CA on appeal from QBD (His Honour Judge Langan QC) before Morritt LJ; Waller LJ; Sir Christopher Staughton. 19th February 1998.

LORD JUSTICE WALLER: This is the judgment of the Court.

Introduction

1. Sion Soleimany and his son Abner Soleimany are Iranian Jews by origin. Until l980 Sion owned a successful business in Teheran which sold and exported valuable Persian and other Oriental carpets. In l980 Sion came to England, and as a result of upheavals in Iran has remained here ever since. Abner was a student in England, but, following his father's arrival here, returned to Iran at Sion's request to help free a consignment of carpets that had been seized by the Iranian customs authorities. In his attempts to free those carpets Abner claims to have suffered severely at the hands of the Iranian authorities. But while in Iran he concluded that there were substantial profits to be made from the export and sale of Persian carpets, but the export from Iran would (as he has always accepted) have involved contravention of Iranian Revenue laws and export controls. Between l980 and l983 Abner arranged the export of carpets from Iran and the carpets were sold by Sion in England or elsewhere outside Iran. Unfortunately disputes arose between Abner and his father. Those disputes covered many areas, but the main area related to whether Abner had received what he claimed was due to him from the proceeds of sale of the carpets that Abner alleged he had arranged to export from Iran.

2. Attempts were made to settle those disputes by mediation, but ultimately, on l2 December l990, Abner and Sion resolved to arbitrate their disputes before the Beth Din, and signed an agreement in the following form: *"We, the undersigned [Abner] and [Sion].... hereby agree to refer to arbitration the claim or cause which the said[Abner] alleges that he has against the said [Sion] for decision by Beth Din (Court of Chief Rabbi) according to the rules of procedure established for or customarily employed in references to arbitration before the said Beth Din.*

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   .....

   And we the undersigned, hereby do further agree each for himself to accept and perform the award of the said Beth Din touching the said claim or cause."

3. It appears from a leaflet described as *"Din Torah; Information for litigants and legal advisers. (Beth Din Leaflet No.4)"* that the system of law to be applied by the Beth Din is Jewish Law, albeit "*sometimes other systems of law may also be relevant ... by way of the doctrine of incorporation,..."* but the decision as to which law to apply *"is that of the Dayanim ...."*.

4. Abner's statement of case before the Beth Din asserted in summary that Abner had arranged the purchase of the carpets in Iran, and that Sion had undertaken to act on behalf of Abner in selling the same in the West. It was asserted that Abner and Sion were not partners, and that although no specific arrangements had been made, Sion should be allowed a reasonable remuneration calculated by reference to the net profits (para 4). Abner asserted that by virtue of entrusting Sion with the responsibility to resell, Sion had assumed a duty to account and to pay Abner the net proceeds of sale. He alleged that Sion had *"failed to discharge the contractual obligations which he assumed ..."*.

5. In Sion's response he made certain allegations unrelated to Abner's claim, but in relation to Abner's claim he asserted that:- l. Sion had supplied the funds for the purchase of carpets in Iran; 2. other carpets had been purchased by Abner contrary to Sion's instructions and at an overvalue so that a loss was made on re-sale; and 3. others had been purchased by Abner utilising the proceeds of sale of Sion's business in Iran. Thus it is alleged in para l2:- *"The transactions carried out by Abner ... were disastrous, inflicting substantial losses on Sion. Abner never paid anything for the price of carpets. All the funds were paid by Sion or advanced upon the undertaking of Sion. Sion had to borrow at prohibitive rates to repay the cost of these transactions and had to accept substantial losses in connection with the operation conducted by Abner."*

6. There was no reliance by Sion at this stage on any illegal activity in Iran as having any bearing on the obligations of either party.

7. In Abner's reply there was a reference to the fact that the carpets belonging to Sion which had been seized by the authorities, were seized because they were being smuggled out of Iran and to the fact that

it was intended, in order to free those carpets, that Abner would bribe the Revolutionary Guards. There was no reference to other forms of illegal activity in Iran.

8. However, in his statement before the Beth Din Abner described how he had found a way of making money by agreeing with diplomats that they would *"take carpets outside Iran for me, using their diplomatic immunity ..."*. Before the Beth Din there was no dispute that, as Abner now states in his affidavit, the carpets with which Abner's claim was concerned were smuggled out of Iran in breach of Iranian Revenue Controls and export controls.

