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Re-calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards

Darius Chan ; Elias Khong

(*) (**)

When an award debtor challenges an award on public policy grounds, usually the principle of finality prevails, and courts will consider the award debtor bound by the decision of the tribunal. However, because public policy has implications beyond the disputing parties themselves, some courts consider themselves justified in reviewing the award. There is therefore a tension between finality versus the court's duty to stand as the guardian of public policy. Whether a review of an award should be allowed under this ground, and if so, the extent of permissible review, differs across various jurisdictions. For instance, common law authorities have generally preferred a very strict approach where a court may review an award on public policy grounds only in extremely limited situations. This paper considers the prevailing approaches taken across different jurisdictions and ultimately proposes an alternative approach for the common law to strike a better balance between all competing interests.

1 INTRODUCTION

1 In arbitration, parties must lie in the bed that they have made for themselves. (1) Those who opt for arbitration 'must live with the decision of the arbitrator, good or bad'. (2) This underscores the principle of *finality* in arbitration. (3) Under this principle, the substantive merits of an arbitral award generally cannot be reviewed by a national
P 272 court – even if the tribunal may have made an error of fact and/or ● law. (4) Meanwhile, national courts also have a duty to safeguard their state's *public policy*. (5) Indeed, when confronted with an attack on its legal system's most fundamental principles, national courts ought to be in a position to act.

2 The tension between these two competing interests – the principle of finality on one hand and the duty to safeguard a state's public policy on the other – is most stark when a national court is faced with an award where the tribunal has already pronounced on a public policy argument. *Betamax* (6) is a case in point. In that case, the defendant attempted to argue that a contract made with a Mauritian-owned entity was illegal for infringing the state's procurement process. The tribunal dealt with this issue, and found that the contract was not illegal as it fell within an exemption provided under the Mauritian public procurement legislation. This same point was raised at the setting-aside stage where the defendant argued that the award was contrary to public policy as it sought to uphold an illegal contract. In such a case, should the national court be allowed to review the tribunal's findings, to prevent the enforcement of an award which is potentially injurious to the public good? If so, under what circumstances should the national court be justified in reviewing such findings? On one hand, excessive intervention in an award may undermine international arbitration as a viable and effective dispute resolution mechanism that can reduce the caseload of courts. On the other hand, indifferent rubber-stamping of awards can lead to the enforcement of illegal agreements and promote illicit activities against the spirit of upholding the rule of law.

3 How then, should this difficult balance be struck? Different jurisdictions have calibrated this balance differently. (7) Some jurisdictions favour a minimalist review, strictly upholding award finality except in extremely narrow circumstances, which risks undermining the state's public policy. On the other end, a maximalist review approach intervenes extensively whenever a public policy objection arises, which jeopardizes the
P 273 finality of arbitration awards. In addressing these shortcomings, this ● paper critically examines existing approaches and proposes a nuanced solution. The proposed approach first deals with the severity of any public policy allegation upfront. At this first stage, the reviewing court must determine if the allegation(s) – even if proven – would trigger the fundamental public policy of the forum. Only allegations which would trigger the fundamental public policy of the forum will proceed to the second stage, where the reviewing court will engage in a full review of the tribunal's analysis on the public policy issue(s). Unlike a *de novo* review, a full review is limited to the evidence that was put forth before the arbitral tribunal. New evidence will not ordinarily be accepted unless the evidence was not reasonably available at the time of the arbitration.

4 Section 2 begins by analysing the ground of public policy from a conceptual and practical perspective. Section 3 deals with the central question of when and how extensively a national court should be allowed to review a tribunal's findings related to a public policy challenge. It critically evaluates three broad approaches that national courts have taken in this regard, and identifies their main deficiencies. Section 4 explains this paper's proposed approach. This proposed approach seeks to balance the individual deficiencies of the three prevailing approaches. Section 5 provides the

justifications for the proposed approach with reference to the three prevailing approaches. It also recognizes the risks associated with the proposed approach and provides suggestions on how to deal with them. Section 6 concludes.

2 THE PUBLIC POLICY GROUND OF CHALLENGE

5 Although the UNCITRAL Model Law on International Commercial Arbitration (Model Law) (8) and the New York Convention (NYC) (9) do not permit appeals against arbitration awards, (10) they provide an exhaustive list of grounds to challenge an award. (11) One of those grounds is premised on the award being contrary to the 'public policy' of the forum. This public policy ground is reflected in Articles 34(2)(*b*)(ii) and 36(1)(*b*)(ii) of the Model Law, which are in *pari materia* to Article V(2)(*b*) of the NYC. (12) These provisions provide
P 275 as follows:

> **Model Law, Article 34. Application for setting aside as exclusive recourse against arbitral award**
>
> ...
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> ... (*b*) the court finds that:
>
> ... (ii) the award is in conflict with the public policy of this State.
>
> **Model Law, Article 36. Grounds for refusing recognition or enforcement**
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> ...
>
> (*b*) if the court finds that:
>
> ... (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.
>
> **ARTICLE V of the New York Convention**
>
> ... 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that –
>
> ... (*b*) the recognition or enforcement of the award would be contrary to the public policy of that country.

The public policy challenge is not only found in these international instruments. Indeed, even jurisdictions which have not adopted the Model Law provide for this 'public policy' exception in their respective national arbitration legislation. (13)

6 This section of the paper will first engage in a conceptual and theoretical analysis of the public policy ground (***A***). Next, we will look at how the public policy ground typically manifests itself in practice. In this regard, this paper identifies at least three manifestations of public policy breaches (***B***).

2.1 Conceptual analysis of the public policy ground

2.1[a] Defining Public Policy

7 Public policy is notoriously amorphous, famously described as 'a very unruly horse, and when once you get astride it you never know where it will carry you'. (14) It is therefore no surprise that there has been no precise definition of the 'public policy' ground to date. (15) In fact, the term 'public policy' was intentionally not defined in the Model Law and the NYC. (16) In the absence of a universal statutory definition, (17) the concept and scope of the 'public policy' ground were left to individual states to develop. (18) This gave rise to the different expressions of public policy we see today. (19) Rather than aim to provide a comprehensive definition, this paper sketches out how public policy has been defined in various jurisdictions in order to sieve out certain common characteristics.

8 Perhaps the best-known definition in the common law world is that of Judge Joseph Smith in *Parsons & Whittemore.* (20) According to Judge Smith, public policy will only be invoked if 'enforcement would violate the forum State's *most basic notions of morality and justice*'. (21) Common law jurisdictions have largely adopted this concept. The leading authority in Hong Kong states that awards should be given effect to 'unless to do so would violate the *most basic notions of morality and justice* [which] would take a very strong case before such conclusion can be properly reached'. (22) Similarly, the Singapore Court of Appeal (SGCA) held that the public policy exception can only be invoked where 'the upholding of an arbitral award would "shock the conscience" ... or is "clearly injurious to the 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'. (23) In the UK, although the phrase 'most basic notions of morality and
P 276 justice' has been referred to occasionally, (24) there is a general reluctance to provide

a working definition of public policy. (25) As Sir John Donaldson of the English Court of Appeal puts it:

> [c]onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution … It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised. (26)

9 Civil law jurisdictions, on the other hand, tend to refer to public policy as a set of fundamental principles or values which undergird their respective societies. The German Federal Court of Justice describes a breach of public policy as:

> only occur[ing] if the arbitral award violates a norm that regulates the foundations of state or economic life, or if it is in intolerable contradiction to German ideas of justice. A mere violation of the substantive law or the procedural law according to which the arbitral tribunal should decide is not sufficient for such a violation. (27)

Austria defines its public policy as 'fundamental values of the Austrian legal system'. (28) The Belgium Court of Cassation observed that public policy is 'what touches upon the essential interests of the State or of the community or sets, in private law, the legal basis on which rests the society's economic or moral order'. (29)

10 Despite the diversity in expressions, we can distil at least two key characteristics which are common to the definitions across the various jurisdictions: (1) it is narrowly defined; and (2) it is subjectively ascertained through the lens of each jurisdiction. As we shall see, these two characteristics will be central to the approach proposed in this paper. (30)

2.2[b] Two Important Characteristics of the Public Policy Ground

2.2[b][i] Narrow Definition

11 Preliminarily, some jurisdictions apply different standards to the public policy ground – depending on whether it is dealing with an enforcement challenge or an annulment challenge. (31) For present purposes, this paper proceeds on the assumption
P 277 that ● the 'public policy' ground under both the setting aside and enforcement regimes are treated in the same way.

12 Putting aside semantic differences, most jurisdictions appear to agree that the public policy ground should be successfully invoked only in exceptional circumstances. (32)

13 This position is supported by commentators, (33) and it is aligned with the intention of the Model Law drafters. (34) Indeed, the preparatory works of the Model Law confirm that the term 'public policy' was 'not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice'. (35) This includes 'instances such as corruption, bribery or fraud and similar serious cases'. (36) Article V(2)(b) of the NYC has been interpreted in a similar manner. In October 2015, the International Bar Association published a 'Report on the Public Policy Exception in the New York Convention' which affirmed that the majority of jurisdictions adopt a narrow interpretation of what public policy is and that it 'require[s] a certain level of intensity for a given circumstance to be held contrary to public policy'. (37)

14 Specifically, numerous jurisdictions have pointed out that not every allegation of illegality would trigger the public policy of the state. For instance, the Supreme Court of India stated: 'In order to attract the bar of public policy, the enforcement of the award must involve something *more than the violation of the law of India*'. (38) Likewise, the
P 278 Federal Court of Australia observed that: (39) ●

> [t]he scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is *only those aspects of public policy that go to the fundamental, core questions of morality and justice* in that jurisdiction which enliven this particular statutory exception to enforcement … [The public policy ground] *should not be used to give effect to parochial and idiosyncratic tendencies* of the courts of the enforcement state.

Commentators echo the same views: 'the narrow construction of public policy implies that not all failures to apply a nation's mandatory law will fall within the public policy exception'. (40)

15 On this point, the SGCA in *AJU* described illegality and public policy as 'two strands of the same principle'. (41) Such a description may give rise to the impression that the two are equivalent concepts. However, as the authorities above point out, treating illegality and public policy as equivalent or mirror concepts fail to distinguish between two related but distinct issues. The first issue relates to the presence or absence of illegality. The second issue relates to whether that alleged illegality is egregious enough to render

an award contrary to the fundamental public policy of the forum. Put simply, the two concepts are not synonymous.

16 Indeed, that the SGCA most likely did not intend to imply that the two concepts are synonymous is apparent from *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864 ("*Westacre (CA)*") – which was cited and endorsed by *AJU* itself. In *Westacre (CA)*, the English Court of Appeal agreed that: (42)

> ... the [public policy] issue raises two separate questions; is it open to the defendants in the enforcement proceedings to challenge the arbitrators' findings of fact on the bribery issue, and secondly, if so *and if successful in proving [their] assertions ... should the English court enforce the award?*

The Court clearly recognized that not every form of illegality would justify a denial of enforcement; they give rise to 'two separate questions'. In fact, a crucial part of the holding in that case was the distinction drawn between breaches of *domestic* public policy and breaches of *fundamental* public policy. (43) Only breaches of the latter would
P 279 justify a denial of enforcement by the English courts. (44)

2.2[b][ii] Subjective Nature of the Ground

17 The second key characteristic is that the application of the public policy ground is *subjective* in nature. In other words, whether there is a breach of public policy or not is assessed through the lens of the relevant state. This is supported by a plain reading of the Model Law and NYC. Both refer to the award being contrary to the public policy of 'that country' or 'this state' – which suggests that the notion of public policy is a subjective one which should be assessed from the perspective of the individual states. Public policy is 'a nebulous concept that changes from State to State'. (45) One caveat is that, instead of being completely subjective, it has been argued that a state must invoke public policy in good faith. (46)

18 This subjective understanding of public policy is also clear on the face of the definitions expressed by the various courts above: common law courts refer to public policy as the *forum state's* most basic notions of morality and justice, (47) whilst civil law courts refer to fundamental principles which undergird *their respective societies.* (48) Legislation and commentary also confirm the subjective nature of public policy. For instance, Portuguese legislation refers to the 'international public policy of the Portuguese State'. (49) Likewise, when commenting on French legislation, Fouchard, Gaillard and Goldman note: (50)

> The international public policy to which Article 1502.5 refers can only mean the *French conception* of international public policy or, in other words, the set of values a breach of which could not be tolerated by *the French legal order*, even in international cases.

Similarly, Lew describes public policy in the following terms: (51)

> [I]t is clear that public policy reflects the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community. *Naturally, public policy differs according to the character and structure of the State or community to which it appertains.*

All of this confirms that the content of the public policy ground remains subjective to each state. Whilst there may be overlap between the public policies of different states, each state is not necessarily seeking to identify and apply a common or harmonized
P 280 standard.

19 This appears, at first glance, to contradict what is referred to by many jurisdictions as '*international* public policy' when describing the public policy ground of challenge. (52) These jurisdictions restrict the scope of the public policy ground to what they describe as 'breaches of *international* public policy', as opposed to 'breaches of *domestic* public policy'. (53) It is suggested here that the word 'international' in this context is somewhat of a misnomer because it gives rise to the misleading impression that the infringement in question must be condemned by the *international* community at large. Such a class of public policy is what some jurists describe as '*truly international* public policy' or '*transnational* public policy', (54) and is not to be confused with '*international* public policy'.

20 *Transnational* public policy does not refer to the public policy of any one state, but rather involves public policy that transcends state boundaries. Such public policy 'aris[es] out of an international consensus regarding universal standards as to norms of conduct that are generally recognized and agreed upon as unacceptable in most civilized countries, such as slavery, bribery, piracy, murder, terrorism, and corruption'. (55) However, as explained above, *transnational* public policy was not what was contemplated by the plain wording of the Model Law and NYC. (56)

21 Unlike *transnational* public policy, *international* public policy is not meant to connote a fixed or uniform standard common to all civilised nations. (57) Instead, it is a policy applied by a state when dealing with *foreign* arbitral awards (this foreign dimension is

perhaps why it is described as '*international* public policy'). (58) It contains a jurisdiction's most important domestic values – the breach of which cannot be tolerated by its legal order, *even in international cases that otherwise have little connection to that jurisdiction.* (59) In Sanders' words: 'international public policy, ● according to a generally accepted doctrine is confined to violation[s] of really fundamental conceptions of legal order in the country concerned'. (60) This is consistent with a subjective understanding of the public policy ground.

