I. ENGLAND AND WALES COURT OF APPEAL (CIVIL DIVISION) DECISIONS

URL: *http://www.bailii.org/ew/cases/EWCA/Civ/1999/1401.html*
Cite as: [1999] 3 All ER 864, [1999] BLR 279, [1999] 1 All ER (Comm) 865, [1999] 3 WLR 811, [1999] CLC 1176, [1999] 2 Lloyd's Rep 65, [1999] 2 LLR 65, [1999] EWCA Civ 1401, [2000] QB 288

IN THE SUPREME COURT OF JUDICATURE QBCMI 1998/0485/3
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(MR JUSTICE COLMAN)
Royal Courts of Justice
Strand
London WC2

Wednesday, 12 May 1999
B e f o r e:

LORD JUSTICE WALLER
LORD JUSTICE MANTELL
SIR DAVID HIRST

\- - - - - -

WESTACRE INVESTMENTS INC
CLAIMANT/RESPONDENT
\- v -

(1) JUGOIMPORT-SDRP HOLDING COMPANY LIMITED
(2) BEOGRADSKA BANKA
(3) THE FEDERAL DIRECTORATE OF SUPPLY AND PROCUREMENT OF THE FEDERAL REPUBLIC OF YUGOSLAVIA
(4) BEOGRADSKA BANKA DD
FOURTH DEFENDANT/APPELLANT
(5) THE STATE OWNED COMPANY YOGOIMPORT SPDR
FIFTH DEFENDANT/APPELLANT

- - - - - -

(Transcript of the handed down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 421 4040
Official Shorthand Writers to the Court)

- - - - - -

MR J GAISMAN QC with MR S KENNY (Instructed by Messrs Holman Fenwick & Willan, London EC3N 3AL) appeared on behalf of the Appellant

MR V VEEDER QC with MR C HOLLANDER QC (Instructed by Messrs Forsters, London W1X 9DB) appeared on behalf of the Respondents

- - - - - -

J U D G M E N T
(As approved by the Court)

- - - - - -

©Crown Copyright

Wednesday, 12 May 1999

J U D G M E N T

Lord Justice Waller:
The appellants are Beogradska Banka DD and the State-Owned Company Yugoimport-SDPR (the appellants). They are the present successors of Udruzena Beogradska Banka (the Bank) and The Federal Directorate of Supply and Procurement of the Socialist Federal Republic of Yugoslavia (the Directorate). The respondents are Westacre Investments Inc, a Panamanian company (Westacre).

Westacre, the Directorate and the Bank entered into a written contract dated 12 April 1988 (the Agreement) whereby the Directorate appointed Westacre its consultant with respect to the sale of military equipment in Kuwait. In return for its services, Westacre was to receive a substantial percentage of the value of the contracts entered into by the Directorate with, principally, the Kuwaiti Ministry of Defence. The Bank guaranteed the payment of all fees due to Westacre under the Agreement under Clause 6 of the Agreement. The Agreement was expressly governed by Swiss law and contained an arbitration agreement. That agreement provided for all disputes being settled in accordance with the rules provided for in the Arbitration Rules of the International Chamber of Commerce with the arbitration's seat to be in Geneva.

In July 1989 the Directorate, after it had secured a sale contract with the Kuwaiti Ministry of Defence dated 29 May 1989 for $500,546,000 and £11,440,329.29

repudiated the agreement and in the result an arbitration was commenced by Westacre.
The Arbitration Tribunal consisted of three lawyers appointed by the International Chamber of Commerce Court of International Arbitration under the ICC Rules (The Tribunal): Dr Reaschke-Kessler of Germany (chairman), Professor Perret who later resigned and was replaced from March 1993 by Me Jean Patry of Switzerland, and a Yugoslav arbitrator, Professor Dr Mitrovic.

The Tribunal and the parties agreed and signed terms of reference at a procedural hearing in Geneva on 21 October 1991 which provided for Geneva to be the place of arbitration. The Tribunal conducted oral hearings in Geneva in 1993 on 27-28 January, 13-16 May, 30 June-1 July, and 26-27 August.

By an award dated 28 February 1994, by a majority, the Tribunal awarded Westacre the sums of $50,010,093.36 plus £1,029,629.37. Various issues arose in the arbitration but the only relevant point so far as this appeal is concerned relates to the contention of the Directorate and the Bank that the Agreement was void on the grounds that it violated " *ordre public international* " or " *bonos mores* ". The point was not taken in any pleading but was taken in opening by counsel for the Directorate. The suggestion of the Directorate was that Westacre had bribed persons in Kuwait for the purpose of persuading those persons to exercise their influence in favour of entering into a contract with the Directorate. It was not suggested that the Directorate had entered into the Agreement with the intention that Westacre would bribe persons in Kuwait or that Westacre was in fact a vehicle for receiving a bribe. The majority of the Tribunal found that the Directorate had not established that there was any bribery and had not established that the activities of Westacre were illicit or that there was anything which rendered the Agreement as unenforceable as violating " *bonos mores* ". Their finding was in the following terms:-

"The majority also holds that bribery renders an agreement invalid. In arbitration proceedings, however, bribery is a fact which has to be alleged and for which evidence has to be submitted, and at the same time constitutes a defence, nullifying the claims arising from a contract. The consequences of this are decisive.

If a claimant asserts claims arising from a contract, and the defendant objects that the claimant's rights arising from the contract are null due to bribery, it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts. The statement of facts and the burden of proof are therefore upon the defendant. The word "bribery" is clear and unmistakable. If the defendant does not use it in his presentation of facts an Arbitral Tribunal does not have to investigate. It is exclusively the parties' presentation of facts that decides in what direction the arbitral tribunal has to investigate.

If the claimant's claim based on the contract is to be voided by the defence of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere "suspicion" by any member of the arbitral tribunal, communicated neither to the parties nor to the witnesses during the phase to establish the facts of the case, is entirely insufficient to form such a conviction of the Arbitral Tribunal."

The Directorate and the Bank appealed to the Swiss Federal Tribunal for the annulment of the Award under Swiss law. The Swiss Federal Court, by order dated 6 January 1995, dismissed the Directorate and Bank's appeal against the Award. On the appeal the Directorate (and indeed the Bank) sought to suggest not simply that Westacre had performed their contract by bribing, but that in fact Westacre was a vehicle of Mr Al-Otaibi, a member of the Kuwaiti government. The allegation was that in seeking to enforce the Agreement Westacre were claiming on behalf of Mr Al-Otaibi a bribe from the Directorate. [See the Directorate's brief to the Swiss Federal Trial Bundle D, pp3-40]. On being requested for their comments the majority arbitrators in summary stated that the Directorate never put their case that way during the arbitration; never asserted that Mr Al-Otaibi played the key role now contended for; and indeed if anything the Directorate played down Mr Al-Otaibi's role. They said, for example, "the court had therefore given no significance to the person of Mr Al-Otaibi in the issue and refrained from its own interpretation." (Trial Bundle D. p.98). The Swiss Federal Court held that the nature of its review of arbitration required it to base its decision on the facts found by the Tribunal. The Swiss Federal Court recognised that the Directorate's allegations, if proved, would make the Agreement void under Swiss law, but held that ....

