ENGLAND

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Re **The Public Policy Exception under Article V(2)(b) – Methodological Approaches**
Country Report England

WILMERHALE

I. THE DEFINITION OF PUBLIC POLICY IN RECOGNITION AND ENFORCEMENT PROCEEDINGS BY THE ENGLISH COURTS

As a general rule, the English courts are "reluctant to excuse an award from enforcement on grounds of public policy."[1] The invocation of public policy is typically seen as "a last defensive resort"[2] and is rarely granted.[3] While the English courts generally adopt a largely pro-arbitration approach, which in itself is seen as a matter of public policy,[4] there are certain circumstances in which the English courts have refused to grant recognition or enforcement of an arbitral award on public policy grounds.

In the words of the English High Court in *Tongyuan (USA) Int'l Trading Group v. Uni-Clan Ltd.* (per Moore-Bick J.):

> "***there is a very strong public policy consideration in favour of enforcing awards***, whether awards published in this country or published abroad, and ***it would require a very strong and unusual case to render the enforcement of an award*** in circumstances of this kind ***contrary to public policy***."[5]

The relevant provision is Section 103(3) of the English Arbitration Act 1996, which incorporates the ground for refusal of recognition or enforcement of an arbitral award on the basis of public policy. Article 103 of the English Arbitration Act sets forth the regime for recognition and enforcement of the New York Convention awards, as follows:

> "(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
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> (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves –
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> > (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

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[1] N. Blackaby, M. Hunter, C. Partasides & A. Redfern, *Refern and Hunter on International Arbitration*, Oxford Univ. Press (2009), at para. 11.104.
[2] M. Kerr, *Concord and Conflict in International Arbitration*, 13(2) Arb'n Int'l 121, at p. 140.
[3] Not so long ago, Michael Kerr wrote that "there is no case in which this exception has been applied by an English court." *See* M. Kerr, *Concord and Conflict in International Arbitration*, 13(2) Arb'n Int'l 121, at p. 140. There were several decisions discussing this defense since that time. It is noteworthy that, as of 2013, "***[o]nly in three recorded cases to date have the English courts refused enforcement of a Convention Award***." C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at para. 26-50.
[4] *See* W. Miles & K. Davies, *Chapter 32: England & Wales*, in *ICLG Guide to International Arbitration 2013*, at p. 275; N. Blackaby, M. Hunter, C. Partasides & A. Redfern, *Refern and Hunter on International Arbitration*, Oxford Univ. Press (2009), at para. 11.105 ("Indeed, this ***pro-enforcement bias is itself considered a matter of public policy*** …") (emphasis added).
[5] *Tonguyan (USA) International Trading Group v. Uni-Clan Ltd.*, High Court of Justice, Queen's Bench Division (Commercial Court), 19 January 2001, in XXVI Y.B. Comm. Arb. 886 (2001), at p. 892 (emphasis added).

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));

(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which it was made.

(3) ***Recognition or enforcement of the 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 recognise or enforce the award***.

(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security."[6]

The list of defences against recognition and enforcement in Section 103 of the English Arbitration Act is taken nearly verbatim from Article V of the New York Convention.[7] Section 103(3) of the English Arbitration Act mirrors Article V(2)(b) of the New York Convention which provides that a court may refuse recognition or enforcement of an award if it would be contrary to public policy.[8]

In general terms, the English courts have set a high threshold for the public policy exception to be triggered. The principles applied by the English courts include:

[6] 1996 English Arbitration Act, §103.
[7] *See, e.g.*, R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 394.
[8] *See* New York Convention, Article V(2)(b) ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … (b) The recognition and enforcement of the award would be contrary to the public policy of that country.").

First, the English courts apply a very narrow interpretation of public policy, understood as the English public policy of the enforcing State.[9] For example, one court decision held that:

> "***[c]onsiderations of public policy***, if relied upon to resist enforcement of an award, ***should be approached with extreme caution***. … The reference to public policy in s.103(3) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards. Instead, the public policy exception in s.103(3) ***is confined to the public policy of England (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice***."[10]

A recent decision in *Honeywell* also quoted (with approval) Lord Atkin's dictum in *Fender v. St John-Mildway* stating that the doctrine of public policy "should only be invoked in clear cases in which the harm to the public is substantial incontestable [sic], and does not depend upon the idiosyncratic inferences of a few judicial minds."[11]

Second, the English courts have refused to conduct a review on the merits of the award as part of the control of public policy.[12]

Third, the English courts have applied public policy on a case by case basis, carefully considering the factual circumstances and the legal principles at issue.[13]

Fourth, the English courts have emphasized that the burden of proof that one or the other defence to enforcement or recognition of the arbitral award is on the award debtor who resists enforcement and/or recognition.[14]

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[9] *See, e.g.*, C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at paras. 26-66 ("It may fairly be stated that Article V(2)(b) of the New York Convention has, on occasion, been abused by national courts to avoid the consequences of entirely legitimate awards. Historically, this has not been the case in England, however, where a very narrow interpretation of public policy has been adopted.") and 26-70 ("the consistent approach of the English courts is to interpret public policy restrictively to mean that it is English public policy, as the policy of the country of enforcement, that should be applied under section 103(3) of the 1996 Act."); R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 403 (English courts have taken the approach that could be said to be well-settled internationally – i.e., that "***the public policy standards are those of the enforcing State***.").

[10] *IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corporation* [2005] EWHC 726 (Comm) ¶13 (emphasis added).

[11] *Honeywell International Middle East Ltd. v. Meydan Group LLC* [2014] EWHC 1344 (TCC) ¶181.

[12] *See, e.g..*, C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at para. 26-43 ("[t]he fundamental principle is that the court is not concerned to investigate the merits of the dispute which is the subject of the award.").

[13] *See, e.g., IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corporation* [2005] EWHC 726 (Comm) ¶11.

[14] *See, e.g.*, R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 397 ("the language of section 103(2), reflecting as it does Art. V.1 of the Convention, places the burden of proof upon the award debtor, who has to prove that it falls within at least one of the defences. … Whatever the award says must presumptively bind the parties (meaning the parties stated on it as being parties), and the courts ought everywhere to regard the party resisting enforcement as having a significant and importance burden to discharge."). *See also*

Merkin & Flannery summarized these principles as follows:

> "it is extremely important that the English courts do not interpret the Convention in an 'anglo-centric' way, but in an international sense. In this regard, ***each of the grounds must be construed restrictively, and the merits of an award should rarely, if ever, be reviewed***. There is a pro-enforcement bias built into the language of the Convention, recognised by courts all over the world."[15]

The English Arbitration Act does not provide a definition of "public policy." In the words of Lord Truro in *Egerton v. Brownlo*w *(Earl)*, public policy is "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law."[16] Or to use the legendary expression of Burrough J in *Richardson v. Mellish*, public policy is "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."[17]