9. By the award made by the Beth Din on 23 March l993, it is recited that *"Abner purchased quantities of carpets and exported them, **illegally** (our emphasis), out of Iran"*. There is further recognition of the illegal activities in Iran in other parts of the award. For example, in relation to quantum it is recognised that "By the very nature of the illicit enterprise, few records were kept ..." *(page 2 second paragraph). In assessing profits the award disallows the full sum claimed by Abner on the basis inter alia that no allowance has been made for "smugglers' fees" (see page 5 category B).*

10. The award was in favour of Abner, but not on the basis put forward by him that he was the owner of the carpets and that Sion had merely been acting as Abner's agent. As the award states: *"This line was subsequently abandoned since it was felt to be only of academic interest. The respective parties were entitled to a share of the profits by virtue of their contribution to the enterprise regardless as to who actually owned the carpets at the time. Indeed both parties conceded as much. The issue at stake is merely that of the percentage which each party ought to have."*

11. The award assesses each party's contribution as follows: *"Abner's role was as follows*

(a) To obtain local currency with which to purchase the carpets or to obtain the carpets on credit.
(b) To purchase the carpets (some with the assistance of Yossuf [a brother])
(c) To arrange for transportation out of Iran at considerable risk to himself [no doubt we interject, a further recognition of the illegal activity in Iran].

Sion's role was as follows:
(d) To pay foreign currency into various European or American Bank accounts, at Abner's instructions;
(e) To provide storage facilities in Europe;
(f) To sell the carpets."

12. The award then assessed Abner's share of the profits on all carpets, other than those originating from Sion's shop in Iran, as 50%; and on the those originating from the shop as 35%. The Dayan then assessed quantum by reference to individual categories of carpets and awarded Abner £576,574 and his costs.

The proceedings to enforce

13. Abner then applied ex parte under Section 26 of the Arbitration Act l950 to register the award as a judgment. That application was supported by an affidavit exhibiting the arbitration agreement and the award. It stated that (l) a dispute in connection with the profits arising from the sale of certain carpets imported from Iran had been referred to arbitration; (2) the award had been made; and (3) Sion had failed to comply with the award.

14. On 4 May l993 Master Gowers made an order granting leave to enter judgment for the sum of £576,574, and giving leave to enforce the award, but granting Sion liberty to apply within l4 days after service of the order to set the order aside, the order not to be enforced during that l4 days or final disposal of any application. The order was served on l6 June l993 and Sion applied by summons dated 28 June l993 issued in the Chancery Division to set aside the order. That application was supported by an affidavit of Mr Nadav Zohar sworn 6 July l993. That affidavit resisted enforcement on the grounds that faced with the extensive evidence of *"the illegality which was at the root of the enterprise on which [Abner's] claim was founded, and which the Beth Din clearly recognised was there, it was the obligation of the Beth Din or an arbitral tribunal to consider whether or not illegality rendered the plaintiff's claim void or unenforceable. This the Beth Din failed to do. In any event, it is [Sion's] case that the illegality rendered [Abner's] claim void or unenforceable in an English court, and that it would be contrary to public policy for an award founded on an illegal agreement or transaction to be enforced as a judgment of the High Court pursuant to section 26 of the Arbitration Act l950"*.

15. The affidavit also refers to the fact that independent of the point on illegality, it was the intention of Sion to attempt to appeal the award under the l950 and l979 Arbitration Acts.

16. By summons dated 6 July l993 Sion applied to transfer the application to set aside Master Gower's order to the Queen's Bench Division, and on the hearing of that application, on Counsel for Sion undertaking to issue any appeal not later than 1 October l993, the matter was transferred to the Queen's Bench Division. A notice of appeal was then issued against the award in the Commercial Court raising many grounds including a point on illegality. It contained an assertion that it had been agreed before Master Gowers that no leave to appeal would be required. An application to strike out that assertion was then made by Abner. On 4 February l994 Judge Phelan struck out that part of the notice of appeal. On 30 March l994 accordingly Sion issued out of time an application for leave to appeal the award. That application came on before Gatehouse J who ruled on 8 June l994 that irrespective of the question whether he would give leave to appeal out of time, he was satisfied that this was not a case for which leave to appeal should be given.