"Thus, the appellants' claim that the agreement, owing to its illegal or immoral purpose, is void does not at all events accord with the factual finding made by the arbitral tribunal. As has already been stated, the truth is that this argument consumes itself in a feckless criticism of the arbitral tribunal's findings of fact and of the procedure applied, considering that no violation of mandatory rules of procedure occurred. In the last analysis, the arbitral tribunal did not at all contravene public policy in upholding the validity of the April 12, 1988, agreement, the substance of which was determined in the course of the proceedings. Thus, to the extent that it is founded on Article 190(2)(e) LDIP, the appeal is without grounds."

On 15 August 1995 Buxton J (as he then was) granted an ex parte order that Westacre be at liberty to enforce the Award in the United Kingdom. That led to the defendants serving on Westacre a summons dated 15 November 1995 to set that order aside.

That application was ultimately supported by an affidavit sworn by Miodrag Milosavljevic dated 13 December 1995. That affidavit was of considerable length but the judge's summary of it is as follows:-

"(i) The consultancy agreement was entered into in the wider context of the negotiation between Yugoslavia and Kuwait of a so-called debt-swapping agreement or memorandum of understanding under which the outstanding debts of Yugoslavia to Kuwait would be reduced by the supply of goods and services to Kuwait.

In the course of the negotiation of that agreement the Secretary General of the Council of Ministers of Kuwait, Mr Al-Otaibi, attended apparently in his private capacity a meeting in Yugoslavia with the Yugoslav Minister of Finance and the then General Manager of the old Directorate.

In the course of a visit to Kuwait by an official Yugoslav delegation in early March 1988 there was agreement in principle to a debt-swapping arrangement but it was made clear by certain high-placed Kuwaiti officials that no contracts for military equipment would be placed unless a consultancy agreement with a nominated consultant was first entered into.

(ii) the plaintiffs, as the old Directorate's exclusive consultant, were to receive a commission of 15 per cent of the value of all contracts entered into during the term of the agreement (three years renewable) for military products and for related training services (whether actually provided or not) and a commission of 20 per cent on all contracts for the supply of spare parts for 20 years from the date of the first supply of military equipment.

(iii) At paragraph 33 of the affidavit M.M. stated:

"Memorandum of Understanding and the consultancy contract with Westacre formed part of a scheme engineered by Mr Al-Otaibi and his associates by which he was able to ensure (a) that Yugoslav military equipment would be chosen in preference to that of other suppliers; and (b) that Westacre, and those who stood behind it, would receive substantial sums."

(iv) In the course of 1989, while negotiations were taking place in respect of the supply of the M-84 tanks, Yugoslav negotiators encountered Mr Al-Otaibi who was passing on information obtained from inside Kuwaiti Ministry of Defence and giving advice generally, including advice to ignore the prohibition of consultants in relation to armaments contracts in Kuwait.

(v) Following the signature of the M-84 contract on 29th May 1989, under which the agreed price for 214 tanks was over US$500 million and £11,440,329.29, there

were meetings in Cairo between General Nikodin Jovanavic, then general manager of the old Directorate, and Mr Al-Otaibi relating to the expressed concern of the Yugoslavs as to the terms of the armaments contract under which in accordance with Kuwait decree No.4A/88 the old Directorate warranted that it had not promised any person at any place "any commissions, doles, expenses, disbursements, bonuses (or) gifts" and that prices had been fixed "exclusive of any hidden additions to meet commissions of agents or expenses" and undertook to cancel any such pre-existing arrangements on pain of very substantial monetary penalties. A document known as the MOD - Circular was also provided to the Old Directorate prior to the conclusion of the M-84 contract. It prohibited the use of agents or intermediaries in the making of contracts with the Kuwait Ministry of Defence. The MOD - Circular provided:

"Since it is imperative that the deals which the Ministry of Defence may conclude with you regarding: arms, ammunition and spare parts, should be accorded the utmost secrecy, it is requested that any such future deals be concluded directly between the Ministry of Defence and your goodselves without the interference of any agent or intermediary.

The Ministry insists on this as an essential provision of the contract, the breach of which will result in considering you to have committed a serious breach of the contract, in addition to all legal consequences including the annulment of the contract.

The Ministry also emphasise that it does not acknowledge any commission you may pay to an agent or intermediary and that it will deduct any such commission from the price apart from considering such an action as a breach of the aforesaid essential provision."

At the meeting in Cairo Mr Al-Otaibi expressed concern at the old Directorate's having raised questions about these provisions and explained that his "group" had succeeded in procuring the armaments contract against the opposition and were very powerful.

(vi) Subsequently, by its letter of 5th July 1989 the old Directorate cancelled the consultancy agreement without having paid the consultancy fees attributable to the armaments contract.

(vii) In describing the arbitration MM refers at paragraph 67 to the issue as to who owned the plaintiff company. One of the two witnesses who claimed to be the controllers and only shareholders, Mr Al-Wazzan, was the son-in-law of Mr Al-Otaibi. He expresses the opinion that "Westacre was a company behind which Mr Al-Otaibi and his associates sheltered in order to maintain their anonymity". In para 69 he states:

“In my respectful submission, it was obvious, both from my own researches and from the evidence given at the arbitration, that the contract with Westacre was a contract to buy influence in government circles in Kuwait. It must, in my respectful submission, have been contemplated that the large commission to be earned by Westacre would be applied to “reward” those who influenced or made the decision to buy tanks and other military equipment from Yugoslavia. Of course, quite how it was applied was not a concern of the old Directorate; but in my respectful submission, it must have been contemplated by those who made the contract that promises of “largesse” would be made to individuals within the Kuwaiti Government who had power to influence the decision from whom to buy military equipment.”

(viii) At paragraph 71 of his affidavit MM states:

“Not every agency or consultancy agreement to promote the sales of military equipment is of this character. Sometimes all that the consultant is required to do is to put the supplier of military equipment into contact with the relevant individuals in government who have the job of determining which weapons etc. A particular state will buy. Sometimes the consultant will undertake lobbying of government officials, or will assist with arranging demonstrations. But the rate of commission in this case, 15%-20%, is, in my experience, unusually high. I draw the inference that it must have been appreciated by those involved in the making of the contract that some of the money at least would be applied to “illegitimate” purposes."

Mr Gaisman QC attached to his skeleton argument a schedule of submissions on the facts. Those were also responded to during the hearing before us by Mr Hollander also in documentary form. Mr Gaisman in summary submits very much as his clients did to the Swiss Federal Court that if the facts set out in M.M.’s affidavit are correct, they establish (perhaps not something fully emphasised by the judge’s summary)

(i) that the Agreement was a contract to pay Mr Al-Otaibi a bribe through a vehicle, Westacre, and intended to be such by one or both parties to the Agreement from the outset; and

(ii) that the evidence put forward by Westacre at the arbitration portraying Mr Al-Wazzam and Mr Al-Ghanin as playing central and important roles was false and put forward deliberately to conceal Mr Al-Otaibi’s role.

