Corrected

Sent by J Veeder
UK/NY
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WESTACRE INVESTMENTS INC

AND

JUDOIMPORT-SDPR HOLDING CO LTD

BEOGRADSKA BANKA

THE FEDERAL DIRECTORATE OF SUPPLY AND PROCUREMENT OF THE FEDERAL REPUBLIC OF YUGOSLAVIA

BEOGRADSKA BANKA DD

Judgment of Mr Justice Colman
delivered on 19th December 1997

Mr V Veeder QC and Charles Hollander instructed by Frere Cholmeley of 4 John Carpenter Street, London EC4Y 0NH on behalf of the plaintiffs

Mr J Gaisman QC and Stephen Kenny instructed by Holman Fenwick & Willan of Marlow House, Lloyds Avenue, London EC3N 3AL on behalf of the Defendants

The Nature of the Proceedings

The main proceedings before the court consist of a preliminary issue ordered to be tried by Mr Justice Tuckey on 21st March 1997. That issue arises in consolidated proceedings by which the plaintiffs claim to enforce an International Chamber of Commerce arbitration award dated 28th February 1994. The plaintiffs originally obtained an ex parte order from Mr Justice Buxton on 15th August 1995 whereby they got leave under section 26 of the Arbitration Act 1950 and section 3 of the Arbitration Act 1975 to enforce that award in the same manner as a judgment. The first defendants and the second defendant were parties to that

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application and they subsequently applied to set aside the enforcement order. On 19th April 1996 Mr Justice Waller ordered that the proceedings to enforce the award should be continued as if begun by writ and provision be made for the issues on enforcement to be fully pleaded.

Then on 23rd April 1996 the plaintiffs commenced proceedings by writ whereby they brought an action on the award itself, as distinct from applying for leave to enforce it. This time they joined two additional parties, The Federal Directorate of Supply and Procurement of the Federal Republic of Yugoslavia and Beogradska Banka DD. These additional parties were joined because it was then believed that an issue arose as to whether, having regard to the political developments in Yugoslavia, the first and second defendants might no longer be the parties properly sued on the award because they had ceased to exist. In the event corporate succession is no longer a live issue and I shall therefore refer to all four defendants, simply as "the defendants". Where it is necessary to distinguish between the first and third defendants I refer to them respectively as "the old Directorate" and "the new Directorate".
The defendants duly served defences, amended and re-amended defences in both proceedings.

Their grounds for challenging enforcement as well as their grounds for defending the action on the award were that it would be contrary to public policy for recovery to be permitted in the English courts by any available route. In essence, what is said is that the arbitration award was made in respect of amounts due under a consultancy contract made on 12th April 1988 under which the old Directorate appointed the plaintiffs as consultants in respect of the procurement of contracts for the sale of military equipment by Yugoslavia to Kuwait and that it was contemplated by the parties that the plaintiffs' servants or agents would exercise personal influence over officials of the Kuwait Government in order to procure such contracts, alternatively that the plaintiffs intended that such personal influence should be

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exercised and that the old Directorate contemplated that this might be done. It was further said that the plaintiffs intended to deal with the Kuwaiti Government officials without disclosing to them that the plaintiffs had a pecuniary interest in the Government's entering into such a contract and further that the plaintiffs intended to bribe Kuwaiti officials. Additionally, the defendants pleaded that it was the mutual intention or contemplation of the parties to the consultancy agreement that it would be performed in a manner which violated Kuwait law or in a manner which was contrary to Kuwait public policy. Accordingly, the English courts should not permit enforcement of the arbitration award.

The defendants' pleaded case referred specifically to and relied upon a substantial part of an affidavit sworn on 13th December 1995 by Miodrag Milosavljevic ("MM"). The deponent was legal counsel first to the old Directorate and subsequently to the new Directorate. He had carried out in that capacity an extensive investigation into the agreement with the plaintiffs and its relationship with the entry into of an arms supply contract dated 29th May 1989 between the old Directorate and Kuwait for the sale of a very large number of M-84 tanks to Kuwait. For this purpose, he said that he conducted an investigation of the documents and interviewed a number of individuals involved in the transactions, mainly Yugoslav military personnel. His affidavit contains a detailed account substantially in chronological order of the making of the consultancy agreement and of the armaments contract. The key points in that affidavit for present purposes are 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.

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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 MM 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

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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 the 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 £11,440,326.29, there were meetings in Cairo between General Nikodin Jovanovic, 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

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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 conract, 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

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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

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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.

It was against this background that a consent order was made by Mr Justice Tuckey on 21st March 1997 by which he ordered that there should be a trial of the following preliminary issue:

"That on the basis that the facts set out in paragraphs 5-82 of the Affidavit of Miodrag Milosavljevic ...... are correct and in the light of the Award dated 28th February 1994 ("the Award") and the decision of the Swiss Court dated 30th 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 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

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for enforcement of the award should be set aside by reason of section 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".

In the course of this hearing the defendants sought leave further to re-amend their Points of Defence. Their further re-amendments which alleged that a number of the witnesses called by the plaintiffs to give evidence at the arbitration including Mr Al-Otaibi had pergured themselves. The evidential bases of these allegations are various passages in MM's affidavit. The defendants plead that the award was obtained by fraud and/or manifestly dishonest evidence and that it would be contrary to public policy to enforce it. It was common ground that, if allowed, this further re-amendment would raise an issue which lay outside the preliminary issue. However, with commendable good sense the parties agreed that since the plaintiffs contended that the defendants' further re-amendments must fail as a matter of law, even if the pleaded factual basis was proved, I should at this hearing consider whether the further re-amendment should be disallowed on a demurrer. I therefore also heard argument on this issue. The plaintiffs also argued that these re-amendments should be refused on grounds of delay and as a matter of general discretion. I was not persuaded by these submissions and accordingly the question of leave to re-re-amend the Points of Defence rested on whether that which the defendants sought to plead must fail as a matter of law.

The Arbitration Agreement and the Arbitration Award

Clause 9 of the consultancy agreement provided as follows:

> "The terms and provisions of this Agreement shall be governed by and construed under the laws of Switzerland.

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Any disputes arising out of the present agreement shall be settled in accordance with the rules provided for in the Arbitration Rules of the International Chamber of Commerce with seat in Geneva. The decision of the arbitration shall be binding on the parties hereto."

Article 24 of the ICC Rules provides as follows:

"Article 24 Finality and Enforceability of award

1. The arbitral award shall be final.
2. By submitting the disputes to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made."

Thus the consultancy agreement and the arbitration agreement within it were governed by Swiss law and the procedural law of the arbitration was also Swiss law as it was held in Geneva. In accordance with the usual practice under the ICC Rules, the arbitrators were appointed by the ICC Court of International Arbitration and comprised a German chairman (Dr Raeschka-Kessler) a Swiss arbitrator (Professional Francois Perret, later replaced on his resignation in March 1993 by Mr Patry) and a Yugoslav arbitrator (Professor Mitrovic).

The arbitration proceedings were commenced on 8th November 1990. Pleadings were exchanged over a period which extended to 15th October 1993. Hearings took place at various dates in and between January 1993 and August 1993, the arbitrators issued an award dated 28th February 1993 by a majority. They decided that under the consultancy agreement the defendants were liable for the following amounts:

"1. US $46,099,140.36 plus 5% interest on US $8,908,190

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from 15 August 1989, 5% interest on US $13,362,285 from 15 October 1989 and 5% interest on US $23,828,665.36 from 27 April 1992;

2. £1,029,629.37 plus 5% interest on £171,604.89 from August 1989, 5% interest on £257,407.34 from 15 October 1989 and 5% interest on £600,617.16 from 27 April 1992;
3. US $3,910,953 plus 5% interest from 15 July 1990; and
4. US $350,000, being 50% of the advance of costs paid by Westacre.

By their award the arbitrators unanimously decided that the arbitration agreement was valid and that the claims against the defendants were governed by Swiss law.

The arbitrators held that the consultancy agreement was not invalid due to an infringement of bona mores. Furthermore, it had not been established that the MOD-circular was part of the mandatory law of Kuwait, as distinct from a term of the M-84 contract, or of the ordre public international. They also held that the defendants had failed to establish that the consultancy agreement was a nullity on the grounds that the parties to it had intended when they made that agreement that the plaintiffs were to procure a contract with the Kuwait Government by illicit means, such as bribery. Accordingly, the consultancy agreement did not infringe the ordre public international. Lobbying by private enterprises to obtain public contracts was not as such an illegal activity. Contracts to carry out such activities were not illegal.

The defendants appealed against this award to the Swiss Federal Tribunal. The main basis of the appeal was that the award was contrary to public policy. The defendants argued that the consultancy agreement was contrary to Kuwait law or evaded it or was a contract to pay bribes and as such was immoral and void. The court rejected those submissions because they were founded on what it described as "a rehearing of the facts on which the

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contested award is based". In as much as the defendants alleged facts which were not found by the arbitrators they were misunderstanding the nature of the review procedure. There being no right of appeal from that decision, the award is now enforceable in Switzerland.

Enforcement proceedings have been pursued in two other jurisdictions: Kuwait and Cyprus.

In Kuwait, on 31st May 1994, the plaintiffs obtained an order from the Kuwait Commercial Court enforcing the award. The procedure of enforcement appears from the judgment to have been specifically directed to New York Convention awards and it is quite clear that the court gave leave to enforce on the grounds that the plaintiffs had proved all the matters to be established under Article IV of that Convention, whereas the defendants "did not appear or challenge the case by any defence or submit any proof for the satisfaction of any of the matters mentioned in Article V."

The defendants have appealed this order. The plaintiffs have so far recovered 141,095.516 Kuwait Dinars from the Bank, which is equivalent to about US $478,313.77. Nothing has so far been recovered in Cyprus where a final order for enforcement has not yet been obtained.

The Submissions

Mr V V Veeder QC, on behalf of the plaintiffs, submitted that under the Arbitration Act 1975, section 5(3), it is the public policy of the enforcement court, in this case England, which is material. This is clearly correct and is supported by the words of Article V.2 of the Convention which provides that:

> "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:

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(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy <u>of that country</u>" (emphasis added).

Mr Veeder takes the very fundamental point that the plaintiffs are not seeking to enforce the consultancy agreement, that is to say the assumed promise of performance by means of corruption of Kuwait Government officials, but the separate agreement to arbitrate which involves both an express obligation to honour awards under Article 24(2) of the ICC Rules and an implied underlying contractual obligation to that effect. The conceptual foundation of this submission leads to the result that if there is a substantive agreement to commit a criminal offence, say an international contract for the sale and illegal importation of cocaine, which contains an ICC arbitration clause, an ICC award in favour of the seller in respect of the unpaid purchase price of the drugs must be treated as insulated from the substantive agreement for the purposes of the public policy exception to the enforcement of Convention awards and indeed at common law. Mr Veeder submitted that the public policy in the finality of an enforcement of an international arbitration agreement displaced any public policy against enforcement of the underlying substantive contract.

