

The Autonomy of Arbitrators, and Fraud Unravels All

by STEVEN GEE QC*

I. COMPETING POLICIES

ARBITRATION PROCEEDINGS may be affected by perjured evidence given by a party, or his use of false documents, or corruption of witnesses. These are illustrations of fraud used by a party to secure success. There is a strong policy adopted internationally that a party who obtained an award through fraud should not be entitled to keep that award. Fraud cannot be allowed to pay. It is also not uncommon for a losing party to want to reopen proceedings so as to reverse the result. There is a strong internationally adopted policy favouring finality so that there can be an end to litigation, and so tending to shut out post award complaints. There is also a strong policy favouring matters being decided by an international arbitration tribunal, and for courts to uphold and support awards, and not to allow an attack on an award based on dissatisfaction with that tribunal's decision on the merits. The case should be heard and determined once, by the international tribunal selected as 'neutral',¹ and agreed upon, by parties from different states.

These policies can sometimes come into conflict. The potential for conflict between different public policies can be seen in case law concerning competition law and whether a state court should annul or refuse recognition to an award which might be contrary to that law.² In the context of fraud, conflict can arise

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¹ *Westacre Investments Inc. v. Jugo-Import SPDR Ltd* [1999] QB 740 at 770 identifying various factors which favour the support of international arbitration: holding parties to their contract, and assisting international trade through allowing selection of a tribunal viewed by commercial men as 'neutral'.

² *Eco Swiss China v. Benetton International NV* [1999] ECR I-3055 (holding that Article 81 EC is part of a Member State's public policy for the purpose of annulment of an award). In *SA Thalès Air Defence v. GIE Euromissile*, decided on 18 November 2004 (docket no. 2002/19606), the competition law issue had not been raised in the Paris arbitration and was raised for the first time before the Paris Court of Appeal, which held that for an award to be set aside on the grounds of public policy, the violation must be manifest (flagrant, real and concrete), so that a reviewing court can reject the annulment ground based on European competition law because the evidence and arguments submitted on the annulment application did not meet this threshold, and without having to review the competition case on its merits; see further the article by Thierry Thomasi in (2005) 8(2) *Int. ALR* 55, describing the standard of review adopted by the Paris Court of Appeal as 'minimalist'.

when a party says that an award has been obtained by fraud and that the arbitrators were deceived into making it by false evidence. Can it be reopened, who is to decide on the complaint, what is the test? What law governs which test is to be applied? If the award is a foreign award, should enforcement of the award be refused? What is the test? These questions should be viewed as part of a more general picture about the potential effects of alleged fraudulent conduct by a party on arbitral proceedings.

In different states, 'public policy' has different contents. There is no single internationally recognised yardstick even in the context of enforcement of foreign arbitral awards.³ Even within a state, public policy is notoriously 'an unruly horse'.⁴ So the answers will depend on the legal system. Nevertheless, whilst bearing in mind that one state's public policy may be materially different from another's, public policy in common law systems, and *ordre public* in civil law systems, are essential concepts when looking at these questions. This is because (1) the answers depend upon resolution of conflicting policies, and (2) the content of a state's policies can be influenced by the policies adopted by other states and international conventions, and the reasons for those policies.

In arbitration, public policies are seldom static. Fraud related policies are no exception. The view of the English legislature has changed on whether parties should be bound by an arbitration agreement to have issues of fraud determined in arbitration. There was a time in England when if there was an issue of fraud⁵ the court, under statute,⁶ could revoke an agreement to refer future disputes to arbitration. The person charged with dishonesty could ask to clear his name in public before a court, possibly with a jury, and there would be a right of appeal. The jurisdiction could be invoked by either party, albeit that the person making the allegation might well be refused revocation when the party charged wished the allegation to be dealt with in arbitration.⁷ This jurisdiction did not apply where the parties submitted an existing dispute to arbitration, because there was then not the same cogency for relieving a party of his contract to arbitrate. Under the Arbitration Act 1996 the jurisdiction has gone,⁸ and the parties are held to their agreement.

English public policy relevant to the merits of a case can sometimes have the emphatic consequence that the agreement to arbitrate is invalid or will not be enforced. This will be so, for example, where there is a serious illegality involving conduct which threatens the wellbeing of members of the community, for

³ The Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards by the Committee on International Commercial Arbitration of the International Law Association London Conference (2000).

⁴ *Richardson v. Mellish* (1824) 2 Bing. 228.

⁵ The jurisdiction did not apply to allegations which fell short of dishonesty (*Watson v. Prager* [1991] 1 WLR 726) or which were nebulous (*Camilla Cotton Oil Co. v. Granadex SA* [1976] 2 Lloyd's Rep. 10 at 16 'a concrete and specific allegation of fraud must be raised').