Mr Hollander’s submission, again in summary, is that this is a totally different stance from that taken before the arbitration tribunal; that there are matters asserted contrary to findings by the arbitrators; that there is nothing now produced which

could not have been produced to the arbitrators and no reason why if this was or is the Directorate's case it should not have been made at the arbitration.

It was in the context of M.M.'s affidavit that on 19 April 1996, when sitting in the Commercial Court, I gave directions for pleadings and granted a stay of execution in the meanwhile. On 23 April 1996 Westacre commenced a second action on the Award and on 8 May 1996 served points of claim in accordance with my directions. Nothing turns on the fact that there are two actions. Defences were served in both actions raising the facts as set out in the affidavit of Miodrag Milosavljevic.

It was in that context that on 11 March 1997 Tuckey J (as he then was) ordered, by consent, that the following preliminary questions be tried:-

"That on the basis that the facts set out in paragraphs 5-82 of the affidavit of Miodrag Milosavljevic sworn herein on 13 December 1995 are correct and in the light of the award dated 28 February 1994 ("The Award") and the decision of the Swiss Court dated 30 December 1994 and the provisions of Swiss law and the legal status of the defendants herein the defendants pleaded case discloses no defence to enforcement of the award."

The judge in his judgment described the effect of the preliminary issue in the following terms:-

"The effect of that preliminary issue is that both the primary facts and the inferences of fact drawn by MM in that affidavit are to be assumed to be proved. Accordingly, the primary issue is essentially whether, if both the plaintiffs and the old Directorate intended that in order to obtain the armaments contract the plaintiffs should exercise personal influence over the officials of the government of Kuwait and contemplated that for that purpose such officials would be bribed, the enforcement of the award would be contrary to English public policy. The defendants argue that at Common law public policy would be a good defence to an action on the award and that in any event the order for enforcement of the award should be set aside by reason of s.5(3) of the Arbitration Act 1975 which provides:

"Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.""

One of the matters which has given the court and counsel some cause for concern is the way in which the preliminary issue has been framed. Mr Gaisman submits that one must assume in deciding the preliminary issue that his clients have established the correctness of the affidavit of M.M.. He supports the way the judge framed the question posed in the passage just quoted, which appears to assume that

the facts have been established . When pressed on the subject Mr Veeder QC suggested that if the judge's formulation was to be interpreted as an acceptance that the facts were true before considering whether to enforce the award, then it was not a proper formulation. He said that if he was forced to accept, or in effect admit for the preliminary issue purposes that the contract was one for bribes, he really had no argument that the award should be enforced. Mr Gaisman, despite his submission that the preliminary issue was framed with the starting point that the correctness of the allegations had been established, did not suggest before us as he had done before the judge that it followed that no question of issue estoppel could arise. He simply submitted that in considering issue estoppel the assumption to be made was that the facts in the affidavit were correct.

I have not found the interpretation of the wording of the preliminary issue easy, but it would not be to the advantage of either party to allow the wording to dictate the answer to what is on any view a difficult problem. Mr Gaisman accepted that at any full trial there would be two questions; should the appellants be allowed now to assert the facts as set out in M.M.'s affidavit in the light of the fact that the bribery issue was an issue before the arbitrators? If so, on the assumption that those facts are correct, should the English court enforce the award? In my view whatever the proper interpretation of the wording of the preliminary issue the court ought to address those issues.

As already indicated, as I understand Mr Veeder's position, he would actually accept that if the appellants are entitled to establish the facts they now allege, and if one assumes those facts to be correct, then he would accept that enforcement of the award should be refused. That is because (a) he accepts the correctness of the decision in this court in *Soleimany v Soleimany* [1998] 3 W.L.R. 811 and indeed the judge's view that "where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality that gave rise to it" (823H); (b) because he accepts that a contract to pay a bribe, and thus an award that enforces a contract to pay a bribe would be unenforceable under English law as contrary to public policy; and (c) because he accepts that the English court may refuse to enforce an award under the New York convention "if it would be contrary to public policy to enforce the award" (Section 5(3) of the Arbitration Act 1975).

The key issue accordingly is whether the appellants should, in these enforcement proceedings, be entitled to prove the facts as set out in the affidavit of M.M.. It is this issue which the judge took first and it is this issue which the parties argued first. I however think it would be more satisfactory to deal with the two other issues which arise on the appeal before turning to the key issue, and I do so because it seems to me that logically if on the first of those issues "the Lemenda point", the appellants are right in submitting that the award would be unenforceable without going beyond the facts that appear in the award and its reasons, then what

is undoubtedly the more difficult point would not arise, and because in relation to the second of those issues "the fraud amendment point" it seems to me there is some interaction with what I am describing as the key issue.

The *Lemenda* point

For this point the appellants rely on a decision of Phillips J in *Lemenda Trading Co . Ltd v African Middle East Petroleum Co. Ltd* [1988] 1 Q.B. 448. It is important as a starting point to see what that case decided. The case was concerned with a contract under which an intermediary was obliged to use personal influence so as to obtain a contract in Qatar. The judge refused to enforce that contract on the grounds that it was contrary to English public policy founded on general principles of morality, and because it contravened a similar public policy in the country of performance. He held:-

"The principles underlying the public policy in the present case are essentially principles of morality of general application. The practice of exacting payment for the use of personal influence, particularly where the person to be influenced is likely to be unaware of the pecuniary motive involved, is unattractive whatever the context. Yet it is questionable whether the moral principles involved are so weighty as to lead an English court to refuse to enforce an agreement regardless of the country of performance and regardless of the attitude of that country to such a practice. The later English decisions were influenced, at least in part, by the effect of the practice in question upon good government in England. It is at this stage that, in my judgment, it becomes relevant to consider the law of Qatar. The significant fact in *Kaufman v. Gerson* was that the contractual adventure was not contrary to French law and the contract was valid and enforceable in France. In the present case Qatar, the country in which the agreement was to be performed and with which, in my view, the agreement had the closest connection, has the same public policy as that which prevails in England. Because of that policy, the courts of Qatar would not enforce the agreement.

In my judgment, the English courts should not enforce an English law contract which falls to be performed abroad where: (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the laws of that country."

In the instant case if the appellants were not to be allowed to go behind the award and were not to be allowed to establish facts inconsistent with the findings of the majority arbitrators, they assert that in any event the arbitrators' findings amounted to holding that the agreement was a contract for the purchase of personal influence similar in almost every detail to the contract being considered by Phillips J in*Lemenda* .