At a later stage in the hearing, however, Mr Veeder adopted a rather less fundamentalist position. His later submissions can be summarised as follows:

(i) If it appeared on the face of the award that international arbitrators had enforced a contract which was void ab initio for common law illegality, such as a contract to pay bribes, the English courts would not enforce the award as a matter of public policy.

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(ii) Where there was before the arbitrators an issue as to whether the underlying contract was illegal and void at common law and the arbitrators determined in a reasoned award that it was not, the award would be enforced.

(iii) Where there was a non-speaking award made in relation to an underlying contract which could be shown to have been illegal and void at common law it would arguably be open to a party resisting enforcement to prove the illegality as a defence to enforcement, but subject always to questions of issue estoppel and the application of Henderson v. Henderson.

The plaintiffs make the further point that under section 5 of the 1975 Act enforcement of an award cannot be refused on the ground of error of law or fact by the arbitral tribunal and that therefore if there is a valid award under the applicable law (in this case Swiss law) the enforcement court is precluded from going behind that award in order to examine the merits of the dispute. Moreover, in the present case the defendants ran before the arbitrators the very point which they now seek to re-run before the enforcement court under the public policy defence. They lost this point before the arbitrators and they cannot re-run it at this stage on the basis of the MM evidence which they could have adduced before the arbitrators.

The plaintiffs further submit that in English law the doctrine of public policy is extremely narrow. It is said to be only in extreme cases that enforcement of an arbitration award should be refused on such grounds, as where "enforcement would violate the forum State's most basic notions of morality and justice."

Mr Jonathan Gaisman QC, on behalf of the defendants, argues that, just as it would be contrary to English public policy to enforce the consultancy agreement on the facts to be assumed in this

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case, so it is contrary to English public policy to enforce an arbitration award made in respect of that agreement. Just as the courts of this country will refuse to enforce foreign judgments founded on underlying transactions which offend English public policy, so also should these courts refuse to enforce arbitration awards founded on such underlying transactions. Although the authorities recognise a countervailing public policy in favour of the finality of arbitration awards, as well as of judgments, particularly of Convention awards, a balance must be struck and the enforcement court must consider whether the underlying illegality or immorality is so offensive to it that it should treat that consideration as a paramount factor displacing the public policy of finality of awards as envisaged by section 5 of the 1975 Act. The doctrine of issue estoppel must yield to public policy against giving effect to transactions offensive to the court.

Mr Gaisman further argues that in any event since the preliminary issue has been framed on factual assumptions which include the contents of MM's affidavit, it is not open to the plaintiffs to rely on issue estoppel; the assumption must be made that the defendants prove those assumed facts at the full hearing and that it is upon such basis that I must now determine this issue. However, in my judgment, the preliminary issue is not worded so as to preclude the plaintiffs from relying on issue estoppel. Although it is formulated on the basis that the facts set out in MM's affidavit "are correct", that is to say it can be proved that such were the facts, it leaves at large the question whether as a matter of law the defendants are entitled to rely on those facts to justify non-enforcement of the award.

Finally, on the assumption that contrary to their primary submission they are bound by the award, the defendants advance an alternative case that a contract for the purchase of personal influence is contrary to English public policy and also contrary to the public policy of the place of performance. In this case, Kuwait has the same public policy as this country. On the basis

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of the award the consultancy agreement was a contract for the purchase of personal influence to be exercised by the plaintiffs even if it did not involve the payment of bribes. Under Kuwait law, such a contract is contrary to public policy. It is therefore contrary to English public policy to enforce an award giving effect to such an agreement. In as much as such a contract would not have been contrary to Swiss public policy or law, the defendants could not have productively rely on the point before the arbitrators or the Swiss Federal Tribunal. Therefore the issue now sought to be raised in relation to English and Kuwait public policy on the facts found and evidence referred to in the award cannot be prohibited on the grounds of issue estoppel or any analogous finality principle.

Since I propose to consider the defendants' application to re-re-amend their Points of Defence as a separate point, I shall summarise the parties' submissions on that application later in this judgment.

Matters of Principle

In the forefront of Mr Veeder's initial primary argument on behalf of the plaintiffs is the proposition that because the agreement to arbitrate and the concomitant agreement to honour an award are a separate and distinct contract from the substantive consultancy agreement, those features of the latter agreement which may be contrary to public policy cannot be deployed to preclude enforcement of the arbitration award. This is a Swiss law contract and the extent, if any, to which the agreement to arbitrate is severable from the substantive agreement is clearly governed by that law. Had this concept of the insulation of the arbitration agreement been part of Swiss law one might have expected the point to have been referred to by the expert witnesses on Swiss law who gave evidence before me, namely Professor Pierre Lalive, who was called by the plaintiffs, and Maitre Paolo Patocchi, who was called by the defendants.

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However, neither of them directly considered this question. Their evidence was largely directed to the validity of the award and to the scope of the doctrine of public policy in Swiss law. However, in the course of his written evidence Professor Lalive said this in relation to the setting aside of Swiss arbitration awards on the grounds of public policy:

> "20. An Arbitral Award rendered in Switzerland may be set aside by the Swiss Federal Tribunal (the only Swiss competent jurisdiction in such proceedings, according to Article 191 LDIP) if it is "incompatible" with public policy, ie. when the concrete and substantial result - of the operative part of the Award, in contradistinction to its reasoning or motives (ATF 112 1A 166) - violates in a clearly unacceptable manner the most basic legal and moral principles or values admitted not only in Switzerland but in civilized states (ATF 116 II 634; ATF 117 II 604 and Bulletin Swiss Arbitration Association, hereinafter Bull ASA 1993 pp 54 ss).
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> 21. With regard to the so-called "substantial" public policy, regarding the merits of the Award (in contradistinction to an alleged violation of "procedural public policy", a concept which is referred to in other sections of the same Article 190 LDIP), it has been decided that it referred to the violation of such fundamental principles as "pacta sunt servanda", the principle of good faith and the prohibition of abuse of right (cf. Article 2 Swiss Civil Code) and the prohibition of discrimination, for example (ATF 117 II 604, 116 II 634, Bull. ASA 1992, 381 and 365).
>
> On the other hand, it has been held that an Award was not (or not necessarily) incompatible with

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public policy when

- it involved the violation of a clear rule of law, whether Swiss Law or foreign law (ATF 117 II 604, 116 II 634, Semaine Judiciaire 1991, 12 and 52);

- it contained statement of facts manifestly contrary to the file of the case (ATF 117 II 606 II 637);

- it did not contain any grounds for the Award (ATF 116 II 373)."

In cross-examination Maitre Patocchi was asked whether he agreed with what Professor Lalive said in paragraph 20 "that what the Swiss courts are looking to is the concrete and substantial result of the particular case". The answer was that as regards setting aside Swiss awards on the grounds of ordre public the applicable test was that which he had put forward viz: "Does the enforcement of this particular award bring about such consequences as to offend against our fundamental conceptions of justice in such a way that enforcement is to be denied, taking into account all the circumstances of the particular case?"

It thus appears that both Professor Lalive and Maitre Patocchi in putting forward this evidence were addressing the question whether, having regard to all the circumstances including the nature of the underlying transaction, it was contrary to public policy to enforce the award. It is implicit in what they say that at the stage of enforcement the Swiss court would not necessarily look only at the arbitration agreement and the resultant award but might in an appropriate case have regard to the underlying transaction.

However, that point arose somewhat obliquely in the course of the evidence. That being so, it is necessary to investigate the

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position in English law because, in the absence of cogent evidence of Swiss law, I must assume that it is identical to English Law.

The distinct and free-standing nature of an agreement to arbitrate was high-lighted in the decisions of the House of Lords in Heyman v. Darwins Ltd [1942] AC 356 and Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd [1981] AC 909. The former decision recognised the enduring applicability of an arbitration agreement in the face of an accepted repudiation of the underlying contract whereas the latter decision recognised that there could be repudiatory breach of an arbitration agreement which would be accepted as terminating that agreement as distinct from the underlying contract. In other words the primary obligations encompassed by the agreement to arbitrate are amenable to remedies of the same nature as are available in respect of the primary obligations under a substantive contract. These characteristics of an arbitration agreement which are in one sense independent of the underlying or substantive contract have often led to the characterisation of an arbitration agreement, as Mr Veeder described it in his submissions, as a "separate" contract.

This, however, is true only to the limited extent recognised by those two decisions. For an agreement to arbitrate within an underlying contract is in origin and function parasitic. It is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract. The primary obligations under the agreement to arbitrate exist only for the purpose of informing the parties by means of an award what are their rights and obligations under the underlying contract. A monetary award therefore identifies a debt due or a secondary obligation to pay damages under that underlying contract to which is super-added a primary obligation to honour the award which arises under the arbitration agreement.

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If, therefore, the direct enforcement of the underlying contract in the courts of this country would be contrary to public policy, it follows that the enforcement of an arbitration award which gave effect to the rights and obligations under that contract could only be consistent with public policy if the interposition of the dispute resolution machinery provided by the arbitration agreement in principle displaced that aspect of public policy which would treat enforcement of the underlying contract as offensive. Given the parasitic or ancillary nature of the arbitration agreement, that proposition would at first sight appear to be difficult to sustain. Do the authorities suggest otherwise?

Mr Veeder relied on certain passages from the judgment of Kerr J. in Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd's Rep 223, in particular that part of the judgment relating to the fourth issue. In that case, there had been an ICC arbitration conducted in the course of what was agreed should be assumed to be a state of war between India and Pakistan. The Indian plaintiff company won under two awards and sought to enforce the awards against the Pakistani defendant Bank in the English courts. It was argued that it was contrary to English public policy to compel performance of or to enforce a contract directly or by the enforcement of an arbitration award or a judgment between parties who are nationals or residents of different states if since the date of the contract a war has occurred between the states in question by which the contract would ipso facto be dissolved or abrogated at English common law or by a rule of international law to like effect. Kerr J. rejected that submission for there appeared "to be no positive ground which (could) be said to support the suggested principle". He went on to hold that the public policy in the case in question should be in favour of upholding the award. His reason for that view was that the parties to arbitration had referred the disputes to the ICC arbitrators after the state of war had begun and had then taken part in the arbitration. In so doing both parties had consented to ignore the war. The Pakistan Government could not then be heard to rely on the continuing state of war

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as a defence to enforcement of the award. It was obliged to satisfy its obligation to honour the resulting award. If the war were relevant, the parties had in effect partly suspended the state of war, the Pakistan Government having permitted the Bank to participate in the arbitration.

