"Public policy": Speaking Notes by Graham Dunning QC, Essex Court Chambers

There are two important provisions of the 1996 Act which refer to *"public policy".* First, so far as concerns domestic awards there is Section 68(2)(g) – this provides that an award may be set aside if *"the award or the way in which it was procured"* is or was *"contrary to public policy".* Second, so far as concerns New York convention awards there is Section 103(3) – this provides that recognition or enforcement may be refused *"if it would be contrary to public policy to recognise or enforce the award"*.

The question is: What does it mean when the Act refers to these things – that is to say, either the award, or the way that it was procured, or recognition or enforcement of the award, being *"contrary to public policy"*?

One thing is clear - there is no definition of *"public policy"* in the Act. This is understandable because in a leading case before the Act Lord Donaldson said commenting on the forerunner of s.103(3) that:

> *"considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution ... It has to be shown that there is some element of illegality or that enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised"*

We therefore cannot expect to find an all-embracing definition – instead we have to look to the authorities for elucidation and development of the concept of *"public policy"* and what is contrary to it.

There has not been a huge number of cases addressing this topic since the Act came into law, and all have been at first instance only.

Those cases that have been reported have mostly dealt with the second limb of section 68(2)(g), namely what does it mean to say that the *"way in which the award was procured was contrary to public policy".*

I propose to spend a few moments on this line of first instance cases and then turn to the question of the award being contrary to public policy.

One of the first cases dealing with the question of the way in which the award was procured being contrary to public policy was *Profilati v Painewebber* [2001] 1 Lloyd's Rep. 715. In this case the question arose as to whether an award was vitiated by one party's failure to give disclosure of a highly relevant document. The Court held that if the document had been deliberately withheld and this influenced the result the Court might well consider that the award was procured in a manner contrary to public policy; but that anything less than deliberate non-disclosure was not enough.

There was another case along similar lines in 2001 – *The Marie H* [2001] 1 Lloyd's Rep. 707. Here, it was argued that one party had caused the other party to believe that it need not take a particular step in the arbitration and the award was made against the party as a result of that party not taking that step. The Court held that where one party sought to set aside an award on the basis of criticising the conduct of the other party which had led to the award, nothing short of unconscionable conduct was sufficient to amount to procuring the award in a manner contrary to public policy; in other words,

misleading the other party by inadvertence or negligence was not enough to satisfy the test.

This approach was followed in *Protech Projects v Al Kharafi* [2005] 2 Lloyd's Rep.779. The Court held that, save in exceptional cases, for the conduct of one party to amount to procuring the award in a manner contrary to public policy there generally has to be something in that conduct which is unconscionable or reprehensible.

In *Elektrim v Vivendi* [2007] 1 Lloyd's Rep. 693 the Court held that, in the context of suggestions of perjury and suppression of documents, the "contrary to public policy" limb in Section 68(2)(g) adds very little, if anything, to the alternative ground that the award was procured by fraud.

In another case, *Gater Assets v Nak Naftogaz* [2008] 1 Lloyd's Rep. 479 much the same approach was taken. This was actually a case under Section 103(3). The Court said that nothing short of reprehensible or unconscionable conduct in the obtaining of the award would suffice to invest the court with the discretion under s.103(3) to consider denying enforcement of a New York convention award; a dishonest intention to mislead the tribunal would suffice or any conduct that could be described as fraud. It is interesting to note that in this case the Court held that the public policy under Section 103(3) was the same as public policy under Section 68(2)(g) – there is scope for substantial debate about that proposition and the question whether s.103 ought not to reflect wider international public policy considerations

Before I move on, I should mention two situations which are *prima facie* contrary to public policy:

(1) First, the situation where the tribunal was influenced by a bribe or if the result was the result of the exercise of some other form of improper influence.

(2) Perjury is the second situation – although there has to be some basis for blaming the party who adduced the perjured evidence and there has also been some debate as to whether it would be necessary to show that the evidence was not available at the time of the original hearing if the credibility of the witness was in issue at that hearing.

I now turn to consider the first limb of section 68(2)(g) – this has been the subject of much less authority under the 1996 Act. What does it mean to say that *the award* is contrary to public policy?

This phrase was considered by Steel J last year in the case of *R v V* [2008] EWHC 1531 (Comm). *R v V* concerned allegations that the underlying contract, which was governed by English law, was one which was illegal or contrary to public policy in the place of performance. This was because although the contract was described as a "consultancy agreement" it was suggested that it was in fact a cover for payments to be made to procure certain favourable decisions from state officials or at least to exercise influence to obtain those favourable decisions. Under English law – not only contracts for the payment of bribes but also contracts for the so-called "peddling of influence" are regarded as contrary to public policy and cannot be enforced. The two leading cases on that *Montefiore v Menday* [1918 2 KB 241 and *Lemenda v African Middle East Co* [1988] QB 448.

The particular question that arose in *P v V* was to what extent - when the Court is examining the award and considering either setting aside the award under s.68 or declining to enforce the award under s.103 – will the Court be concerned with whether the underlying contract was contrary to public policy.

This question had been considered in a trilogy of cases which arose under the previous legislation. Those 3 cases were: *Soleimany v Soleimany* [1999] QB 785; *Westacre v Jugoimport* [2000] 1 QB 288; and *OTV v Hilmarton* [1999] 2 Lloyd's Rep. 222.

Soleimany concerned a domestic award – by the Beth Din. The award enforced an agreement that was illegal in the place of performance, which was Iran, and under English law it is normally regarded as contrary to public policy to enforce a contract the performance of which is illegal in the place of performance. The Court of Appeal held that – as the illegality (smuggling) in the place of performance was apparent on the face of the award - the Court should decline to enforce the award as being contrary to public policy, despite the fact that the contract was enforceable under the parties' chosen law.