It was and is however accepted that it is not solely on the findings of the arbitrators that the appellants can rely. They accept that it was an important aspect of Phillips J's finding that the English court should not enforce the contract in *Lemenda* that the contract was also contrary to the public policy of the place of performance and its proper law, in that case Qatar. They accept that in the instant case there was no finding on Kuwait public policy by the arbitrators because the point was not raised by the appellants at the arbitration. They seek to excuse not raising the point at the arbitration on the basis that there would have been no point in doing so because under the proper law of the agreement and under the curial law of the arbitration, Swiss law (a) a contract for the purchase of personal influence short of bribery would not be contrary to the public policy of Switzerland; and (b) because it would not be contrary to public policy in Switzerland to enforce a contract that involved the commission of acts contrary to the public policy of Kuwait or any other foreign and friendly state as opposed to being "illegal" by the law of that state.

The appellants accordingly sought to establish at the hearing before Colman J by expert evidence (a) that by the law of Kuwait the agreement involved a performance that was contrary to the public policy of that country; and (b) to make good their point that there was no purpose in calling that evidence during the arbitration, that as a matter of Swiss law (the proper law of the agreement and the curial law of the arbitration) the agreement was not contrary to public policy, and would have been enforced despite the public policy of Kuwait.

The appellants' argument is then that apart from the necessity to call the evidence on Kuwait law the case is on all fours with *Soleimany*where because the illegality of the agreement being enforced by the arbitration award was clear on the face of the award this court held that the English court should not enforce the award.

In *Soleimany v Soleimany* the court was concerned with an award made by the Beth Din under Jewish law, which on its face purported to enforce an illicit enterprise for the smuggling of carpets out of Iran. This court took the view as previously indicated that the interposition of an arbitration award did not isolate the successful party's claim from the illegality that gave rise to it. It took the view that at the enforcement stage it was the function of the court to see that its executive power was not abused, and it refused to enforce the award.

When the judge ruled on this aspect of the case, *Soleimany* had not been decided by the Court of Appeal. However, his reasoning received, save in one respect of relevance in the key issue to which I have yet to turn, broad approval. It is however right to stress that there are clear distinctions between the facts and the award in this case, and the facts and the award being considered in *Soleimany*. It was plain on the face of the award in *Soleimany* that the award was enforcing an enterprise unlawful by the place of performance. So far as the award in this case is concerned

the reasons expressly state that performance would not be illegal by the laws of Kuwait, and there is nothing in the reasons to suggest that public policy in Kuwait would be offended by performance of the same. Furthermore there is every suggestion that Swiss public policy has been considered at least on the bribery issue, and accordingly the English court looking at the award and its reasons would contemplate, as indeed turns out to be correct, that so far as Swiss law is concerned the agreement is not either illegal by that law or considered contrary to Swiss public policy.

These distinctions are apparent from the judge's consideration of the *Lemenda* point. His ruling on that point can I think be summarised as follows:

1. He thought that it was difficult to see why outside the field of such universally condemned activities such as terrorism, drug trafficking, prostitution, paedophilia, anything short of corruption or fraud in international commerce should invite the attention of English public policy in relation to contracts which are not performed within the jurisdiction of the English courts. It was, he thought, thus international comity (i.e. because performance in *Lemenda* was against public policy in the place of performance as well as in England), that led the English court not to enforce the contract;

2. He thought that in this instance the fact that the court was concerned with enforcement of the award valid by its curial law, and by the proper law of the contract, as opposed to the underlying contract, was material;

3. He thought it was material that the illegality did not appear on the face of the award, and that it was necessary to have the evidence relating to Kuwait ;and

4. He further thought that if one carried out a balancing exercise as between the public policy of enforcing awards and the public policy of not enforcing illegal contracts that since the offensiveness of the illegality alleged in this instance was not at the highest level, the balance was in favour of upholding the award.

It is right to add that the judge did accept the evidence of Professor Ballantyne called by the appellants, that the agreement in this case would have been unenforceable in Kuwait as contrary to public policy there. His understanding of that evidence was:-

"I did not find that Mr. Al Awadhi’s evidence was supported by any source material as compelling as that of Professor Ballantyne. In this connection, my understanding of the substance of the latter’s evidence was that any commission contract under which an intermediary is paid to lobby a government official and which may involve the persuasion of that official to reach a decision with regard to

any consideration other than the best interests of good government is treated as void as contrary to public policy, even if it does not involve corruption."

He also accepted that under Swiss law a contract to lobby a government minister was not contrary to public policy. Bribery and corruption made the difference.

The respondents have put in a respondents' notice challenging those findings, but so far as Kuwait law was concerned all that Mr Hollander's submissions came to was to emphasise that albeit an intermediary would not be able to enforce a contract for his remuneration in Kuwait, that was because that was "high policy", and "high policy" because of the secrecy that should have been accorded to sales to the MOD of Kuwait, and because of the increase the payment of commissions to intermediaries was likely to make to the price.

As regards Swiss law the point was not much pressed but it was pointed out that the experts on Swiss law had some difficulty in discerning any major distinction between the English court's attitude to contracts so far as public policy was concerned, but were of the view that a contract to lobby was not contrary to public policy in Switzerland.

I accept that, as Mr Gaisman submitted, there were many similarities between the contract in *Lemenda* and the agreement as found by the Arbitrators to be the subject of this case. Mr Hollander sought to suggest that one distinction on the findings of the arbitrators in this case related to the openness with which the "intermediary" conducted his negotiations. In *Lemenda* Phillips J held:-

"Mr. Silber for the plaintiffs submitted that the nature of the agreement between the parties must have been quite apparent to Mr. Jaida. The evidence does not support that submission. Mr. Yassin did not tell Mr. Jaida that he was to be paid for his services, let alone that he was to be paid on a commission basis. He told Mr. Jaida that Mr. Abdelnour was a friend of his and urged him to support a fellow Arab. Mr. Yassin agreed, when cross-examined, that Mr. Jaida must have known of the policy of the Qatar Government and would not have wished to be involved in an activity of which the government or the minister would disapprove. If Mr. Jaida was loyal to Q.G.P.C., and there was no suggestion that he was not, it was plainly important that he should not be aware of the nature of the agreement between Mr. Jassin and Mr. Abdelnour. I find that he had no knowledge of this."

Mr Hollander points to the finding of the arbitrators [page 322 of Bundle A] in the following terms:-

"To the majority of the Arbitral Tribunal, these and other statements of Mr. Al-Wazzan and Mr. Al-Ghanim, which might imply secret activities, do not seem illegal. The statements must be considered in their context. Mr. Al-Ghanin also

said he had acted “on behalf of the company” (tr. 14.5 1993, p.90), that is, he openly represented the Claimant. The majority of the Arbitral Tribunal qualifies the answers of Mr Al-Wazzan and Mr. Al-Ghanim as not suggesting secret activities but as trying not to disclose their professional know how to third persons. This is neither illicit nor illegal."