In the Court of Appeal, at pages 300-301, the principle of public policy relied on by the Bank was rejected and the judgment of Kerr J. on this point was affirmed.

In my judgment, this case provides no support whatever for the proposition that the English courts will enforce an international arbitration agreement notwithstanding that the direct enforcement of the underlying contract would have been contrary to public policy. The decision proceeds on the basis that there was no relevant principle of public policy which could be deployed by way of defence.

The plaintiffs also heavily relied on Harbour Assurance Ltd v. Kansa Ltd [1993] QB 701. The issue there was whether a stay of proceedings should be granted under the Arbitration Act 1975 where a claim was brought on a reinsurance contract but where the plaintiff reinsurers since claimed that the foreign defendant reassureds were not approved to carry on insurance or reinsurance business in this county in accordance with the requirements of the Insurance Companies Acts 1974 and 1981. The reinsurance contracts contained an arbitration clause. The question therefore arose whether the issue of illegality was within the jurisdiction of the arbitrator. If the effect of the Insurance Companies Acts was to render void both the underlying contract and the agreement to arbitrate, the dispute could clearly not be arbitrable and a stay would not be available.

The real issue in that case was whether, as asserted by the plaintiff reinsurers, it followed automatically that if the underlying contract was illegal and void ab initio the agreement to arbitrate must also be void ab initio. The Court of Appeal

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held that the answer to that question was No. The key question was held to be whether not only the underlying contract but also the agreement to arbitrate was impeached by the statutory prohibition on carrying on the business of insurance or reinsurance. There was no principle of law which prevented the parties from setting up their own machinery for determining disputes as to whether the underlying contract was illegal and void ab initio: see Ralph Gibson LJ at page 712 C-F, Leggatt LJ. at page 719C-D and Hoffmann LJ. at page 723F to 724E. It is, however, quite clear from all three judgments that the essential test is whether that which invalidates or renders void ab initio the underlying contract also strikes down or renders void the agreement to arbitrate. Thus, at page 724A-E Hoffmann LJ. observed:

> "In every case it seems to me that the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other but, as we have seen, it may not. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract and to ask, as the House of Lords did in Heyman v. Darwins Ltd [1942] AC 356, whether the rule strikes down the arbitration clause as well. There may be cases in which the policy of the rule is such that it would be liable to be defeated by allowing the issue to be determined by a tribunal chosen by the parties. This may be especially true of contracts d'adhesion in which the arbitrator is in practice the choice of the dominant party. Thus, saying that arbitration clauses because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be as Ralph Gibson LJ. has pointed out the same is true of allegations of fraud.
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> In deciding whether or not the rule of illegality also

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strikes down the arbitration clause it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. There are, first the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes and secondly, the practical advantages of one-stop adjudication or in other words, the inconvenience of having one issue resolved by the court and then contingently on the outcome of that decision, further issues decided by the arbitrator.

In discussing those passages in the speeches of Viscount Simon LC and Lord Macmillan in Heyman v. Darwins Ltd, supra, in which reference was made to the non-arbitralibility of the initial invalidity of the underlying contract, Hoffmann LJ. said this (page 725c)

> "Mr Longmore submitted that the rule for which he was contending, however illogical or inconvenient it might be, was established by authority binding upon this court. He relied in particular upon some remarks in Heyman v. Darwins LTd [1942] AC 356 by Viscount Simon LC and Lord Macmillan, with whose speech Lord Russell of Killowen agreed. Both speeches contain passages which contrast cases of accepted repudiation or frustration, with which the case was actually concerned, with cases of initial invalidity, with which it was not concerned. It seems to me that this contrast was understandable because the most common examples of cases in which the ground of invalidity, of the substantive obligations of the contract also necessarily entails the invalidity of the arbitration clause are cases of initial invalidity, such as the absence of consensus ad idem, non est factum, mistake as to the person and so forth. There was no reason for their Lordships to go into the question of whether every ground for initial invalidity of the main contract necessarily entailed the invalidity of the arbitration clause and anything which appears to

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support this proposition must in my judgment have been an obiter dictum."

The Court of Appeal concluded that the effect of the Insurance Companies Acts was not to render illegal and void the agreement to arbitrate and since that agreement was expressed in terms wide enough to confer jurisdiction to determine the initial validity of the underlying contract, the matter in issue must be referred to arbitration.

Now it is perfectly true, as Mr Veeder, on behalf of the plaintiffs, has strongly emphasised, that all three members of the court attached great weight to the importance of the parties being at liberty to agree upon their own machinery for resolving disputes as to the initial validity of the underlying contract in line with the developing international jurisprudence on the subject. However, the judgments all recognise that the application of that objective cannot surmount the obstacle of circumstances which render initially invalid the agreement to arbitrate itself. Various examples were given of circumstances which might have that effect, such as fraud inducing the making of both the underlying contract and the agreement to arbitrate (Ralph Gibson LJ at page 712D), the effect of a statute rendering the underlying contract illegal, the absence of consensus ad idem, non est factum, mistake as to the person making the contract and contracts d'adhesion in which the arbitrator is in practice, the choice of the dominant party (Hoffmann LJ. in the passages at p724B and 725D already cited).

Although therefore this decision certainly demonstrates that it does not follow that where the underlying contract is illegal and void ab initio an agreement to arbitrate disputes arising under it will necessarily also be void ab initio, it does not establish any general principle, that wherever the underlying contract is illegal and void under a statute or at common law, an arbitration agreement in respect of disputes arising under it will necessarily be valid or that awards made under such agreement

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will be enforceable. It is thus necessary to determine in each case whether the nature of the illegality is such as to invalidate the agreement to arbitrate as well as the underlying contract. In that case the Insurance Companies Acts were held not to strike down arbitration agreements collateral to the reinsurance contracts which were invalidated.

Likewise in Whiteman v. Newey (1912) 28 TLR 240 it was held that the Gaming Acts did not impeach the validity of a subsequent reference to the committee of Tatterwall's of a dispute about amounts due under betting agreements.

In relation to statutory illegality the question must depend on the proper construction of the statute. But in relation to illegality at common law the only available determinant of that question can be the court's concept of the public policy relating to the object and purpose of the substantive contract.

It would therefore seem in principle that if the underlying contract were illegal and void at common law the question whether an arbitration agreement ancillary to it was also impeached by the illegality would have to be answered by reference to the policy of the court in relation to the particular nature of the illegality involved.

The plaintiffs referred to the decision of Mocatta J. in Prodlexport State Company for Foreign Trade v. E D & F Man Ltd [1972] 2 Lloyd's Rep 375. That was a case where there was enforcement of an arbitration award for damages for non-delivery in the face of evidence that non-performance of the sale contract by the sellers was due to a change in the law of the place of performance, Rumania, which had prohibited export of sugar. The court declined to go behind the award in order to protect international comity, notwithstanding that a direct claim for damages for the same breach of the same contract would, on the assumed facts, not have been enforced by action in the English court. This case is relied on as an example of the inviolability

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of an award even where the arbitrators had in effect enforced a contract illegal at the place of performance.

This case does not assist the plaintiffs. Mocatta J. (at pages 381-382) approached the issue of enforcement by asking whether the arbitrators had jurisdiction to determine the issue of illegality and its effect on the contract. That he held, was the principle applied by the Court of Appeal in David Taylor & Sons Ltd v. Barnett [1953] 1 Lloyd's Rep 181 and in its earlier decision in Smith Coney and Barrett v. Becker Gray & Co (1915) 112 LT 914. In order to ascertain whether the arbitrators had jurisdiction it was necessary to ask whether the contract was void ab initio. If it were, the arbitration agreement would fall with it; but, if it were not, the arbitration agreement would give jurisdiction to the arbitrators to determine issues as to the existence and effect of supervening illegality. Since this was a non-speaking award and the sellers had failed to ask for a special case, it was held that the award should be enforced. At page 383 Mocatta J. clearly distinguished between a contract and an arbitration agreement void ab initio and one affected by supervening illegality. It is were not void ab initio the arbitration agreement would remain intact and the effect of the change in law could be a matter for the arbitrators. This case therefore does not assist investigation of the circumstances in which, if the underlying contract is illegal and void ab initio at common law, the arbitration agreement is also rendered void. It does, however, provide an example of the court, as a matter of policy, treating an issue of supervening illegality as within the jurisdiction of the arbitrators.

Mr Veeder further heavily relied on a recent and unreported decision of His Hon Judge Langan QC sitting as a Judge of the High Court in Sion Soleimany v. Abner Soleimany (21 March 1997). That involved a claim to enforce an arbitration award made by the Beth Din under an ad hoc agreement to refer to such arbitration pre-existing disputes which had arisen between a father and son under an agreement for the export of carpets from Iran to be

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procured by the son. It was common ground that the carpets were smuggled out of Iran contrary to a prohibition of export under Iranian law and there was evidence that bribery, abuse of the diplomatic bag and breaches of Iranian Exchange Control legislation had occurred and that it was known to both parties from the outset that their agreement would be performed by numerous breaches of Iranian laws. The claim was for amounts due to the son under the agreement. Illegality was not raised as a defence before the arbitrator. The arbitration was conducted on the basis that the rights and obligations under the agreement were to be determined in accordance with Jewish law under which the question of illegality would not be material.

It was argued that in as much as the underlying contract necessarily involved breaches of Iranian law, including the corruption of officials, it was illegal under English law and, although it was enforceable under Jewish law, the English courts should not enforce indirectly a contract which would not be enforced directly by action.

It was held that the award must be enforced. The grounds were that the contract was to be treated as governed by Jewish law which had no doctrine of illegality in respect of the facts of the case. The decision of the arbitrator on Jewish law was not the kind of conclusion with which the court would interfere. Secondly, the parties had made their arbitration agreement after the dispute had arisen and had then chosen Jewish law as the medium for the determination of the claim. Judge Langan concluded:

> "Further, enforcement does not involve the English court in giving approval or endorsement to intended and actual breaches by the parties of Iranian law. What are approved and endorsed are the arbitration agreement and the award, and the difference seems to me to be real and not semantic. That difference, in my judgment, meets convincingly the contention that by permitting enforcement the court is

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somehow infringing the principle of international comity."