In this instance, therefore, the Court held that the interposition of an award did not insulate the successful party's claim from the illegality which gave rise to it. Although it was not strictly necessary for its decision, the Court briefly considered what the position would have been if the tribunal had considered the question of illegality and considered that there was none, or if it had produced a non-speaking award. The court pointed out that in such a case there would be a tension between the public interest in favour of

enforcing arbitration awards and the public interest that illegal contracts should not be enforced. On this point – the court ventured the opinion by way of obiter dictum that if there was prima facie evidence before the court of the award being based on an illegal contract, then the enforcement judge *"Should enquire further to some extent".* The Court also said that in an appropriate case the Court may inquire into illegality even if the tribunal had jurisdiction over this issue and found that there was no illegality. These observations have caused subsequent uncertainty.

Westacre was different because it concerned a New York Convention Award made in Switzerland. The English court approached the matter on the basis of an assumption that the contract was illegal in the place of performance which was Kuwait, although the contrary had in fact been decided by the tribunal. So, this was a case of a type foreseen in the obiter dictum in *Soleimany* in that here the tribunal had held that the agreement was not illegal; unlike Soleimany there was therefore no finding of illegality on the face of the award and instead a positive finding of no illegality.

In this instance, the Court of Appeal held that the Court with supervisory jurisdiction over the award was the Swiss court and that in the English court the paramount public policy was in favour of enforcing the New York convention award, rather than declining enforcement on the basis that performance of the contract was illegal in the place of performance. The majority of the Court held that it was doubtful whether the Court should embark on a preliminary inquiry to go behind the arbitrator's findings, and that in the absence of any reason to suspect collusion or bad faith on the part of the tribunal, it was not open to challenge the tribunal's findings.

In the third case - *Hilmarton* – the English Court was again faced with the question of whether to enforce a Swiss award. But here the facts were slightly different – in this case performance of the contract was illegal in the place of performance which was Algeria and this did appear in the award. But the Swiss tribunal applying Swiss law (which the parties had chosen) had held that the contract was nevertheless enforceable under Swiss law notwithstanding such illegality in the place of performance – it should also be noted that there was no finding by the tribunal of any actual bribery or corrupt practices.

Following the decision in *Westacre* - the court held that the public policy in favour of enforcing the Swiss New York Convention Award overrode the consideration that in so doing the Court was thereby enforcing a contract which was illegal in the place of performance. The Court said that it might well have been the case that an English tribunal applying English law would have held that the agreement was unenforceable – but absent a finding of corrupt practices the Swiss tribunal applying the parties chosen law – Swiss law - had held that the contract was enforceable even though performance was illegal in Algeria - and therefore the award should be enforced

The key difference between *Hilmarton* and *Soleimany* was that the latter concerned a domestic award in which the illicit nature of the contract was apparent on the face of the award and the former concerned a New York Convention award with the attendant public policy in favour of enforcing foreign arbitration awards and there was no finding of corruption or illicit practice. However, in both cases the contract was enforceable under the parties chosen law, despite the illegality in the place of performance on the

face of the award; but the Court treated that factor differently: in *Soleimany* the fact that the contract was enforceable under Jewish law was held not to save the award, whereas in *Hilmarton* the fact that the contract was enforceable under Swiss law was prayed in aid in enforcing the award.

Somewhat surprisingly in light of the uncertainties flowing from these 3 cases – there were no cases under s.68 until the case of *P v V* last year. *P v V* was a case in which the contract was governed by English law and the place of performance of the contract was Libya. The arbitral tribunal held that performance of the contract was not illegal or contrary to public policy in Libya. The Award was a domestic award under ICC rules, and a challenge was made under s.68. The first and the key question that arose was to what extent - following what had been said by the Court of Appeal in *Soleimany* – the Court could or should *"inquire further to some extent"* to see for itself whether there was evidence that the award was contrary to public policy because it enforced an underlying contract which was itself contrary to public policy.

The Court considered the Court of Appeal decisions in *Soleimany* and *Westacre.* It said that *"the difficulty with the concept of some form of preliminary inquiry is of course assessing how far that inquiry has to go".* But the Court then largely dodged the question of principle and said that **even assuming** that some form of preliminary inquiry was appropriate, in the circumstances it was necessary to accord full faith and credit to the award. The Court also adopted the dictum of Colman J that in general the level of opprobrium attaching to commercial corruption was not on a par with crimes such as drug trafficking. This is a controversial proposition particularly in light

of the Wolff report for BAE and the recent developments in the criminal law relating to overseas corruption. And the court said that there mere fact that the tribunal was arguably wrong was insufficient to undermine the issue estoppels that arose from the tribunal's decision. The Court also concluded that it was bound by the decision of the Court of Appeal in *Westacre*, even though this concerned a Swiss and not a domestic award and that its reasoning was largely based on the public policy in favour of enforcing New York Convention Awards.

I would respectfully suggest that the decision in *P v V* has not shed a great deal of light on this difficult area. It did not decide what the Court should do if faced with a convincing case of unlawful activity or bribery which has not been reflected in the award or has been rejected in the award. Whilst the case has emphasised what we already know – namely that the Court is generally reluctant to set aside an award - it has not laid down clear principles or guidance as to how the "public policy" concept is to be applied under the Act. And it has not given a convincing explanation of how the decisions in the 3 earlier cases are to be reconciled, or what their precise status is under the 1996 Act.