In *Deutsche Schachtbau v. National Oil*, the English Court of Appeal clarified the notion of public policy in the context of enforcement of arbitral awards as follows:

> "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 the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."[18]

As noted in prominent commentary on the English Arbitration Act, the public policy exception is "where the two principles come to clash head on: the notion that an arbitral award is final, and should not be reopened in anything except the most extreme

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C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at para. 26-43 (Section 103 of the English Arbitration Act "places the burden of proving the existence of the relevant ground on the party challenging recognition or enforcement."); B. Harris, R. Planterose & J. Tecks, *The Arbitration Act 1996: A Commentary*, 4th ed.,at p. 432 ("While a court may take an illegality point of its own volition under s.103(3), if a party against whom enforcement is sought wishes to rely on matters within that subsection, the burden of making good the objection rests on that party."). *See also, e.g., Minmetals Germany GmbH v. Ferco Steel Ltd.* [1999] CLC 647 (Colman J) ("With regard to the court's power under s. 103(3) to decline to enforce or recognise an award on grounds of inarbitrability of the subject-matter or of enforcement being contrary to public policy, whereas it is always open to the court to take an illegality point of its own volition, ***if a respondent to enforcement wishes to rely on matters within this subsection, the burden of making good the objection to enforcement, in my judgment, clearly rests on that party***.") (emphasis added).

[15] R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 394.

[16] *Egerton v. Brownlow (Earl)* (1853) 4 HL Cas 1, at 196 (per Lord Truro).

[17] *Richardson v. Mellish* (1824) 2 Bing 229, per Burrough J at 252.

[18] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell Int'l Petroleum Co. Ltd.*, Court of Appeal, 24 March 1987 [1987] 2 Lloyd's Law Rep. 246, ¶26, per Sir John Donaldson MR (reversed on other grounds by the House of Lords [1990] 1 AC 295).

circumstances; and the notion that the enforcing court's fundamental norms of public policy should not be violated."[19]

II. THE METHODOLOGICAL APPROACH OF ENGLISH COURTS TOWARDS THE PUBLIC POLICY EXCEPTION: SUMMARY OF THE RELEVANT CASE LAW

Among the English courts judgments that have addressed the public policy ground in the enforcement context, the judgments could be grouped into the following categories:

- The award has been obtained by perjury or fraud;
- The losing party is at risk of having to make payment in some other jurisdiction as well as in England;
- The award is tainted by illegality;
- The award was obtained in breach of the rules of natural justice. This is a limited defence, for the losing party will normally have a right to seek to have the award overturned by the courts of the jurisdiction in which the award was given, and if the losing party has sought but failed to obtain relief from the curial courts, or has unreasonably not invoked the jurisdiction of the curial courts, the award will generally be enforced by the English courts;
- The award is so unclear as to the obligations imposed on the losing side as to be incapable of enforcement; and
- The award affects the UK's international obligations under a treaty or EU Law.[20]

The decisions of the English courts considering the above public policy categories are discussed in more detail below.

A. Award Obtained by Perjury or Fraud

Although there were not many cases that have addressed this public policy issue, the few decisions that have are worth to be noted. The approach adopted by the English courts in international arbitration context is analogous to that in the domestic context, under section 68(2)(g) of the English Arbitration Act.[21]

1. Westacre

In *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd.*,[22] the dispute arose out of a consultancy agreement for the procurement of contracts related to military equipment in Kuwait. Westacre initiated an arbitration claim for recovery of payment of its consultancy fees. Jugoimport's defense was based on Westacre bribing Kuwaiti officials in order to exert their influence in favour of entering sales contracts with Jugoimport. The contract between

[19] R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 403.
[20] Cf. R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 403.
[21] *See* R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 403.
[22] *Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. and others*, [1998] 4 All ER 570, affirmed by the Court of Appeal in [1999] 3 All ER 864 .

Westacre and Jugoimport was governed by Swiss law and provided for arbitration in Switzerland. The arbitral tribunal found that there was no evidence of corruption and that lobbying by private enterprises to obtain public contracts was not illegal under Swiss law. The award was challenged in the Swiss Federal Court, which rejected the challenge on the basis that allegations of corruption had already been dealt with and rejected by the arbitral tribunal. Westacre sought to enforce the award in Kuwait and Cyprus, and also in the UK.

In August 1995, Westacre obtained an ex part order from Buxton J granting it leave to enforce the award in the same manner as a judgment. Attempts to enforce the award were subsequently challenged in the English courts, where Jugoimport filed new affidavit evidence in support of its allegations of corruption. The appellants contended that, on the face of the award, the consultancy agreement was a contract for the purchase of personal influence and that it would therefore be contrary to English public policy to enforce the award.[23] Alternatively, the appellants sought to reopen the factual basis of the award, contending that it had been obtained by perjury on the part of Westacre and that the agreement was in fact a contract to pay bribes to a third party through Westacre.

The High Court (Colman J) rejected both challenges to enforcement, holding on the issue of perjury or fraud that, "[w]here a party to a foreign New York Convention award alleges at the enforcement stage that it has been obtained by perjury 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
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> (ii) the evidence was not available or reasonably obtainable either
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> > (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.
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> 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."[24]

Colman J decided that, in light of the available evidence, the defendants "should not be permitted to reopen under the public policy exception … the issues of fact already determined by the arbitrators."[25] The application was refused. had to decide on the issue whether the

[23] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 864.
[24] *Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1998] 4 All ER 570, 608. *See also* R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 404.
[25] *Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. and others*, [1998] 4 All ER 570, 608.

enforcing court could accept fresh evidence as to the illegality that was not previously put before the arbitral tribunal.

The appellants appealed to the Court of Appeal.

The Court of Appeal was thus faced with two issues: "is it open to the appellants in the enforcement proceedings to challenge the arbitrators' findings of fact on the bribery issue, and secondly, if so and if successful in proving the assertions set out in the affidavit …, should the English court enforce the award."[26] The Court of Appeal affirmed Colman J's decision, and rejected the challenge to enforcement.[27] The Court held that:

> A party seeking to rely on evidence of fraud in an application to set aside leave to enforce an arbitral award must establish "that the evidence to establish fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators;"[28] and "where perjury is the fraud alleged, ie where the very issue before the arbitrators is whether the witness or witnesses were lying, the evidence must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result."[29]
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> The Court refused to reopen the facts on the bribery issue and confirmed their deference to the arbitral tribunal's determination that bribery was not established in that case:
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> > "First, there was evidence before the Tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the award."[30]