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22 For completeness, it may be part of a state's practice or policy to recognize or give effect to certain decisions or policies of foreign states in certain situations (61) – which indeed finds expression in some forms of the doctrine of comity – but that does not detract from the proposition that, at least for the purposes of recognition and enforcement of an arbitral award, each state applies its *own* public policy.

23 Having dealt with the principles behind the public policy ground, we now turn to consider the practical manifestations of public policy breaches.

2.3 Three primary manifestations of public policy breaches

24 There are at least three different ways public policy challenges can be raised: (1) the *remedies* ordered by the award are contrary to public policy; (2) the award gives effect to an *underlying contract* that is illegal or tainted with illegality; and (3) *how* the award was procured is contrary to public policy. This section provides an overview of each category and explains how they may (or may not) give rise to the issue of having to re-open a tribunal's findings.

2.3[a] Remedies Ordered by an Award are Contrary to Public Policy

25 The first (and least common) manifestation of a public policy breach is found on the face of the award itself. Such challenges are premised on the *remedies* granted in the award being contrary to public policy. For example, in ICC Case No 5946, a claim for punitive damages was refused in an arbitration taking place in Geneva, on the basis that damages beyond compensatory damages constitute a punishment of the wrongdoer contrary to the public policy of the seat (*viz.* Swiss public policy). (62) Although this case dealt with public policy at the pre-award stage, one could certainly imagine such a claim arising in a post-award context. More ● recently, in *Hardy Exploration*, (63) an award was refused enforcement in the United States on public policy grounds because the award issued an order which would violate the national sovereignty of another state. The tribunal there issued an award which ordered India to allow a private oil and gas exploration company into its territorial waters for three years to continue its exploration. The US District Court for the District of Columbia refused enforcement, holding that the award's 'forced interference with India's complete control over its territory violates public policy'. (64)

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26 In such cases, there will rarely be an issue of re-opening the tribunal's findings because tribunals are unlikely to pronounce on the compatibility of its remedies with a state's public policy. Generally speaking, the reviewing court would be considering the public policy challenge in the first instance and thus can pronounce on the issue without even having to look at the merits of the case.

27 However, that is not to say the issue of re-opening will *never* arise in this category. The issue can still arise if the tribunal explicitly finds that its award is *not* contrary to the public policy of the reviewing court. By way of illustration, consider ICC Case No 5946 referred to above. (65) Assume the tribunal in that case found that a claim for punitive damages was *not* contrary to Swiss public policy, and thus orders punitive damages against the respondent. If the respondent seeks to set aside the award in the Swiss courts on the same public policy grounds, that would require the Swiss courts to re-examine an issue which has already been decided by the tribunal. As shall be seen below, this situation illustrates why some of the prevailing approaches are not flexible enough to provide the Swiss courts with an appropriate remedy.

2.3[b] Award Gives Effect to an Underlying Contract That Is Illegal or Tainted with Illegality

28 The public policy objection in this second category stems from the *underlying contract* in the award. In practice, this is the most common manifestation of a public policy challenge. (66) The argument is that an award which is underpinned by an ● illegal contract should be set aside (or denied enforcement) because recognizing such an award would amount to the recognition of an illegal contract – and that would be contrary to the public policy of the forum. (67) This is conceptually one step removed from the first category because it is the *underlying contract* that is objectionable, not the *award itself.*

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29 The issue of re-opening an award is most common in such cases because the legality of the underlying contract would often have been an issue that the tribunal has dealt with. Therefore, to deal with a public policy challenge in this category, reviewing courts would generally have to first decide if it should re-open the issue of illegality. Given the prevalence of such cases, most prevailing approaches were designed specifically with this category in mind. It is suggested here that a common defect across all the prevailing approaches (68) arises because they fail to provide a universal solution that can be

applied across all the three different categories of public policy objections identified above. (69)

30 As with the first category, there will be exceptional situations where the issue of re-opening the tribunal's findings does not arise under the second category. For example, consider a situation where a tribunal finds that the underlying contract was *illegal* but nonetheless permits the claim. The reviewing court in such a case would not have to re-open the tribunal's decision on illegality in order to determine that the award is contrary to its public policy. The court can simply use the tribunal's own finding of illegality as a basis to invoke the public policy exception to refuse enforcement. This was precisely what happened in the English Court of Appeal case of *Soleimany*. (70) The underlying contract in that case was for carpets to be illegally exported from Iran and sold in other countries. The Beth Din (a Jewish tribunal) found that the underlying contract was indeed illegal under the law of the place of performance (Iranian law), but still enforced the contract as the tribunal found that the procedural law of the arbitration (Jewish law) attached no significance to the illegality. The Court refused enforcement because it was contrary to the public policy of England to enforce an award which upheld an illegal contract. (71) This would be true regardless of the procedural law of the arbitration. (72) Since it was the tribunal itself which found that the underlying contract was illegal, the
P 284 Court could refuse enforcement without having to re-open the finding of the tribunal.

2.3[c] The Process of Procuring the Award is Contrary to Public Policy

31 The third and last category involves allegations that the process in which the award was procured is contrary to public policy. This is sometimes referred to as a breach of '*procedural* public policy'. (73) Examples of such breaches include corruption or fraud perpetrated on (or by) the tribunal. (74)

32 Unlike the first two categories, re-opening a tribunal's findings under this third category is generally unobjectionable. (75) This is because tribunals are not in a position to adjudicate on their own procedural deficiencies – they are either complicit in the deficiency or did not even have an opportunity to take notice of it. Hence, when a reviewing court is confronted with a procedural public policy challenge, it can determine the issue afresh even in the unlikely event that the tribunal had already pronounced on the issue. (76) In such cases, concerns of finality usually take a back seat. (77)

33 Given these justifications, there is very little controversy surrounding the re-opening of an award for breaches of *procedural* public policy. All of the prevailing approaches are in agreement that, under this category, the reviewing court should be allowed to reopen the
P 285 findings of the award. (78)

3 WHEN CAN A NATIONAL COURT RE-OPEN A TRIBUNAL'S FINDINGS UNDER THE 'PUBLIC POLICY' GROUND?

34 In the previous section, we have set out the relevant context by discussing the conceptual basis of the public policy ground, as well as its specific manifestations. Against this background, we now turn to address the central issue in this paper: under what circumstances can a national court re-open a tribunal's findings under the public policy ground?

35 There are three broad approaches which have emerged from the case law: (1) the Maximal Review Approach; (2) the Contextual Review Approach; and (3) the Minimal Review Approach. In this section, we explain these approaches and identify their deficiencies wherever relevant.

3.1 Maximal Review Approach

3.1[a] Content of the Maximal Review Approach

36 Under this first approach, a national court will always embark on a *de novo* examination of the award afresh, *whenever* a public policy objection is raised (Maximal Review Approach). As long as there is an allegation to this effect, the court will engage in a full rehearing of the tribunal's findings which are related to the public policy objection. This effectively translates into two defining features. First, the scope for permitting a review is very wide. The reviewing court does not have to agree with the severity of the allegation, and the challenging party does not have to substantiate its allegation. (79) Secondly, the extent of review is relatively intrusive. A *de novo* examination involves a complete rehearing of the relevant issues afresh, without being bound by the tribunal's findings in any way. (80) The reviewing court can evaluate the evidence as if for the first time, and make its own factual findings. (81) This may entail accepting *new* evidence, even if such evidence was reasonably available (yet not produced) at the time of the
P 286 arbitration. (82) In this regard, *new* evidence may be contrasted against *fresh* evidence. Unlike *new* evidence, *fresh* evidence could not have been obtained at the time of the arbitration despite reasonable diligence. (83) There is therefore less justification for the introduction of *new* evidence in the post-award context. As we shall see, this distinction between *new* and *fresh* evidence is important when we consider the other approaches below. (84)

37 No court has *explicitly* adopted such an extreme stance – although there are some cases which ostensibly apply it. (85) One such case is the Singapore High Court decision in *Rockeby*. (86) That case involved an agreement where the claimant was to provide consultancy services to the respondent. The respondent argued that this agreement was illegal under the Securities and Futures Act of Singapore, which provides for licensing requirements for persons who provide capital market services in Singapore. (87) The claimant, in turn, argued that it was an exempt financial advisor and therefore did not require a license. The tribunal found in favour of the claimant – that the agreement was not illegal. The respondent then sought to set aside the award on the same grounds that it was illegal and thus contrary to Singapore's public policy. The court then re-opened the tribunal's finding on the issue of illegality, without considering whether this was an appropriate case to do so. (88) In the learned Judge's view, 'the court has the *inherent jurisdiction* to reconsider the issue of illegality although the arbitral tribunal may have determined that the contract in question was not illegal'. (89) However, *Rockeby* did not involve a *de novo* examination and was, in any event, quickly overruled by the SGCA in *AJU* just a few months later. (90) Since then, the Maximal Review approach has not yet resurfaced in common law jurisdictions. In civil law jurisdictions, the Maximal Review approach *was* celebrated most notably in France during the 1990s. (91) This is presumably because of the scepticism surrounding arbitration during that time. (92) At that time, it was believed that commercial arbitrations should not be allowed to usurp the exclusive
P 287 domain of the courts in adjudicating matters and ● applying the law. (93) However, since the early 2000s, (94) French judicial attitudes have gradually shifted with the times, toward a more Minimal Review approach. (95)

38 Interestingly, a recent French Cour de Cassation decision has been described as endorsing France's return to the 'maximalist review' approach. (96) In *Belokon v. Kyrgyzstan*, the highest court in France upheld the Paris Court of Appeal decision to set aside a USD15m award on public policy grounds. The claimant in that case was a Latvian citizen who invested in a local bank ('Manas Bank') based in the Kyrgyzstan (i.e., the respondent state). This investment was made in 2007, against the backdrop of a bilateral investment treaty (the 'BIT') between Latvia and Kyrgyzstan – which sought, amongst other things, to encourage investment across the two countries and safeguard investors' rights. However, in 2010, the Kyrgyz National Bank issued a decree which essentially suspended the activities of Manas Bank. This was justified on the basis that the bank was engaged in money laundering and other criminal activities. The claimant thus brought a claim under the BIT for the respondent to compensate him for losses. The tribunal issued an award of roughly USD fifteen m in favour of the claimant, and the respondent sought to set aside the award in France. After being satisfied that there was a 'serious, precise and concordant indication' (97) of money laundering, the court proceeded to engage in a new investigation into the merits of the case, ignoring the tribunal's finding on the same issue. Although the French courts here may have been very thorough and intrusive in their re-examination of the issue, (98) this is arguably *not* an adoption of the Maximal Review approach in its purest form. The courts did not proceed to re-examine the issue on the basis of a *mere allegation* alone. Instead, it only engaged in a re-examination of the tribunal's findings after being satisfied that there was a 'serious indication of illegality'. (99) Indeed, the Maximal Review Approach not only describes *how extensively* the courts review the tribunal's decision, but also *how easily* the courts will engage in a review of the tribunal's decision.

3.1[b] Deficiencies of the Maximal Review Approach

39 The biggest issue with this approach is that it sets too wide a scope for parties seeking a backdoor to judicial review on the substantive merits of an arbitral award. This
P 288 contradicts the principle of respecting the finality of arbitral awards and ● minimal curial intervention. (100) Reyes IJ aptly describes the issue in the following terms: (101)

> Public policy is often invoked by a losing party in an attempt to manipulate an enforcing Court into re-opening matters which have been (or ought to have been) determined in an arbitration. The public policy ground is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory. The Court must be vigilant that the public policy objection is not abused in order to obtain for the losing party a second chance at arguing a case. To allow that to happen would be to undermine the efficacy of the parties' agreement to pursue arbitration. That by itself would not be conducive to the public good.

If all it takes is a simple allegation, that would further perpetuate the issue highlighted by Reyes IJ. To prevent such abuse, there must be gateways to cross before one can re-open a tribunal's findings.

40 The second issue relates to the *extent* of review permitted under this approach. A full *de novo* rehearing of the public policy issue is arguably too intrusive. In particular, accepting *new* (and not just *fresh*) evidence too freely at the post-award stage would make a mockery of the arbitral proceedings. Uncooperative award debtors would be able to prolong enforcement unnecessarily by introducing new evidence at the post-award stage without being able to justify the delay. This erodes the viability of arbitration as an efficient mode of dispute resolution.

41 Recent developments in the UK vis-à-vis jurisdictional challenges lend further support to this critique. After a thorough review of the English Arbitration Act and engagements with stakeholders, (102) the UK Law Commission has recommended various amendments. (103) One key proposal relates to the narrowing of jurisdictional challenges – such that they should operate by way of an *appeal* and not a *rehearing*. (104) Unlike a rehearing, an appeal does not allow parties to adduce *new* evidence which was not before the tribunal. (105) In support of this reform, the Commission provides two main reasons. (106) First, it
P 289 reduces delay and ● costs from repetition. (107) Secondly, it prevents the jurisdictional hearing before the arbitral tribunal from becoming a 'dress rehearsal' for the challenging party to plug the gaps identified. (108) It is suggested here that these two reasons apply with equal force when considering the deficiencies of the Maximal Review approach.