17. Sion still pursued an appeal from the ruling of Judge Phelan. That matter came before the Court of Appeal on l3 March l995 which upheld Judge Phelan. Passages in the judgment of the Master of the Rolls have been relied on before us. The Master of the Rolls said for example: *"It is accepted by both parties to the proceedings, and is the subject of no controversy, that this was a valid arbitration agreement recognised by English Law."*

He also said: *"In my view the argument advanced on this appeal, as before the judge, is quite simply an adventitious attempt to exploit an infelicity in the wording of the order made by Master Gowers.....It is in any event futile since leave to appeal has been refused, and since in all the circumstances the appeal itself, even if leave were granted, could have no hope of success".*

18. At one time it appeared that Mr Serota might seek to rely on this obiter dictum of the Master of the Rolls as assisting him in relation to the appropriate attitude of the English court to the point raised by Sion on illegality in the notice of appeal, but Mr Serota, it seems, was in fact arguing in the Court of Appeal at that juncture that there could be no question of a failure to deal with the effect of any illegality providing a ground of appeal. His submission was that any questions relating to illegality would arise only at the enforcement stage. On that basis, we for our part cannot see how Mr Serota for Abner can gain much assistance from that last comment. We would also say that even in relation to the first comment, the acceptance by the parties that the arbitration was valid, may not be the last word once the question of illegality and English public policy has to be considered on enforcement.

19. In relation to the application to set aside the order of Master Gowers, on l0 April l996 Mr Rosshandler swore a further affidavit on behalf of Sion. The first point taken relates to illegality. Additional points were however also taken which it is convenient to dispose of at this stage.

(l) Possibility of re-hearing before Beth Din in accordance with the rules of the Beth Din: There is a great deal of material in the bundles on this aspect. But on the hearing of this appeal Mr Bhalla made clear that no point now arose on it. Accordingly it is unnecessary to refer further to the point.

(2) Alleged compromise: The assertion is that at some stage prior to the reference to the Beth Din, a compromise was reached. As we read Sion's response in the arbitration, the point that there had been a compromise was taken, and indeed Mr Rosshandler says that the evidence of a compromise was before the Beth Din. That compromise was always denied by Abner, and the existence of the same was an issue to be decided in the arbitration. It did not go to the Beth Din's jurisdiction as suggested by Mr Rosshandler. Since further it would have been a complete answer to Abner's claims in the arbitration, it must follow that Dayan Berger rejected the defence of compromise, and on enforcement, it is not open to a party to attack the findings of the arbitrator as attempted on this issue.

(3) Claims by Sion against Abner: In Mr Bhalla's skeleton argument on this appeal he referred to two items; £95,000 which he asserted it was Abner's own case that Sion was entitled to set-off (para l5 page 25l), and a sum of £80, 000 which Abner in his statement before the Beth Din admitted taking from Sion's shop.(see para 45 of Mr Rosshandler's affidavit). In his statement to the Beth Din Abner says that he made clear that the £80,000 was included in the sum of £95,000. We put to Mr Serota that

it did seem from the calculation of profits set out in the award, that the admitted set-off of £95,000 had not been taken into account. He was not disposed to argue otherwise. Accordingly it would, if the award were otherwise enforceable, be right to make that enforcement subject to giving credit for the admitted figure of £95,000.

20. That enables us to turn to the principal issue on this appeal relating to the relevance of the illegality, to the question of enforcement.

Illegality issue

l. What is the law relating to illegality so far as the English court is concerned?

21. That point has been recently summarised in the judgment of Stuart-Smith LJ in a decision of the Court of Appeal in **Royal Boskalis NV v Mountain** [l997] 2 All ER 929 at 946:- *"What is the law so far as the English court is concerned? In* ***St John Shipping Corp v Joseph Rank Ltd [****l956] 3 All ER 683 at 687, [l957] l QB 267 at 283 Devlin J stated the law in relation to illegal contracts as follows:*

> *'There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it.'*

22. And in **Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall, third party)** [l96l] l All ER 4l7 at 424, [l96l] l QB 374 at 388 Devlin LJ said: *'The effect of illegality on a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is enforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely on his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio, and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.'*

23. Those are both cases where the proper law of the contract was English law, whereas in this case the proper law of the finalisation agreement is Iraqi law. But the principle that where one party to the contract intends it to be performed in an unlawful way it will not be enforced at his behest is only part of the wider principle that if both parties have that intent, neither can enforce it. This is the principle enunciated in **Foster v Driscoll , Lindsay v Attfield , Lindsay v Driscoll [**l929] l KB 470, [l928] All ER Rep l30 and **Regazzoni v K C Sethia (l944) Ltd [**l957] 3 All ER 286, [l958] AC 30l. In the application of this principle it is immaterial whether the contract is governed by English or foreign law and Rix J accepted this. He was, in my opinion, clearly right. (See **Regazzoni v K C Sethia (l944) Ltd [**l957] 3 All ER 286 at 288-289, 292-293, [l958] AC 30l at 3l7, 323 per Viscount Simonds and Lord Reid, Dicey and Morris on the Conflict of Laws (l2th edn, l993) pp l282-l283 and Cheshire and North's Private International Law (l2th edn, l992) p 504."