2. Heinz

In *H J Heinz Co. Ltd. v. EFL Inc.*,[31] the High Court dismissed the respondent's application for summary judgment aimed at dismissal of the claim by the claimant, Heinz, for an injunction to prevent the defendant from taking steps to enforce a Hungarian award, and seeking declaration that the award is not capable of being recognised or enforced in England on the basis of public policy under section 103(3) of the English Arbitration Act. The arbitration was conducted in Budapest, under the Rules of the Hungarian Chamber of Commerce and applying Hungarian law. The arbitral tribunal found Heinz liable for breach of contract and ordered Heinz to pay damages. As part of its defense in the arbitration proceeding, Heinz argued that the distribution contracts that EFL has entered into and under which it was now claiming consequential damages from Heinz, were a sham. The arbitral tribunal considered this defense and decided that "the defendants did not succeed in proving

[26] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 887.
[27] *See* discussion in N. Blackaby, M. Hunter, C. Partasides & A. Redfern, *Refern and Hunter on International Arbitration*, Oxford Univ. Press (2009), at paras. 11.105-11.106.
[28] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 881.
[29] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 881.
[30] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 887.
[31] *H J Heinz Co Ltd. v. EFL Inc.* [2010] EWHC 1203 (Comm) (Burton J).

beyond reasonable doubt that the three distribution contracts were sham contracts."[32] The application for an injunction was aimed at preventing Heinz from enforcing a Hungarian award in England on the basis of new evidence of forgery discovered following the award.[33]

The Court held that "in a case of concealed fraud (concealed forgery) it may be, particularly where the source of the evidence is contained in the opposite camp, that, upon analysis of the facts an approach more favourable to the party defrauded in respect of what is due, or reasonable diligence, may be adopted;" however, the Court found that it was "unable to conclude without evidence and cross-examination at trial that the evidence sought to be relied on in respect of the forgery … was reasonably available to the Claimant at the hearing."[34] The Court further stated, on the issue whether a party is estopped from resisting enforcement on grounds that were rejected in annulment proceeding in arbitral seat, that it was "satisfied that there [was] at least a strongly arguable case that there is no estoppel, and such that the reverse is, through arguable, nowhere near sufficient to justify a summary conclusion on this application that the Claimant has no realistic prospect of success."[35]

The Court decided that the application to prevent enforcement of the Hungarian award on grounds of public policy was arguable and could not be summarily dismissed.

A more recent issue that could potentially give rise to decisions in the English courts in the near future is "whether an award made pursuant to a contract made in breach of UN or EU sanctions would be denied recognition or enforcement here under the public policy ground (or even if giving effect to an otherwise legal award may itself constitute some sort of breach of such a sanction)."[36] The recent series of sanctions against Russia announced in the context of the Russia-Ukraine crisis in 2014 may set the ground for such challenges, which the English courts are yet to consider.

3. Honeywell

In the recent judgment in *Honeywell*, the High Court rejected a challenge to enforcement of a DIAC award brought on the basis that such enforcement would be contrary to the public policy of the United Kingdom as the state in which recognition and enforcement of the award is sought under section 103(3) of the English Arbitration Act because the award was obtained by deceit by the claimant representing to the tribunal that it provided a performance security to the defendant (a condition precedent to any right to payment on the part of the claimant) knowing the representation to be false and misleading.[37] The Court decided that "given that the alleged fraud which has led to the alleged perjury could have been put before the Tribunal because the evidence was available to Meydan and given that the evidence of perjury is not so strong as to have been decisive, I do not consider that there is any public policy ground which would mean that if, contrary to what I have held, false evidence was put before the

[32] *H J Heinz Co Ltd. v. EFL Inc.* [2010] EWHC 1203 (Comm) ¶¶1-6.
[33] *See H J Heinz Co Ltd. v. EFL Inc.* [2010] EWHC 1203 (Comm) ¶10; R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 404.
[34] *H J Heinz Co Ltd. v. EFL Inc.* [2010] EWHC 1203 (Comm) ¶33.
[35] *H J Heinz Co Ltd. v. EFL Inc.* [2010] EWHC 1203 (Comm) ¶50.
[36] R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 406.
[37] *Honeywell International Middle East Ltd. v. Meydan Group LLC* [2014] EWHC 1344 (TCC) at p. 35.

Tribunal then on that basis alone, as a matter of public policy, the Award should not be enforced."[38] The facts of this case are discussed in more detail below.

B. Losing Party is at Risk of Having to Make Payment in Some Other Jurisdiction as well as in England

In *Deutsche Schachtbau und Tiefbohrgesellschaft mgH v. R'as Al-Khaiman National Oil Co.*, the arbitral tribunal decided in its award that the proper law governing substantive obligations of the parties included "internationally accepted principles of law governing contractual relations." The defendants opposed enforcement of the arbitral award on the basis that "it would be contrary to English public policy to enforce an award which holds that the rights and obligations of the parties are to be determined not on the basis of any particular national law, but upon some unspecified, and possibly ill defined, internationally accepted principles of law."[39] The Court of Appeal held that the parties to the contract clearly intended to create legally enforceable rights and obligations, and that their agreement was sufficiently certain to be legally enforcement.[40] On the issue whether the enforcement of the award would be contrary to public policy using the coercive powers of the State, Sir John Donaldson held that:

> "I am left in no doubt that the parties intended to create legally enforceable rights and liabilities and that the enforcement of the award would not be contrary to public policy."[41]

The Court further rejected the defendant's argument of double jeopardy to the effect that it might be forced to pay twice, in England and in the United States.[42]

Other decisions are to the same effect.[43]

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[38] *Honeywell International Middle East Ltd. v. Meydan Group LLC* [2014] EWHC 1344 (TCC) ¶192.
[39] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell Int'l Petroleum Co. Ltd.*, Court of Appeal, 24 March 1987 [1987] 2 Lloyd's Law Rep. 246, ¶19.
[40] *See* C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at fn. 63 on p. 579.
[41] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell Int'l Petroleum Co. Ltd.*, Court of Appeal, 24 March 1987 [1987] 2 Lloyd's Law Rep. 246, ¶27.
[42] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell Int'l Petroleum Co. Ltd.*, Court of Appeal, 24 March 1987 [1987] 2 Lloyd's Law Rep. 246, ¶31.
[43] *See Soinco v. Novokuznetsk Aluminium Plant (No. 2)* [1998] 2 Lloyd's Rep. 346 (CA). This was a case involving enforcement of a Swiss award by garnishee proceedings. Enforcement was permitted, despite the threat of the award debtor having to make the same payment again in Russia. The Court held that "I am unpersuaded that it is arguable that under English law enforcement of this award would be contrary to English public policy. The reasons are separate and distinct. First, it is the award with which the English court is concerned and not the underlying contract. The question of illegality having been raised and dealt with by the arbitrators, and there being no requirement as a result to perform some act which English law would regard as illegal under English law or contrary to the recognised morals of this country, the public policy is, if anything, in favour of abiding by the terms of the Convention and enforcing the award. Second, in any event, if an offence will be committed by NAKP in Russia as a party to the award in paying the same, that is the result of their own failure to obtain the requisite consents, and English public policy would in my view be offended if that relieved that party from its obligation to meet the award." *Soinco v. Novokuznetsk Aluminium Plant (No. 2)* [1998] 2 Lloyd's Rep. 346 (CA). *See also* R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 403.