3.2 Contextual review approach

3.2[a] Content of the Contextual Review Approach

42 The Contextual Review Approach was first formulated by Waller LJ in *Soleimany* (109) which his Lordship further developed in his dissenting judgment in *Westacre (CA)*. (110) In *Westacre*, the contract was performed through the exercise of improper influence and bribery and was therefore void on public policy grounds. The tribunal held that these allegations were not made out and thus issued an award in favour of the claimant. In resisting the enforcement of the award in England, the respondent made three separate public policy arguments:

(1) First, the underlying agreement was a contract for the purchase of personal influence. (111)

(2) Second, Westacre gave perjured evidence at the arbitration. (112)

(3) Third, the agreement was intended to be used as a vehicle for bribery from its very inception. (113)

43 In deciding whether (and the extent to which) it should re-open the illegality findings of the tribunal, Waller LJ formulated the following contextual approach which requires the court to be satisfied with certain preliminary conditions before it can embark on a more elaborate enquiry into the tribunal's findings on illegality. (114)

44 In essence, this approach proceeds in three main stages. (115) First, the court must be satisfied that there is at least *prima facie* evidence of illegality. (116) Second, the court must then conduct a preliminary enquiry and determine whether to give full faith and
P 290 credit to the award, having regard to the following factors: ●

(1) whether there is evidence on the other side to the contrary; (117)

(2) whether there was anything to suggest that the arbitrator was incompetent to conduct such an inquiry; (118)

(3) whether the arbitrator expressly found that the underlying contract was not illegal; (119)

(4) whether it was a fair inference to suggest that he did reach that conclusion; (120)

(5) whether there may have been collusion or bad faith, so as to procure an award despite illegality; (121) and

(6) whether the level of opprobrium justifies re-opening the case. (122)

Third, it is only if the court is satisfied that the award is unsafe that it should then embark on a more elaborate inquiry into the issue of illegality. (123)

45 Unfortunately, Waller LJ did not elaborate further on what 'a more elaborate inquiry' under the third stage entails. (124) In particular, his Lordship did not specify whether *new evidence* (which was reasonably available at the time of the arbitration) could be considered under this 'more elaborate inquiry'. (125) Hwang, however, suggests otherwise. (126) In his description of the Contextual Review approach, Hwang says 'Waller LJ made clear that in assessing whether there was illegality (under [the second or third stages]), the court was not limited to considering fresh *or new evidence*; it may even consider evidence that had been put before the tribunal'. (127) He explains in his footnote (128) that this can be discerned from *Soleimany*'s departure from Colman J's sixth proposition
P 291 in *Westacre (HC)*. (129) ●

46 It is suggested here that *Soleimany*'s departure only indicates that a reviewing court may consider *facts which were placed before the arbitrators* when conducting the 'more elaborate inquiry'. (130) It does not suggest that a reviewing court may also consider facts which are *new but not fresh*. (131) In fact, Waller LJ most likely did not intend for a reviewing court to consider new but not fresh evidence. Just a few paragraphs before his Lordship restated the Contextual Review approach in *Westacre (CA)*, Waller LJ rejected Jugoimport's attempt to adduce additional evidence because Jugoimport failed to show that the evidence was not available at the time of the arbitration. (132) Although this holding (133) was made in the context of an application for leave to amend arguments, (134) it demonstrates Waller LJ's inclination to reject new (as distinct from fresh) evidence when a court embarks on the 'more elaborate enquiry'.

47 Putting aside the ambiguity of the third stage, Waller LJ's approach essentially seeks to balance the competing interests by only re-opening a limited scope of cases. For

example, a court applying the Contextual Review approach may reopen a case if there are strong reasons to doubt the credibility of the award. This appears to be what factors (1) and (2) address. Another example of when re-opening may be permitted under Contextual Review is where the tribunal has not even dealt with or pronounced clearly on the issue of illegality. In such a case, concerns of finality may be overblown since the reviewing court will not contradict the findings of a tribunal. This situation appears to be what factors (3) and (4) above seek to address.

48 Re-opening may also be permitted when the level of opprobrium (or seriousness) of the alleged illegality is sufficiently high. This is of course a direct manifestation of factor (6). Presumably, Waller LJ included this factor because a national court should be more inclined to review and ensure that the tribunal's decision is right when the stakes are higher. (135) However, the other judges did not agree. Their Lordships viewed this factor as irrelevant at the second stage, holding that it is something to be taken into account
P 292 only when deciding whether the award should be enforced. (136) Unfortunately, the majority did not provide any further reasons why this would be an irrelevant factor at the second stage.

3.2[b] Deficiencies of the Contextual Review Approach

49 Conceptually, this approach may seem like an attractive one to take. It attempts to strike a balance between respecting the finality of awards, (137) whilst also acknowledging the role played by national courts in upholding the public policy of the forum. (138) However, as with all flexible approaches, it is arguably difficult to apply in practice. (139)

50 First, it is not clear what weight should be placed on the different factors, as well as the threshold that needs to be crossed before a court can decide not to 'give full faith and credit to the award'. In practice, the situations are usually not as neatly delineated as the examples presented above. (140) The reality (and difficulty) of Contextual Review is that it is a multi-factorial approach, and the different factors may push and pull in different directions. This problem is exaggerated by the fact that, unlike other multi-factorial tests, (141) it is extremely difficult to come to a binary conclusion for most of the factors under the Contextual Review approach. (142) To illustrate, consider factor (2) – which deals with the competence of the tribunal. In order to conclude whether this factor weighs in favour or against re-opening the case, the court would have to draw an arbitrary threshold for the level of incompetence which would justify re-opening an award. It is also conceptually difficult to ascribe a value to the competence of a tribunal solely by reference to other tribunals. Each tribunal may comprise different arbitrators who bring different strengths and weaknesses to the table.

51 Second, there is also the danger of slipping into a full-scale review at the preliminary inquiry stage. In Steel J's words: '[t]he difficulty with the concept of some form of preliminary inquiry is of course assessing how far that inquiry has to go'. (143) Factors (1), (2), (3) and (4) involve value judgments relating to the robustness of the tribunal's decision. This undoubtedly involves some degree of analysis into the merits of the
P 293 dispute, especially if counsel are invited to make submissions on those factors.

52 Hwang and Lim, however, find this second concern overstated. (144) In their view, a clear enough distinction can be drawn between the preliminary inquiry in the second stage and the full-scale review in the third stage. (145) In essence, they argue that the second stage should only be triggered if the award's lack of credibility can be 'reasonably easily perceived'. (146) If 'lengthy submissions and complex argumentation' are required to raise suspicions, then the court should give full faith and credit to the award and not proceed to a full-scale enquiry at the third stage. (147)

53 However, these guidelines may be too broad to guard against the risk of slipping into a full-scale review. Lengthy submissions and complex argumentation are not atypical in commercial disputes where the stakes are high. What do reasonable suspicions entail? How long and complex do the arguments have to be before a court should reject them outright? These are questions that will involve difficult value judgments. It is fully recognized here that a judge's role is precisely to make difficult value judgments, but in this context any challenging party will undoubtedly seek to cast as much doubt as possible on the tribunal's reasoning. In practice, dealing with such argumentation will very likely shade into a de facto full-scale review.

54 Third, the preliminary inquiry is somewhat circular in logic. This is particularly true of factor (1) – which invites counsel to explain why the tribunal was wrong. Considering such a factor at the preliminary inquiry stage is logically flawed because the whole point of the preliminary inquiry is to determine if such explanations should even be submitted for consideration by the reviewing court in the first place.

55 Fourth, as Grierson points out in relation to factor (5), there is much practical difficulty in showing 'incompetence', 'collusion', or 'bad faith' – especially so when such deficiencies have to be shown from a cursory audit of the tribunal's reasoning at the preliminary enquiry stage. (148)

56 Last, the Contextual Review approach is not flexible enough to deal with all categories of public policy breaches. Put another way, it does not prescribe a universal solution to

P 294 deal with all forms of public policy challenges. In fact, it was formulated to deal only with a specific form of public policy breach (*viz.* where ● there is an underlying contract that is illegal). (149) This is evident from the phrasing of the Contextual Review approach itself. (150) However, as explained earlier, (151) public policy breaches can take different forms. It is not necessarily limited to a case which involves an illegal underlying contract.

57 For example, in a case where the public policy objection is directed at the *remedies* ordered by an award, (152) the Contextual Review approach is not flexible enough to provide a satisfactory remedy. This is because the preliminary inquiry stage focuses primarily on factors relating to the *credibility* of the award and the *seriousness* of the allegation. (153) It pays no attention to the *type* of pronouncement made by the tribunal. In other words, the fact that a tribunal pronounced wrongly on the *content* of the forum's public policy is not a relevant factor in itself under the Contextual Review approach. As long as there is nothing to question the credibility of the award, a reviewing court applying the Contextual Review approach is expected to yield to a tribunal's determination of what its own public policy entails. (154) This will obviously not be satisfactory to any reviewing court.

58 Another lacuna in the Contextual Review approach emerges when a court deals with an award where the tribunal erroneously finds that a contract is *illegal*. Such a situation would not be captured by the Contextual Review approach because it only permits a review when the tribunal erroneously finds that a contract is *not illegal*. (155) This stems from the first stage, which can only succeed where 'there is *prima facie* evidence of *illegality*'. (156) It does not contemplate the situation where there is *prima facie* evidence
P 295 of *legality*. At first blush, this may seem to be a purely ● theoretical issue. The assumption is that a claim would be dismissed in a case where the tribunal finds that a contract is *illegal*. Accordingly, one would assume that there would be no award to enforce in such cases. However, case law has suggested that a negative declaratory award may still be set aside. (157) This is therefore not a theoretical issue. It is entirely possible for courts to be faced with such cases, (158) and the Contextual Review approach would leave those cases without a satisfactory remedy.

3.3 Minimal Review Approach

59 Finally, we consider the most widely endorsed Minimal Review approach, (159) which gives the greatest degree of deference to the findings of arbitral tribunals. Under this approach, awards will be upheld (or enforced) as a starting point, and it is only in *exceptional cases* that courts will relook the issue of illegality. (160) However, even within this approach, different courts have adopted different definitions of what constitutes an 'exceptional case'. (161)

3.3[a] *Betamax*'s Conception of Minimal Review

60 The most straightforward (and narrow) conception of the Minimal Review Approach is found in the recent UK Privy Council case of *Betamax*. (162) That case involved a dispute between the claimant shipping company ('Betamax') and the trading arm of the Mauritian state ('STC'). In 2009, the parties entered into a Contract of Affreightment ('CoA') under which Betamax took over the transport of Mauritius' oil imports from India. A new government took over STC in 2010 and decided to terminate the CoA on the basis of serious infringements in the procurement process. In May 2015, Betamax commenced arbitral proceedings for STC's breach of contract. STC's principal defence was that the CoA breached public procurement rules and was thus illegal and unenforceable. Therefore, STC argued that Betamax could not rely on the CoA to claim
P 296 damages – because this ● would be tantamount to enforcing an illegal contract. Betamax responded by asserting that the CoA was not illegal because it fell within the exemption prescribed under the Mauritian public procurement legislation. The arbitrator found that STC was indeed an exempted organization under Mauritian legislation and that there was accordingly no illegality. The CoA was therefore legal and enforceable, and Betamax was awarded damages of USD 115 million. STC then applied to set aside the award for being in conflict with Mauritius' public policy.

61 The Privy Council held that a national court *cannot* review the findings of a tribunal unless the tribunal's decision-making process has been tainted with 'fraud, a breach of natural justice, or any other vitiating factor'. (163) In other words, re-opening a tribunal's decision is only justified in cases of *procedural* public policy breaches. (164) Although the Board left open the possibility of other 'exceptional cases' where a court may be entitled to review a tribunal's decision, (165) the line was largely drawn at the point where a breach of procedural public policy can be established.

62 This approach suffers from several deficiencies. For one, confining the exceptional cases only to cases of procedural public policy may lead to unpalatable outcomes. For instance, consider a case that deals with a contract for the sale of human body parts. Assume the tribunal finds that the contract is not illegal under its proper law and renders an award on that basis. It would be extremely discomforting to know that reviewing courts at the award enforcement stage are barred from reviewing that decision unless there is a breach of *procedural* public policy.

63 A less extreme illustration can be found in the case of *Hardy Exploration*. (166) To

recapitulate, that case dealt with an award where India was ordered to allow a private oil and gas exploration company into its territorial waters for three years to continue its exploration. Assume that the tribunal there dealt with a public policy argument, and erroneously held that it was *not* against US public policy to issue an award infringing upon the territorial sovereignty of India. If the *Betamax* conception of minimal review is
P 297 applied, (167) the US courts would be forced to enforce an award which they believe is contrary to their state's public policy. (168) This would ● be an unsatisfactory outcome. The US courts – as the judicial arm of the government – should not be expected to yield to a commercial arbitrator's determination on what US public policy entails.

64 Another deficiency of *Betamax's* conception of the Minimal Review Approach was noted by Poon. (169) He argues that such a strict approach may result in abuse. In his view, if a court can only review errors made by the tribunal where there is a recognized vitiating factor, then 'parties can endeavour to commit acts which would be a breach of public policy yet reap the rewards of such a breach by slipping in a favourable arbitration clause'. (170) This would leave arbitration open to abuse by commercial parties seeking to hide illegal conduct by laundering it through an arbitral award. (171) Hwang and Lim echo similar sentiments. (172) They argue that the '*laissez-faire*' nature of Minimal Review 'leaves courts open to shameless exploitation by wily and unscrupulous claimants seeking judicial assistance to enforce their corrupt schemes and other nefarious wrongdoing'. (173)

65 Lastly, much like the Contextual Review approach, (174) *Betamax's* conception of Minimal Review is not flexible enough to deal with all forms of public policy challenges. Lord Thomas's formulation suggests that the approach applies only where the tribunal has already pronounced on the (il)legality or public policy issue(s) in question. (175) It is not clear to what extent the *Betamax* approach can or should be applied in a case where the tribunal has not dealt with the specific allegations made before the reviewing court. This is problematic because crafty award debtors can avoid the restrictive Minimal Review approach by taking a different factual 'spin' on essentially the same public policy objection at the post-award stage. In fact, this was precisely what happened in *Westacre (CA)*. (176) There, the award debtor initially argued before the arbitral tribunal that Westacre had *performed* the underlying contract through bribery. (177) Before the English
P 298 enforcement court, it instead argued ● that the entire *purpose* of the underlying contract from its inception, was to provide funds for the bribery of governmental officials. (178) *Betamax*'s conception of Minimal Review arguably could not be applied on the facts of *Westacre* because the tribunal had not yet pronounced on the specific (il)legality or public policy issue before the court. (179)

3.3[b] Majority in *Westacre* (CA)'s Conception of Minimal Review

66 In *Westacre (CA)*, Mantell LJ (delivering the judgment of the majority) suggested that the presence of *fresh evidence* may also be an exceptional case allowing a court to re-open an award. (180) However, his Lordship did not specify whether there had to be fresh evidence of *fraud or bribery in particular*, or fresh evidence of *any* breach of public policy. It is suggested here that Mantell LJ was likely envisioning the former. This is because his Lordship appears to have restricted the exception of fresh evidence to the 'circumstances' of the case he was dealing with. In his words: (181)

> From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected. … ***[I]n those circumstances*** *and without fresh evidence*, I would have thought that there could be no justification for refusing to enforce the award.