24. There is a distinction, which may not be unimportant in the context of this case, to be drawn between a 'joint venture' agreement with an object of committing illegal acts in a foreign and friendly state which will be totally unenforceable, and a contract which does not have that objective. In the latter case, the question may arise whether the plaintiff, in order to establish his rights, has to rely on his own illegal act.

2. Is it apparent from *the award itself* what type of contract the arbitrator was dealing with ?

25. We pose the question in this way because it seems to us important to emphasise that we are dealing with a case where it is apparent from the face of the award that (i) the arbitrator rejected Abner's case that he had exported carpets purchased by himself which had then been sold by his father on his behalf; and (ii) the arbitrator was dealing with what he termed an illicit enterprise under which it was the joint intention that carpets would be smuggled out of Iran illegally.

26. This was the view of Judge Langan as we understand it, and we did not understand Mr Serota to quarrel with that view.

27. It must follow that Dayan Berkovits was right in the affidavit he has sworn for the purposes of these proceedings that the arbitrator did not take the same view as an English court would have taken, but

considered the illegality to be of no relevance "since he was applying Jewish law, under which, any purported illegality would have no effect on the rights of the parties."

3. What attitude would the English court take if a foreign court had decided as a matter of fact that there was a contract entered into with the object of committing an illegal act in a foreign and friendly state, but by the law of the foreign court, either illegality of that sort had no effect on the rights of the parties, or the foreign court was empowered to award compensation, and had awarded compensation ?

28. Mr Serota drew our attention to Lord Goff's reference to New Zealand Legislation in his speech in **Tinsley v Milligan** [l994] l A.C. 340 at 364, which gives the New Zealand courts a very broad discretion to award compensation even though the illegal contract by the same legislation is recognised to have "no effect". He suggested that the English court should be prepared to recognise a system of law that showed a more relaxed approach to illegality than that shown by the English courts heretofore.

29. There are of course Conventions covering the enforceability of judgments which have been brought into effect in England by statute. There are in the result express statutory provisions which exclude from registration in England a judgment "which was in respect of a cause of action which for reasons of public policy ... could not be entertained by the registering court" (the Administration of Justice Act l920); or which provide that registration may be set aside if "the enforcement of the judgment would be contrary to public policy in the country of the registering court"(the Foreign Judgments (Reciprocal Enforcement) Act l933). The distinction between those two provisions may be important, the l933 Act being concerned with recognition of the *judgment*, and the l920 Act with the original cause of action. Dicey & Morris (The Conflict of Laws l2th Edn, Rule 44 p 5ll) suggests that the rule at common law is that a judgment is impeachable "on the ground that its enforcement or as the case may be, its recognition, would be contrary to public policy." It seems that there are very few cases in which foreign judgments in personam have been denied enforcement or recognition for reasons of public policy. Those relevant were examined by Colman J in **Westacre Investments Inc v Judoimport-SDPR Holding Co Ltd ,** unreported, l9 December l997. They included a decision of Astbury J in **In Re Macartney** [l92l] l Ch. 522 ; **Israel Discount Bank of New York v Hadjipateras** [l984] l W.L.R. l37; and Vervaaeke v Smith [l983] A.C. l45. In **Macartney,** Astbury J concluded that the principle that the English court would not enforce a contract against the public policy of this country wherever it was made, applied as *"directly to the enforceability of foreign judgments founded on contracts contrary to public policy or rights of that character."*

30. In relation to **Vervaeke v Smith** we gratefully adopt Colman J's synopsis and comments. It was a case *"in which a petitioner for a decree of nullity of an English marriage in the English courts on the grounds of lack of consent to the marriage, having failed to obtain such decree, obtained a declaration from the Belgian court that the English marriage, was void ab initio on the ground that the marriage was merely a device to obtain a British passport so that she could work as a prostitute without being deported and that the parties had no intention of living together. That was substantially the ground on which she had relied in the English courts. She then applied for a declaration in the English court that the Belgian decree was entitled to be recognised in England under the Foreign Judgments (Reciprocal Enforcement) Act l933 and the bilateral convention between the UK and Belgium. She lost at first instance and in the Court of Appeal. The House of Lords dismissed the appeal on two grounds. All members of the House concluded that the earlier English judgment gave rise to an estoppel per rem judicatam which precluded reliance on the Belgian decree. Secondly, Lord Hailsham LC and Lord Simon, with whom Lord Brandon agreed, held that recognition of the Belgian decree should be refused on grounds of public policy. Lord Simon observed at p l64 that:*

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

Although an English court would decline recognition of a foreign judgment 'with extreme reserve', the instant case called for that course. This was firstly because English public policy treated 'sham' marriages as valid in conflict with Belgian law. Secondly, since the marriage took place in England, English public policy should be preferred to Belgian law. The appellant first invoked the jurisdiction of the English courts before going to the Belgian courts. The marriage had its most real and substantial connection with England and by it the appellant took advantage of

English public law. The underlying reasons for the course adopted by the appellant was her attempt to succeed to property in England which she could only do if she were not married to Smith and validly married to the deceased owner of the property.