Furthermore it really does not seem very likely that anyone acting on behalf of the Kuwait M.O.D. would not appreciate that Mr Al- Wazzan and Mr Al-Ghanim were not representatives of the Directorate but were intermediaries. But be all that as it may, the openness factor does not appear to have been the critical issue so far as Phillips J was concerned having regard to the language he used at p.461 already quoted.

What in my view *Lemenda* decided was (1) there are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic [see 459C]; (2) contracts for the purchase of influence are not of the former category; thus (3) contracts for the purchase of personal influence if to be performed in England would not be enforced as contrary to English domestic public policy; and (4) where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also that the English court would not enforce it. There is also an implied recognition as it seems to me that if all that can be said of a contract is that performance in a foreign country will be contrary to the domestic public policy of that state, enforcement will only be refused if performance would be contrary to the domestic public policy in England. If that was not so, consideration of English public policy would not in fact have been necessary or relevant.

It must also follow, as it seems to me, that an English court would take notice of the fact that different courts and different tribunals might have different views as to the enforceability of contracts for the purchase of personal influence depending on the proper law of the contracts and where they were to be performed. It would be for example legitimate for a foreign tribunal to take the view (indeed consistent with the English court's own view if I am right on the above implication), that albeit performance was contrary to domestic public policy in its place of performance, since it was not contrary to the domestic public policy either of the country of the proper law and/or the curial law, enforcement should be allowed.

It is in this context, in my view, that albeit the award is not isolated from the underlying contract, it is relevant that the English court is considering the enforcement of an award, and not the underlying contract. The English court takes cognisance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy

where the English court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as there may be, have been considered by the Arbitral Tribunal. It is legitimate to conclude that there is nothing which offends English public policy if an Arbitral Tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view.

On the *Lemenda* point accordingly I would hold that the judge was right, and that thus unless the appellants are entitled to go behind the facts as found by the arbitrators there is no public policy answer to the enforcement of the award.

Fraud amendment

The appellants seek leave to amend their defence to allege that Westacre, through its witnesses, gave perjured evidence at the arbitration. The judge in his judgment at page 804 A-F sets out in full the amendment sought. It is sufficient for the purposes of this judgment simply to say that the thrust of the amendment is to seek to allege that Westacre dishonestly put forward the case at the arbitration that the agreement was a genuine consultancy agreement with Mr Al-Wazzam and Mr Al-Ghanim playing significant roles, whereas the truth was that the agreement was a vehicle providing bribes particularly to Mr Al-Otaibi. It will be seen that there is a close interaction between what the appellants would seek to assert under this amendment and the key issue, but at this stage I am going to leave on one side the factor that if the appellants were allowed leave to amend it might enable them to establish their public policy defence in relation to bribery. In other words I will consider the point as if it were alleged following any foreign arbitration award simply that the party seeking to enforce the award had given perjured evidence at the arbitration.

It is also right to emphasise that it was no part of the judge's decision that leave to amend should be refused as a matter of discretion. His decision on the amendment was that it should not be allowed because it raised no arguable point.

As the judge pointed out if it is open to a party to seek to get an enforcing court to retry issues of fact which the arbitrators had before them, and which they had to and did determine, it would appear to present an open invitation to disappointed litigants to relitigate their disputes by alleging perjury, and a major inroad would be made into the finality of Convention awards. However Mr Gaisman submits that much the same could be said of the rule that relates to foreign judgments, and yet that rule exemplified by *Abouloff v Oppenheimer & Co* (1882) 10 Q.B.D. 295 does allow a person against whom a foreign judgment has been given to resist enforcement simply on the basis that the foreign judgment was obtained by the

perjury of witnesses, notwithstanding that the truth of that evidence was an issue before the foreign court.

Dicey & Morris Conflict of Laws 12th Edition (1993) at pp 505-506 points up the distinction between the attitude of the English court to its own judgments as compared with that to foreign judgments. As regards domestic judgments a second action can be brought to set aside the judgment on the basis that it was obtained by fraud, but it will be summarily dismissed "unless the plaintiff can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence, and which is so material that its production at the trial would probably have effected the result, and (when the fraud consists of perjury) so strong that it would reasonably be expected to be decisive at the rehearing and if unanswered must have that result." That test bears some similarity to, but is if anything more stringent than, the test by reference to which fresh evidence may be introduced in the Court of Appeal as laid down in *Ladd v. Marshall* [1954] 1 W.L.R. 1489 at 1491:-

"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

It bears a striking similarity to the test in the abuse of process context. Goff LJ's judgment in the Court of Appeal sub nom *McIlkenny v Chief Constable of the West Midlands* [1980] Q.B. 283 was approved when the case went to the House of Lords see *Hunter v Chief Constable of the West Midlands* [1982] A.C. 529. That demonstrated that for an action making a collateral attack on a previous decision not to be an abuse of process the evidence had to be "fresh" i.e. unavailable at the time of the first hearing , and the "new evidence must be such as entirely changes the aspect of the case" as laid down by Earl Cairns in *Phosphate Sewage v Molleson* (1879) 4 App. Cas. 801 at 814.

It also bears a similarity to the test supported by *Mustill & Boyd 2nd Edition* and by Hirst J in *The Vimeira* [1985] 2 Lloyd's Rep 377 at 400 in relation to the situation in which remission of an award of arbitrators might have been ordered prior to the Arbitration Act 1996 coming into force i.e. the evidence would have had a substantial effect or an important influence on the result, and it must have been unavailable to the party at the time of the hearing of the arbitration. I have not considered fully what the position is now that the 1996 Act is in force, but in this context it is difficult to think that if under section 68(2)(g) it was suggested an award had been obtained by fraud and that relief under section 68(3) should be

granted, the court would not insist on the same condition i.e. unavailability of the evidence produced as at the time of the arbitration, and that such evidence would have had an important influence on the result.

It does seem anomalous that enforcement of a foreign judgment can be attacked without any requirement that the evidence must be evidence not available at the trial, and apparently without regard to the question whether the impact of that evidence would be likely to be decisive. As the cases referred to by the judge show albeit the House of Lords felt unable to overrule *Abouloff* in *Owens Bank Limited v Bracco* [1992] 2 A.C. 443, it is a decision which has been distinguished, and its application weakened wherever possible. Thus in *House of Spring Gardens v Waite* [1991] 1 Q.B. 241, it was held that where an attempt had been made to set aside a foreign judgment for fraud in the jurisdiction where the judgment had been obtained, the party against whom judgment had been given was estopped from raising the fraud in the enforcement proceedings in England. In *Owens Bank Ltd v Etoile Commerciale S.A.* [1995] 1 W.L.R. 44 the Privy Council concluded that the local Court of Appeal had been entitled to view the allegation of fraud as so weak as to amount to an abuse of process. It was in that case that Lord Templeman said:-

"Their Lordships do not regard the decision in *Abouloff's* case, 10 Q.B.D. 295, with enthusiasm, especially in its application to countries whose judgments the United Kingdom has agreed to register and enforce. In those cases the salutary rule which favours finality in litigation seems more appropriate."