If a defendant voluntarily agrees that issues as to pre-existing claims against him should be resolved by an arbitrator applying a body of law which has no principles of illegality material to the issues, there is much to be said for the view that if the award goes against him he should not be entitled to raise the issue of illegality under English law at the enforcement stage. More difficult is the concept that enforcement of the award goes no further than enforcing the agreement to arbitrate and does not also involve the indirect enforcement of the underlying agreement. As Mr Gaisman, on behalf of the defendants, has argued, the case seems to have been argued only on the basis that enforcement would damage international comity and not on the basis that the contract was illegal because its performance involved the bribery of Iranian officials.

However, the circumstances of that case were such that a strong case could be made out for the view that the public policy which in English law would have invalidated the underlying agreement could not be said also to invalidate the subsequent agreement to arbitrate in accordance with Jewish law. Accordingly, the court would recognise the jurisdiction of the arbitrator and would enforce the award. It may thus be taken as an example of a case where considerations of public policy which would have applied if an attempt had been made to enforce the underlying contract directly in the English courts did not apply so as to render the subsequent agreement contrary to public policy, the relevant policy consideration being in favour of sustaining the subsequent agreement.

The case certainly does not support the view that in all cases where the underlying agreement can be shown to be illegal under English common law, an applicable arbitration agreement, particularly one which was made as part of the underlying contract, will be held to be enforceable and capable of conferring jurisdiction on the arbitrators.

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In Norske Atlas Insurance Company Ltd v. London General Insurance Co Ltd (1927) 49 Ll L Rep 541, also relied on by the plaintiffs, there was a claim a Norwegian arbitration award made under an arbitration agreement in a reinsurance policy governed by Norwegian law. However, the policy was not fully stamped to the extent which the current English legislation required for policies of marine insurance. It was argued that the contract was one of marine insurance which was not adequately stamped and "the plaintiffs could not evade that fact by saying that they were suing on the award and not on the contract; for the award and the original cause of action were not separable" and the contract was not admissible in evidence.

Mackinnon J. held that an action could be brought on the award. Although an action could not have been brought on the policy itself, the only purpose for which the policy was put in evidence was to prove the arbitration agreement and for that purpose it was admissible. Since the contract of reinsurance was governed by Norwegian law and valid under it, the award was valid and enforceable.

The statutory prohibition on the deployment in evidence of an unstamped marine policy was therefore inapplicable to an arbitration agreement contained in the policy. There was thus no basis for impeaching the validity of the arbitration agreement in the English courts. The scope of the illegality as defined by the statute did not extend to the collateral arbitration agreement. The analysis is therefore similar to that in Harbour Assurance v. Kansa, supra, and the case does not support the wider principle for which the plaintiffs contend.

Mr Veeder, on behalf of the plaintiffs, referred me to a number of decisions of the United States courts including the decision of the Supreme Court in Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc (1985) 87 L Ed 2nd 444. A Puerto Rico corporation entered into a distribution and sales agreement with a Japanese corporation. The agreement included an arbitration

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clause which provided for arbitration by the Japan Commercial Arbitration Association. Disputes having arisen, the Japanese party brought an action in the District court in Puerto Rico by which it claimed an order to enforce the arbitration agreement and compel the Puerto Rico corporation to arbitration in Japan. The defendants by their answer and counterclaim relied on the Sherman Act. They argued that these anti-trust issues were not arbitrable. They were thus using the Sherman Act as a basis for invalidating or at least limiting the scope of the arbitration agreement. The argument went to jurisdiction in as much as it rested on the basis that the United States courts should treat Sherman Act relief as outside the scope of the agreement to arbitrate.

The Supreme Court of the United States, having first considered whether on its proper construction the agreement to arbitrate was wide enough to cover Sherman Act relief and having decided that it was, then went on to consider whether there was any rule of law which made the agreement to arbitrate unenforceable in respect of the claims for anti-trust relief. It had been held in a previous Federal Court of Appeals case, American Safety Equipment Corporation v. J P Maguire & Co 391 F 2d 821, that "the pervasive public interest in enforcement of the anti-trust laws, and nature of the claims that arise in such cases, combine to make ...... anti-trust claims....... inappropriate for arbitration". A majority of the Supreme Court rejected that analysis in these words at p. 456.

> "we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."

And later at p. 461

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"There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. Cf Wilko v. Swan, 346 US, at 433-434, 98 L Ed 168, 74 S Ct 182. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement state to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art V (2)(b), 21 UST, at 2520; see Scherk, 417 US, at 519, n 14, 41 L Ed 2d 270, 94 S Ct 2449. While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them."

Thus the Supreme Court concluded that the importance of giving effect to international arbitration agreements outweighed the desirability of confining the determination of antitrust relief

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to the courts in the interests of the class protected by the Sherman Acts. In substance, therefore, the court was using a policy approach to determining what effect should be given to that legislation. To that extent, its basic approach was similar to that of the Court of Appeal in Harbour Assurance v. Kansa, supra. Its reasoning and the fact that the Court expressly left open the question whether the same result would be reached in relation to a domestic arbitration agreement shows that it was not assuming an overriding principle of the primacy of arbitration agreements in the face of the asserted statutory illegality or invalidity of the underlying transaction. The plaintiffs are, however, entitled to rely on the weight attached by the court to the importance of enforcing an international arbitration agreement in its analysis of the policy to be adopted in giving effect to the antitrust legislation. The plaintiffs also draw support from the Court's perception that at the enforcement stage, provided that the arbitrators had determined the antitrust issues, the award would stand without interference by the court. That would be the logical consequence of the conclusion that the parties had effectively conferred jurisdiction in respect of the antitrust issue. Once it was accepted that the arbitrators had jurisdiction, mistaken application of the statutory regime would not in itself justify interference with the award.

Mr Gaisman's fundamental point is that in cases where the underlying contract is as a matter of public policy illegal and void in the eye of English law, the existence of an arbitration agreement and an award does not necessarily insulate the illegality from the proceedings to enforce the award. In this regard he submits that there is no meaningful distinction between the enforcement of a foreign award and the enforcement of a foreign judgment. He draws attention to a number of cases where the English courts have been prepared to go behind foreign judgments to ascertain whether it would be contrary to public policy that they should be enforced.

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In _In Re Macartney_ [1921] 1 Ch 522 the issue was whether a judgment of the Maltese courts could be enforced to the effect that it granted to an illegitimate child born posthumously to the fiancee of the testator a right to perpetual maintenance against the estate. Astbury J. held that the judgment should not be enforced for it was contrary to public policy:

> "On this point there appears to be no direct English authority. The action is not a penal action, nor is the cause of action so directly contrary to general morality as on that ground alone to be refused recognition in this country. It is however not only a claim of a character which raises no cause of action in this country, but in my judgment its recognition is contrary to public policy, because the general recognition of the permanent rights of illegitimate children and their spinster mothers as recognised in Malta is contrary to the established policy of this country, especially having regard to the fact that the child's interest is not confined to minority.
>
> In _Rousillon v. Rousillon_ (1) it was held that "If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English Court will not enforce it" and Fry J. said "[counsel] has insisted that, even if the contract was void by the law of England as against public policy, yet, inasmuch as the contract was made in France, it must be good here, because the law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me, however, plain on general principles that this court will not enforce a contract against the public policy of this country, wherever it may be made. It seems almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else. That passage applies directly to the non-

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enforceability of foreign judgments founded on contracts contrary to public policy or rights of that character."

In Israel Discount Bank of New York v. Hadjipateras [1984] 1 WLR 137 the plaintiffs claimed summary judgment on a judgment of the New York courts to the effect that the defendant was liable under certain guarantees. The defendant relied on a defence of undue influence, which he had not raised in New York, and submitted that it would be contrary to English public policy for the underlying contract to be enforced. Stephenson LJ. in concluding that judgment should have been given on the New York judgment because the defendant had omitted to rely on the point in the New York proceedings, referred to In re Macartney, supra, and to an earlier decision of the Court of Appeal in Kaufman v. Gerson [1904] 1 KB 591 and continued at page 143:

> "I do not doubt that an agreement obtained by undue influence, like an agreement obtained by duress or coercion, may be treated by our courts as invalidating a foreign judgment based upon the agreement, or as a ground for not enforcing it as contrary to the distinctive public policy of this country. We have to assume that the original guarantee and its jurisdiction clause were arguably so obtained, presumably by the bank or with the bank's connivance or knowledge, though not that the agreement to take part in the New York action was arguably so obtained. But what is plain here is that in those cases to which we have been referred the public policy involved was what English courts considered to be the distinctive public policy of this country, and it was only because the law or practice of the foreign country, Malta or France or Germany, differed from that policy that the question of the validity of the contract or judgment was raised in the courts of this country. It was out of this conflict that those cases arose."

Thus the public policy reflected in Henderson v. Henderson (1843)

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3 Hare 100, in effect outweighed the public policy against enforcing contracts induced by undue influence.

Mr Gaisman further relied on Vervaeke v. Smith [1983] AC 145 in which a petitioner for a decree of nullity of an English marriage in the English courts on the grounds of lack of consent to the marriage, having failed to obtain such decree, obtained a declaration from the Belgian court that the English marriage was void ab initio on the ground that the marriage was merely a device to obtain a British passport so that she could work as a prostitute without being deported and that the parties had no intention of living together. That was substantially the ground on which she had relied in the English courts. She then applied for a declaration in the English Court that the Belgian decree was entitled to be recognised in England under the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the bilateral convention between the UK and Belgium. She lost at first instance and in the Court of Appeal. The House of Lords dismissed the appeal on two grounds. All members of the House concluded that the earlier English judgment gave rise to an estoppel per rem judicatam which precluded reliance on the Belgan decree. Secondly, Lord Hailsham LC and Lord Simon, whith whom Lord Brandon agreed, held that recognition of the Belgan decree should be refused on grounds of public policy. Lord Simon observed at p 164 that:

> "There is little authority for refusing, on the ground of public policy, to recognise an otherwise conclusive foreign judgment - no doubt because the conclusiveness of a judgment of a foreign court of competent jurisdiction is itself buttressed by the rule of public policy, interest reipublicae ut sit finis litium, the "commonwealth" in conflict of laws extending to the whole international community."

Although an English court would decline recognition of a foreign judgment "with extreme reserve", the instant case called for that

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course. This was firstly because English public policy treated "sham" marriages as valid in conflict with Belgian law. Secondly, since the marriage took place in England, English public policy should be preferred to Belgian law. The appellant first invoked the jurisdiction of the English courts before going to the Belgian courts. The marriage had its most real and substantial connection with England and by it the appellant took advantage of English public law. The underlying reason for the course adopted by the appellant was her attempt to succeed to property in England which she could only do if she were not married to Smith and validly married to the deceased owner of the property.