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

31. It may be that legislation of the New Zealand type would provide different arguments for the party trying to enforce a judgment because it could be said, first, that the judgment is not enforcing an illegal contract but awarding compensation pursuant to a perfectly valid statute; and thus, second, there is no reason in public policy not to recognise the judgment.

32. However, it would seem to us that if what the foreign court did was to recognise by its judgment that a contract had been entered into with the object of committing an illegal act in a state which England recognised as a foreign and friendly state, and to enforce the rights of the parties under it, then there would be no room for recognising the more relaxed approach of a different jurisdiction. That, as it would seem to us, is the very type of judgment which the English court would not recognise on the grounds of public policy.

33. We stress that we are dealing with a judgment which ***finds as a fact*** that it was the common intention to commit an illegal act, but enforces the contract. Different considerations may apply where there is a finding by the foreign court to the contrary or simply no such finding, and one party now seeks such a finding from the enforcing court.

34. Thus our conclusion would be that if the award were a judgment of a foreign court, the English court would not enforce it.

4. Does it make any difference that the question of enforcement relates to an arbitration award?

35. There are material distinctions between awards and foreign judgments. First, an award can only be valid if the arbitrator had jurisdiction founded on a contract between the parties. If that contract is itself invalid the award will be unenforceable. In this case we were referred to the cases relating to the separability of an arbitration clause. It was sought to demonstrate that the rather broad statement of Denning LJ in **Taylor v Barnet** [l953] l W.L.R. 562 that "an arbitrator has no jurisdiction or authority to award damages on an illegal contract" must be read in the context of the facts with which that case was concerned. The most important case in this area is **Harbour v Kansa** [l993] l Q.B. 70l where the Court of Appeal held that the arbitration clause in an insurance contract was separate from the main contract with the effect that (a) invalidity of the main contract did not deprive the arbitrator of jurisdiction, and (b) the arbitrator had jurisdiction to decide the question of illegality of the main contract.

36. But, the fact that in a contract alleged to be illegal the arbitration clause may not itself be infected by the illegality, does not mean that it is always so, and does not mean that an arbitration agreement that is separate may not be void for illegality. There may be illegal or immoral dealings which are from an English law perspective incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English law. The English court would not recognise an agreement between the highwaymen to arbitrate their differences any more than it would recognise the original agreement to split the proceeds. Ralph Gibson LJ in **Harbour** when dealing at 712F with a case concerned with betting and an arbitration provision collateral to that contract, **Joe Lee Ltd v Lord Dalmeny** [l927] l Ch. 300, recognised the possibility of an agreement containing an arbitration clause of such a nature that the arbitration clause itself was invalid. It must also follow that an arbitration agreement made separately in relation to an illegal or immoral dispute would not be recognised.

37. At one stage it seemed to us that Mr Serota was conceding that what Abner and Sion sought to have arbitrated was how to split the proceeds of a joint venture that had as its object the commission of offences in Iran. If that were so, we would incline to the view that the arbitration clause was invalid, so that there was no award to enforce. But, on reflection, and having analyzed the way the matter was put before the arbitrator, it seems to us that it is not fair to characterise the matter in that way. Disputes between Abner and Sion arising out of a claim by Abner for an account of the proceeds of sale, was what was referred to the arbitrator. It was during the arbitration that the arbitrator took the view that he was dealing with a joint venture with the objects we have already indicated.

38. Accordingly it seems to us that the original arbitration agreement was a valid agreement, and that it was within the jurisdiction of the arbitrator to consider questions of illegality insofar as they might affect the rights of the parties.

39. That brings us to the second possible distinction between a judgment and an award. In enforcing an award, whether by action or by registration under section 26 of the Arbitration Act, the plaintiff is enforcing a promise either implied into the reference to arbitration, or, as in this case, expressed in the reference to arbitration. If the reference to arbitration is valid, it can be argued, and is argued by Mr Serota, that since at the enforcement stage the court is only concerned with enforcement of that promise, the court should not examine what underlies the award any further. Thus, he argues, all that he has to establish is a valid arbitration agreement, an award, and a failure to meet the award.