67 If we construe *Westacre (CA)* as requiring fresh evidence of *bribery in particular*, then this exception is arguably too restrictive. Indeed, Hwang and Lim went as far as to say that this is the 'fatal weakness' of the Minimal Review approach. (182) In their view, the requirement of fresh evidence of fraud 'will usually be impossible for victims of corruption to procure'. (183) As a result, 'under almost no circumstances will an award be capable of review … no matter how corrupt the services performed under the contract were in reality'. (184)

68 However, if Mantell LJ was instead proposing a *general* exception of fresh evidence, one can agree with the proposition in principle. Generally speaking, *fresh* (and not merely
P 299 *new*) (185) evidence of any public policy breach should be *a* basis for ● re-opening an award. (186) As shall be seen below, (187) this is why the notion of fresh evidence has been incorporated into the approach proposed by this paper.

3.3[c] AJU's Conception of Minimal Review

69 *AJU*'s conception of the Minimal Review Approach is less straightforward. (188) That case was concerned with the legality of a settlement agreement which required the respondent in the arbitration to 'take such action as [was] necessary to withdraw and/or discontinue certain criminal proceedings' filed by the respondent against officers of the claimant with the Thai prosecution authority. This settlement agreement was governed by Singapore law. At the arbitration, the respondent failed to convince the tribunal that the settlement agreement was illegal as it sought to stifle the prosecution of forgery in Thailand.

70 The respondent then sought to set aside the award on essentially the same ground – that the award was contrary to public policy as it sought to uphold a settlement agreement which stifled Thai prosecution. Although the Singapore High Court acknowledged the principle of finality, it nonetheless thought that this was an 'appropriate case' for the court to 'safeguard the countervailing public interest' and thus re-opened the issue on illegality. On appeal, the SGCA had to consider whether the judge below was right 'in going behind the … award and reopening the tribunal's finding that the [settlement agreement] was valid and enforceable'. Although Chan CJ (as he then was) ostensibly endorsed the Minimal Review approach, (189) he added one qualification. Specifically, Chan CJ opined that the public policy ground for setting aside awards only applied to 'findings of *law* made by an arbitral tribunal – to the exclusion of findings of *fact*'. (190) In this regard, when dealing with the legality of an agreement governed by Singapore law, the court held that its:

> supervisory power extends to correcting the [t]ribunal's decision on [the] issue of illegality … as the court cannot abrogate its judicial power to the [t]ribunal to decide what the public policy of Singapore is and, in turn, whether or not the [agreement] is illegal (illegality and public policy being … mirror concepts) (191)

This appears to suggest that the Singapore courts can freely review *all* findings of law
P 300 relevant to a public policy challenge, even if no recognized vitiating factor can ● be established. Apart from the fact that a bright line distinction between questions of fact and questions of law can be very hard to draw in practice, (192) the UK Privy Council in *Betamax* noted that such a suggestion 'went further than was necessary for the decision in the case and is inconsistent with the judgement read as a whole'. (193) As Ng explains, such an expansive reading of *AJU* would arguably be inconsistent with the decision 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'. (194)

71 It is suggested here that these criticisms of *AJU* likely stem from a failure to delineate clearly between the two distinct issues described above. (195) In particular, issues of *legality* and issues of *public policy* are distinct, and not 'mirror concepts'. (196) Properly understood, Chan CJ's description of an 'error of law' should be narrowly construed as an error relating only to the *content of the forum's public policy.* It should not be understood as *any* error of law with a public policy dimension. Under this interpretation, an error relating to the *legality of an underlying contract* is not capable of review because it does not deal with the *content* of the forum's public policy. A similar view is taken by Ng, who perceptively points out Chan CJ's precise description of what a question of law is. (197) In Chan CJ's words: '[i]t is a question of law what the public policy of Singapore is. An arbitral award can be set aside if the arbitral tribunal makes an error of law *in this regard*'. (198) Put another way, one should understand *AJU* to stand for the proposition that the Singapore court can freely review findings made by an arbitral tribunal on the *content* of Singapore's public policy (and not all findings of law with a public policy dimension). This would reconcile *AJU* with *Betamax*'s interpretation of the same. (199)

72 In principle, this paper agrees that this narrow exception, namely the review of a tribunal's pronouncement on the *content* of the reviewing court's public policy, should also be a basis for re-opening the tribunal's award. However, as with the other
P 301 conceptions of Minimal Review, it should not be the *only* basis for review. ●

3.3[d] *CBX*'s Conception of Minimal Review

73 In a more recent decision before the Singapore International Commercial Court, Reyes IJ in *CBX v. CBZ* attempted to interpret *AJU*'s minimal review approach. (200) *CBX* involved certain share purchase agreements which were governed by Thai law. The tribunal issued an award which ordered compound interest on the award sum. The respondent sought to set aside the award on the basis that the compound interest order was contrary to Thai mandatory law, and thus upholding that order would be contrary to Singapore public policy. (201) In support of this argument, the respondent cited *AJU* for the proposition that the courts can intervene where the tribunal made an error of law. In this regard, Reyes IJ interpreted *AJU* as giving rise to the following four scenarios. (202) These four scenarios are best represented in the following matrix (*see* Table 1.1). (203)

Table 1.1 Table summarising different scenarios laid out in *CBX v. CBZ*

Scenario	*Law Governing the Underlying Contract*	*Tribunal's Finding on the Legality of the Underlying Contract*	*Whether Re-opening by Reviewing Court is Permissible*
#1	Singapore law	Not illegal	Yes
#2	Singapore law	Illegal	No
#3	Foreign law	Illegal	No
#4	Foreign law	Not illegal	No unless there is 'palpable and indisputable illegality'

74 Several observations can be made on this matrix. First, *Scenario #1* may have overstretched the holding in *AJU*. Here, Reyes IJ argues that a Singapore court can intervene in a tribunal's finding of legality because 'as the supervisory court, it "cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore
P 302 is" (*AJU v. AJT* ... at [62])'. (204) ● However, as argued above, (205) when *AJU* is understood in context, the court's judicial power to scrutinize an award should specifically be limited to '*what* the public policy of Singapore is'. (206) This is conceptually distinct from intervening in questions relating to the *illegality* of the underlying contract. Simply put, the two are not 'mirror concepts'. (207) It is therefore arguable that the court intervention permitted by *Scenario #1* may be too broad.

75 The second observation relates to *Scenarios #2* and *#3*. Here, the Court observed that where a tribunal finds that the contract is *illegal*, then parties must live with that decision and have no avenue of appeal. In this regard, the Court essentially distinguished between 'false positive' awards and 'false negative' awards. In 'false positive' awards, the tribunal has decided that an underlying contract is *not illegal* – when in actuality, it may have been illegal. (208) On the other hand, in 'false negative' awards, the tribunal has decided that an underlying contract is *illegal* – when in actuality it may have been perfectly legal. Through *Scenarios #2 and #3*, the Court categorically held that 'false negative' awards should *not* be subject to review, but did not provide further justification for drawing this distinction. (209) Nevertheless, the assumption is that in 'false negative' cases there would be no avenue for any national court to review the tribunal's finding that the contract was illegal because the claim would have already failed. This makes sense if the failed claimant does not pursue the matter any further and there is nothing to enforce. However, that is not always the case. Where a claim is dismissed for *illegality*, the tribunal may issue an award denying the claim (i.e., a *negative* declaratory award). This is still an award which can be set aside if the failed claimant can show that the tribunal came to an erroneous conclusion. (210) To the extent the Court believes that a reviewing court can intervene in 'false positive' awards, there is arguably no principled reason why the Court cannot also intervene in 'false negative' awards. After all, both of
P 303 them have equal potential to raise a public policy objection. (211) ●

76 The last observation relates to the distinction the Court sought to draw between *Scenarios #1* and *#4*. Under *Scenario #4*, where a tribunal has decided that the underlying contract is not illegal under a *foreign law*, the Singapore court should not intervene in that decision. This is presumably because the Singapore courts are not in a position to correct an error of foreign law; that should be left to the foreign court to correct. However, this view appears to miss the point behind the public policy ground. As seen from the various possible manifestations described above, (212) breaches of Singapore public policy are not necessarily confined to cases where the underlying contract is governed by Singapore law. It can also occur when the underlying contract is governed by a foreign law. (213) It may be too blunt or artificial to deny intervention in cases simply because the underlying contract is governed by foreign law.

4 PROPOSED APPROACH

77 Having considered all the deficiencies identified above, this section suggests that courts can adopt an alternative approach (the Proposed Approach). It is submitted that this approach strikes the best balance between the concerns highlighted above, whilst also furthering the courts' legitimate interest in safeguarding public policy. The Proposed Approach proceeds in the following two stages.

4.1 Stage One: Would the public policy of the reviewing forum be triggered?

78 Under Stage One, the central question for each court is: do the allegations made – even if proven – trigger the fundamental public policy of the forum? At this stage, each court will proceed on the assumption that the allegations made by the challenging party are true. There is no need to conduct any form of review of the tribunal's analysis at this first stage.

79 However, national courts should be careful in applying this stage, always bearing in mind the two key characteristics of the public policy ground identified above. First, in order to safeguard the finality of awards, the public policy ground should only be successfully invoked in exceptional circumstances. (214) Mere illegality does not suffice. (215) The challenging party will have to demonstrate how the alleged illegality is so egregious that the forum should not tolerate the award. This will aid in sieving out a
P 304 majority of the applications. Secondly, courts should also ● remember that the inquiry here is *subjective* in nature. (216) In other words, an alleged illegality which involves an egregious breach of the laws of a *foreign* jurisdiction can but does not necessarily trigger the public policy exception in the reviewing forum. Litigants will therefore have to articulate precisely how the public policy *of the reviewing forum* has been breached by the foreign illegality.

4.2 Stage Two: Full review of the tribunal's analysis

80 Only if the court finds that the public policy of its own jurisdiction has been triggered should it then proceed to Stage Two. Here, it will perform a *full review* of the tribunal's

analysis on the specific issues giving rise to the public policy objection.

81 However, this should operate as a *review* and not a *rehearing*. As explained earlier, a full rehearing (typically referred to as a '*de novo*' hearing) involves a re-examination of the public policy issue afresh. This may entail accepting *new* evidence. (217) A review, however, is limited to an evaluation of the tribunal's existing analysis based on arguments made by parties during the arbitration. Hence, a court should not ordinarily accept new evidence, unless the evidence was not reasonably available at the time of the arbitration. (218) A corollary of this is that a challenging party will have to sustain the allegations it made at Stage One based on the factual findings of the arbitrator. It cannot introduce new evidence unless it can show that such evidence could not have been obtained with reasonable diligence at the time of the arbitration. This will limit a challenging party's ability to re-cast or re-characterize its allegations at Stage One. After all, it will have to substantiate whatever allegations it makes from the limited pool of evidence.

82 In practical terms, a 'rehearing' under Stage Two would only be permitted in cases where the evidence for the alleged impropriety genuinely becomes known only after the arbitral proceedings. In such cases, a 'rehearing' is justified because the claim is made entirely on fresh evidence which was not reasonably available at the time of the arbitration. There can be no rehearing under the Proposed Approach if evidence was already tendered during the arbitration, but the tribunal decides not to discuss them, sees them as irrelevant, or deals with them in a cursory manner. Such cases are better dealt with under a claim for a breach of natural justice, (219) and should not unduly
P 305 broaden the scope of the public policy ground.

83 Critically, Stage Two does not entail a full review of the *entire award.* Courts should only re-open an award to the extent needed to decide on the specific allegation(s) that passed muster under Stage One. Otherwise, the public policy ground would be subject to abuse by recalcitrant award debtors seeking a back door to re-litigate their entire case. If, in the course of the review, a court notices another error that is unrelated to the public policy objection, it cannot correct it. If such errors do not impinge on public policy, there is no normative reason to go against the principle of finality of awards. After all, those who opt for arbitration 'must live with the decision of the arbitrator, good or bad'. (220)

4.3 Application of the Proposed Approach

84 In order to illustrate how the Proposed Approach operates, this next section will apply the Proposed Approach to the facts of actual cases below.

4.3[a] Application of Proposed Approach to *Betamax Ltd v. State Trading Corporation* [2021] UKPC 14

85 *Betamax* (221) concerned a dispute between a shipping company ('Betamax') and the trading arm of the Mauritian state ('STC'). In 2009, the parties entered into a 'CoA' under which Betamax took over the transport of Mauritius' oil imports from India. A new government took over STC in 2010 and decided to terminate the CoA on the basis of serious infringements in the procurement process. In May 2015, Betamax commenced arbitral proceedings for STC's breach of contract. STC's principal defence was that the CoA breached public procurement rules and was thus illegal and unenforceable. Therefore, STC argued that Betamax could not rely on the CoA to claim damages – because this would be tantamount to enforcing an illegal contract. Betamax responded by asserting that the CoA was not illegal because it fell within the exemption prescribed under the Mauritian public procurement legislation. The arbitrator found that STC was indeed an exempted organization under Mauritian legislation and that there was accordingly no illegality. The CoA was therefore legal and enforceable, and Betamax was awarded damages of USD 115 million. STC then applied to set aside the award for being in conflict with Mauritius' public policy.

86 Under Stage One of the Proposed Approach, the public policy of Mauritius would likely
P 306 be triggered by STC's illegality allegation. Although the Privy Council deliberately avoided this question, (222) it did suggest that the Mauritius Supreme Court would be best positioned to decide whether an illegal CoA would be contrary to its forum's public policy, (223) and the Mauritius Supreme Court decided that it was. (224) In other words, if one assumes that the CoA was illegal for failing to comply with public procurement legislation, then the Mauritius courts will likely find that its public policy has been infringed. Stage One of the Proposed Approach will therefore be passed in *Betamax*.

