are illustrated in the diagram below:

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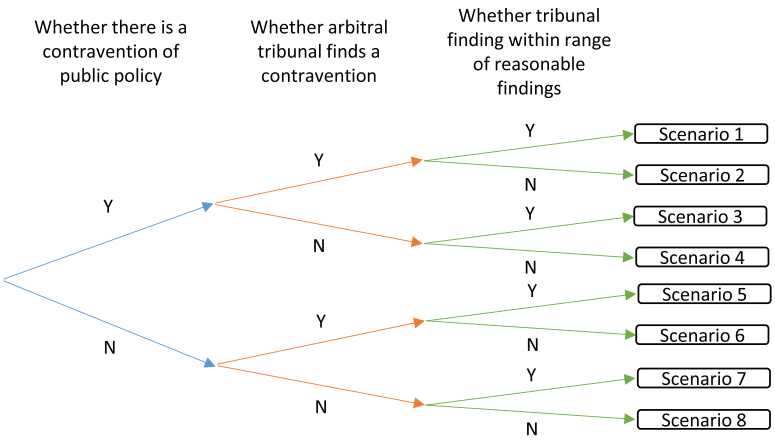
[112] *Soleimany, supra* note 7 at 800F; *Westacre Investments* (EWCA), *ibid* at 314G.

[113] *Westacre* (EWCA), *ibid* at 311A.

[114] Hwang SC & Lim, "Corruption in Arbitration", *supra* note 47 at 84-91.




This scenario analysis will show that the minimal review approach strikes a better balance between finality in arbitration and other public interests protected by public policy rules.

Scenarios 2 and 8 can immediately be eliminated from consideration. There is an internal inconsistency between the decision of the arbitral tribunal actually being correct and it being outside the range of reasonable conclusions an arbitral tribunal can reach on the evidence. In other words, scenarios 2 and 8 do not reasonably exist.

In scenarios 1 and 7, the arbitral tribunal's findings are in fact correct. It follows, as before, that the correct finding must have been reasonably open to the arbitral tribunal on the evidence. It is hard to imagine an exceptional case where the arbitral reaches the factually correct conclusion, but that conclusion is not reasonably open to it on the evidence before it. For scenarios 1 and 7, therefore, there is no risk of harm to the countervailing public policy interest. Any scope for re-opening the tribunal's findings would therefore have a negative impact on the policy in favour of finality in arbitration without any corresponding gains in protecting the countervailing public policy interest. Therefore, in these two scenarios, a minimal review approach is preferable to a contextual review approach.

Scenarios 3 to 6 are more difficult. In all four scenarios, the arbitral tribunal's decision is actually wrong. Scenarios 3 and 4 involve a false negative outcome in the award, whereas Scenarios 5 and 6 involve a false positive outcome. As earlier submitted, the same standard of review should apply to both false positive and false negative cases.[115] The relevant sub-distinction between these four scenarios is instead whether, even though the decision of the tribunal is actually wrong, that decision was one a reasonable arbitral tribunal could reach on the evidence before it.

In Scenarios 3 and 5, the decision reached by the arbitral tribunal is one that a reasonable arbitral tribunal could reach on the evidence before it, even though it is actually wrong. Yet, when faced with a challenge on public policy grounds, the challenge court cannot know that. If there is a review under the contextual review approach and the challenge court reaches the opposite conclusion, all that can be said is that the challenge court took a different view of the evidence. In international

[115] See the text supported by note 107.

arbitration, parties have generally chosen to exclude appellate review entirely. Further, there is no guarantee at the point of deciding whether to review the arbitral tribunal's finding that the challenge court will reach a different conclusion. Since the arbitral tribunal's finding in these two scenarios is reasonable, there is every chance that the challenge court will reach the same conclusion anyway. Overall, if a contextual review is adopted over the minimal review approach in these two scenarios, there would be a significant inroad into the interest in finality in international arbitration, whereas the gain to the countervailing public policy interest is only speculative. It is therefore submitted that the balance between the two interests should be struck in favour of finality in these two scenarios as well, and therefore that the minimal review approach is more suitable for them.

We then come to the final two scenarios where the case for striking the balance in favour of finality is the weakest. Scenarios 4 and 6 both involve situations where the arbitral tribunal's decision on whether a relevant public policy has been contravened, and where that decision is one which no reasonable arbitral tribunal could have reached. In such situations, it is not difficult to see why the interest in finality is weakened. Imagine a case where the arbitral tribunal expressly finds that there was no bribery involved in the performance of the contract, but that finding cannot reasonably be supported by the evidence before the arbitral tribunal. While such situations like *Soleimany*-type cases are arguably rare, it is very difficult to imagine that courts will keep strictly to an espoused minimal review approach and categorically refuse to reopen the issue of whether there is bribery.[116] After all, in both *Betamax* and *AJU*, the court also agreed with the arbitral tribunal's findings of law and fact respectively. This is apart from relying on the fact that the decision is one no reasonable arbitral tribunal could reach as a factor to make serious allegations against the integrity of the arbitral process itself.