40. The critical question is whether that submission is right and we now address that issue.

41. In **London Export Corporation v Jubilee Coffee Roasting Co. Ltd .** [l958] l W.L.R. 27l at 277 Diplock J said:- *"When the arbitration agreement has been construed and no breach of the agreed procedure found there may nevertheless arise a second and quite separate question: that is, whether, as a matter of public policy, a particular award, made pursuant to that agreed procedure, ought not to be enforced and ought, therefore, to be set aside; for an arbitrator's award, unless set aside, entitles the beneficiary to call upon the executive power of the State to enforce it, and it is the function of the court to see that that executive power is not abused."*

42. This passage was endorsed by McNair J in **James Laing Son & Co. Ltd. v Eastcheap Dried Fruit Company** [l962] l LLR 285 at 290.

43. An English court exercises control over the enforcement of arbitral awards as part of the **lex fori ,** whatever the proper law of the arbitration agreement or the place where the arbitration is conducted. If a claimant wishes to invoke the executive power in this country to enforce an award in his favour, he can only do so subject to our law. For the purposes of the present dispute, that means section 26 of the Arbitration Act l950. There was no express provision in that section that an award would not be enforced if enforcement was contrary to public policy; but there was such a provision in relation to foreign awards in section 37(l), and it is hard to suppose that a more liberal regime applied to English awards. (It is now expressly provided in section 68(2) of the Arbitration Act l996 that an award may be challenged on the ground that it is contrary to public policy; and section 2(2)(b) of that Act in effect provides that the enforcement of awards shall be governed by English law even if that is not otherwise the law applicable to the arbitration). It follows that an award, whether domestic or foreign, will not be enforced by an English court if enforcement would be contrary to the public policy of this country.

44. It is clear that it is contrary to public policy for an English award (i.e. an award following an arbitration conducted in accordance with English law) to be enforced if it is based on an English contract which was illegal when made. That follows from the decision of this court in **David Taylor & Sons Ltd. v Barnet Trading Company [**l953] l W.L.R. 562, where the award was based on a contract for the sale of Irish stewed steak at two shillings and four pence per pound, whereas the maximum price allowed under the Defence (General) Regulations was two shillings and three farthings per pound.

45. There was for some time a dispute as to whether that decision was based on the theory that an arbitrator had no jurisdiction to make an award on an illegal contract, or that it was misconduct for an arbitrator to do so. That dispute has been concluded, so far as this court is concerned, in the case of ***Harbour Assurance Co.(UK) Ltd v Kansa General International Insurance Co. Ltd.*** [l993] QB 70l. That was an action brought for a declaration that some reinsurance policies were void for illegality, and that the

plaintiffs were not liable under them. The illegality alleged was that the defendants were not registered or approved to carry on insurance or reinsurance business under the Insurance Companies Acts. The illegality was denied. This court granted a stay of the action in favour of arbitration, on the ground that the illegality pleaded did not affect the validity of the arbitration clause. All three members of the Court of Appeal held that the **David Taylor** decision was not based on jurisdiction but on misconduct by the arbitrator. It was also held that the arbitration clause in the **Harbour Assurance** contracts was wide enough to enable an arbitrator to decide on the illegality there alleged.

46. The **Harbour Assurance** case was not concerned with enforcement of an award, but with whether there should be a stay of legal proceedings in favour of arbitration. The illegality was at that stage contested, and at least in the view of Hoffmann LJ (at p.72l) it was open to question whether there was illegality such that the contracts were void ab initio. By contrast it may be that in the case of ***palpable illegality*** (to use the expression adopted by Colman J in **Westacre Investments Inc. v Judoimport - SDPR holding Co. Ltd .** l9 December l997 unreported), an English court would declare that there was no arbitrable dispute, or refuse to grant a stay in favour of arbitration, on the ground that an arbitrator could not lawfully enforce the contract. As already indicated, there may be classes of contract - trading with the enemy was cited as a plausible example, and the robbers referring their dispute would be another - where the making of the contract will itself be an illegal act, and where the court would be driven nolens volens to hold that the arbitration clause was itself void.

47. So we turn to the enforcement stage, on the basis (as we have already concluded), that the arbitrators had jurisdiction.