C. Award Relating to a Contract Tainted by Illegality

One of the frequent issues that the English courts have been faced with is that of an application to enforce an arbitral award under the New York Convention said to have been based on a claim made pursuant to an illegal contract.[44] In the words of a commentator, "[t]he most common context in which the English courts have considered the public policy exception in relation to enforcement of arbitral awards has been where the underlying contract has been tainted by illegality."[45] There are several decisions that address this issue, as summarized below.

1. Westacre (High Court)

In *Westacre*, the facts of which are discussed above, the High Court (Colman J) set out six principles guiding the approach that the enforcing court should take in relation to an allegation of illegality of the underlying contract:

> "(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.
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> (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.
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> (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 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

[44] *See* R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 404.
[45] *See* C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at para. 26-72.

the issue of illegality should be left to arbitration. If it was not consistent, the arbitrators would have 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 issues in particular."[46]

2. Soleimany

In *Soleimany v. Soleimany*,[47] the English Court of Appeal denied recognition and enforcement of an arbitral award, which gave effect to a contract between a father and a son requiring the smuggling of carpets out of Iran in violation of Iranian revenue laws and export controls.[48]

The parties agreed to submit their dispute to arbitration by the Beth Din,. A dispute arose over the division of the proceeds of the scheme, and the parties referred the matter to binding arbitration by the Beth Din, the court of the Chief Rabbi in London, applying Jewish law. The Beth Din's award explicitly referred to the illegal nature of the enterprise, but nevertheless enforced the contract. As a matter of applicable Jewish law, the illegality of the contract had no effect on the rights of the parties. The English High Court granted the defendant leave to enforce the award. On appeal, the appellant contended that, at the enforcement stage, the court should not examine the underlying transaction if the reference to arbitration was itself valid.

The issue before the Court of Appeal was thus whether the interposition of an arbitral award isolates the successful party's claim from illegality that gave rise to it, where such illegality would otherwise contravene English public policy.

The Court held that it was "inconceivable that an English court would enforce an award made on a joint venture agreement between bank robbers … Where public policy is involved, the interposition of an arbitral award does not isolate the successful party's claim from the illegality that gave rise to it."[49]

The court declined to enforce an illegal contract, and held that:

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[46] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1998] 4 All ER 570, 593.
[47] *Soleimany v. Soleimany*, [1999] QB 785.
[48] *See* N. Blackaby, M. Hunter, C. Partasides & A. Redfern, *Refern and Hunter on International Arbitration*, Oxford Univ. Press (2009), at para. 11.104; M. Scherer, *Article V: Grounds for Refusal of Recognition of Arbitral Awards*, in R. Wolff (ed.), *New York Convention – Commentary* (2012), at para. 575.
[49] *Soleimany v. Soleimany* [1999] QB 785 at 799-800 (per Waller LJ).

> "The Court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it."[50]

The appeal was allowed, and the application to set aside leave to enforce the award was granted.

3. Westacre (Court of Appeal)

The Court of Appeal in *Westacre* introduced a qualification where foreign awards are concerned. The court found that in the context of contracts which were not to be performed in England, it was necessary to balance competing interests:

> "The court is in this instance performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English court is not abused."[51]

Thus, according to commentary, the balancing test was between: "[o]n the one hand, … the public policy considerations in discouraging any form of illegality and also principles of comity in not enforcing awards relating to contracts made in violation of other states' laws" and "the policy of giving effect so far as possible to the finality of foreign arbitral awards."[52]

The Court stated that:

> "it [is] difficult to see why outside the field of such universally condemned activities such as terrorism, drug trafficking, prostitution, paedophilia, anything short of corruption or fraud in international commerce should invite the attention of English public policy in relation to contracts which are not performed within the jurisdiction of English courts."[53]

Thus, the Court, unlike in *Soleimany v. Soleimany*, considered that it would be inappropriate to look behind the finding of the tribunal. This decision was considered binding and duly followed by David Steel J in a later case of *R v. V*.

4. OTV v. Hilmarton

In the third case on this issue, *Omnium de Traitement et de Valorisation SA ("OTV") v. Hilmarton Ltd.*,[54] the court was asked to enforce a Convention Award made in Switzerland. The underlying contract was governed by Swiss law and provided for work to be performed in Algeria. The contract was unlawful under Algerian law (the law of the place of performance) because of the prohibition against intervention of intermediaries in public

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[50] *Soleimany v. Soleimany* [1999] QB 785, at 800.
[51] *Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. and others*, [1999] 3 All ER 864 , 885.
[52] *See* C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at para. 26-74.
[53] *Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. and others*, [1999] 3 All ER 864 , 885.
[54] *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 All ER (Comm) 146.

contracts, but not under Swiss law (the law governing the agreement). The ICC arbitral tribunal rendered an award in favour of the respondent, Hilmarton, ruling that although the contract was illegal under Algerian law which prohibited "the intervention of a middleman in connection with any public contract or agreement within the ambit of foreign trade," it did not involve any bribery or other similar corrupt activity.[55] Hilmarton sought enforcement of the award in the UK. It was granted an *ex parte* order giving it leave to enforce the ICC award. OTV challenged the enforcement order on the basis that enforcement of the award would be contrary to public policy.

The Court (per Walker J) noted that the arbitral tribunal had made its own assessment of foreign law, and reached a finding that the contract was illegal under Algerian law but legal under Swiss law. The Court also showed deference to the arbitral tribunal's determination that bribery or other corrupt practices were not involved, and held that it would be "quite wrong for this Court to entertain any attempt to go behind this explicit and vital finding of fact."[56] The Court stated that it was not to decide on the underlying contract; rather, its decision was on whether the award should be enforced in England:

> "I am not adjudicating upon the underlying contract. I am deciding whether or not an arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced."[57]

Thus, although English law might take a different view when faced with the contract rather than the award and would not have enforced the contract or awarded damages for its breach given the violation of Algerian law, the Court decided that it would not be contrary to public policy to enforce an award which was not contrary to the public policy of the governing law or of the law of the seat:[58] "[i]n my judgment, there are no public policy grounds on which the enforcement of this award could be refused."[59]

5. R. v. V.

Although this case concerned a domestic arbitral award, *R. v. V.*[60] could be helpful in understanding the approach of the English courts. In this case, the claim was brought under the terms of a consultancy agreement providing for the use of influence and information, concerning negotiations with Government officials and state and private corporations, to assist the plaintiff in connection with the promotion of its interests in Libya. Subsequently the plaintiff took the view that the agreement was unenforceable, *inter alia*, on the basis that

[55] *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 All ER (Comm) 146, 148.
[56] *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 All ER (Comm) 146, 148.
[57] *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 All ER (Comm) 146, 149.
[58] *See* C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at para. 26-77.
[59] *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 All ER (Comm) 146, 151.
[60] *See R v. V*, [2008] All ER (D) 111.

the agreement was illegal under Libyan law and contrary to English public policy with regard to "upholding of corrupt practices including influence peddling."[61] The ICC tribunal in London rejected the plaintiff's contentions and issued an award in favour of the defendant. The plaintiff challenged the award under sections 68(2)(g) (English public policy) and 81(1)(c) (common law public policy) of the Arbitration Act 1996. The issue before the Court was whether a contract for the purchase of personal influence, which offends domestic public policy in its place of performance, but does not offend the domestic public policy of the country of the proper law and/or the curial law, is enforceable in England.