Yet, strict adherence to the minimal review approach would require the court not to disturb a finding that it considers one that no reasonable arbitral tribunal could reach. Where that finding concerns a public policy interest such as combating corruption, there is substantial harm to that countervailing public policy interest by refusing to re-open the finding. By contrast, there is little interest in upholding the finality of the finding given the state of the evidence. Thus, in these situations that lie at the margin, there is a strong argument that a contextual review approach strikes a better balance between finality in arbitration and countervailing public policy interests.

The preliminary result of this scenario analysis is that out of the six scenarios that could reasonably exist, the minimal review approach strikes the better balance between the interest in finality in international arbitration and the interest in protecting countervailing public policy interests in four of the six scenarios. However, this is too simplistic a basis for concluding that the minimal review approach represents the appropriate balance to be struck between the two competing interests.

Whether the minimal review approach truly strikes the appropriate balance would depend on the relative frequencies in which the six scenarios that reasonably

[116] It is also the consideration of these scenarios that has led commentators to suggest that courts which expressly endorse and apply the minimal review approach may actually go beyond what minimal review requires: see Hwang SC & Lim, "Corruption in Arbitration", *supra* note 47 at 111-115.

exist occur in the population of challenges brought before challenge courts. If the frequency of arbitral tribunals making erroneous findings that no reasonable arbitral tribunal could reasonably make is low, then the harm to any countervailing public policy interest is also reduced. On the other hand, allowing an ambiguous extent of preliminary review which would likely shade into a full review would result in substantial harm to finality in arbitration without correspondingly significant gains to protecting those countervailing public policy interests.

While the question of frequencies is ultimately an empirical question, it is difficult to imagine that there are a large number of cases where arbitral tribunals make erroneous findings that no reasonable arbitral tribunal could have made. Arbitrators are understandably concerned with their professional reputations, and parties generally select arbitrators for their ability to competently resolve their disputes, including disputes over whether a relevant public policy has been contravened. This is not to say that there are no incompetent arbitrators. Instead, it is an inference drawn about the frequency of encountering incompetent arbitrators.

An alternative way of addressing concerns with incompetence, if it needs addressing, is a gloss on the minimal review approach that makes it a short step closer toward the contextual review approach.

A significant criticism of the contextual review approach is the open-ended nature of its first stage inquiry into whether or not the arbitral tribunal's findings should be re-opened.[117] Indeed, there are even differences between how Waller LJ framed the first stage in *Soleimany* and *Westacre (EWCA)*.[118] The approach as set out by Waller LJ is therefore likely too open-textured, resulting in too extreme an inroad into the interest in finality. It also impermissibly allows the unsuccessful party to enhance its chances at the first stage by invoking a more serious public policy objection.[119]

The alternative suggested here is to have a defined narrow test for determining whether the arbitral tribunal's findings of fact or law that relate to a relevant countervailing public policy should be re-opened to replace the open-ended first stage of Waller LJ's formulations. A viable standard, which has already been introduced, is whether the arbitral tribunal's findings are one that a reasonable arbitral tribunal could reach. This has the advantage of being relatively well known, and being based on the standard for challenging findings of fact in appellate judicial proceedings. Such a threshold stage should not involve a full trial, and should ideally be determined on the face of the award itself. While there will be some loss of finality as a result of this approach, the high threshold set should operate as a sufficient filter in the same manner as the threshold set of challenges on the basis of breach of natural justice.[120]

The other major criticism of the minimal review approach that needs to be addressed is its supposed inability to combat procedural fraud and collusion. In principle, this could fall within the public policy ground of challenge.[121]

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[117] *Ibid* at 96 (which suggests the open-ended nature of its first stage inquiry).

[118] *Ibid* at 110, 111.

[119] *Westacre* (EWCA), *supra* note 8 at 317B.

[120] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (CA).

[121] Hwang SC & Lim, "Corruption in Arbitration", *supra* note 47 at 106, commenting on the Swiss and French applications of the minimal review approach in the *Thales* saga. 'Procedural fraud' refers to when a party commits perjury, conceals material information and/or suppresses evidence that would

This criticism, however, is based on a failure to distinguish between (a) the ordinary challenge on public policy grounds and (b) procedural fraud and collusion as a conceptually distinct ground. The ordinary challenge on public policy grounds is based on allegations that an act leading to the formation of the agreement, a clause of the agreement itself, or some act done pursuant to the agreement is contrary to a relevant public policy that renders the claim unenforceable. A challenge based on procedural fraud or collusion is different. Challenges to awards based on procedural fraud or collusion are an invocation of "fraud, a breach of natural justice or any other vitiating factor" apart from the public policy ground of challenge itself within the language of *Betamax*[122] and *AJU*.[123] These types of challenges attack the integrity of the arbitral process itself, rather than the substance of the claim advanced. Thus, for instance, under Singapore law, these objections are specifically provided for in section 24(a) of the *IAA SG* in addition to Art 34(2)(b)(ii) of the Model Law.