48. Even if we were wrong in the view already expressed that an arbitration agreement between robbers (for example) to arbitrate their disputes would itself be void, it is in our view inconceivable that an English court would enforce an award made on a joint venture agreement between bank robbers, any more than it would enforce an agreement between highwaymen, Everet & Williams Lindley on Partnership l3th Edn, p.l30 Note 23. Where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it. If Buxton J expressed a contrary view **in S.R. v H.H .** 8 December l994, unreported, we have to say that we do not agree with it. Mr Serota on this appeal accepted that an English court could go behind the award, at least if the arbitration was governed by English law.

49. The reason in our judgment is plain enough. The court declines to enforce an illegal contract, as Lord Mansfield said in **Holman v Johnson** (l775) l Cowp. 34l not for the sake of the defendant, nor (if it comes to the point) for the sake of the plaintiff. 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. In the present case the parties were, it would seem, entitled to agree to an arbitration before the Beth Din. It may be that they expected that the award, whatever it turned out to be, would be honoured without further argument. It may be that Abner can enforce it in some place outside England and Wales. But enforcement here is governed by the public policy of the ***lex fori .***

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

51. It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should enquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is

there anything to suggest that the arbitrator was incompetent to conduct such an enquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in International trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate enquiry into the issue of illegality.

52. That approach is in our view consonant with, and supported by, the recent authorities. In the first place it accords well with the rule that there can be a bona fide compromise of an issue as to whether a contract is illegal. That was decided by this court in **Binder v Alachouzos** [l972] 2 Q.B. l5l, where a contract recited that the parties had been advised by solicitors and counsel that the Moneylenders Acts did not apply to transactions which were the subject of legal proceedings between them, and went on to provide for a compromise. Lord Denning MR said (at p.l58): *"In my judgment, a bona fide agreement of compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was a fair arguable case for each. The agreement they reached was fair and reasonable. It should not be reopened. I agree with the judge below that this agreement of compromise was binding and I would dismiss the appeal."*

And Phillimore LJ (at p.l59) said: *"Speaking for myself, I think it is entirely plain that this was a bona fide compromise, and that there is nothing in the evidence here which could make this court say with any confidence that these were moneylending transactions, illegal transactions; and accordingly, as it seems to me, here the court is faced with a bona fide compromise of what was a question of fact. The terms of the agreement are not to be described as colourable. The court ought to be very slow to look behind an agreement reached in such circumstances as these. I cannot think that Mr Jackson has made out anything like a case which would be strong enough to justify this court in looking behind the terms of what was clearly a bona fide compromise, and I also would accordingly dismiss this appeal."*

Roskill LJ likewise emphasised (at p.l60) that the dispute was on a question of fact, and that the issue of fact was the subject of the compromise.

53. There are also cases directly in point. In **Soinco SACI & Anr v Novokuznetsk Aluminium Plant & Ors** l6 December l997, unreported, the issue was whether NKAP should have an extension of time for applying to set aside an order that a Swiss arbitration award be enforced as a judgment. The facts were that the contract provided for arbitration under the International Arbitration Rules of the Zurich Chamber of Commerce. The arbitrators considered an assertion of illegality by NKAP, and rejected it with reasons. Thereafter a decision of a Russian court, in proceedings at which only NKAP and the public prosecutor were present, held that the contract was illegal. A Swiss court was then asked to have the arbitration award revised and refused to do so. Waller LJ, (with whom Chadwick and Phillips LJJ agreed) said this at p.8: *"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."*

54. Emphasis was placed on the fact that it was an award with which the court was concerned, but at the same time the court did examine the way in which illegality had been dealt with by the arbitrators, and the reasoning of the arbitrators had not led to any anxiety that the question of illegality had not been dealt with properly.

55. Another recent and important decision is that of Colman J, in the **Westacre** case on l9 December l997. The underlying contract in that case was a consultancy agreement, under which it was said to be contemplated or intended (or both) that the plaintiffs would bribe Kuwaiti officials in order to obtain contracts for the purchase of military equipment. The contract was governed by Swiss law and provided for arbitration by the International Chamber of Commerce in Geneva.

56. The arbitrators were clearly a highly sophisticated tribunal composed of a German chairman (Dr Raeschka-Kessler), Professor Francois Perret (Swiss, later replaced by Mr Patry) and Professor Mitrovic (Yugoslav). They held by a majority that the underlying contract was not, (as it would seem in law and in fact), illegal. A Swiss court upheld the award.

57. After a lengthy review of the authorities, Colman J set out six principles which he held to be the law. The first three concerned the question whether an arbitrator has jurisdiction to decide whether the underlying contract is affected by illegality. His conclusion in principle (iii) was that it *"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."*

58. That is not very different from our own view already stated, that there may be cases where an arbitrator has no jurisdiction to make an award when a contract is said to be effected by an issue of illegality.