Previous authority (*Westacre*) established that there were some rules of public policy which would when infringed lead to non-enforcement whatever the proper law or wherever the contract was to be performed, such as concerns regarding terrorism or drug trafficking. Contracts for the sale of influence were not such an example. If a tribunal enforces a contract that does not offend the domestic public policy under either the proper law of (a) the contract or (b) the place of performance or (c) the law of the seat, there is nothing that offends against international public policy in allowing enforcement of the award, even if a different view of the legality might be taken by an English court. In the present case, there was ample material before the tribunal that the contract was not illegal under Libyan law and the arbitrators had expressly so held. Enforcement of the award was therefore granted by the Court.

6. Honeywell

In the recent 2014 case in *Honeywell v. Meydan Group LLC*[62] that has received wide coverage and publicity, the enforcement of an arbitral award was also challenged on grounds of corruption. The High Court upheld a DIAC award, rejecting allegations that the underlying contract was procured through bribery.[63]

Honeywell was successful in an arbitration, in which Meydan had declined to participate, linked to a contract for the installation of systems at a Dubai racecourse. While enforcement proceedings were pending before the Court of Appeal in Dubai, the plaintiff obtained an order granting permission to enforce the award through the English courts, which the defendant applied to set aside on the basis that the award was invalid. The defendant asserted, *inter alia*, that the plaintiff had won the underlying contract by bribing the defendant's agent in Dubai, and that any enforcement of the award in such circumstances would be contrary to English public policy. Meydan appealed the enforcement order, claiming that the contract had been obtained through bribery in the form of a deposit and certain fees paid to Meydan's agent.

The issue before the Court was thus whether enforcement of an award involving contracts resulting from bribery would be contrary to public policy.

[61] *R v. V*, [2008] All ER (D) 111 ¶1.
[62] *Honeywell International Middle East Ltd. v. Meydan Group LLC* [2014] EWHC 1344 (TCC).
[63] *See, e.g,* M. McClure, *Dubai Award Survives Bribery Challenge in England*, Kluwer Blog (26 May 2014).

The Court held that the defendant could not substantiate the alleged bribery.[64] The Court next held that, even if bribery were made out, the enforcement of the award would not conflict with English public policy, for the following reasons:

> "… where a contract has been induced by bribery it is not contrary to English public policy for the contract to be enforced but it gives the innocent party the opportunity to avoid the contract, at its election, provided counter-restitution can be made.
>
> It follows that whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which have been procured by bribes are not unenforceable. It follows that I do not consider that Meydan has real prospects of successfully contending that recognition or enforcement of the Award should be refused on the basis that it would be contrary to public policy, if contrary to my previous conclusion, the Contract had been procured by a bribe."[65]

The Court rejected objections to the awards' enforcement on this basis (and also on the basis of substantial injustice and perjury, as discussed elsewhere).

D. Award Obtained in Breach of Rules of Natural Justice

This category is a "limited defence, for the losing party will normally have a right to seek to have the award overturned by the courts of the jurisdiction in which the award was given, and if the losing party has sought but failed to obtain relief from the curial courts, or has unreasonably not invoked the jurisdiction of the curial courts, the award will generally be enforced by the English courts."[66]

In this respect, English courts have applied the principles applied to judgments in the Court of Appeal decisions in *Adams v. Cape Industries Ltd.*.[67]

In *Minmetals Germany GmbH v. Ferco Steel Ltd.*, the respondent sought to resist enforcement of a Convention Award made in China under sections 103(2)(c), (d) and (e) of the English Arbitration Act, as well as on public policy grounds (by filing an application to set aside leave to enforce two Chinese arbitration awards obtained by the plaintiff, Minmetals). The respondent claimed that the arbitrators had not followed the rules of arbitration (namely those of the CIETAC). The court rejected the challenges.[68] In particular, with respect to the public policy challenge, the Court held that, where the supervisory court had rejected a challenge against the award on the basis of violation of a party's right to present its case, the public policy was strongly in favour of enforcing convention awards and upholding the determinations of the supervisory court.

The Court held that:

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[64] *See Honeywell International Middle East Limited v. Meydan LLC* [2014] EWHC 1344, ¶ 89; T. Kendra & A. Bonini, *Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?*, 31(4) J. Int'l Arb. 439 (2014), at p. 446.
[65] *Honeywell International Middle East Limited v. Meydan LLC* [2014] EWHC 1344, ¶¶184-185.
[66] R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 403.
[67] *Adams v. Cape Industries Ltd*. [1991] 1 All ER 921.
[68] *See* C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at para. 26-55.

> "In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because t***here may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be re-investigated by the English courts on an enforcement application is to be most strongly deprecated***."[69]

Thus, outside the exceptional cases cited by the Court, deference must be paid to the supervisory court's decision with regard to the challenged award.

With respect to the test adopted by the Court, Colman J clarified that "in a case where an enforcee alleges that a New York Convention award should not be enforced on the grounds that such enforcement would lead to substantial injustice and therefore be contrary to English public policy the following must normally be included amongst the relevant considerations:

> (1) the nature of the procedural injustice;
>
> (2) whether the enforcee has invoked the supervisory jurisdiction of the seat of the arbitration;
>
> (3) whether a remedy was available under that jurisdiction;
>
> (4) whether the courts of that jurisdiction have conclusively determined the enforcee's complaint in favour of upholding the award;
>
> (5) if the enforcee has failed to invoke that remedial jurisdiction; for what reason and in particular whether he was acting unreasonably in failing to do so."[70]

In view of the circumstances of the case, the Court concluded that the enforcement of the awards would not lead to substantial injustice, because of the unreasonably conduct of Ferco in the manner of its subsequent conduct of the arbitration which has, in effect, deprived it of its local remedies.[71] The Court stated that "the countervailing policy considerations in favour of enforcement of the awards are, in my judgment, so strong that they displace the policy

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[69] *Minmetals v. Ferco Steel* [1999] CLC 647 at 661 (per Colman J) (emphasis added).
[70] *Minmetals v. Ferco Steel* [1999] CLC 647 at 651 (per Colman J). *See also* B. Harris, R. Planterose & J. Tecks, *The Arbitration Act 1996: A Commentary*, 4th ed.,at p. 432.
[71] *Minmetals v. Ferco Steel* [1999] CLC 647 at 662 (per Colman J).

consideration of non-enforcement in the face of procedural defects going to a breach of natural justice."[72]

The application to set aside leave to enforce the arbitral awards was rejected.