The approaches toward these two grounds are also different in case law. One major difference concerns the restrictions against relying on evidence that is merely new, rather than fresh, which also arguably do not apply in these cases. In *Bloomberry Resorts*, the Singapore High Court has left open whether the strict *Ladd v Marshall* Requirements have any application to challenges to awards on the basis of procedural fraud,[124] noting the conflicting Singapore decisions[125] in this area as well as the more relaxed approach adopted by the UK Supreme Court toward setting aside judgments for fraud in *Takhar*.[126]

Further, it is submitted that a more relaxed approach toward new evidence is warranted in such cases as a matter of principle. The arbitral proceedings themselves are therefore the factual context for the allegation of procedural fraud. By definition, evidence of what occurred during the arbitral proceedings would not reasonably be available to the arbitrators at the time. Where there is perjury or concealment of material evidence, or worse still collusion, it is easy to see how that would have a material impact on the award. Indeed, even if strict *Ladd v Marshall*-type requirements were imposed, evidence of procedural fraud or collusion would likely satisfy those requirements anyway.

Treating allegations of procedural fraud or collusion as a conceptually distinct ground of challenge also serves a useful function of requiring that unsuccessful parties relying on this ground expressly allege and prove such serious allegations. Allegations of fraud or bad faith are generally expected to be made directly, and with particulars.[127] While the standard of proof in civil cases remains on a balance

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have a substantial effect on the making of the award: see *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 1 SLR 1045 (CA) at para 41.

[122] *Betamax, supra* note 4 at para 52.

[123] *AJU, supra* note 11 at para 66.

[124] *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2020] 3 SLR 725 at paras 220-222.

[125] Contrast *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573 (HC), *BVU v BVX* [2019] SGHC 69 and *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 (HC) with *Ching Chew Weng Paul, deceased v Ching Pui Sim and others* [2011] 3 SLR 869 (HC).

[126] *Takhar v Gracefield Developments Ltd* [2020] AC 450 (UKSC).

[127] Cavinder Bull SC *et al*, eds. *Singapore Civil Procedure* (Singapore: Sweet & Maxwell, 2021) at 18/12/14, 18/12/19.

of probabilities, there is a heightened level of scrutiny for the evidence tendered in support because of the inherent seriousness of the allegations.[128] It is therefore important that where an unsuccessful party makes such allegations, they are compelled to make and prove them in a forthright manner, rather than by insinuation. Thus, the fact that the arbitral tribunal made a finding that it could not reasonably have reached is a factor to take into consideration, but should not be elevated beyond that. A serious allegation should not be allowed to pull itself up by its own bootstraps.

Thus, the criticisms of the minimal review approach as inadequate to combat procedural fraud and collusion are likely premised on applying that standard beyond its scope.

## V. Conclusion

With the proliferation of the regulatory state, it is not difficult to envisage public policy contraventions being raised as defences to contractual or other claims in international arbitration. Indeed, such defences have already been raised in many arbitrations. With the scope of standard form arbitration clauses being interpreted generously[129] and increasing acceptance of the arbitrability of regulatory issues,[130] arbitral tribunals often have the jurisdiction and therefore a duty to decide whether claims are defeated by public policy objections. In each dispute, there will be an unsuccessful party who will have an incentive to challenge the arbitral tribunal's findings of fact and law made via the public policy objection. On the one hand, to support the interest in finality in arbitration, courts should not allow the unsuccessful party to re-open the arbitral tribunal's findings. But on the other hand, arbitral tribunals are not infallible and do reach the wrong findings. Where such errors lead to a wrong outcome on a public policy issue, there is a case to be made for correcting this error in order to protect the countervailing public policy interest.

However, out of all the scenarios where arbitral tribunals make findings on public policy issues, only two out of a possible six warrant national court intervention. These are where the arbitral tribunal's findings are not reasonably open to the tribunal. These situations are also expected to be relatively rare. Once it is understood that the minimal review approach does not apply to cases where procedural fraud or collusion are alleged, it becomes clear that the minimal review approach strikes the most appropriate balance between finality and countervailing public policy interests.

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[128] *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 (CA) at para 30.

[129] *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 (UKHL).

[130] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985).