This conclusion is grounded on the primary consideration that recognition of the validity of "sham" marriages in England was a matter of English public policy and that, since the Belgian decree was, as appeared from the judgment, founded on an inconsistent principle of Belgian law, the appellant was claiming relief which was equally inconsistent with English public policy. An analogous claim would be one to enforce a foreign judgment which on the face of it, held to be enforceable a contract governed by English law which was illegal at common law. The enforcement of such a judgment would seem to be contrary to public policy. However, Lord Simon's conclusion is not based solely on the substance of the Belgian decree being contrary to English public policy but upon other considerations, such as the place of the marriage ceremondy, as factors to be weighed in the balance in relation to recognition.

The decision of the Court of Appeal in E D & F Man (Sugar) Ltd v. Yani Haryanto No.2 [1991] 1 LR 429 is also relevant to this issue. The facts are complex and it is unnecessary to rehearse them. The issue was whether a settlement agreement in respect of claims on the defendants under contracts for the purchase of sugar was enforceable in England. The English courts had first held the contracts to be enforceable, the defendant not having raised illegality. Then the Indonesian courts had held them to

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be illegal as contrary to the public policy of Indonesia. Before the English courts the Indonesian defendant purchaser then sought to contend that effect should be given to the Indonesian judgment. This argument was rejected. Neill LJ. having observed that the defendant had not raised illegality in the original English proceedings, said this (p436).

> "It follows therefore that, at any rate prima facie, Mr Haryanto is faced with an issue estoppel as to the validity of the disputed contracts and that this estoppel will cover defences which might have been raised but were not raied in the English proceedings. Furthermore, it is to be emphasised that an English Cort will not recognise a foreign judgment, even if otherwise unimpeachable, if it is inconsistent with a previous decision of a competent English court: see Vervaeke v. Smith [1993] 1 AC 145.
>
> The crucial question, as I see it, is whether, as a matter of English law, the public policy in favour of finality is overridden by some more important public policy based on the unenforceability of illegal contracts. I do not consider that this issue has been decided by the judgment of the District Court in Jakarta. 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 recognised in most jurisdictions throughout the world.
>
> The present case is quite different. The public policy

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invoked is a policy based on the rules of 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."

Mr Gaisman relies on this judgment as showing that the doctrine of public policy would, in cases of what one might call "universal illegality", involve the English courts in going behind a foreign judgment which gave effect to such an illegal contract, even if a foreign court had determined the issue of illegality.

In my judgment, this decision is directly relevant for present purposes in as much as it exemplifies the balancing process which is required where there is on the one hand a domestic judgment giving effect to a contract and on the other a subsequent foreign judgment declaring the contract to be illegal. The balance to be addressed is between the public policy underlying the principles of estoppel and the public policy underlying the unenforceability of illegal contracts. Neill LJ's hypothetical example of the contract for the import of drugs shows that the balance may in some cases come down in favour of declining to enforce the foreign judgment. This approach clearly reflects the conclusion and reasoning of the majority of the House of Lords in Vervaeke v. Smith, supra, as regards public policy at common law and of the Privy Council in Kok Hoang v. Leong Cheong Keng Mines [1964] AC 993 as regards statutory illegality.

The latter was a case where a lender of money had obtained a default judgment against a borrower and the issue was whether in relation to other loans the borrower was estopped from arguing

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that the lender was a money lender or that the loans were part of a money lending transaction. The issue therefore was whether an estoppel per rem judicatam could defeat the allege application of the Moneylenders Acts. Viscount Radcliffe observed at page 1016:

> "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 LJ.) 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)."

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The Effect of the Authorities

The effect of the authorities is in my judgment as follows:

(i) Where it is alleged that an underlying contract is illegal and void and that an arbitration award in respect of it is thereby unenforceable the primary question is whether the determination of the particular illegality alleged fell within the jurisdiction of the arbitrators.

(ii) There is no general rule that, where an underlying contract is illegal at common law or by reason of an English statute, an arbitration agreement, which is ancillary to that contract is incapable of conferring jurisdiction on arbitrators to determine disputes arising within the scope of the agreement including disputes as to whether illegality renders the contract unenforceable.

(iii) Whether such an agreement to arbitrate is capable of conferring such jurisdiction depends upon whether the nature of the illegality is such that, in the case of statutory illegality the statute has the effect of impeaching that agreement as well as the underlying contract and, in the case of illegality at common law, public policy requires that disputes about the underlying contract should not be referred to arbitration.

(iv) When, at the stage of enforcement of an award, it is necessary for the court to determine whether the arbitrators had jurisdiction in respect of disputes relating to the underlying contract, the court must consider the nature of the disputes in question. If the issue before the arbitrators was whether money was due under a contract which was indisputably illegal at

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common law, an award in favour of the claimant would not be enforced for it would be contrary to public policy that the arbitrator should be entitled to ignore palpable and indisputable illegality. If, however, there was an issue before the arbitrator whether the underlying contract was illegal and void, the court would first have to consider whether, having regard to the nature of the illegality alleged, it was consistent with the public policy which would, if illegality were established, impeach the validity of the underlying contract, that the determination of the issue of illegality should be left to arbitration. If it was not consistent, the arbitrators would be held to have no jurisdiction to determine that issue.

(v) If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, prima facie the court would enforce the resulting award.

(vi) If 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.

Public Policy in this case

Although the question of the arbitrators' jurisdiction under Swiss law does not appear to have been raised before the arbitrators or the Swiss court, both the arbitration proceedings and the hearing before the Swiss Federal Tribunal were conducted

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on the basis that the arbitrators did have jurisdiction to determine whether the underlying contract was immoral and a nullity because it was a contract to purchase personal influence and to pay bribes. Since both the underlying consultancy agreement and the arbitration agreement incorporated in it were governed by Swiss law, it is right to proceed for present purposes on the basis that under that law jurisdiction to determine that issue existed. Certainly the defendants had participated in the arbitration and had tendered submissions on that issue. Their conduct is inexplicable otherwise on the basis that they accepted that the arbitrators did have jurisdiction to determine the issue.

However, since it is now sought to enforce the award in the English courts, it is also relevant to consider whether English public policy would lead to a different result. If it would, that would be a factor to be taken into account in the balancing exercise in determining whether the overll effect of English public policy would be contrary to enforcement of the award.

It is common ground that in English law a contract under which A promises to pay money to B if B will procure by bribery a public body to contract with A is illegal and void ab initio: see Chitty on Contracts, 27th Ed para 19-019. If it was B's intention to use bribery to procure the contract or if B used bribery for that purpose, B cannot enforce the contract against A, even if the latter did not share that intention: see <u>Royal Boskalis v. Mountain</u> [1997] 2 All ER 929.

On the defendants' case there was either a mutual intention that the plaintiffs would use bribery to obtain armaments contracts or a unilateral intention by the plaintiffs to pay bribes to obtain such contracts. Those to be bribed were officials of the Government of Kuwait. That would be illegal by the law of Kuwait. Neither the plaintiffs nor the defendants had anything to do with England, the plaintiffs being a Panamanian corporation and the defendants being Yugoslav entities. The consultancy

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agreement had no connection with this country, save that the contact address, telephone number and fax number of the plaintiffs was specified in the agreement as that of Frere Cholmeley of 28 Lincoln's Inn Fields. The payment of the fees due to the plaintiff was to be effected in the United States.

There can be no doubt that as a matter of language the arbitration clause in the consultancy agreement was expressed in terms wide enough to cover the issue whether the agreement was illegal and void by reason of a common or unilaterial intention to bribe Kuwaiti officials. The approach to the question whether as a matter of English public policy an agreement to arbitrate that issue should be treated as enforceable must be determined by considerations similar to those deployed by the United States Supreme Court in the context of statutory illegality in relation to the antitrust legislation in <u>Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc</u>, supra. It is necessary to consider both ont he one hand the desirability of giving effect to the public policy against enforcement of corrupt transactions and on the other hand the public policy of sustaining international arbitration agreements. One consequence of the arbitrators being accorded jurisdiction might be that they gave effect to a contract which on the face of the award was held to involve the payment of bribes. It would then be a matter for consideration at the enforcement stage whether, although the arbitrators had jurisdiction to determine the issue, the award should be enforced because they had exceeded their jurisdiction in giving effect to an illegal contract or had misconducted themselves: cf <u>David Taylor & Sons v. Barnett</u> [1953] 1 LR 181 or because enforcement would be contrary to public policy. If, however, the arbitrators found facts on the basis of which they rightly concluded that the underlying contract did not involve the payment of bribes, their award would ordinarily be enforced notwithstanding that it might be objected that their findings of fact were in truth mistaken. Thus, in determining whether English public policy would deny jurisdiction to arbitrators to determine the illegality issue consideration has to be given to the weight that ought to be

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attached to the risk that arbitrators might reach the wrong decision in a way which could not be challenged and thereby give effect to an underlying contract which the courts would have declined to enforce.

In the present case, the parties selected arbitration by an impressively competent international body, the ICC. The English court would be entitled to assume that arbitrators appointed were of undoubted competence and ability, well able to understand and determine the particular issue of illegality arising in this case. That issue involves no consideration of complex principle of law capable only of being safely determined by an English court. Insofar as it involves determination of questions of fact, that is an everyday feature of international arbitration. The opportunity for erroneous and uncorrectable findings of fact arises in all international arbitration. If much weight were to be attached to that consideration it is difficult to see that arbitrators would ever be accorded jurisdiction to determine issues of illegality.

Moreover, the fact that the parties themselves not only chose Swiss law as the proper law under which the arbitrators would have jurisdiction over issues of illegality but also had participated in the arbitration after the dispute had arisen and had referred to the arbitrators the issue in question, would be a matter which weighed compellingly in favour of the English court's concluding that there was no objection to the exercise of that jurisdiction by the arbitrators. In its decision of 27th February 1970 (1990) Arbitration International, Vol 6 No.1 p79 the German Federal Supreme Court observed:

> "There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals ... Experience shows that as soon as a dispute of any kind

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arises from a contract, objections are very often also raised against its validity."