In *Interdesco S.A. v Nullifire Ltd.* [1992] 1 Lloyd's Rep 180 Phillips J concluded that in a case where the judgment being enforced in England was being so enforced under the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters which has the force of law pursuant to Section 2 of The Civil Jurisdiction and Judgments Act 1982, the rule in *Abouloff* had no application at least as he put it in its "most extreme formulation" because under that Convention the English court was not entitled to review the findings of another Convention court where the very points had been in issue before it. He also expressed the view quoted by the judge as follows:-

"In my judgment, where registration of a Convention judgment is challenged on the ground that the foreign court has been fraudulently deceived, the English court should first consider whether a remedy lies in such a case in the foreign jurisdiction in question. If so it will normally be appropriate to leave the defendant to pursue his remedy in that jurisdiction. Such a course commends itself for two reasons. First, it accords with the spirit of the Convention that all issues should, so far as possible, be dealt with by the state enjoying the original jurisdiction. Secondly, the courts of that state are likely to be better able to assess whether the original judgment was produced by fraud. Where a defendant is or may be

precluded from challenging the judgment in the original jurisdiction because of the application of principles which are similar to those which would lead an English court to decline to review an English judgment - e.g. the principle in*Henderson v. Henderson* (1843) 3 Hare 100 - I am not persuaded that the English court should necessarily itself entertain such a challenge in disregard of those principles. This is not it seems to me an area where rigid rules should be formulated or followed. Principles of estoppel should be applied with care and a degree of flexibility to ensure that they accord with rather than defeat the ends of justice - see*Arnold v. National Westminster Bank* , The Times, 26 April 1981. Subject to this it seems to me that the English court should not normally entertain a challenge to a Convention judgment in circumstances where it would not permit a challenge to an English judgment."

The judge in his judgment did not extend the principle in *Abouloff* to the enforcement of an award under the New York Convention. He appears to have done so suggesting first that the foundation for the *Abouloff* principle was that public policy should prevent a party from benefiting from his own fraud, and recognising that that public policy was present as much in domestic judgments as in foreign judgments and thus logically it also should apply to the sphere of arbitration. But he concluded that under the New York Convention a party should only be entitled to pursue the allegation that an award has been obtained by fraud on certain conditions which he put this way:-

"Where a party to a foreign New York Convention arbitration award alleges at the enforcement stage that it has been obtained by perjured evidence that party will not normally be permitted to adduce in the English courts additional evidence to make good that allegation unless it is established that: (i) the evidence sought to be adduced is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced t the hearing; and (ii) the evidence was not available or reasonably obtainable either (a) at the time of the hearing of the arbitration; or (b) at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrators' award if such procedure were available. Where the additional evidence has already been deployed before the court of supervisory jurisdiction for the purpose of an application for the setting aside or remission of the award but the application has failed, the public policy of finality would normally require that the English courts should not permit that further evidence to be adduced at the stage of enforcement. The defendants have not established that they could justify the introduction of the evidence in M.M.'s affidavit either on the basis that such evidence could not reasonably have been obtained at the time of the arbitration or subsequently in time to engage Swiss court procedures for challenging the award on the basis that the plaintiffs had adduced perjured evidence. The procedure available under Swiss law for "revision" of an award on the grounds that it has been obtained by perjured

evidence must be invoked within a time limit of 90 days from the discovery of the dishonest evidence, according to a letter of advice provided to the plaintiffs by a Swiss lawyer, M. Andre Gillioz. This was clearly not done. That being so, I have no doubt that, notwithstanding the apparent strength of the evidence of M.M. on which they would rely, the defendants should not be permitted to reopen under the public policy exception to enforcement under section 5(3) of the Act of 1975 the issues of fact already determined by the arbitrators. Accordingly, the defendants' application for leave further to re-amend their points of defence must be refused."

I agree with the judge that the principle in *Abouloff* in its extreme formulation should not be extended to arbitration awards but would put the matter a little differently but only in degree.

I would suggest that the reason why the *Abouloff* principle should not be extended to foreign arbitration awards is first that an arbitration award is an award from the tribunal chosen by the parties to decide their dispute; that will very often not be the case either when a domestic or a foreign judgment has been obtained. Second, there is thus a logic in placing foreign arbitration awards into the same category as domestic arbitration awards and not into the same category as foreign judgments. I am not for my part much influenced by the fact that the award is a New York Convention award, because I do not see that the provisions of that Convention can in any way be equated with those of the Brussels Convention relied on by Phillips J in *Interdesco.*

But I would thus agree with the judge that normally the conditions to be fulfilled will be (a) that the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators; and (b) where perjury is the fraud alleged i.e. where the very issue before the arbitrators was whether the witness or witnesses were lying, the evidence must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result. I would prefer not to express a concluded view as to whether if under the curial law the local court had the power to review or remit an award, it should always be a pre-condition that the fresh evidence should not have been available prior to the expiry of the period for making the application to the local court. I am anxious about making that aspect too inflexible a condition, since it is clear that if an application to the local court is made and fails, the result may be an estoppel as per *House of Spring Gardens v White.* However, I agree with the judge that in the instant case, no good reason has been shown as to why the appellants should not have applied to the Swiss court within the period of 90 days, raising the allegation that the award had been obtained by perjured evidence , and that is an added factor against granting the appellants leave to amend to raise the issue in this jurisdiction.

Thus, unless the bribery element provides a factor which makes for an exception, I agree with the judge that the amendment should be refused.

Can the facts be re-opened?

I return thus to the key issue. Should this court allow the facts as found by the arbitrators to be re-opened? Both parties accept for present purposes what was said in *Soleimany* including the view expressed obiter as to the approach of the court to enforcement when the arbitrators have entered upon the topic of illegality and held there was none. What we said in *Soleimany v. Soleimany* was as follows *:-*

"The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none. Or perhaps they have made a non-speaking award, and have not been asked to give reasons. In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. We do not propound a definitive solution to this problem, for it does not arise in the present case. So far from finding that the underlying contract was not illegal, the Dayan in the Beth Din found that it was.

It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. 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. "

We furthermore expressed our disagreement with Colman J on one aspect, when we said that although we agreed that where the arbitrator had jurisdiction to decide the issue of illegality, and decided there was none, prima facie the court would enforce the award. We continued:-

"But, in an appropriate case it [the court] may inquire, ... into an issue of illegality even if an arbitrator had jurisdiction and has found 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."

It is in fact of interest that as we read Colman J's formulation in his sixth proposition even he was not taking what one might term a full*Ladd v Marshall* approach. His sixth proposition contemplates a balancing exercise simply on the basis that certain facts were not placed before the arbitrator without a requirement that those facts should not have been available to the party resisting enforcement at the time of the hearing. The reason for not taking a strict *Ladd v Marshall* approach, and indeed for taking the approach we advocated which went a little further, is that when questions of illegality could be in issue, cases may be fought by the parties either in a way that disguises illegality from the tribunal, or at the least from one party's point of view seeks to shine the best light on their own conduct.