59. In principles (iv) to (vi), which will be found in the judgment of Colman J if and when it is reported, he deals with the stage of enforcement, although in principle (iv) he returns at the end to jurisdiction. His conclusion, with which we can readily agree, was this:- *"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 undisputed illegality."*

60. It may well be that the same rule applies to illegality by statute. We would not frame it in precisely the same way as Colman J. In our view it is not so much a question of what the arbitrator is ***entitled*** to do; the Dayan was ***entitled*** to make his award in the present case. But the court will not enforce it.

61. In other cases, Colman J holds that prima facie the court would enforce the resulting award; and with that too we agree. But, in an appropriate case it may enquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. We thus differ from Colman J, who limited his sixth proposition to cases where there were relevant facts not put before the arbitrator.

62. For completeness in considering the authorities we should refer to the decision of Streatfield J in ***Birtley & District Co-operative v Wendy Nook & District Industrial Co-operative Society [***l960] 2 Q.B. l. That was a dispute as to the territory available to the two societies, and the dispute was followed by an award. The judge said (at p.l4): *"There is nothing on the face of the award to indicate that it is an unreasonable restraint of trade, against the interest of the parties or the public. And in my view, I am not entitled to look behind the award and become in effect an appellate tribunal from the arbitrators."*

63. The **David Taylor** case had been cited to the judge. If rightly decided, his judgment must in our view have been based on the absence of prima facie evidence of illegality.

64. We were also referred to passages in Mustill & Boyd on Commercial Arbitration (2nd Edn.) pp ll3, l50, dealing with illegality. These passages were evidently based on the view previously held by many that the **David Taylor** case was based on lack of jurisdiction; and in any event the authors are tentative in their conclusions. These have been overtaken by subsequent authority.

65. We should make it clear that we have been considering only initial illegality, present when the underlying contract was made. Nothing that we have said touches on supervening illegality. That is, in the ordinary way, a defence either as constituting frustration or an allied topic under its own name. Arbitrators without doubt have jurisdiction to consider it; see ***Prodexport State Company for Foreign Trade v E.D. & F. Man Ltd .*** [l973] Q.B. 389. Whether and in what circumstances their award is enforceable in this country does not arise in this case.

66. Finally, under this head, we should state explicitly what may already have been apparent: when considering illegality of the underlying contract, we do not confine ourselves to English law. An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country. That is well established as appears from the citations earlier in this judgment. This rule applies as much to the enforcement of an arbitration award as to the direct enforcement of a contract in legal proceedings.

67. The award in this case, which purports to enforce an illegal contract, is not enforceable in England and Wales. In reaching that conclusion we are differing from Judge Langan. However, he was not referred to the ***Harbour Assurance*** case which threw a different light on the ***David Taylor*** case; and he did not have the advantage of the recent decisions in ***Soinco*** and ***Westacre.*** The judge was impressed by what the Master of the Rolls had said in an earlier stage of the dispute, that there was no prospect of an appeal against the award of the Beth Din succeeding. That may well be right. But it does not affect the question whether the award will be enforced here. As Mr Serota himself argued at that stage, illegality was a matter for consideration in enforcement proceedings and not on an appeal against the award.

5. Can Abner rely now on the fact that he might have put his case differently if he had known that English public policy would not allow him to succeed on the basis set out in the award?

68. There are various reasons why Mr Serota's argument that account should now be taken of the possibility that Abner might have relied on title to the carpets and the decision in the House of Lords of ***Tinsley v Milligan*** (supra) so as to achieve an award that might not have fallen foul of the public policy arguments. First, as we read the award, the arbitrator expressly rejected this basis for the claim and indeed he records the claim being abandoned. Second, it is not at all clear whether some claim based on title, if it had been maintained and succeeded, would have fallen within the principles pronounced in the majority speeches in that case. Third, and perhaps most importantly, the court is concerned with enforcing the award that is before it. That award refers on its face to an illegal object to the enterprise which the English court views as contrary to public policy. It is that award which the English court should not enforce.

Conclusion

69. In the result, the appeal should be allowed, judgment on the award set aside, and the order of Master Gowers reversed.

Order: Appeal allowed with costs; application for leave to appeal to the House of Lords refused.

MR BITU BHALLA and MR JONATHAN MILLER (instructed by Messrs Nabarro Nathanson, London WlX 6NX) appeared on behalf of the Appellant (Defendant).

MR DANIEL SEROTA QC and MR COLIN MANNING (instructed by Messrs Paisner & CO, London EC4A 2DQ) appeared on behalf of the Respondent (Plaintiff).