In his judgment at first instance in Harbour Assurance v. Kansa [1992] 1 LR 81 at page 92 Steyn J. whose judgment was reversed only on the effect of David Taylor v. Barnett Trading, supra, identified an international trend towards the full recognition of the principle of the separability of the arbitration clause and explained why this development had arisen in these words:

> "First, there is the imperative of giving effect to the wishes of the parties unless there are compelling reasons of principle why it is not possible to do so. As Lord Justice Balcombe put the matter in a passage in his judgment in Ashville, which I have already quoted, it must be presumed that the parties intended to refer all the disputes arising out of the particular transaction to arbitration. Party autonomy threfore militates in favour of the full recognition of the separability principle. Secondly, if the arbitration clause is not held to survive the invalidity of the contract, a party is afforded the opportunity to evade his obligation to arbitrate by the simple expedient of alleging that the contract is void. In such cases courts of law then inevitably become involved in deciding the substance of a dispute. Moreover, in international transactions where the neutrality of the arbitral process is highly prized, the collapse of this consensual method of dispute reolsution compels a party to resort to national courts where in the real world the badge of neutrality is sometimes perceived to be absent. For parties the perceived effectiveness of the neutral arbitral process is often a vital condition in the process of negotiation of the contract. If that perception is absent, it will often rpesent a formidable hurdle to the conclusion of the transaction. A full recognition of the separability principle tends to facilitate international trade. These considerations are of concern in England since England is

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> a major trading nation and London is a major centre of international arbitrations."

In the Court of Appeal Leggatt LJ. at page 719 said this:

> "In my judgment this court is not obliged by authority to prevent the arbitrator from determining the issue of initial illegality. The tide is flowing in favour of permitting the arbitrator to do so, and it is no more necessary on the grounds of public policy for the courts to retain exclusive control over the determination of the initial legality of agreements than over their subsequent legality. In particular, it would ill become the courts of this country, by setting their face against this jurisdiction, to deprive those engaged in international commerce of the opportunity of entrusting such disputes to English commercial arbitrators without the need for arbitration clauses containing elaborate self-fulfilling formulae."

Having regard to these considerations I have no doubt that an English court would give predominant weight to the public policy of sustaining the parties' agreement to submit the particular issue of illegality and initial invalidity to ICC arbitration rather than to the public policy of sustaining the non-enforcement of contracts illegal at common law. The importance of the former consideration would be held to outweigh the need to protect against the risk that arbitrators might by way of uncorrectable errors of fact enforce an illegal contract.

Accordingly, in determining the question of public policy as to enforcement, I proceed on the basis that, like the Swiss courts, the English courts also would have held that the arbitrators had jurisdiction to determine the question whether the consultancy agreement was illegal and void on the grounds alleged.

The arbitrators having heard evidence on the issue of illegality

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in the present case and having heard the parties' submissions and decided the issue to the effect that the consultancy agreement was not illegal and void, the question that now has to be decided is whether, on the assumption that the facts in MM's affidavit can be proved, an English court would decline to enforce the award on the grounds that in the face of the fresh evidence to do so would be contrary to public policy.

There can be no doubt that the evidence now sought to be adduced was directly relevant to the issue of illegality before the arbitrators. Indeed, in substance, the exercise upon which the defendants are now embarked is to put forward at the enforcement stage material which goes to whether they had a substantive defence in the arbitration. In substance, they seek to use the public policy doctrine to conduct a re-trial on the basis of additional evidence of illegality when it was open to them to adduce that evidence before the arbitrators. Such an exercise would appear to be clearly in conflict with the principles of issue estoppel. For the defendants to be permitted to re-open illegality on the basis of the evidence of MM would be contrary to the well-established principle in Henderson v. Henderson (1843) 3 Hare 100.

However, in deciding whether to permit enforcement of the award the court has to consider whether the public interest in preventing the enforcement of corrupt transactions outweighs the public interest in sustaining the principle of nemo debit bis vexari which underlies the issue estoppel. This involves essentially the kind of public policy balancing exercise envisaged by Neill LJ. in E D & F Man (Sugar) Ltd v. Yani Haryanto (No.2), supra, in the passage from his judgment previously cited. On the one hand there is the public policy of sustaining the finality of awards in international arbitration and on the other hand the public policy of discouraging corrupt trading. The principle which should guide this balancing process is that identified by Viscount Radcliffe in Kok Hoang v. Leong Cheong Keng Mines, supra, in the passage previously cited. The

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relevant question is whether the public policy of discouraging corrupt trading represents a social policy to which effect ought to be given in the interests of the international comity generally or some section of it in preference to the public policy of sustaining the finality of international arbitration awards.

In my judgment, it is relevant to this balancing exercise to take into account the fact that there is mounting international concern about the prevalence of corrupt trading practices. This concern relates particularly to armaments contracts and to contracts for public works. Ministers and government officials are in certain parts of the would customarily bribed to procure lucrative contracts for the suppliers of arms and the providers building and construction projects. Indeed in the very week when this judgment is being delivered the Government of the United Kingdom together with the governments of many other states is signing the OECD Convention on combatting the Bribery of Foreign Officials in International Transactions. Under that Convention the parties are by Article I to create a specific criminal offence of bribery of foreign public officials to the effect that it would be an offence "for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order or retain business or other improper advantage in the conduct of international business."

No doubt the MOD Circular of the Kuwait Ministry of Defence was aimed at this practice. It is therefore important that although the Convention has not yet come into force the English courts should not be seen to be encouraging the corruption of government officials as an instrument of international trade or merely to be paying lip service to such widespread disapproval.

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On the other hand, it is also necessary to take into account the nature of the transactions involved in this case. They were entered into respectively nearly ten years ago (the consultancy agreement) and nearly nine years ago (the M-84 tanks contract). None of the parties involved - the plaintiffs, the Yugoslav defendants and the Kuwait Government had any connection with this country and nor did the transactions, save for Frere Cholmley's "post office" services. Accordingly, the relevant public policy on the facts of this case is to be derived from the need to discourage foreign corporations and governments from pursuing corrupt practices in relation to other foreign governments. I must assume that the governments concerned must for this purpose at least be treated as "friendly".

There is also an international comity factor in this equation. I heard evidence from experts in the law of Kuwait. The plaintiffs called Mr Al Awadhi and the defendants called Professor William Ballantyne. Their evidence was primarily concerned with the question whether a contract, such as the consultancy agreement, under which one party was to lobby the Kuwait Government in order to procure armaments contracts by personal influence over Government officials was contrary to the public policy of Kuwait. They were not directly concerned with the impact of bribery on government contracts, but it is clear from their evidence and the materials which they referred to that a contract which was intended to the performed by paying bribes to Kuwait government officials would be contrary to Kuwait public policy and unenforceable in Kuwait. Accordingly, an order of this court which directly enforced such an agreement would be in collision with the public policy of Kuwait. That, however, is not the order which the plaintiffs invite this court to make, for there is the additional dimension in this case that the issue of illegality has already been the subject of arbitration and of a valid award. Although direct enforcement of the contract would clearly be offensive to comity, enforcement of any such award in England under the New York Convention must be very much less so, for enforcement does not substantially depend on the public

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policy of Kuwait but of this country.

Against these considerations it is necessary to take into account the importance of sustaining the finality of international arbitration awards in a jurisdiction which is the venue of more international arbitrations than anywhere else in the world. I have already referred to the developing jurisprudence on the separability of arbitration agreements in the context of allegations of illegality. In Man v. Haryanto, supra, Neill LJ expressly contemplated in the passage which I have cited that in the case of drug-trafficking contract where a foreign judgment was sought to be enforced, the English court would go behind the judgment in the interests of public policy. However, although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking.

On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption. Accordingly, the defendants' primary point does not bring them within the public policy exception to enforcement of the award under section 5(3) of the Arbitration Act 1975. That conclusion is not to be read as in any sense indicating that the Commercial Court is prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption is referred to high calibre ICC arbitrators and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.

The Defendants' Alternative Case on Public Policy

This point is designed to invoke English public policy without infringing the principles of issue estoppel. The steps in

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argument are:

(i) a contract for the purchase of personal influence over government officials falling short of the use of bribery is contrary to the public policy of Kuwait;

(ii) such a contract would not have been contrary to Swiss public policy or law and reliance on such features would not have availed the defendants in the arbitration so that there was no point in arguing the matter before the arbitrators, before whom nothing short of corruption would be a defence;

(iii) having regard to (i) enforcement of such a contract would be contrary to English public policy and enforcement of the award should therefore be refused.

The defendants' submission is founded on a decision of Phillips J. in Lemanda Ltd v. African Middle East Co [1988] 1 QB 448. In that case the plaintiffs claimed sums payable under a commission contract with the defendants under which, if the defendants procured the renewal of an oil supply contract between the Qatar natural oil corporation as supplier and the defendants as buyers, the plaintiffs would receive a very substantial payment to be calculated by reference to the quantity of oil to be supplied. The plaintiffs were intended to use their personal influence on the minister of Qatar to obtain renewal. Phillips J. held that that the action failed on the grounds of public policy. His reasoning can be summarised as follows:

(i) The commission agreement was subject to English Law.

(ii) The performance of that agreement would have to be in Qatar.

(iii) The agreement for the payment of commission in exchange for the use of personal influence with a

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government official in England to procure a contract was, as a matter of morality, contrary to English public policy: see Montefiore v. Menday Motor Corporation Co Ltd [1918] 2 KB 241 in which Shearman J. observed at page 457:

> "In my judgment it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the government."

(v) Although, if such an agreement were to be performed by influencing government officials abroad and not in England, enforcement would not necessarily be contrary to English public policy, where there was the additional factor that such an agreement was contrary to the public policy of the place of performance, that factor would lead to the enforcement of the contract in England being refused on the grounds of public policy.

The reasoning at (v) is explained in the following passage from the judgment at page 461:

> "The principles underlying the public policy in the present case are essentially principles of morality or general application. The practice of exacting payment for the use of personal influence, particularly when 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

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> 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 law of that country.
>
> In such a situation international comity combines with English domestic public policy to mitigate against enforcement."

In Lemanda Phillips J. was concerned with the issue whether the English court should directly enforce a contract governed by English law which involved activity in Qatar which, had it been carried out in England, would have rendered the contract unenforceable as being contra bonos mores. Since the contract was not to be performed in England it became necessary to investigate public policy in Qatar. Had it not been contrary to public policy in Qatar, it is clear that judgment would have been given for the plaintiffs. The comment that it was "questionable whether the moral principles involved (were) so weighty as to lead an English court to refuse to enforce an agreement regardless of the country of performance and regardless of the

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attitude of that contrary to such a practice is one which is, in my judgment, if anything, somewhat understated. Outside the field of such universally-condemned international activities as terrorism, drug-trafficking, prostitution and paedophilia, it is difficult to see why 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. That it should be the policy of the English courts to deter the exercise of personal influence short of corruption and fraud to obtain valuable contracts in foreign countries in which such activity is not contrary to public policy by refusing to enforce contracts would involve a unjustifiable in-road into the principle of pacta sunt servanda.