What I believe we, and indeed Colman J, were recognising was that although normally at the enforcement stage a party who brings an action on the award will be estopped from attempting to re-argue the points on which he has lost the arbitration (see *Mustill & Boyd* page 419 and the cases cited at note 17), there are exceptional circumstances where the court will not allow reliance on an estoppel. In *Arnold v. Natwest Bank Plc* [1990] 1 Ch 573 this court held that an issue that had been the subject of judicial decision could be relitigated between the same parties in later proceedings if special or exceptional circumstances justified it, thereby placing issue estoppel and the principle in*Henderson v Henderson* (1843) 3 Hare 100 into the same category, distinguishing both from cause of action estoppel. In that case the fact that the first decision could by the date of the second hearing be shown to be "plainly rather than merely arguably wrong" was so far as the majority was concerned sufficient to provide exceptional circumstances. They applied the dictum of Lord Upjohn in *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] 1 A.C. 853 at 947:

"All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

There are authorities which in my view support the proposition that where illegality is raised and at least where the evidence of illegality is so strong that if not answered it would be decisive of the case, the court would not allow reliance on issue estoppel, or on the principle in*Henderson v Henderson* to prevent the point being ventilated. In other words illegality can if raised provide the special circumstances in which an estoppel will not provide a defence.

In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] A.C. 993 the Privy Council were concerned with an appeal from the Court of Appeal in Malaya. The plaintiff in the case had in the first set of proceedings obtained judgment in default for arrears of rental alleged to be due for certain machinery. The defendant had not raised any issue that the contract might be a money lending transaction invalid by virtue of non- compliance with the Moneylenders Ordinance. When sued on the same contract in a second action the defendant sought to raise the point under the Moneylenders Ordinance. The plaintiff's response was to assert that the defendant was estopped by the judgment in default. The Privy Council held firstly that there was nothing in the first action which had decided the moneylending point "necessarily and with complete precision" and that thus there was no estoppel, but independently they also decided that a party cannot set up an estoppel "in the face of a statute". Lord Radcliffe delivering the opinion of the Privy Council went further when he said at 1015 as follows:-

"Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction upon which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel: see *In re Bankruptcy Notice,* in particular *per* Atkin L.J.

It does not appear to their Lordships that the principle invoked is confined to transactions that have been made the subject of legislation or that, where legislation is in question, the bare prescription that a transaction is to be void or unenforceable is sufficient by itself to justify the principle's application. Thus, on the one hand, the common law may itself prohibit the enforcement of certain contracts, such as those of an infant not for necessaries, and it cannot be supposed that it would any the less refuse to base a judgment on an estoppel against an infant who had so contracted. An infant who has obtained goods from a tradesman by representing himself to be of full age cannot be estopped from setting up his infancy, if sued for the price of the goods. On the other hand, there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels. One example of these is the Statute of Frauds (see *Humphries v. Humphries* , in which it was no doubt considered that, following *Leroux v. Brown* , the statute ought to be treated as regulating procedure, not as striking at essential validity); another is the Stamp Act or Acts in their application to oral contracts of marine insurance, which, according to the decision in *Barrow Mutual Ship Insurance Co. v Ashburner* , are not prohibited so much as penalised.

It has been said that the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied upon is imposed in the public interest or "on grounds of general public policy" (see *In re A Bankruptcy Notice* , *per* Atkin L.J.). But a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statute, for

which this claim might not be made. In their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of moneylending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Thus the laws of gaming or usury (*Carter v. James*) override an estoppel: so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled tenancies (*Welch v. Nagy*)."

In *E.D. & F. Man (Sugar) LTD v. Yani Haryanto (No. 2)* [1991] 1 Lloyd's Rep 429 the Court of Appeal, as it seems to me, recognised that illegality could give rise to special circumstances so as to prevent reliance on an estoppel. In the judgment of Neill L.J. he showed that what the court is concerned to do is to see whether the public policy of finality in litigation is overridden by some more important public policy based on the unenforceability of illegal contracts. In that case Mr Haryanto brought proceedings in England seeking a declaration that he was not bound by certain contracts, and seeking to prevent Man continuing with an arbitration, but not raising any issue of illegality. The action was dismissed and an appeal therefrom also dismissed. Mr Haryanto then commenced a further action seeking a declaration that the contracts were illegal, applied to the English Court of Appeal to vary the declaration of the Court of Appeal so to allow him to raise illegality on which the court thought it unnecessary for them to rule, but refusing to alter the declaration given. Man then issued proceedings in the Commercial court seeking declarations that Mr Haryanto was now estopped from raising illegality following which a settlement agreement was entered into settling the arbitration and all proceedings. Under the settlement Mr Haryanto agreed to pay certain sums in instalments with an accelerator clause for failure to pay an instalment. Mr Haryanto failed to pay an instalment and the accelerator clause was operated.

At this stage Mr Haryanto started proceedings in Indonesia alleging the contracts were entered into for an illegal purpose namely importation of sugar other than through a certain entity and thus contrary to Indonesian law. Man also commenced proceedings in Indonesia relying on the settlement agreement. The District Court in Indonesia held that the contracts were unenforceable as being "..... in conflict with the public welfare and the public policy of Indonesia" and that the settlement agreement and the decision of the English Court of Appeal were unenforceable. There were then proceedings and counterproceedings in both jurisdictions into which it is unnecessary to go save that the issue raised in the new English proceedings brought by Man, was (1) whether it was open to Man to rely on the settlement agreement having regard to the fact that in the Indonesian proceedings to which they had been a party that court had ruled on its validity; or (2) whether it was Mr Haryanto who was estopped from asserting the invalidity of the contracts not having raised the same in the original English proceedings.

At p.435 Neill LJ spells out the submissions on behalf of Mr Haryanto, and he concludes that it cannot be said that the Indonesian court has decided the issue whether the public policy in favour of finality has been overridden by some more important public policy based on the unenforceability of illegal contracts; that is for the English court to decide. But he continues:-

"It therefore becomes relevant to examine - in the words of Mr. Justice Steyn - “the nature of the countervailing illegality”.

I can well understand that in certain circumstances a Court would entertain an argument that despite a declaration as to the validity of a contract the Court should go behind the declaration because the contract related, for example, to the import of drugs. In support of such an argument reliance could be placed on principles of public policy which are of the greatest importance and which are almost certainly recognized in most jurisdictions throughout the world.

The present case is quite different. The public policy invoked is a policy based on the rules of the Indonesian domestic law.

It is the English court which must carry out the balancing exercise. In my judgment this exercise can have only one result. Mr. Haryanto could have raised a defence based on Indonesian law in the proceedings before Mr. Justice Staughton and the Court of Appeal. He chose not to do so. The subsequent judgment of the District Court in Jakarta does not change or improve Mr. Haryanto’s position."