87 Now that one proceeds to Stage Two, the courts will engage in a full review of the relevant issues. Here, STC would have to substantiate its allegation that the CoA was indeed illegal. This is where STC would likely fail in its challenge. Indeed, after a very comprehensive review of Mauritius' public procurement legislation spanning 40 full paragraphs, (225) the Privy Council decided that the CoA was *not* illegal because it was exempted from the procurement regime. (226) Applying the Proposed Approach, STC will fail to substantiate its allegation of illegality at Stage Two, and the award will be upheld.

4.3[b] Application of Proposed Approach to *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864

88 In *Westacre*, the dispute centred on an arms-trading agreement. Under this agreement, a Panamanian consultancy firm ('Westacre') agreed to help procure for a Yugoslavian government agency ('Jugoimport') contracts to sell military equipment to the government of Kuwait. A dispute arose as to the fees payable, and Westacre initiated arbitral proceedings against Jugoimport. In response, Jugoimport alleged that the agreement was performed through the exercise of improper influence and bribery in Kuwait, and the agreement is thus void on public policy grounds. The arbitral tribunal held that Jugoimport's allegations were not made out and thus made an award in favour of Westacre.

89 In resisting the enforcement of the award, Jugoimport made three separate public policy arguments. First, England's public policy was breached because the underlying
P 307 agreement was a contract for the purchase of personal influence. (227) ● Second, Westacre gave perjured evidence at the arbitration, and this fraud is contrary to public policy. (228) Third, the agreement was intended to be used as a vehicle for bribery from its very inception. (229)

90 These arguments appeared to have been advanced disjunctively. (230) In other words, it was argued that each argument *alone* was sufficient to invoke the public policy of England. (231) As shall be seen below, (232) the disjunctive structure of the arguments will influence how Stage One of the Proposed Approach is applied. Interestingly, Jugoimport also sought to adduce *new* evidence to support its second and third arguments. This new evidence took the form of a sworn affidavit by one Miodrag Milosavljevic ('MM's Affidavit'). (233)

91 Under Stage One, the reviewing court will consider these three allegations separately because they were advanced disjunctively. (234) In other words, the reviewing court will first consider if each of the allegations are *individually* capable of invoking the public policy of the forum under Stage One. Only the allegations which are so capable will require substantiation under Stage Two.

92 The first argument is likely to fail here. Although the Court of Appeal recognized that a contract for the purchase of personal influence might be contrary to the domestic public policy of the place of performance (*viz.* Kuwait), that in itself was not sufficient to invoke the fundamental public policy of England. (235) For the fundamental public policy of England to be invoked, the contract had to be contrary to *both* the domestic public policy of the place of performance *and* the domestic public policy of the country of its proper law or curial law. (236) This was not satisfied in relation to the first argument. A contract for the purchase of personal influence was contrary to public policy in Kuwait (the place of performance). However, it was *not* contrary to the public policy of Switzerland (country of the curial law). (237) Consequently, English fundamental public
P 308 policy was not ● infringed and the first argument would fail under Stage One. There is no need for the court to enquire into the veracity of this allegation under Stage Two.

93 On the contrary, the second and third arguments are likely to pass muster under Stage One. This is because the preparatory works of the Model Law explicitly identify 'bribery or fraud' as examples of fundamental public policy breaches. (238) However, they will fail at Stage Two because they can only be sustained by *new* evidence. (239) As explained earlier, (240) Stage Two operates by way of a *review* of the tribunal's existing analysis. It does not permit the admission of *new* evidence unless the evidence was not reasonably available at the time of the arbitration. In this case, Jugoimport failed to show how the new evidence (*viz.* MM's Affidavit) could not have been reasonably obtained during the arbitration. (241) Therefore, it cannot rely on MM's Affidavit at Stage Two, and without MM's affidavit its second and third arguments cannot be sustained. (242) As a result, applying the Proposed Approach, Jugoimport's second and third arguments will fail at Stage Two, and the award will be upheld.

4.3[c] Application of Proposed Approach to *AJU v. AJT* [2011] 4 SLR 739

94 The facts of *AJU* are more complicated. It concerned the legality of a subsequent settlement agreement and not the underlying contract itself. The underlying contract in this case was between a Thai production company ('AJU') and a British Virgin Islands company ('AJT'). Under this contract, AJU had the right to stage annual tennis tournaments in Bangkok for a term of five years. Disputes arose out of this contract, and AJT commenced arbitration against AJU. In the course of the arbitral proceedings, AJU made a complaint of fraud and forgery to Thailand's prosecution authorities against AJT. Under Thai law, fraud is a compoundable offence whereas forgery was non-compoundable. Generally, non-compoundable offences are more serious and thus the withdrawal of a complaint may not guarantee termination of criminal proceedings or investigations. (243)

95 As the investigations were ongoing, parties concluded a settlement agreement. Under this agreement, AJT agreed to terminate the arbitration and pay AJU a sum of USD 470,000
P 309 upon AJU's withdrawal and/or discontinuation and/or ● termination of the Thai criminal proceedings. However, after AJU withdrew its complaint, AJT did not keep to its side of the bargain. AJU thus applied to terminate the arbitral proceedings on the grounds that the parties had reached a full and final settlement. AJT responded by challenging the settlement agreement on the basis of duress, undue influence, and illegality. In an interim award, the tribunal rejected AJT's allegations and upheld the settlement agreement. AJT was thus compelled to terminate the arbitral proceedings and pay AJU

the settlement sum of USD 470,000.

96 AJT then applied to set aside the award, arguing that it was in conflict with Singapore public policy. (244) In support of this ground, AJT made the following two allegations (245) : (1) that the settlement agreement was an agreement to stifle the prosecution of non-compoundable offences; and (2) that AJU performed the settlement agreement through bribery and/or corruption of the Thai public authorities. (246) However, AJT did not specify whether these two allegations were meant to be considered *separately* or *cumulatively*. (247) For the purposes of this mock application, we will proceed on the assumption that these allegations were mounted *separately*. (248)

97 Under Stage One, the reviewing court will thus consider the two allegations in turn. Here, both allegations are likely to independently invoke the public policy of Singapore. In fact, it was '*common ground between the parties*' (249) that the settlement agreement would be in conflict with the public policy of Singapore if *any one* of the two allegations
P 310 hold true. (250)

98 Proceeding to Stage Two, we now consider if each of these allegations can be sustained without the introduction of *new* evidence. Regarding the first allegation, AJT is unlikely to succeed in substantiating it. The SGCA shares this view. (251) In particular, Chan CJ found that the settlement agreement did not require stifling the prosecution of non-compoundable offences, and provides four reasons in support of his finding. (252) AJT is also unlikely to succeed in substantiating its second allegation under Stage Two. As alluded to earlier, (253) this allegation was rejected by the tribunal and the Singapore High Court. (254) There was simply insufficient evidence to prove that AJU had bribed the Thai public authorities. (255) Consequently, both allegations will fail at Stage Two, and the award will be upheld under the Proposed Approach.

4.3[d] Application of Proposed Approach to *Gokul Patnaik v. Nine Rivers* [2020] SGHC (I) 23

99 *Gokul* concerned a protracted shareholder dispute between several parties. In essence, Nine Rivers invested INR 300 million into an Indian company, alongside other shareholders such as Gokul. Nine Rivers made this investment on the understanding that it would be able to sell off its shares for a profit of at least INR 1.329 billion by a stipulated deadline. Unfortunately, this did not happen. After several attempts at re-negotiation, Nine Rivers still could not secure its exit from the Indian company. As such,
P 311 Nine Rivers sent a put option notice calling upon Gokul and other existing shareholders to purchase its shares for the originally agreed sum of INR 1.329 billion. Gokul and the other shareholders did not comply with this put option notice, and Nine Rivers commenced arbitration. One of the arguments Gokul raised in defence was that performance of the put option contravened Indian foreign exchange regulations and thus could not be enforced. The tribunal rejected this argument, (256) finding that Indian foreign exchange regulations were not contravened. (257) Therefore, Gokul and the other shareholders were jointly and severally required to purchase Nine Rivers' shares at the put option price. Gokul then applied to set aside the award on public policy grounds. In support of this, he continued to insist that the performance of the put option contravened Indian foreign exchange regulations.

100 Gokul's public policy challenge will likely fail at Stage One of the Proposed Approach. This is because the breach of foreign exchange regulations is insufficient to trigger the fundamental public policy of Singapore. As Ramsey IJ pointed out:

> *there is no reason why a breach of the [foreign exchange] [r]egulations or the laws of India, without more, would 'shock the conscience' or violate the 'most basic notions of morality and justice'. If Mr Patnaik's [Gokul's] submissions are taken to their logical conclusion, then* any *minor illegality or regulatory infringement by a contract in its place of performance would* ipso facto *lead to the conclusion that international comity, and thus Singapore public policy, would be breached so that the arbitral award would have to be set aside. The public policy ground under Art 34(2)(*b*)(ii) of the Model Law is a narrow ground and does not lead to that conclusion.* (258)

101 Since Gokul's public policy challenge fails at Stage One, there is no need to proceed to Stage Two. Applying the Proposed Approach, the reviewing court can dismiss the public policy challenge.

5 JUSTIFICATIONS FOR THE PROPOSED APPROACH

102 The Proposed Approach is conceptually and practically preferable to the three prevailing approaches because it resolves each of their respective deficiencies.

5.1 Justifications over the Maximal Review approach

103 First, in relation to Maximal Review, the two deficiencies identified above were: (1)
P 312 the scope for permitting a review is too wide and open to abuse (259) ; and (2) the extent of review is too intrusive. (260) The first deficiency is resolved because Stage One functions as a gateway to prevent the review of issues which do not even fall within the narrow scope of the public policy ground. (261) This will sieve out abusive challengers

who seek to re-open a tribunal's findings under the guise of public policy. It is recognized here that there might still be a residual risk of abuse. For example, challenging parties may exaggerate the alleged illegality at Stage One in order to bring the challenge within the narrow confines of the public policy ground. This may enable them to re-open the case under Stage Two. However, these potential abusers would have to substantiate their exaggerated allegations at Stage Two without the introduction of any *new* evidence. If they fail to do so, courts can consider imposing cost consequences to deter such abusive attempts at delaying enforcement.

104 The second deficiency is also resolved because Stage Two restricts the scope of courts' review to the findings made by the tribunal itself and/or *fresh* evidence which was not reasonably available at the time of the arbitration. (262) Such a level of intrusion is arguably justified as it strikes the best balance between all interests at stake. On one hand, the *restrictive evidentiary scope* balances the interests of award debtors in repeating legitimate public policy objections, while also respecting the interests of award creditors in not being unduly burdened with new arguments which should have been raised at the arbitration. On the other hand, allowing a *review* of the public policy challenge allows reviewing courts to safeguard their forum's most fundamental principles and values. This makes the Proposed Approach preferable to the Maximal Review approach.

5.2 Justifications over the Contextual Review approach

105 The Proposed Approach also resolves the deficiencies inherent in the Contextual Review approach. To recapitulate, the deficiencies of Contextual Review are: (1) it is difficult to apply in practice; (263) (2) it runs the risk of slipping into a full-scale review; (264) (3) it is circular in logic; (265) (4) there is a practical difficulty in showing 'collusion or bad faith' under factor (5); (266) and (5) it is not flexible enough to deal with all forms
P 313 of public policy breaches. (267)

106 In relation to the first deficiency, the Proposed Approach is preferable because it is much easier to apply in practice. Unlike the multi-factorial second stage of the Contextual Review approach, Stage One of the Proposed Approach only focuses on one factor (*viz.* whether the public policy of the forum is invoked). More importantly, in contrast to the Contextual Review approach, the Proposed Approach does not involve any arbitrary line drawing or abstract weighing. It simply asks whether the public policy of the reviewing forum would be invoked. Although this question might involve some value judgment, it is at least capable of producing binary conclusions – either the public policy of the reviewing forum is invoked or not. The same cannot be said of the factors under the Contextual Review approach. (268) In any event, the value judgment inherent in answering the central question under Stage One must necessarily be answered in any public policy challenge. This is therefore not a flaw of the Proposed Approach itself, but rather a difficulty inherent in the very nature of the public policy ground. (269)

107 Likewise, the second deficiency does not feature in the Proposed Approach. There is no risk of slipping into a full-scale review because Stage Two of the Proposed Approach precisely entails a full-scale review. In this regard, there is no added benefit to adopting the Contextual Review approach because it is typically a full review in disguise. As explained above, (270) the preliminary inquiry from the Contextual Review approach requires parties to make submissions on issues which are akin to the merits of the dispute. In practical terms, this means parties do not save time and costs with the Contextual Review approach because arguments on the tribunal's findings will emerge anyway. In contrast, the Proposed Approach can lead to more efficient applications by expunging weak claims at the outset under Stage One.

108 In relation to the third deficiency, the Proposed Approach presents a more elegant solution. By assuming the factual premises of the challenging party at Stage One, the Proposed Approach does not run into the issue of circularity. At this stage, making factual assumptions is warranted because these are facts which will eventually have to be established under Stage Two. Indeed, the assumption is merely a tool for courts to determine if a review of the tribunal's findings is even worth undertaking in the first
P 314 place. This assumption breaks the circularity inherent in the Contextual Review approach and makes the Proposed Approach preferable as a matter of conceptual soundness.

109 In relation to the fourth deficiency, there is no practical difficulty in demonstrating 'collusion or bad faith' because its existence is simply not a relevant factor under Stage One of the Proposed Approach. Under the Proposed Approach, a challenging party is not faced with the uphill task of showing 'collusion or bad faith' solely from a cursory audit of the tribunal's findings. He can first make the allegation under Stage One, (271) and then proceed to substantiate it with the benefit of a full review under Stage Two. This overcomes the practical difficulty of having to establish 'collusion or bad faith' from a mere preliminary inquiry under the second stage of the Contextual Review approach.