It is therefore the additional factor of international comity which led to the conclusion that the contract in Lemanda should not be enforced. Accordingly, if one assumes that in this case the consultancy agreement did not involve any corrupt practice, but merely the use of personal influence with Kuwait government officials and that had the contract been sued upon in Kuwait it would have been unenforceable as contrary to Kuwait public policy, one must go on to ask whether, if the English courts were not to enforce this Swiss award, that would offend international comity.

To this question, in my judgment, the answer must be No. This is not a case of direct enforcement of the underlying contract, but of enforcement of the award which is a valid award in accordance with the curial law - Swiss law - chosen by the parties and one made by arbitrators having jurisdiction and in respect of a contract governed by Swiss law. The arbitrators address the issues whether the consultancy agreement was illegal under Kuwait law and whether under the curial law it was "invalid because of lobbying by the claimant" and they conclude in their reasoned award that it was neither: see pages 71-74 of the Award. On the face of the award, there is nothing which could suggest

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that the enforcement of the underlying contract would be contrary to English public policy since the performance of the contract was to be in Kuwait and nothing in the award suggests that the contract was unenforceable as contrary to public policy in Kuwait. Therefore, only by going behind the award and admitting further evidence of Kuwait public policy would an English or any other enforcement court become aware that the underlying contract was contrary to Kuwait public policy.

Given the weight to be attached to the public policy of sustaining the finality of international arbitration awards which I have already discussed, it is difficult to see how enforcement of such an award could be said to represent a lack of respect for the law of or administration of justice in Kuwait, so as to give that country, which is a party to the New York Convention, a just cause for complaint against the English courts.

Moreover, as I have already held, it does not follow that, merely because an underlying contract is void at common law because direct enforcement would be contrary to public policy enforcement of an international arbitration award which treated that contract as enforceable would itself automatically be contrary to public policy. Apart from any question of estoppel, the court was to strike a balance between on the one hand the nature of the illegality alleged and on the other the policy of upholding international awards. No doubt, if it were proved that the underlying contract was, in spite of all outward appearances, one involving drug-trafficking, the alleged offensiveness of the transaction would be such as to outweigh any countervailing consideration. Where, however, the degree of offensiveness is as far down the scale as in the present case, I see no reason why the balance of policy should be against enforcement.

It may add little to the justification for this conclusion that the Kuwait court itself was prepared to enforce the award. However, the defendants did not then raise the point that the consultancy agreement was contrary to Kuwait public policy. Nor

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did the court take the point of its own motion, although on the evidence it was certainly open to it to do so. Since, according to Mr Al Awadhi, the hearing only lasted about twenty minutes, not too much can be made of this. It may simply be a matter of judicial oversight. It is fair to say, however, that, were this court now to refuse enforcement, such a decision would in the circumstances appear to be highly anomalous.

Accordingly, I conclude that the defendants' alternative case does not put forward any justification for declining to enforce the award. However, in case I am wrong on this point, it may be helpful if I indicate what alternative conclusion I should have reached.

Firstly, as to Kuwait public policy, I found the evidence of Professor Ballantyne more convincing than that of Mr Al Awardhi. My reason for this conclusion is that his views were soundly based in general principle as reflected in the writings of the renowned Egyptian jurist, Al Sanhoury. His commentary on traffique d'influence states as follows:

> "The matter is not limited to the employee; every intermediary (middleman) who exercises his intervention for reward to be gained by him for achieving a result which the probity of the administration enjoins shall be obtained without reward or mediation simply engages in an illegal act and his contracting is void. Thus, the agreement of an intermediary (middleman) with a person for reward to be taken by the intermediary if he enables such person to obtain employment or remuneration or decoration, or a concession from the government or contract (ie. normally for works), wherein he wins the tender, or such like, is a void agreement as contravening public order."

Professor Ballantyne made the point that the Qatari public policy against commission contracts as expressed in the Maydalani Report which was agreed evidence in Lemanda, supra, closely reflects

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Kuwait public policy, both principles having been derived from the Egyptian Code. 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.

Under Swiss law the evidence of both the experts, Professor Pierre Lalive and Maitre Patocchi, leads to the conclusion that a contract to lobby a government minister would not be contrary to public policy, although if bribery were involved, such a contract would be contrary to public policy and unenforceable. Accordingly, had the defendants submitted to the arbitrators that the underlying contract was void or unenforceable in Swiss law because it was a contract for the purchase of personal influence, as distinct from a mere lobbying contract, the submission would have failed.

It follows that the defendants' submission that this narrow point could not have been productively raised before the arbitrators is correct. If this is so, the principle in Henderson v. Henderson, supra, would not be compromised if the defendants were now permitted to deploy this point in order to mount a challenge to enforcement on the basis of the approach to public policy in Lemenda, supra. There would thus be no additional counterweight to the public policy of acting consistently with international comity.

I would therefore have concluded in relation to this alternative argument that the defendants' pleaded case did disclose a defence on the assumptions identified by the preliminary issue.

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The Defendants' Application for Leave further to re-amend the Points of Defence

The defendants apply for leave to rely on the giving of perjured evidence at the arbitration as a ground for not enforcing the award. They argue that, if it can be proved by adducing further evidence that the plaintiffs' witnesses gave false evidence at the hearing before the arbitrators, the English court should not, as a matter of public policy, enforce the award. The proposed further re-amendments are as follows:

"D. Further or alternatively, the Award was obtained by fraud and/or by manifestly dishonest evidence; and it would be contrary to English public policy to enforce or recognise it.

(1) At the arbitration, the Plaintiff alleged that the old Directorate always knew of the involvement of Mr Al-Wazzam and Mr Al-Ghanim in the Plaintiff's business; and Mr Al-Otaibi had no stake in its business. The true facts are set out in the affidavit of Mr Miodrag Milosavljevic at paragraph 67.

(2) At the arbitration, the Plaintiff maintained that Mr Al-Wazzam and Mr Al-Ghanim were the only shareholders in the Plaintiff company; and that they were chosen by the old Directorate as "the men for the job". The true facts are set out in the affidavit of Mr Miodrag Milosavljevic at paragraphs 75-77.

(3) At the arbitration, the involvement of Mr Al-Otaibi in the procuring of the contract with the Government of Kuwait was concealed.

(a) Mr Al-Otaibi's evidence was that after

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initially placing the old Directorate in contact with Mr Al-Wazzam he had no other involvement in the plaintiff's affairs until June 1989 when he attempted to mediate between the plaintiff and the old Directorate. The true facts are set out in the affidavit of Mr Miodrag Milosavljevic at paragraphs 16 to 62.

(b) Mr Sadiyeh's evidence was that Mr Al-Otaibi told him that he had no contacts with the Kuwaiti Ministry of Defence, but that Mr Al-Wazzam was better placed to help; and that in early 1988 Mr Al-Otaibi introduced General Matovic to Mr Al-Wazzam, who agreed to Mr Al-Wazzam being involved in the procuring of contracts with the Ministry of Defence. The true facts are set out in the affidavit of Mr Miodrag Milosavljevic at paragraphs 16 to 62 and 67.

(4) At the arbitration it was represented by Mr Abed in his evidence that the Consultancy Agreement was concluded after very hard negotiations, particularly in relation to the rate of commission. He further stated:

(a) that he did not take a draft contract with him to Belgrade;
(b) that a 15% rate of commission was not unusual in arms dealing;
(c) that the choice of Swiss law as the governing law was a compromise.

The true facts are set out in the affidavit of Mr Miodrag Milosavljevic at paragraphs 23-27, 29, 71."

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By this point also, therefore, the defendants, in effect, invite the enforcement court to re-try issues of fact which the arbitrators had before them and which they had to and did determine. If the public policy defence under Article IV of the New York Convention and under section 5(3) of the 1975 Act extended to this ground, it would present an open invitation to disappointed parties to re-litigate their disputes by alleging perjury and a major inroad would be made in to the finality of Convention awards.

In support of this application Mr Gaisman QC relies on the submission that the rule in Abouloff v. Oppenheimer (1882) 10 QBD 295 relates to the enforcement in England of foreign Convention awards as it does to foreign judgments. In that case it was held that it would be a good defence to an action on a foreign judgment that the plaintiff had misled the foreign court by giving perjured evidence, notwithstanding that the truth of that evidence was in issue before the foreign court. Lord Coleridge CJ. identified the broad ground for the decision as being "that no man can take advantage of his own wrong, and that it is a principle of law that no action can be maintained on the judgment of a court either in this country or in any other, which has been obtained by the fraud of the person seeking to enforce it." This approach to a judgment obtained by perjured evidence differs from that applicable to domestic judgments. In the latter case the party against whom enforcement is sought must show that he relies on evidence which has since become available and 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 affected the result and appears to the enforcement court to be so strong that it would reasonably be expected to be decisive at the rehearing and,if answered, must have that result: see Dicey & Morris, Conflict of laws, 12th Ed at p 505-506. The principle that a foreign judgment procured by perjured evidence could be impeached by way of defence to an action on the judgment was reiterated by the Court of Appeal in Vadala v. Lawes (1890) 25 QBD 310 and has been applied in more recent times by the Court

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of Appeal in Jet Holdings v. Patel [1990] 1 QB 335 and House of Spring Gardens v. Waite [1991] 1 QB 241. In Owens Bank v. Bracco [1992] 2 AC 443, the issue was whether a foreign judgment should be registered under section 9 of the Administration of Justice Act 1920. The defendant relied on the exception to registration in section 9(2)(d) - "No judgment shall be ordered to be registered under this section if - (d) the judgment was obtained by fraud". It was held in the Court of Appeal that the Abouloff principle applied: see Parker LJ. at pages 465-469. In the House of Lords, which dismissed the appeal, Lord Bridge explained the distinction drawn between domestic and foreign judgments and why it was now too late to overrule Abouloff in the following passage:

> "An English judgment, subject to any available appellate procedures, is final and conclusive between the parties as to the issues which it decides. It is in order to preserve this finality that any attempt to reopen litigation, once concluded, even on the ground that judgment was obtained by fraud, has to be confined within such very restrictive limits. In the decisions of Abouloff v. Oppenheimer & Co and Vadala v. Lawes the common law courts declined to accord the same finality to foreign judgments, but preferred to give primacy to the principle that fraud unravels everything. In the Judgments Extension Act 1868 Parliament provided for full reciprocal enforceability as between the judgments of the superior courts in the different jurisdictions within the United Kingdom, with the affect that a judgment given in one jurisdiction and registered in another would enjoy the same finality as a judgment given in that jurisdiction, with no obstacle placed in the way of registration. By contrast, the judgment creditor seeking registration under the Act of 1920 must first surmount the obstacles which section 9(2) places in his way and section 9(2)(d), construed, as I think it must be, as an adoption of the common law approach to foreign judgments, specifically denies finality to the

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judgment if it can be shown to have been obtained by fraud.