In the *Honeywell* case, the High Court was asked to rule whether the recognition and enforcement of the award would be contrary to public policy under section 103(3) of the English Arbitration Act because it has caused substantial injustice to the defendant.[73] The Court rejected the objection on this basis, and noted that "there is nothing which gives rise to a separate heard of public policy in relation to what Meydan characterises as substantial injustice, based upon the facts of this case" because "Meydan chose not to participate in the Arbitration" and is therefore not placed to challenge the award rendered in the arbitration proceeding.[74]

E. Award Is Incapable of Enforcement (Unclear as to the Obligations Imposed on the Losing Side)

One of the bases invoked for resisting enforcement of an arbitral award in England was that the award is incapable of performance due to lack of clarity and events subsequent to the making of the award might make the award unfair.[75]

In *Tongyuan (USA) International Trading Group v. Uni-Clan Ltd*., the parties have entered into a contract for Tongyuan to sell, install and satisfactorily test two sachet-filling machines; the contract contained an arbitration clause providing for CIETAC arbitration seated in Shenzhen or Shanghai. A dispute arose regarding the performance of one type of machines, and was referred to arbitration by Tongyuan in April 1998. Uni-Clan took no part in the arbitration, but was kept informed of the proceedings. The arbitral tribunal held a hearing in Beijing and issued an award in April 1999 holding that the machine was defective, and ordered the machine to be taken back by Uni-Clan and Uni-Clan was to return the purchase price with interest. Tongyuan applied to English courts for leave to enforce the award as a judgment, and that application was granted. Uni-Clan sought to set aside that order, arguing that the award was a nullity because the proceedings had been conducted in Beijing rather than Shenzhen or Shanghai, that it was not expressed in a form which was capable of being enforced as a judgment, and finally, that the court ought not to order that the award be enforced summarily as this would prevent its cross-claim from being taken into account.[76] The applicant alleged that "it would be contrary to public policy in this case for the court to

[72] *Minmetals v. Ferco Steel* [1999] CLC 647 at 662 (per Colman J).
[73] *Honeywell International Middle East Ltd. v. Meydan Group LLC* [2014] EWHC 1344 (TCC) at p. 33.
[74] *Honeywell International Middle East Ltd. v. Meydan Group LLC* [2014] EWHC 1344 (TCC) ¶¶186-190.
[75] *See* R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 403; A. Sheppard, *English Arbitration Act (Chapter 23), Part III, Recognition and Enforcement of New York Convention Awards, Section 103 [Refusal of recognition or enforcement]*, in L. Mistelis (ed.), *Concise International Arbitration*, Kluwer (2010), at para. 10 on pp. 865-866.
[76] *Tonguyan (USA) International Trading Group v. Uni-Clan Ltd*., High Court of Justice, Queen's Bench Division (Commercial Court), 19 January 2001, in XXVI Y.B. Comm. Arb. 886 (2001), at p. 887.

allow the award to be enforced in a manner which did not enable the sellers to have their cross-claim taken into account."[77]

The High Court rejected the application to set aside, and found that the change in the venue of the proceedings was not critical to the validity of the award; the language of the award was sufficiently clear to be capable of enforcement; and it would not be contrary to public policy to recognise and enforce the award in a manner which did not enable Uni-Clan to have its cross-claim taken into account.[78] As far as we understand from the summary of this decision, the cross-claim of the seller allegedly arose from deterioration or loss of parts of the machine which occurred after the award was rendered, while the buyers have been, in effect, involuntary bailees of this machine and allegedly owed a duty to the sellers to take reasonable care of it until it was collected.[79]

This decision is also authority for the proposition that circumstances occurring after the award, rendering enforcement potentially unfair, will not amount to a valid public policy ground upon which enforcement can be refused.[80]

> "In my judgment, an important distinction is to be drawn between the situation in which the manner in which the award has been obtained can be criticised in some manner, and circumstances which may have arisen since the publication of the award which are said to render its enforcement unfair. In the former case, it is the validity of the award itself which is impeached; in the latter case, the award is not impeached, it is simply said that it would be unfair to enforce it. I am not aware of any case in which the courts have accepted that it would be inappropriate to allow a Convention award which is otherwise valid and enforceable to be enforced as a judgment on the grounds that the judgment debtor has an arguable cross-claim against the holder of the award."[81]

The court rejected the application.

F. Public Policy and UK's International Obligations under a Treaty (Including EU Law)

Public policy defenses could arguably also be raised if the enforcement of an arbitral award would result in a violation of the UK's international obligations under a treaty, including EU instruments.[82]

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[77] *Tonguyan (USA) International Trading Group v. Uni-Clan Ltd.*, High Court of Justice, Queen's Bench Division (Commercial Court), 19 January 2001, in XXVI Y.B. Comm. Arb. 886 (2001), at p. 892.
[78] *Tonguyan (USA) International Trading Group v. Uni-Clan Ltd.*, High Court of Justice, Queen's Bench Division (Commercial Court), 19 January 2001, in XXVI Y.B. Comm. Arb. 886 (2001), at p. 887.
[79] *See Tonguyan (USA) International Trading Group v. Uni-Clan Ltd.*, High Court of Justice, Queen's Bench Division (Commercial Court), 19 January 2001, in XXVI Y.B. Comm. Arb. 886 (2001), at p. 892.
[80] R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), fn. 72 on p. 403.
[81] *Tonguyan (USA) International Trading Group v. Uni-Clan Ltd.*, High Court of Justice, Queen's Bench Division (Commercial Court), 19 January 2001, in XXVI Y.B. Comm. Arb. 886 (2001), at p. 892.
[82] *See* C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at para. 26-78. *See also Eco Swiss China Time Ltd. v. Benetton Int'l NV* [1999] 2 All ER (Comm) 44; *Asturcom Telecomunicaciones SL v.*

In *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, the public policy exception was invoked on the basis that the underlying agreement was contrary to principles of EU law, in particular competition law as set out in Articles 101 and 102 of the TFEU.

III. THE METHODOLOGICAL APPROACH OF ENGLISH COURTS TOWARDS THE PUBLIC POLICY EXCEPTION: ANALYSIS OF CASE LAW

This section summarizes the decisions by English courts on the public policy defense to recognition and enforcement of arbitral awards. Section C (below) provides elements of analysis of the English courts' *methodology* applied in considering public policy grounds for the purposes of recognition and enforcement of arbitral awards, or in other words, *how* the courts have arrived at their conclusions in cases involving public policy considerations.