110 Lastly, in relation to the fifth deficiency, the Proposed Approach is capable of being applied to all forms of public policy challenges. By way of illustration, consider the applicability of the Proposed Approach to the two hypothetical cases which could not be resolved under the Contextual Review approach. (272) First, the Proposed Approach can

apply to a case where the public policy objection is directed at the *remedies* ordered by the award. Stage One does not discriminate between different types of public policy objections. The only limitation is whether the objection would invoke the public policy of the forum. For the same reasons, the Proposed Approach can also apply to a case where the tribunal erroneously finds that a contract is *illegal*. As long as a challenging party can demonstrate how such an erroneous finding invokes the public policy of the forum, (273) it may be possible to successfully challenge such an award under the Proposed Approach.

5.3 Justifications over the minimal review approach

111 Finally, the Proposed Approach is arguably preferable to the Minimal Review approach. As explained earlier, (274) the biggest deficiency of Minimal Review is that it is too narrow. This can lead to unpalatable outcomes, (275) or perhaps even abuse by
P 315 parties seeking to launder their illegal conduct through an award. (276) The Proposed Approach overcomes these issues by permitting a full review under Stage Two. (277) Here, as long as its forum's public policy is at stake, courts have the power to scrutinize an award and ensure its compliance with the forum's fundamental values. It will not have to yield to a commercial arbitrator's determination on what public policy entails.

112 In a paper in support of Minimal Review, (278) Ng has argued that Minimal Review strikes the best balance between the interests of finality and public policy. (279) Most notably, he points out the scenario where a tribunal reaches a reasonable conclusion that is actually wrong. (280) In such scenarios, he argues that precluding a review under the Minimal Review approach is justifiable because 'all that can be said is that the challenge court took a different view of the evidence'. (281)

113 However, that is perhaps the precise reason why a review should be permitted in the first place. As the judicial arm of a government, courts should arguably have the final say on matters relating to its forum's public policy – even if it ends up affirming the erroneous decision of the tribunal. Further, as a matter of principle, a review in such scenarios is justifiable on the basis that public policy does not hinge on party autonomy; it can be investigated by the courts *ex officio*. (282) In other words, where a state's public policy is genuinely engaged and at stake (which means the matter passes Stage One of the Proposed Approach), parties' preferences for finality should take a back seat. As Waller LJ observes: '[w]here public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it'. (283) The concern of 'creating an inroad into the interest in finality' (284) is also mitigated by the narrow scope inherent in Stage One of the Proposed Approach. Not every allegation of illegality would trigger the public policy of the state and permit a review under Stage Two. (285)

6 CONCLUSION

114 The issue of when and how extensively a national court can review a tribunal's decision under the public policy ground has always been a difficult issue. This paper has
P 316 attempted to unpack that issue by first analysing the conceptual basis of the public policy ground of challenge. (286) Two key characteristics were distilled from a thorough review of the relevant provisions in the NYC, Model Law, and existing case law: (1) that it is narrowly defined; and (2) that it is subjective in nature. The paper then explored how public policy challenges can manifest in a number of different ways. (287) Whichever approach is ultimately chosen by the courts, it is argued that the approach should be flexible enough to deal with the myriad ways in which public policy challenges may be advanced.

115 Next, we considered the three prevailing approaches of Maximal Review, Contextual Review, and Minimal Review. It was then argued that none of them provided a satisfactory solution. In brief, the Maximal Review approach sets an unduly wide scope for permitting a review and allows for an overly intrusive extent of review which violates the finality of awards. The Contextual Review is too difficult to apply in practice, giving rise to potentially arbitrary outcomes. It also runs the risk of slipping into a full-scale review, is circular in logic, and is not flexible enough to deal with all forms of public policy breaches. The Minimal Review approach is arguably too narrow and does not empower courts with the necessary tools to address potentially serious incursions into their most fundamental values or notions of morality and justice. Indeed, in adopting any one approach, courts in the past were forced to 'pick their poison' and live with the respective deficiencies of the chosen approach.

116 This paper suggests an alternative solution which minimizes the deficiencies that previous approaches had to live with. It proceeds in the following two stages: (1) first, courts will assume the factual veracity of the public policy allegations and, on that basis, determine if its fundamental public policy is even triggered in the first place; (2) only allegations which would trigger the fundamental public policy of the forum will proceed to the second stage where the court will engage in a review of the tribunal's analysis on the relevant public policy issues(s). Unlike a *de novo* rehearing, a review is limited to the arguments and evidence that was put forth before the arbitral tribunal. New evidence will not ordinarily be accepted unless the evidence was not reasonably available at the time of the arbitration.

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117 It is suggested that this Proposed Approach mitigates the deficiencies of all the prevailing approaches and offers a universal solution which all reviewing courts can apply to all forms of public policy allegations.

References

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1) I. Ng et al., *Five Recurring Problems in International Arbitration: The Relationship Between Courts and Arbitral Tribunals*, 8(2) Indian J. Arb. L. 19, 20 (2020).
2) *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 [65].
3) A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* 422 (4th ed., Sweet & Maxwell 2004) (Redfern & Hunter); G. Born, *International Commercial Arbitration* (3d ed., Kluwer Law International 2021) (Born).
4) Born, *supra* n. 3, at 3760; K. P Berger, *The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective*, 12 Fordham Int'l L.J. 605 (1988); S. Shackleton, *Challenging Arbitral Awards: Part III – Appeals on Questions of Law* (New Law Journal 1834 2002); Redfern & Hunter, *supra* n. 3, at 412; J. Lew et al., *Comparative International Commercial Arbitration* 731 (Kluwer Law International 2003); *BLC v. BLB* [2014] SGCA 40 [53]; *Burchell v. Marsh* [1854] 58 US 344 at 349; *Judgment of 6 October 2010, Albert Abela Family Foundation v. Joseph Abela Family Foundation*, 2010 Rev. Arb. 813, 814 (French Cour de Cassation); *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 [65]; *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR(R) 597 (*PT Asuransi*) [57].
5) This duty is enshrined under Art. 34(2)(*b*)(ii) and Art. 36(1)(*b*)(ii) of the Model Law, which are *in pari materia* to Art V(2)(*b*) of the New York Convention.
6) *Betamax Ltd v. State Trading Corporation* [2021] UKPC 14 (*Betamax*).
7) *See* s. 3 below.
8) United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, UN Doc. A/40/17 (Model Law).
9) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 Jun. 1958, United Nations Treaty Series, vol. 330, no 4739 (NYC).
10) Some domestic legislation, however, permits appeals. For example, the Singapore Arbitration Act 2001 (2020 Rev ed.) (Singapore AA) s. 49 provides a party to a purely domestic arbitral proceeding an avenue of appeal to the Singapore courts on a question of law arising out of an award. However, this right of appeal can be expressly derogated from by agreement. *See also* English Arbitration Act 1996 (English AA), s. 69, which provides parties to an arbitral proceeding the right of an appeal to the English courts on a question of law arising out of the award, unless parties expressly provide otherwise.
11) Model Law, *supra* n. 7, Arts 34 and 36; NYC, *supra* n. 8, Art. V.
12) Born, *supra* n. 3, at 3603.
13) English AA, *supra* n. 9, s. 68(2)(g); French Code of Civil Procedure, Art. 1520(5); Arbitration Law of the People's Republic of China, 1994, Art. 58(6); Netherlands Code of Civil Procedure, Art. 1065(1)(e); Swiss Law on Private International Law, Art. 190(2)(e).
14) *Richardson v. Mellish* (1824) 130 ER 294, 303 *per* Burrough J, in the context of an action to recover damages for the breach of an agreement. Although this phrase did not originate from an arbitration – related case, many commentators have subsequently used it to describe the unpredictable nature of the public policy ground in arbitration. *See* e.g., S. A. F. Haridi & Mohamed S. Abdel Wahab, *Public Policy: Can the Unruly Horse Be Tamed?*, 83(1) Arb. Int'l J. Arb. Mediation & Disp. Mgmt. 35, 35–47 (2017); H. Arfazadeh, *In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception,* 13(1–4) Am. Rev. Int'l Arb. (2003); M. Gearing, *The Public Policy Exception – Is the Unruly Horse Being Tamed in the Most Unlikely of Places?* (Kluwer Arbitration Blog 17 Mar. 2011).
15) International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report on the Public Policy Exception in the New York Convention* 18 (Oct. 2015) (IBA Report).
16) *Ibid.,* at 1.

17) Statutory definitions have been provided in the *national* arbitration legislation of two notable jurisdictions: Australia and UAE. In Australia, s. 8(7A) of the 1974 International Arbitration Act provides that 'the enforcement of a foreign award would be contrary to public policy if: (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award'. In the UAE, Art. 3 of the Civil Transactions Law states in general (not limited to the context of arbitration) that public order 'include[s] matters relating to personal status such as marriage, inheritance and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individual ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Sharia'.
18) IBA Report, *supra* n. 15, at 2; *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 19 June 1958 – Commentary* 494 (R. Wolff ed., Beck, Hart & Nomos 2012).
19) *See* IBA Report, *supra* n. 15, at 6–10 for a list of definitions provided by various civil and common law jurisdictions.
20) *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier* (1974 US Court of Appeals) 508 F.2d 969 (*Parsons & Whittemore*).
21) *Ibid.,* at 974 (emphasis added in italics by the authors).
22) *Hebei Import and Export Corporation v. Polytek Engineering* [1999] 2 HKC 205, 211C–D (emphasis added in italics by the authors).
23) *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR(R) 597 (*PT Asuransi*) [59].
24) *See* e.g., *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [1999] 1 QB 740 (*Westacre (HC)*) 752.
25) M. Scherer, *Draft IBA Country Report England, The Public Policy Exception under Article V(2)(b) Methodological Approaches Country Report England,* International Bar Association 6 (2014).
26) *Deutsche Schachbau v. Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246, 254.
27) BGH (German Federal Court of Justice), 12 Jul. 1990 – III ZR 174/89, NJW 1990 3210.
28) OGH (Austrian Supreme Court of Justice), 24 Aug. 2011, 3 Ob 65/11x; OGH (Austrian Supreme Court of Justice), 12 Oct. 2011, 3 Ob 186/11s; OGH (Austrian Supreme Court of Justice), 28 Aug. 2013, 6 Ob 138/13g; OGH (Austrian Supreme Court of Justice), 26 Jan. 2005, 3 Ob 221/04b.
29) Belgium Court of Cassation, 18 Jun. 2007.
30) *See* ss 4 and 5 below.
31) Portugal, e.g., requires a higher level of affront in enforcement challenges compared to annulment challenges: *see* IBA Report, *supra* n. 15, at 3–4. The Singapore Court of Appeal, on the other hand, has held that 'there is no difference between [the] two regimes as far as the concept of public policy is concerned': *AJU v. AJT* [2011] 4 SLR 739 ('*AJU*') [37].
32) *Parsons & Whittemore, supra* n. 20, at 974. *RBRG Trading (UK) v. Sinocore International* [2018] EWCA Civ 838 [25]. *Hebei Import & Export Corporation v. Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111 *per* Litton PJ 118; *Judgement of 30 October 2008*, III ZB 17/08 (German Bundesgerichtshof); *Judgment of 20 August 2008*, 9 Ob 53/08x (Austrian Oberster Gerichtshof); *Judgment of 9 December 2016,* Case No T 2675-14, (Svea Court of Appeal) ¶40; *Judgment of 29 April 2009, CG Impianti v. Bmaab & Son Int'l Contracting Co.*, XXXV Y.B. Comm. Arb. 415 (Milan Corte di Appello) 416–7.
33) Born, *supra* n. 3, at 3611–3618 and 4000–4027; A. G. Maurer, *The Public Policy Exception under the New York Convention: History, Interpretation and Application* 54 (2013); M. Campbell, Betamax v. STC: *Alleged Illegality, Public Policy and the Model Law,* 17(2) Asian Int'l Arb. J. 183, 184 (2021), doi: 10.54648/AIAJ2021009 (accessed 19 Apr. 2024) (Campbell); A. V. Dicey, J. Morris & L. A. Collins, *The Conflict of Laws* 16, 150 (15th ed., Sweet & Maxwell 2018) (Dicey, Morris, & Collins).
34) Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, Official Records of the General Assembly, A/40/17 (21 Aug. 1985).
35) *Ibid.,* para. 296.
36) *Ibid.,* para. 297.
37) International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards: Report on the Public Policy Exception in the New York Convention (Oct. 2015) 18.
38) *Renusagar Power Co. Ltd v. General Electric AIR* 1994 SC 860, 880 (emphasis added in italics by the authors).
39) *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd (No 2)* [2012] 291 ALR 99 (Federal Court of Australia) 105 (emphasis added in italics by the authors).
40) L. Villiers, *Breaking in the 'Unruly Horse': The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards*, 18 Austl. Int'l L.J. 156, 165 (2011) (Villiers).
41) *AJU, supra* n. 31, at [19].
42) *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864 (*Westacre (CA)*) 887 (emphasis added in italics by the authors).
43) *Ibid.*, at 876–877.