That case in my judgment is important. It demonstrates that even if a party had obtained a declaration from the English court as to the validity of a contract in a situation in which the defendant had not raised a public policy issue in relation, for example, to the fact that the contract was for the importation of drugs, the English court would not allow the plaintiff to rely on an issue estoppel to prevent “argument on principles of public policy which are of the greatest importance”. The position may be different if the public policy issue relates to a rule of Indonesian domestic law.

It thus supports the view that was being expressed obiter in *Soleimany* that there will be circumstances in which, despite the prima facie position of an award preventing a party re-opening matters either decided by the arbitrators or which the party had every opportunity of raising before the arbitrators, the English court will allow a re-opening. The court is in this instance performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English court is not abused. It is for those reasons that the nature of the illegality is

a factor, the strength of case that there was illegality also is a factor, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal is a factor.

The judge performed the balancing exercise and narrowly came down on the side of upholding the finality of the award. It would seem that if the case had concerned a drug trafficking contract he might well have taken a different view but he placed "commercial corruption" at a different level of opprobrium from drug trafficking.

I have reached a different conclusion to that of the judge. I disagree with him as to the appropriate level of opprobrium at which to place commercial corruption. It seems to me that the principle against enforcing a corrupt bargain of the nature of this agreement, if the facts in M.M.'s affidavit are correct, is within that bracket recognised by Phillips J in *Lemenda* and by Neill L.J. in *Man v. Haryanto* as being based on public policy of the greatest importance and almost certainly recognised in most jurisdictions throughout the world. I believe it important that the English court is not seen to be turning a blind eye to corruption on this scale. I believe that if unanswered the case at present made on M.M.'s affidavit would be conclusive against Westacre being entitled to enforce the agreement and thus the award as a matter of English public policy. I also believe that the judge did not sufficiently consider the extent to which the case now presented on bribery was examined by the Arbitration Tribunal. When one examines the circumstances of this case one can see that in truth the bribery issue has not been ventilated properly before the Swiss Arbitral Tribunal. Mr Gaisman would suggest that that is because Westacre put forward a dishonest case if the facts of M.M.'s affidavit are to be taken as correct. It is by no means as simple as that. Mr Gaisman's clients chose not to run the case as it is now being run. He submits that that was inadvertence or incompetence. The alternative explanation is that the claimants did not want to accept what they now put forward as their case that they or employees of theirs were involved and intended the agreement to constitute the vehicle by which a bribe was to be paid. There was not collusion which we suggested in *Soleimany* might lead the court to look carefully at the question of enforcement, but the effect is the same, and both parties, if the facts in M.M.'s affidavit are correct, bear responsibility for the fact that the matter was not properly considered.

The fact is that the arbitrators simply did not have an opportunity of considering the case as now made, and whatever their suspicions, the majority did not feel it in their place to make inquiries. I draw attention to the quotation from the reasons of the majority at the commencement of this judgment, where they say, if the defendant does not present the facts "an Arbitral Tribunal does not have to investigate", and to the fact that they asserted to the Swiss court that the allegation that the appellants were themselves involved in the bribery was not part of the case before the arbitrators.

What of course gives one cause for concern is the way the matter can be put so powerfully in relation to finality. The appellants chose not to run the point they now run before the arbitrators, and on the bribery issue they raised they lost; they took the matter to the Swiss Federal Court and lost; the point, if it is successful, prevents at least in this jurisdiction enforcement so as to require payment of that part of the price paid under the main arms contract which would otherwise have gone to Westacre.

The answer is that so far as public policy is concerned it is always unattractive for one party to be able to take the point, but the English court is concerned with the integrity of its own system, and concerned that its executive power is not abused. If the agreement represented a contract to pay a bribe, Westacre should not be entitled to enforce the agreement before an English court and should not be entitled to enforce an award based on it. In addition, it may be possible to give some opportunity to the Ministry of Defence in Kuwait to make whatever claim they might have against either party if the appellants were to succeed in establishing the facts in M.M.'s affidavit.

If the court were concerned with a domestic arbitration and citizens of this country, I would have thought that if a party were to come before the English court and seek to prove that an agreement was unenforceable because it was in fact an agreement to pay a bribe, in addition to the contract not being enforced by the English court, the papers would be sent to the Director of Public Prosecutions. There is no such sanction available in relation to an agreement between foreign citizens. However, I would suggest that it would be appropriate to draw the attention of the Ministry of Defence to the allegations being made so that they could consider what remedies might be available to them.

LORD JUSTICE MANTELL:

I gratefully adopt the summary of facts provided by Waller LJ. I respectfully agree with the reasoning by which he rejects what he has called "the Lemenda point" and "the fraud amendment point". I also agree that the preliminary issue raises two separate questions; is it open to the appellants in the enforcement proceedings to challenge the arbitrators' findings of fact on the bribery issue and secondly, if so and if successful in proving the assertions set out in the affidavit of Miodrag Milosavljevic, should the English court enforce the award. Clearly the questions have to be addressed in that order and the key question is the first. On that key question I regret to say that I am unable to agree with Waller LJ. I hope I shall be forgiven for stating my reasons shortly.

It is of crucial importance to evaluate both the majority decision in the arbitration and the ruling of the Swiss Federal Court, Swiss Law being both the proper law of the contract and the curial law of the arbitration and Switzerland, like the United

Kingdom, being a party to the 1958 New York Convention. From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award.

However, in the obiter passage cited by Waller LJ from the judgment in Soleimany it seems to have been suggested that some kind of preliminary inquiry short of a full scale trial should be embarked upon whenever "there is prima facie evidence from one side that the award is based on an illegal contract". For my part I have some difficulty with the concept and even greater concerns about its application in practice, but, for the moment and uncritically accepting the guidelines offered, it seems to me that any such preliminary inquiry in the circumstances of the present case must inevitably lead to the same conclusion, namely, that the attempt to re-open the facts should be rebuffed. I so conclude by reference to the criteria given by way of example in Soleimany itself. First, there was evidence before the Tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the award. The seriousness of the alleged illegality to which Waller LJ gives weight is not, in my judgment, a factor to be considered at the stage of deciding whether or not to mount a full scale inquiry. It is something to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality which can only be performed in response to the second question, if it arises, namely, should the award be enforced.

Accordingly I would dismiss the appeal.

SIR DAVID HIRST:

I also would dismiss this appeal for the reasons given by Mantell LJ, with which I entirely agree.

I would only add that, had the second question arisen, I would have answered it in favour of the respondent for the same reasons as those given by Colman J at [1998] 3 WLR 770 at pp 798B to 800C. Here, in my judgment, Colman J struck the correct balance, and, in doing so (contrary to Waller LJ's view) gave ample weight to the opprobrium attaching to commercial corruption (see especially the passage at p.798F to 799G).

ORDER: Appeal dismissed with costs; leave to appeal to the House of Lords refused; hearing on continuation of the stay pending appeal adjourned, with a stay pending the hearing. (This order does not form part of the approved judgment)

BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
URL: *http://www.bailii.org/ew/cases/EWCA/Civ/1999/1401.html*