A. Who Defines Public Policy: Approach of the Courts of the Enforcing State

English courts follow the approach that appears to be internationally-settled – *i.e.*, that "***the public policy standards are those of the enforcing State***;"[83] and "the consistent approach of the English courts is to interpret public policy restrictively to mean that it is English public policy, as the policy of the country of enforcement, that should be applied under section 103(3) of the 1996 Act."[84] The courts proceed to analyse public policy in light of the circumstances of each particular case, and whether the enforcement of an arbitral award would be contrary to that public policy.

For example, in *IPCO Nigeria*, the court held that "the relevant public policy is English public policy," and the analysis is whether "enforcement of the award here would offend against English public policy."[85] In this case, the respondent's argument in resisting enforcement of the award was that the arbitral award was contrary to public policy because it circumvented the restrictions under Nigerian law against execution of judgments against NNPC (the respondent) as a state entity, and would therefore be contrary to public policy. Justice Gross rejected the application to set aside the order to enforce an arbitral award, noting that "[i]n my judgment, English public policy is not engaged; if that be wrong, English public policy would, if anything, favour the enforcement of arbitration awards …"[86]

Similarly, in *Dalmia* the Court decided that "[a] contract which is contrary to the ***public policy of the forum*** will not be enforced even if it is valid by its proper law … But if it is contrary to public policy its validity is determined by its proper law."[87] In *Soleimany*, the Court explained that "enforcement here is governed by ***the public policy of the lex fori***."[88]

Maria Cristina Rodriguez Nogueira [2009] EUECJ C-40/08; *Accentuate Ltd. v. ASIGRA Inc.* [2009] EWHC 2655 (QB).

[83] R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 403.

[84] C. Tevendale & A. Cannon, *Chapter 26: Enforcement of Awards*, in J. Lew, H. Bor et al. (eds.), *Arbitration in England, with Chapters on Scotland and Ireland*, Kluwer (2013), at para. 26-70.

[85] *IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corporation* [2005] EWHC 726 (Comm) ¶24.

[86] *IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corporation* [2005] EWHC 726 (Comm) ¶24.

[87] *Dalmia v. National Bank of Pakistan* [1978] 2 Lloyd's Law Rep. 223, 268.

[88] *Soleimany v. Soleimany*, [1999] QB 785 at 800.

By contrast, however, the recent decision in *Honeywell* appears to turn away from the courts' discretion in defining and applying public policy, to the extent it reiterates the role of the legislator in defining public policy: the Court cited Parke B's dictum in *Egerton v. Brownlow* to the effect that public policy is "the province of the statesman, and not the lawyer to discuss, and of the legislature to determine, what is best for the public good, and to provide for it by proper enactments."[89] The Court further noted that "[i]t is therefore necessary to be cautious about applying public policy in areas where there is no established principle of public policy which applies."[90]

B. Which Public Policy is to Be Taken into Account?

For determining whether the award is contrary to public policy under Section 103(3) of the English Arbitration Act, the "relevant test is English international public policy."[91]

Although English courts in certain circumstances would accept to look at the public policy of the place of performance of the litigious contract, the usual inquiry is that whether the enforcement of the award would violate English public policy.

Several earlier decisions by English courts referred to "English public policy." For example:

Hilmarton: "That can of course only be ***English public policy***…"[92]

Westacre:

> High Court (Colman J) held that:
>
> "… 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 Kuwaiti public policy, one must go on to ask whether, if the English courts were now 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 made by arbitrators having jurisdiction and in respect of a contract governed by Swiss law."[93]
>
> "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

[89] *Honeywell International Middle East Ltd. v. Meydan Group LLC* [2014] EWHC 1344 (TCC) ¶180.
[90] *Honeywell International Middle East Ltd. v. Meydan Group LLC* [2014] EWHC 1344 (TCC) ¶182.
[91] A. Sheppard, *English Arbitration Act (Chapter 23), Part III, Recognition and Enforcement of New York Convention Awards, Section 103 [Refusal of recognition or enforcement]*, in L. Mistelis (ed.), *Concise International Arbitration*, Kluwer (2010), at para. 10, pp. 865-866.
[92] *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 All ER (Comm) 146, 147.
[93] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1998] 4 All ER 560 at 600G-J (Colman J).

invite the attention of ***English public policy*** in relation to contracts which are not performed within the jurisdiction of the English courts;"[94]

The Court of Appeal referred to "Swiss and ***English public policy***,"[95] and noted that:

"contracts for the purchase of influence, if to be performed in England, would not be enforced ***as contrary to English domestic public policy***; and (4) where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also, that the English court would not enforce it. There is also an implied recognition as it seems to me that if all that can be said of a contract is that performance in a foreign country will be contrary to the domestic public policy of that state, enforcement will only be refused if performance would be contrary to the domestic public policy in England. If that was not so, ***consideration of English public policy*** would not in fact have been necessary or relevant.[96]

… [A]n English court would take notice of the fact that different courts and different tribunals might have different views as to the enforceability of contracts for the purchase of personal influence depending on the proper law of the contracts and where they were to be performed. It would be for example legitimate for a foreign tribunal to take the view … that albeit performance was contrary to domestic public policy in its place of performance, since it was not contrary to the domestic public policy either of the country of the proper law and/or the curial law, enforcement should be allowed.

It is in this context, in my view, that albeit the award is not isolated from the underlying contract, ***it is relevant that the English court is considering the enforcement of an award, and not the underlying contract***. The English court takes cognisance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as there may be, have been considered by the arbitral tribunal. It is legitimate to conclude that ***there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view***."[97]

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[94] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1998] 4 All ER 560 at 600 (Colman J).
[95] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 887.
[96] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 876-877.
[97] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 877.

More recent decisions have clarified that the relevant public policy is international public policy, rather than domestic public policy.[98] For example, in *Tamil Nadu Electricity Board v. ST-CMS Electric Company Private Ltd.*, the Court clarified that "in the context of an international treaty, 'public policy' means international public policy and differs from public policy in a domestic context."[99]

C. Factors to be Taken into Account by English Courts when Considering Allegations of Violation of Public Policy

In certain (but not all) decisions, the English courts have set forth a list of factors, or considerations, explaining the analysis that the court would follow on an issue of public policy under section 103(3) of the English Arbitration Act.