44) *Ibid.*
45) A. I. Okekeifere, *Public Policy and Arbitrability under the UNCITRAL Model Law*, 2(2) Int'l Arb. L. Rev. 70 (1999).
46) *See* Stephan Schill & Robyn Briese, *If the State Considers: Self-Judging Clauses in International Dispute Settlement*, 13 Max Planck Y.B. United Nations L. 61 at 97 (2009), doi: 10.1163/18757413-90000037. (accessed 19 Apr. 2024).
47) *See* above at [8].
48) *See* above at [9].
49) Portuguese Voluntary Arbitration Law 2011, Art. 56(1)(b)(ii).
50) E. Gaillard & J. Savage, *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para. 1648 (emphasis added in italics by the authors).
51) J. Lew, *Applicable Law in International Commercial Arbitration* 3210 (Oceana 1978) (emphasis added in italics by the authors).
52) French Code of Civil Procedure, Art. 1520(5°); Lebanese Code of Civil Procedure, Art. 814; Portuguese Voluntary Arbitration Law 2011, Art. 56(1)(b)(ii); Peruvian Arbitration Law 2008, Art. 75(3)(b); Paraguayan Arbitration Law, Art. 46°(b). *Judgement of 4 December 1992* (1997) XXII Yearbook 72 (Court of Appeal of Milan) where the court held that the public policy referred to in Art V(2)(b) of the NYC is *international* public policy.
53) *See* A. Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,* 19(2) Arb. Int'l 217, 219–220 (2003), doi: 10.1093/arbitration/19.2.217 (accessed 19 Apr. 2024) (Interim ILA Report) (emphasis added in italics by the authors).
54) P. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *Comparative Arbitration Practice and Public Policy in Arbitration* 257, 273 (P. Sanders ed., ICCA Congress Series No 3 1987). *See also* P. Mayer & A. Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,* 19(2) Arb. Int'l 249, 251 (2003), doi: 10.1093/arbitration/19.2.249 (accessed 19 Apr. 2024) (Final ILA Report); H. Fazilatfar, *Overriding Mandatory Rules in International Commercial Arbitration* 17–19 (Edward Elgar Publishing 2019) ELECD 2857; Villiers, *supra* n. 40, at 162; M. Moses, *Public Policy: National, International and Transnational* (Kluwer Arbitration Blog 2018) (Moses).
55) Moses, *supra* n. 54, at 2.
56) *See* above at [17].
57) *Hebei Import and Export Corporation v. Polytek Engineering* [1999] 2 HKC 205, 216 C–D.
58) Moses, *supra* n. 54, at 2.
59) Villiers, *supra* n. 40, at 162.
60) P. Sanders, *'Commentary' in 60 Years of ICC Arbitration: A Look at the Future* (ICC Publishing 1984).
61) For instance, the Singapore Court of Appeal in *Anupam Mittal v. Westbridge Ventures II Investment Holdings* [2023] SGCA 1 has taken the view that the term '*public policy*' in s. 11 of the Singapore International Arbitration Act (Cap 143A, 2992 Rev ed.) (Singapore IAA), relating to subject matter arbitrability was broad enough for the Singapore courts to consider the public policy of other states specifically 'where this arises in connection with essential elements of an arbitration agreement' (at [48]). However, the Court noted that, in contrast, the provisions concerning setting aside and enforcement of an award uses the term 'public policy of Singapore' (at [48]).
62) ICC Award No 5946 of 1990 (YCA 1991).
63) *Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas* Civ. Action No 16–140 (D.D.C. 7 Jun. 2018) (*Hardy Exploration*).
64) *Ibid.*, at 113.
65) *See* above at [25].
66) *See* e.g., *CHY v. CIA* [2020] SGHC(I) 3 [18]; *CBX v. CBZ* [2020] 5 SLR 184 [45]; *Gokul Patnaik v. Nine Rivers Capital Ltd* [2021] 3 SLR 22 (*Gokul*) [135]; *Rockeby Biomed Ltd v. Alpha Advisory Pte Ltd* [2011] SGHC 155 (*Rockeby*) [17]; *BBA v. BAZ* [2020] 2 SLR 453 [27]; *Bloomberry Resorts and Hotels Inc v. Global Gaming Philippines LLC* [2021] 3 SLR 725 [100]; *Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 [99].
67) *Ibid.*
68) *See* below at [55], [63] and [107].
69) *See* above at [24].
70) *Soleimany v. Soleimany* [1999] QB 785 (*Soleimany*).
71) *Ibid.*, at 800.
72) *Ibid.*
73) IBA Report, *supra* n. 15, at 12–13; Interim ILA Report, *supra* n. 53, at 238 et seq.; M. S. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 22 (2d ed., Oxford University Press 2010) (Kurkela & Turunen): 'It is clear that due process or procedural public policy also forms a part of public policy or ordre public'.; Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, Official Records of the General Assembly, A/40/17 (21 Aug. 1985), at 296–297.

74) Singapore IAA, *supra* n. 61, s. 24(a); Australian International Arbitration Act, s. 19; Indian Arbitration and Conciliation Act, s. 34.
75) Redfern & Hunter, *supra* n. 3, ss 10.36, 10.41, 10.75; *Jugoimport v. Westacre*, Swiss Federal Tribunal's Judgment of 30 Dec. 1994, ASA Bulletin (Swiss Decision of *Westacre*) 226; *Betamax Ltd v. State Trading Corporation* [2021] UKPC 14 (*Betamax*) [52]; *National Oil Corporation v. Libyan Sun Oil Co.*, 733 F.Sup 800, 813–814 (D. Del. 1990); *Biotronik Mess-und Therapiegereate GmbH & Co. v. Medford Med. Instrument Co.*, 415 F.Sup 133, 137 (D.N.J. 1976); *Westacre Inv. Inc. v. Jugoimport SPDR Holding Co. Ltd* [1998] 4 All E.R. 570 (Q.B.); Judgment of 26 Jan. 2005, XXX Y.B. Comm. Arb. 421 (Austrian Oberster Gerichtshof) (2005) Judgment of 2 Nov. 2000, 2001 NJW 373 (German Bundesgerichtshof); Judgment of 25 May 1992, 1993 Rev arb 91 (French Cour de Cassation). Compare, *Thomson CSF v. Frontier AG*, Swiss Federal Tribunal's Judgment of 28 Jan. 1997, 16(1) ASA Bulletin 118 (1998) (*Thomson v. Frontier* Judgment of 28 Jan. 1997) 130, where the Swiss Federal Tribunal refused to review the award, even though the challenging party alleged that it was based on non-existent evidence.
76) *Ibid.*
77) However, arguments of procedural public policy breaches may still be subject to other evidentiary restrictions.
78) *See* s. 3 below for a more thorough analysis into the prevailing approaches.
79) *See European Gas Turbines SA v. Westman International Ltd*, Paris Court of Appeal Judgment of 30 Sep. 1993, XX Y.B. Comm. Arb. 198 (1995) (*Westman*), where the court embarked on a full analysis of allegations of fraud and perjury upon a simple allegation.
80) B. A. Garner, *Black's Law Dictionary* 837 (10th ed., Thomson Reuters 2014). *See also Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 [41].
81) A. Sayed, *Corruption in International Trade and Commercial Arbitration* 407–409 (1st ed., Kluwer Law International 2004) (Sayed); M. Hwang & K. Lim, *Corruption in Arbitration – Law and Reality*, 8(1) Asian Int'l Arb. J. 1 (2012) (Hwang & Lim) [139].
82) N. Enonchong, *Enforcement in England of Foreign Arbitral Awards Based on Illegal Contracts,* Lloyd's Mar. & Com. L.Q. 495, 514 (2000) (Enonchong) The Enonchong citation should read: N. Enonchong, Enforcement in England of Foreign Arbitral Awards Based on Illegal Contracts, Lloyd's Mar. & Com. L.Q. 495, 514 (2000) (Enonchong)
83) *Westacre (CA), supra* n. 42, at 878 per Waller LJ; *Ladd v. Marshall* [1954] 3 All ER 745, 748.
84) *See* below at [44]–[45] and [64]–[66].
85) *See* e.g., *Westman, supra* n. 79; *Thomson CSF v. Frontier AG*, Paris Court of Appeal's Judgment of 10 Sep. 1998, *Revue de l'arbitrage* (2001) (*Thomson v. Frontier* French Judgment of 10 Sep. 1998) 583.
86) *Rockeby Biomed Ltd v. Alpha Advisory Pte Ltd* [2011] SGHC 155 (*Rockeby*).
87) Securities and Futures Act (Cap 289, 2006 Rev Ed).
88) *Rockeby,* at [18]–[19].
89) *Ibid.,* at [18].
90) *AJU, supra* n. 31, at[60].
91) *See* e.g., *Westman, supra* n. 79; *Tho mson v. Frontier*, French Judgment of 10 Sep. 1998, *supra* n. 85.
92) *See* generally, A. Redfern *Chapter 2: The Changing World of International Arbitration,* in *Practicing Virtue: Inside International Arbitration* 44–51 (D. Caron ed., Oxford University Press 2015).
93) *Ibid.*
94) *SA Thalès Air Defense v. GIE Euromissile*, Paris Court of Appeal's Judgment of 18 Nov. 2004; *SNF SAS v. Cytec Industries BV*, French Cour de Cassation's Judgment of 4 Jun. 2008.
95) The specific contours of the Minimal Review approach are still subject to debate today and will be discussed further below at [58]–[73].
96) *Belokon v. Kyrgyzstan*, Appeal No 17–17.981, French Cour de Cassation's Judgment of 22 Mar. 2022.
97) *Ibid.,* at 14.
98) *Ibid.*
99) *Ibid.*
100) Born, *supra* n. 3, at 3760; Berger, *supra* n. 4, at 605; Shackleton, *supra* n. 4; Redfern & Hunter, *supra* n. 3, at 412; J. Lew, L. Mistelis & S. Kroll, *Comparative International Commercial Arbitration* 731 (2003); *BLC v. BLB* [2014] SGCA 40 [53]; *Burchell v. Marsh* [1854] 58 US 344 349; *Abela Family Foundation v. Joseph Abela Family Foundation*, French Cour de Cassation Judgment of 6 Oct. 2010, Rev. Arb. 813, 814; *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 [65]; *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR(R) 597 (*PT Asuransi*) [57].
101) *A v. R* [2010] 3 HKC 67 [24]–[25].
102) *See* UK Law Commission's press release on the consultation, https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/#related (accessed 19 Apr. 2024).
103) UK Law Commission, *Review of the Arbitration Act 1996 Consultation Paper*, Law Commission Consultation Paper 257 (2022) (UK Consultation Paper).

104) *Ibid.*, [8.23].
105) *Ibid.*
106) UK Consultation Paper, *supra* n. 103, at [8.29]–[8.31].
107) *Ibid.*, at [8.29].
108) *Ibid.*, at [8.31].
109) *Soleimany v. Soleimany* [1999] QB 785 (*Soleimany*).
110) *Westacre (CA), supra* n. 42.
111) *Ibid.*, at 874. Waller LJ refers to this argument as 'the *Lemenda* point'.
112) *Westacre (CA), supra* n. 42, at 871 and 877.
113) *Ibid.*
114) *Soleimany, supra* n. 70, 800F–H.
115) *Ibid.*
116) *Ibid.*
117) *Ibid.*
118) *Ibid.*
119) *Ibid.*
120) *Ibid.*
121) *Ibid.*
122) Waller LJ's dissent in *Westacre (CA), supra* n. 42, at 886; *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [1999] QB 740 (*Westacre (HC)*) 773A–E. compare, majority in *Westacre (CA), supra* n. 42, at 887 who opined that this factor should not be relevant at this second stage and should instead be considered at the third stage.
123) *Soleimany, supra* n. 70, 800F–H.; Waller LJ's dissent in *Westacre (CA), supra* n. 42), at 886; *Westacre (HC), supra* n. 122, 773A–773E.
124) *Soleimany, supra* n. 70, at 800; *Westacre (CA), supra* n. 44, at 881–882.
125) *Ibid.*
126) Hwang & Lim, *supra* n. 81, at [155].
127) *Ibid.* (emphasis added in italics by the authors).
128) *See* footnote 375 of Hwang & Lim, *supra* n. 81.
129) *Ibid.* Colman J's sixth proposition was: '[i]f the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, *on the basis of facts not placed before the arbitrators*, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular' (emphasis added in italics by the authors). Waller LJ in *Soleimany* disapproved of Colman J's sixth proposition in the following terms: 'But, in an appropriate case [the court] may inquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. We thus differ from Colman J, *who limited his sixth proposition to cases where there were relevant facts not put before the arbitrator*' (emphasis added in italics by the authors).
130) *See* n. 125 above, which shows that Waller LJ's disapproval of Colman J's sixth proposition related only to the consideration of facts which were already put before the arbitrator. It did not relate to the consideration of new but not fresh evidence.
131) The difference between *new* and *fresh* evidence has been explained above at [36].
132) *Westacre (CA), supra* n. 42, at 881.
133) The majority agreed with this portion of Waller LJ's judgment. *See Westacre (CA), supra* n. 42, at 887 *per* Mantell LJ.
134) *Westacre (CA), supra* n. 42, at 877–881.
135) *See E D & F Man (Sugar) Ltd v. Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429, 436, which Waller LJ cited with approval in *Westacre (CA), supra* n. 42, at 885.
136) *Westacre (CA), supra* n. 44, at 887–888.
137) *See* above at [2].
138) Campbell, *supra* n. 33, at 183.
139) *See Westacre (CA), supra* n. 42, at 316 where Mantell LJ expresses his 'difficulty with the concept and even greater concerns about its application in practice'.
140) *See* above at [46]–[47].
141) For instance, consider the multi-factorial approach under the *forum conveniens* test in private international law. Under that multi-factorial test, courts can reasonably come to a binary conclusion for each factor (*viz.* personal connections of parties; location of events or transactions; governing law; etc.).
142) Compare, multi-factorial approach under the *forum conveniens* test in private international law, where the court can come to a binary conclusion for each factor.
143) *R v. V* [2008] EWHC 1531.
144) Michael Hwang SC & Kevin Lim, *Corruption in Arbitration – Law and Reality*, 8(1) Asian Int'l Arb. J. 1 (2012), doi: 10.54648/AIAJ2012001 (accessed 19 Apr. 2024) (Hwang & Lim) [182].
145) *Ibid.*, at [184].
146) *Ibid.*
147) *Ibid.*
148) J. Grierson, *Court Review Of Awards On Public Policy Grounds: A Recent Decision Of The English Commercial Court Throws Light On The Position Under The English Arbitration Act 1996*, 24 Mealey's Int'l Arb. Report 2 (2009).

149) *See Soleimany, supra* n. 70 800F–H which describes the entire approach from the perspective of an allegedly illegal contract underlying an award.

150) The seminal formulation of the Contextual Review approach by Waller LJ in *Soleimany, supra* n. 70, at 800 states: 'In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an *illegal contract*, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the *underlying contract was not illegal*? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite *illegality*? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decided at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the *issue of illegality*' (emphasis added in italics by the authors).

151) *See* above at [24], where we describe three primary manifestations of public policy breaches.

152) *See* e.g., *Hardy Exploration, supra* n. 63, where an award was refused enforcement because it issued an order which would violate the national sovereignty of another state

153) *See* above at [43] for a list of the relevant factors under the Contextual Review approach.