I recognise that, as a matter of policy, there may be a very strong case to be made in the 1990s in favour of according to overseas judgments the same finality as the courts accord to English judgments. But enforcement of overseas judgments is now primarily governed by the statutory codes of 1920 and 1933. Since these cannot be altered except by further legislation, it seems to me out of the question to alter the common law rule by overruling Abouloff v. Oppenheimer & Co and Vadala v. Lawes. To do so would produce the absurd result that an overseas judgment creditor, denied statutory enforcement on the ground that he had obtained his judgment by fraud, could succeed in a common law action to enforce his judgment because the evidence on which the judgment debtor relied did not satisfy the English rule. Accordingly, the whole field is effectively governed by statute and, if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it."

In Owens Bank Ltd v. Etoile Commerciale SA [1995] 1 WLR 44 the issue was whether the defendant ought to be permitted to rely on fraud as a common law defence to an action in St Vincent and the Grenadines on a judgment of the French court which had rejected a submission that the guarantee sued upon had been fraudulently obtained. The Privy Council concluded that, having regard to the weakness of the evidence of fraud it was open to the local Court of Appeal to treat the allegation of fraud as an abuse of process and thereby not to permit the defence. In the course of the judgment Lord Templeman, having referred to Lord Bridge's speech in Owens Bank v. Bracco, supra, observed:

"Their Lordships do not regard the decision in Abouloff's case, 10 QBD 295, with enthusiasm, especially in its application to countries whose judgments the United Kingdom has agreed to register and enforce. In those cases the

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salutary rule which favours finality in litigation seems more appropriate."

In Interdesco SA v. Nullifire Ltd [1992] 1 Lloyd's Rep 180 Phillips J. had to consider whether upon an application to register a French judgment under the Civil Jurisdiction and Judgments Act 1982 the defendant could bring themselves within Article 27 of the Brussels Convention which provides in relation to foreign judgments:

"A judgment shall not be recognised:

(1) if such recognition is contrary to public policy in the State in which recognition is sought......"

The defendants submitted that recognition of the French judgment was contrary to public policy in England because the judgment was procured by deliberately and falsely misleading the French court as to the facts. It was submitted on behalf of the defendants that it was contrary to English public policy that anyone should be entitled to take advantage of his own wrong and that therefore it was contrary to English public policy to recognise or enforce a judgment that had been procured by fraud. Phillips J. concluded that, subject to the need first to exhaust local remedies to set aside a foreign judgment obtained by fraud, the English courts should not normally apply the rule in Abouloff to the question whether it was contrary to public policy that the judgment should be registered under the Convention. At page 188 he said this:

"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

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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 procured 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 - eg. 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 April 26, 1991. 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."

This approach to the application of the Convention was approved by the Court of Appeal in Societe d'Informatique Service Realisation Organisation v. Ampersand Software BV [1994] 1 L Pr 55.

Mr Gaisman submits that these decisions spring from the particular regime of the Convention which he argues is different in a number of relevant respects from that of the New York Convention. That is no doubt true, but the judgment is founded on a perception of the ambit of public policy which is directly material to the issue which I have to decide. That perception would result in the rule in Abouloff not normally being extended to Convention judgments.

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The reasoning set out in the passage from the judgment cited above shows that the dominant consideration of public policy which led Phillips J. to that result was the achievement of finality. That consideration is one to which, for reasons given earlier in this judgment, very considerable weight must be accorded in the field of international arbitration under the New York Convention. To that must be added the further consideration that, as was recognised in Harbour Assurance v. Kansa, supra, there is a developing independent element of public policy in the protection of the integrity of the independent dispute resolution regime agreed upon by the parties.

Mr Gaisman submits that arbitration awards cannot logically be treated differently from non-Convention foreign judgments, such as those emanating from the courts of the United States, particularly in cases where the court giving the judgment is in a jurisdiction selected by the parties under an exclusive jurisdiction clause. That logic is unassailable, but it rests upon the assumption that the doctrine of binding precedent requires this court to proceed to apply Abouloff to awards because awards have similar characteristics in their origin and function to judgments and that accordingly, the public policy which would permit the retrial of issues of fact determined by foreign judgments must also apply to foreign awards.

That assumption is, in my judgment, wrong. The reasoning which led the Court of Appeal to its conclusion in Abouloff included as an essential factor the consideration that although the relevant issue of fact had been determined by the foreign court, the issue of whether that determination had been obtained by perjured evidence had not and therefore the finality principle was not in play - does not bear logical analysis. If the court was required to determine an issue of fact, it was required to determine the truth of the evidence adduced in support of that fact. Once it is accepted, as it must be in this case, that at least in the field of arbitration, if not in the field of judicial proceedings, there is no substantial difference between

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the two issues, the principle in Henderson v. Henderson is engaged and can be displaced only if it is outweighed by the public policy of preventing a participant in an arbitration from benefitting from his own perjured evidence.

As regards arbitrations, there is the strongest conceivable public policy against re-opening issues of fact already determined by the arbitrators. That is the policy which underlies the 1979 and 1996 Arbitration Acts and, as it is now accepted, prohibits investigation by the courts by means of the appeal procedure under the pretence of a question of law, of the weight of the evidence before the arbitrator in order to disturb findings of fact: see Mustill & Boyd, Commercial Arbitration, 2nd Edn pages 592-593 and 593. The introduction of fresh evidence in order to disturb an English award is subject to requirements similar to those relating to the introduction of fresh evidence to challenge an English judgment: see Mustill & Boyd, supra, pages 562-563. In particular, the fresh evidence must be of sufficient cogency and weight to be likely to have influenced the arbitrator's conclusion and the evidence must not have been available or reasonably obtainable at the time of the hearing. The principles of finality and justice are nicely balanced by that rule. The authorities do not suggest that any different rule applies to English arbitrations in those cases where it is alleged that the consequence of permitting fresh evidence to be adduced would be that evidence given at the hearing by the successful part could be shown to have been perjured.

If the balance of public policy is satisfied by that rule in relation to English awards, is there any sound basis for concluding that a different balance should apply in relation to the enforcement of foreign awards? I have no doubt that there is not. The salutary effect of the rule applicable to fresh evidence in domestic arbitrations is that it enables a party who alleges that he has been prejudiced by an adverse award based on perjured evidence to re-open the award where he has not been at fault in omitting to adduce rebuttal evidence at the hearing.

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The application of the Abouloff rule to foreign awards could be justified only if the balance of public policy required that fault in omitting to adduce evidence in a foreign arbitration should weigh differently in the balance from the same kind of fault in a domestic arbitration. A principle that the policy of the English courts should be more indulgent of fault in a foreign arbitration than in to a domestic arbitration would be quite unsustainable. Indeed, there is a strong argument for the policy of the enforcement court under the New York Convention being less willing than that of a domestic court of supervisory jurisdiction to permit the re-opening of an award on issues of fact. That is because the Convention recognises that the primary supervisory function in respect of arbitrations rests with the court of supervisory jurisdiction as distinct from the enforcement court: see Article VI and section 5(5) of the 1975 Act. Accordingly, if it is open to a party to re-open an award by proceedings in the court of supervisory jurisdiction and he fails to do so when the relevant evidence was available to him at the relevant time or could reasonably be obtained, there is much to be said for the view that the enforcement court's policy should be to exclude any attempt to adduce that evidence under the public policy exception in Article VI, however strong the evidence is and even in a case where the evidence could not reasonably be obtained at the time of the arbitration.

Mr Veeder, on behalf of the plaintiffs, has argued that in English law public policy does not cover defects in an award which can be cured by active remedies in the court having supervisory jurisdiction, such as an application to remit an award to arbitrators or to set it aside on the grounds that further evidence has come to light which, if accepted, would establish that the award had been obtained by perjured evidence and had thereby been improperly procured. The availability of such remedies under the Arbitration Act 1979 was limited by reference to strict and relatively short time limits imposed by RSC Order 73, rule 5 (now RSC Order 73, rule 27) (21 days from publication of the award). Accordingly, it is argued, if a party

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against whom a foreign award has been made has not availed itself of the active remedies available in the court of supervisory jurisdiction, English public policy cannot be deployed at the enforcement stage to re-open issues of fact, even in a case where perjury is alleged. Mr Veeder has relied in support of this proposition on a number of materials relating to the advisability of adopting the UNICTRAL Model Law, including the Report in 1989 of the Department of Trade Departmental Advisory Committee under the Chairmanship of Lord Mustill. My attention has also been drawn to a statement in Mustill & Boyd, 2nd Ed at page 418 that it will not be a defence to an action on a domestic award "that the award ought to be set aside or remitted on grounds not rendering the award void but merely voidable."

In my judgment, this argues goes too far.

If an award has been procured by perjury, there is no reason in principle why, in all cases the public policy of preventing a party from benefiting from its own fraud should be muzzled. That aspect of public policy manifests itself in relation to both foreign and domestic judgments and there can be no justification in principle for excluding it from the sphere of arbitration. Section 23 of the 1950 Act and section 68(2)(g) of the 1996 Act expressly contemplate intervention by the court where a domestic award has been "improperly procured" (section 23) or obtained by fraud or procured in a manner contrary to public policy (section 96). The countervailing public policy of finality ought not automatically to outweigh that of determining perjury in the case of arbitration awards any more than it does in the case of foreign Convention judgments, as held in Interdesco v. Nullifire supra. Providing that the evidence of perjury was not reasonably available either at the time of the arbitration or so as to enable application to be made to the court of supervisory jurisdiction, there is no reason in principle why the English court in an action on a foreign New York Convention award should in all cases decline to permit further evidence to be adduced for the purpose of establishing that the award was obtained by

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perjury. The public policy of finality can be adequately protected by the requirement that, where possible, local supervisory remedies must be employed.

I have therefore reached the following conclusions on the application of the public policy exception in section 5(3) of the 1975 Act.

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 at 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.

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The defendants have not established that they could justify the introduction of the evidence in MM'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 MM on which they would rely, the defendants should not be permitted to re-open under the public policy exception to enforcement under section 5(3) of the 1975 Act 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.

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