In this regard, the judgment in *Minmetals v. Ferco Steel* is particularly instructive. Colman J set out a list of relevant considerations that an English court will take into account in considering whether an award would be contrary to English public policy on the basis of procedural injustice, as follows:

> "(1) the nature of the procedural injustice;
>
> (2) whether the enforcee has invoked the supervisory jurisdiction of the seat of the arbitration;
>
> (3) whether a remedy was available under that jurisdiction;
>
> (4) whether the courts of that jurisdiction have conclusively determined the enforcee's complaint in favour of upholding the award;
>
> (5) if the enforcee has failed to invoke that remedial jurisdiction; for what reason and in particular whether he was acting unreasonably in failing to do so."[100]

Another example is the High Court judgement in *Westacre*, in which Colman J set out six principles guiding the approach that the enforcing court should take in relation to an allegation of illegality of the underlying contract.[101]

D. Balancing Exercise Between Competing Public Policy Considerations

In considering applications against the enforcement of arbitral awards on public policy grounds, English courts generally engage into a balancing exercise with the view of establishing which of the competing public policy considerations outweighs the other, so as to determine the outcome of the application. Most decisions of the English courts, with rare exceptions, have found that the public policy favouring enforcement of New York Convention awards would outweigh most other considerations relating to the public policy of the forum. In performing that balancing exercise, English courts have looked, inter alia, as to

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[98] *See* R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 408.
[99] *Tamil Nadu Electricity Board v. ST-CMS Electric Company Private Ltd.* [2008] 1 Lloyd's Rep 93 at ¶42.
[100] *Minmetals v. Ferco Steel* [1999] CLC 647 at 651 (per Colman J). *See also* B. Harris, R. Planterose & J. Tecks, *The Arbitration Act 1996: A Commentary*, 4th ed.,at p. 432.
[101] *See above* at p. 12.

whether the supervisory court (of the seat of the arbitration) had considered and upheld the challenged award.

For example, in *Minmetals*, the Court held that:

> "In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a ***very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand***. ***Just as great weight must be attached to the policy of sustaining the finality of international awards so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction***. I use the word 'normally' because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be re-investigated by the English courts on an enforcement application is to be most strongly deprecated."[102]

The Court concluded that "the countervailing policy considerations in favour of enforcement of the awards are, in my judgment, so strong that they displace the policy consideration of non-enforcement in the face of procedural defects going to a breach of natural justice."[103]

Similarly, in *Westacre*, the Court of Appeal described its approach as "***a balancing exercise between the competing public policies of finality and illegality***; between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English court is not abused."[104]

E. No Reopening of the Facts (Including in Bribery and Corruption Cases)

When considering allegations of contradiction to public policy, the English courts have refused to reopen the facts considered by arbitral tribunals, save in exceptional circumstances: "where foreign arbitrators had concluded that a contract was not void for illegality, and the court having supervisory jurisdiction over the tribunal had dismissed an appeal in respect of effectively the same contention, the English court would not review that conclusion."[105]

In *Soleimany v. Soleimany*, the High Court (Waller LJ) proposed a two-stage test for the review of an arbitral award alleged to be tainted by illegality. Under this proposed approach, if there is "prima facie evidence" of illegality, the court should first conduct a preliminary

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[102] *Minmetals v. Ferco Steel* [1999] CLC 647 at 661 (per Colman J).
[103] *Minmetals v. Ferco Steel* [1999] CLC 647 at 662 (per Colman J).
[104] *Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. and others*, [1999] 3 All ER 864 , 885 (emphasis added).
[105] B. Harris, R. Planterose & J. Tecks, *The Arbitration Act 1996: A Commentary*, 4th ed.,at pp. 432-433.

inquiry (short of a full-scale trial) to see if the award should be given "full faith and credit"; if so, then the award will be upheld by the court. If not, then the court will need to conduct a full-scale inquiry to determine the issue of illegality.[106]

Waller LJ articulated this two-prong test in *Soleimany* by way of the following *obiter dictum*:

> "The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none. Or perhaps they have made a non-speaking award, and have not been asked to give reasons. In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. … In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. … We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instances. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decided at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality."[107]

Other decisions and commentary[108] have contradicted, and even directly disproved, the above approach, and have instead refused to reopen the facts. In the context of allegations that the award was obtained by perjury and fraud, the High Court in *Westacre* (Colman J) refused to reopen the tribunal's findings of fact, holding 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."[109]

This opinion was supported by Mantell L.J. in *Westacre* noting that "[t]he allegation [of bribery] was made, entertained and rejected [by the arbitral tribunal] … in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award."[110] Mantell LJ further noted that:

> "in the obiter passage cited by Waller LJ from the judgment in *Soleimany v. Soleimany* [1999] 3 All ER 847, [1999] QB 785, it seems to have been suggested that some kind of preliminary inquiry short of a full scale trial should be embarked upon whenever 'there is prima facie evidence from one side that the award is based on an illegal contract'. For my part I have some difficulty with the concept and even greater concerns about its application in practice, but, for the moment and uncritically accepting the guidelines offered, it seems to me that any such preliminary inquiry in

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[106] *See* explanation in M. Hwang & K. Lim note under *AJU v. AJT AS, AJU v. AJT, Case No. [2011] SGCA 41*, 22 August 2011, A Contribution by the ITA Board of Reporters, Kluwer (2011), ¶19.
[107] *Soleimany v. Soleimany*, [1999] QB 785 at 800.
[108] *See, e.g.*, R. Merkin & L. Flannery, *Arbitration Act 1996*, 5th ed. (2014), at p. 407.
[109] *Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. and others*, [1998] 4 All ER 570, 598.
[110] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 887.

> the circumstances of the present case must inevitably lead to the same conclusion, namely, that ***the attempt to reopen the facts should be rebuffed***."[111]

Similarly, in *Hilmarton*, the Court noted that the arbitral tribunal had made its own assessment of foreign law, and reached a finding that the contract was illegal under Algerian law but legal under Swiss law. The Court also showed deference to the arbitral tribunal's determination that bribery or other corrupt practices were not involved, and held that it would be "***quite wrong for this Court to entertain any attempt to go behind this explicit and vital finding of fact***."[112] The Court recognised that, at the enforcement stage, "it is immaterial whether the contract itself is governed by English or foreign law"[113] and that if English law were applied, the result would have been different. Therefore, "absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations," it was immaterial that English law would have led to a different result compared to Swiss law.[114] That is because the English court was considering the enforcement of an award, and not the enforcement of the underlying contract.[115]

As noted by one commentator, "[r]eading *Westacre* and *Hilmarton* together affirms that English courts are according considerable respect to the factual findings of foreign arbitral tribunals concerning corruption allegations. It also affirms that English courts are distinguishing, quite correctly, between the responsibility of an arbitral tribunal as finder of fact charged with applying the law of the contract, and a court seized with enforcement of a foreign arbitral judgement."[116]

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[111] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others*, [1999] 3 All ER 864, 887.
[112] *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd*., [1999] 2 All ER (Comm) 146, 148.
[113] *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd*., [1999] 2 All ER (Comm) 146, 149.
[114] *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd*., [1999] 2 All ER (Comm) 146, 149.
[115] *See* A. Appleton, note under High Court decisions in *Westacre Investments Inc. v. Jugoimport SDPR Holding Co. Ltd*. and *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.* (24 May 1999), 17(3) ASA Bull. 377, 380.
[116] A. Appleton, note under High Court decisions in *Westacre Investments Inc. v. Jugoimport SDPR Holding Co. Ltd*. and *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.* (24 May 1999), 17(3) ASA Bull. 377, at pp. 380-381.