154) By way of example, consider the hypothetical ICC Case No 5946 discussed above at [25].

155) *See Soleimany, supra* n. 70, at 800; *Westacre (CA), supra* n. 42, at 882.

156) *Ibid.*, (emphasis added in italics by the authors).

157) *See West Tankers Inc v. Allianz SpA* [2012] EWCA Civ 27 where the English Court of Appeal upheld the High Court's decision to enforce a negative declaratory award under s. 66 of the English Arbitration Act 1996.

158) *See* below at [72], for a deeper analysis into the difference between the two types of findings.

159) Besides the jurisdictions discussed below, this also appears to be the approach of courts in India (*see Associate Builders v. Delhi Development Authority* [2014] 4 ARBLR 307 (SC)); Thailand (*see* Supreme Court of Thailand Decision No 6411/2560 [2017]); and Hong Kong (*see X v. Jemmy Chien* [2020] HKCFI 286). compare, *Z v. Y* [2018] HKCFI 2342.

160) Hwang & Lim, *supra* n. 81, at [121].

161) *Ibid.*

162) *Betamax, supra* n. 75.

163) *Ibid.*, at [52].

164) *See* above at [31].

165) *Betamax, supra* n. 75, at [52].

166) *See* above at [25].

167) In *Betamax*, Lord Thomas interpreted *AJU* as allowing a court to intervene in 'determination[s] of the nature and extent of public policy': *see Betamax, supra* n. 75, at [39]. However, he stopped short of endorsing this narrow exception.

168) The assumption here is that an award infringing upon the territorial sovereignty of a foreign friendly state falls within the narrow scope of fundamental public policy.

169) N. Poon, *Striking a Balance Between Public Policy and Arbitration Policy in International Commercial Arbit ration*, Sing. J. Legal Stud. 186 (2012) (Poon).

170) *Ibid.*, at 190.

171) *See Soleimany, supra* n. 70, at 800.

172) Hwang & Lim, *supra* n. 81, at [179].

173) *Ibid.*

174) *See* above at [55].

175) In Lord Thomas' formulation of the Minimal Review approach in *Betamax, supra* n. 75, at [52], his lordship states: 'More likely, as appears from the decided cases and observations made in them, are cases where the arbitral tribunal has expressly considered issues which have required the arbitral tribunal to inquire into circumstances suggesting illegality and set out their reasons for holding as a matter of fact and of law that there was no illegality. *In cases of that kind*, the arbitral tribunal's decision on fact and on law is a decision for the arbitral tribunal, if within its jurisdiction; if it holds that the contract is not illegal, then that decision will be final, in the absence of fraud, a breach of natural justice or any other vitiating factor' (emphasis added in italics by the authors).

176) *Westacre (CA), supra* n. 42.

177) *Ibid.*, at 868.

178) *Ibid.*, where Waller LJ states that the arbitrators themselves acknowledge that 'the [award debtor] never put their case that way during the arbitration'.

179) More recently, the Hong Kong Court of First Instance, citing *Betamax* with approval, remitted awards back to the tribunal for the tribunal to consider how changes to the law of illegality in Hong Kong announced just a few days before the release of the first award would affect the awards: *G v. N [2023]* HKCFI 3366.
180) *Westacre (CA), supra* n. 42, at 887.
181) *Ibid.*, (emphasis added in italics and bold italics by the authors).
182) Hwang & Lim, *supra* n. 81, at [179].
183) *Ibid.*
184) *Ibid.*
185) For the differences between *fresh* and *new* evidence, *see* above at [36].
186) However, it should not be *the only* basis for reviewing an award.
187) *See* below at [77].
188) The facts of *AJU v. AJT* are canvassed in fuller detail below at [X].
189) In particular, that an award will only be re-opened if there is 'fraud, a breach of natural justice or any other vitiating factor'. *See Betamax, supra* n. 75 at [52].
190) *AJU, supra* n. 31, at [69] (emphasis added in italics by the authors).
191) *Ibid.*, at [62].
192) *See* M. J. Beazley, *The Distinction Between Questions of Fact and Law: A Question Without Answer?*, Land and Environment Court Conference Kiama (2013), for a flavour of the blurred distinction between questions of fact and questions of law in the context of environmental law.
193) *Betamax, supra* n. 75, at [39].
194) M. Ng, *Reviewing the Standard of Curial Review for Findings in Arbitration Involving Public Policy*, Sing. J. Legal Stud. 75, 83 (2022) (Ng).
195) *See* above at [15].
196) *Ibid.*
197) Ng, *supra* n. 194, at 84. *See also Rakna, supra* n. 66, at [99]–[100].
198) *AJU, supra* n. 31, at [67] (emphasis added in italics by the authors).
199) *See Betamax, supra* n. 75, at [39], where Lord Thomas understood *AJU* as standing for the following proposition: 'the determination of the nature and extent of public policy was a question of Singapore law for determination by the courts of Singapore'.
200) *CBX v. CBZ* [2020] 5 SLR 184 ('*CBX v. CBZ*').
201) *CBX v. CBZ* [52].
202) *CBX v. CBZ* [67].
203) *Ibid.*
204) *Ibid.*
205) *See* above at [68].
206) As explained above at [15], illegality and public policy are *not* mirror concepts.
207) *Ibid.*
208) This was what happened in *AJU, supra* n. 31; *Betamax, supra* n. 75; and *Gokul, supra* n. 66.
209) All Judge Reyes said was: 'It would not usually be appropriate for the Singapore court to intervene in such case. The parties should be held to their agreement to abide by the tribunal's award, even if that award is wrong as a matter of law'. However, it is not clear why this exact same reasoning should not also apply to 'false positive' awards.
210) *See* e.g., *West Tankers Inc v. Allianz SpA* [2012] EWCA Civ 27, where the English Court of Appeal upheld the High Court's decision to enforce a negative declaratory award under s. 66 of the English Arbitration Act 1996.
211) By way of example, consider a Dutch-seated arbitral tribunal which erroneously dismissed a claim because it held that gay marriage is illegal in the Netherlands. The Dutch courts may possibly intervene in this 'false negative' award for being contrary to its pro-LGBT policy.
212) *See* above at [24].
213) *See* e.g., *Soleimany, supra* n. 70.
214) *See* above at [1]–[13].
215) *See* above at [14].
216) *See* above at [17].
217) *See* above at [36].
218) *Westacre (CA), supra* n. 42, at 881; *Ladd v. Marshall* [1954] 3 All ER 745, 748; *Bloomberry Resorts and Hotels Inc v. Global Gaming Philippines LLC* [2021] 3 SLR 725 [105]; *BVU v. BVX* [2019] SGHC 69 [106].
219) Model Law, *supra* n. 8, Arts 34(2)(*a*)(ii) or 36(1)(*a*)(ii).
220) *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 [65].
221) *Betamax*, *supra* n. 75.
222) *Ibid.*, at [95].
223) *Ibid.*, In particular, the Board opined: '*Moreover, a determination of the public policy of the Republic of Mauritius in relation to any such illegality is an issue on which* ***it would be necessary****, particularly in relation to public procurement,* ***to have close regard to the determination of the Supreme Court*** *when such an issue actually arises*' [emphasis added].
224) *Betamax*, *supra* n. 75, at [26]–[27].
225) *Ibid.*, at [54]–[94].
226) *Ibid.*

227) *Westacre (CA)*, *supra* n. 42, at 874. Waller LJ refers to this argument as 'the *Lemenda* point'.
228) *Westacre (CA)*, *supra* n. 42, at 871 and 877.
229) *Ibid.*
230) *See Westacre (CA)*, *supra* n. 42, at 873, where Waller LJ implicitly describes the three arguments as disjunctive arguments.
231) *Ibid.*
232) *See* below at [86] and [91].
233) *Westacre (CA)*, *supra* n. 42, at 869–871.
234) In theory, the public policy arguments may also be advanced *cumulatively*. In other words, a challenging party may argue that although the individual arguments are not capable of triggering the high threshold of the public policy ground alone, they would if they are considered cumulatively. In such cases, *all* of the arguments will have to be substantiated at Stage Two for the public policy ground to be effectively invoked.
235) *Westacre (CA)*, *supra* n. 42, at 877.
236) *Ibid.*
237) *Westacre (CA)*, *supra* n. 42, at 874.
238) Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, Official Records of the General Assembly, A/40/17 (21 Aug. 1985), para. 297.
239) *Westacre (CA)*, *supra* n. 42, at 881.
240) *See* above at [77].
241) *Westacre (CA)*, *supra* n. 42, at 881.
242) *Ibid.*, at 871.
243) *AJU*, *supra* n. 31, at [15].
244) AJU also argued that the award was made in breach of natural justice: *see AJU*, *supra* n. 31, at [16] and [18].
245) *AJT v. AJU* [2010] 4 SLR 649 ('*AJT (HC)*') at [12]; *AJU*, *supra* n. 31, at [17].
246) The second allegation was dismissed at first instance, and not followed up on appeal: *see AJT (HC)*, *supra* n. 245, at [54]; *AJU*, *supra* n. 31, at [26]. However, for the purposes of this mock application, we will proceed as the first instance court and deal with both allegations.
247) Compare, *Westacre (CA)*, *supra* n. 42 where the three allegations appeared to be mounted *separately*: *see* above at [85].
248) Counsel will of course be free to mount the allegations cumulatively. In other words, they are free to argue that, even if one of the allegations *alone* is not sufficient to invoke the public policy of Singapore, the court ought to consider if both allegations, *cumulatively*, would be sufficient. However, the danger of mounting arguments cumulatively is that *all* the allegations made would then have to be substantiated under Stage Two. If at least one of the allegations cannot be sustained, then the entire public policy challenge fails.
249) *AJU*, *supra* n. 31, at [19].
250) *Ibid.*, where Chan CJ noted: '*it was common ground between the parties … that … the [settlement agreement] would be … in conflict with the public policy of Singapore … if: (a) the Concluding Agreement required the Appellant to stifle the prosecution of the Forgery Charges, which were not compoundable under Thai law;* ***and/or*** *(b) the Thai prosecution authority had been bribed to issue the Non-Prosecution Order with respect to the Forgery Charges against [O]*' [emphasis added in bold italics].
251) *AJU*, *supra* n. 31, at [73].

252) *Ibid.*, where Chan CJ held: '*In our view, this interpretation is, with respect, not justified for the following reasons. First, the Judge interpreted the Concluding Agreement (which was not illegal on its face) on the basis that "agreements of an illegal nature [were] unlikely to be expressly stated[;] [i]nferences ha[d] to be made from the surrounding circumstances" (see [46] of the HC Judgment). This is tantamount to assuming a fact which has yet to be proved. Second, none of the provisions of the Concluding Agreement required the Appellant to take any unlawful action to stop the Thai criminal proceedings. In particular, cl 1 merely referred to the Appellant receiving evidence from the Thai prosecution authority (or other relevant authority) of the withdrawal and/or discontinuation and/or termination of those proceedings. Third, the Judge relied on the draft cl 5 (as defined at [24] above) as evidence of the parties' agreement to achieve an illegal purpose when the very fact that that provision was subsequently discarded would suggest the contrary. In any case, although the draft cl 5 expressly stated that as a condition precedent to the performance of each party's obligations, the Appellant was to "take such action as [was] necessary to withdraw and/or discontinue certain criminal proceedings ... filed ... by [the Appellant] against [Q], [P] and [O] with [the Thai prosecution authority]", it did not necessarily follow that the action which the Appellant had to take would invariably involve some kind of unlawful action. As mentioned earlier, the Respondent's allegation that the Appellant had procured the issue of the Non-Prosecution Order by bribery was rejected by the Tribunal, and this finding was affirmed by the Judge (see [25] above). Fourth, the Judge failed to consider that there was no reason for the Respondent to have entered into an illegal agreement as it would surely have wanted to be paid the Agreed Final Settlement Amount of US$470,000: why should the Respondent have taken the risk of entering into an agreement which the Appellant could have resiled from at any time on the ground of illegality?*'.

253) *See* footnote 235 above.
254) *AJT (HC)*, *supra* n. 245, at [54]; *AJU*, *supra* n. 31, at [26].
255) *Ibid.*
256) *Gokul*, *supra* n. 66, at [182]-[186].
257) *Ibid.*
258) *Gokul*, *supra* n. 66, at [206].
259) *See* above at [39].
260) *See* above at [40].
261) *See* above at [76].
262) *See* above at [77].
263) *See* above at [49].
264) *See* above at [50].
265) *See* above at [53].
266) *See* above at [54].
267) *See* above at [55].
268) *See* above at [43]. In particular, factor (2) (*viz.* whether the tribunal was competent enough) might not be capable of producing a binary answer.
269) This is perhaps why public policy has been described as 'a very unruly horse' by Burrough J in *Richardson*, *supra* n. 14, at 303.
270) *See* above at [50]–[52].
271) Such an allegation would likely be capable of invoking Stage One of the Proposed Approach. *See* Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, Official Records of the General Assembly, A/40/17 (21 Aug. 1985) which explicitly identifies 'instances such as corruption, bribery or fraud' as manifestations of a fundamental public policy breach.
272) *See* above at [56]–[57].
273) As alluded to at n. 203 above, one possible example is where a Dutch-seated arbitral tribunal erroneously dismisses a claim because it held that gay marriages are illegal in the Netherlands. In such a case, the Dutch courts would likely intervene in this 'false negative' award for being contrary to its pro- LGBT public policy.
274) *See* above at [60]-[62].
275) *Ibid.*
276) *See* above at [62].
277) As long as the objection made at Stage One invokes the public policy of the forum and is thus worth entertaining.
278) Ng, *supra* n. 194.
279) *Ibid.*, at 89–94.
280) *Ibid.*, at 90, which he terms as 'Scenarios 3 and 5' in his matrix.
281) *Ibid.*
282) Kurkela & Turunen, *supra* n. 73, at 18.
283) *Soleimany*, *supra* n. 70, at 800.
284) Ng, *supra* n. 194, at 91.
285) *See* above at [76].
286) *See* above at s. 2.A.
287) *See* above at s. 2.B.