⁶ Arbitration Act 1950, s. 24(2). The same point could arise when a party sought a discretionary stay of an action so that the dispute could be resolved in arbitration.

⁷ *Cunningham-Reid v. Buchanan-Jardine* [1988] 1 WLR 678.

⁸ Section 107(2).

example, an arbitration clause in an arrangement between highwaymen to divide the proceeds,⁹ or in an arrangement to import illegal drugs. An arbitration clause in a gaming contract is invalid¹⁰ because the purpose of the legislation is to protect members of the public, and the court interprets the gaming laws as imposing invalidity in furtherance of an important social purpose. The force of a public policy which bars an arbitration agreement would equally invalidate any award made under such an agreement, leaving it susceptible to being set aside under the Act as either made by a tribunal without ‘substantive jurisdiction’,¹¹ or because the award is ‘contrary to public policy’.¹²

In England, there is no public policy requiring issues of fraud to be decided by the courts, and it is now common for arbitral proceedings to involve allegations of fraud. There are cases where fraud is simply an issue in an arbitration and is resolved by the tribunal. The award is final and conclusive. However, there can be a fraud issue in the arbitration which itself gives rise to a public policy issue. For example, it can be said that the arbitrator has found fraudulent conduct by a party which should have resulted in a different award had an important public policy been correctly identified and applied. Another example is where it is alleged that a party is running a dishonest case supported by perjured evidence. Where the fraud issue touches on the honesty of a party’s conduct of the proceedings, considerations of public policy arise which tend to point away from the finality of an award, and argue in favour of the intervention of courts to ensure that public policy on fraud is enforced.

II. FRAUD, ARBITRATION AND PUBLIC POLICY

*Commercial Union v. Lines*¹³ concerned an application to vacate part of an arbitration award. The arbitration proceedings were taking place in the USA and related to reinsurance contracts placed with Commercial Union or its predecessor in interest, as reinsurers, covering certain liabilities of a mutual insurance company organised in Massachusetts, Electric Mutual Liability Insurance Company (EMLICO), to its only commercial policyholder, General Electric (GE). Some three years after GE had made claims for asbestos and environmental clean up costs, EMLICO made a proposal to the authorities in Massachusetts and Bermuda so that it could change its domicile from Massachusetts to

⁹ *Soleimany v. Soleimany* [1999] QB 785 at 797 F–G, and 800 A–B, referring to *Everet v. Williams* noted in *Lindley on Partnership* (13th edn, 1971), p. 130 note 23.

¹⁰ *Harbour Assurance Co. (UK) v. Kansa General International* [1993] QB 701 (the issue of illegality of the reinsurance because of lack of authorisation to carry on insurance business, and its consequences on the reinsurance, were within the arbitration clause and the dispute was to be determined by the arbitrators). In contrast, an arbitration clause in a gaming contract, which is void under s. 18 of the Gaming Act 1845, is under English public policy also void: *O’Callaghan v. Coral Racing Ltd*, *The Times*, 26 November 1998.

¹¹ Arbitration Act 1996, s. 67 and *see* s. 30(1)(a): there is a lack of ‘substantive jurisdiction’ when there is not a valid arbitration agreement.

¹² *Ibid.* s. 68(2)(g).

¹³ 378 F.3d 204 (2d, Cir. 2004), decided by Feinberg and Cabranes, Circuit Judges, under Second Circuit Local Rule 0.14 (b), Judge Kravitz having recused himself.

Bermuda. This proposal was approved, and implemented. EMLICO then petitioned to be wound up in Bermuda. Commercial Union alleged that EMLICO had achieved its move to Bermuda by fraud on the authorities, and that it had done this in order to avoid being liquidated in Massachusetts, where the consequences would have been much more advantageous for Commercial Union, the reinsurers. The parties agreed that this fraud issue would be resolved as part of the arbitration proceedings. The arbitrators found in phase I of the arbitration that there had been a fraud on the authorities, but decided that the reinsurance contracts would not be rescinded. In a clarification of their decision, the arbitrators said that in adjusting the parties' rights in the further phases of the arbitration they would adjust 'for any differences that may have resulted from the deceitfully obtained change of jurisdiction ... [W]hen the arbitration is completed, [Commercial Union] will end up in the same position as it would have been in had there been no re-domestication'. Commercial Union challenged this award on the ground that in practice the arbitrators would not be able to achieve their stated objective. The district court rejected the challenge and there was an appeal by Commercial Union to the Second Circuit.

The Second Circuit observed that the case did not involve any allegation that the arbitrators did not have jurisdiction to decide the fraud issue, or that Commercial Union's agreement to jurisdiction had itself been induced by fraud. The court also distinguished the situation where an award has been obtained by fraud, or bias, or other conduct, which corrupts or taints the arbitral process. Under the Federal Arbitration Act,¹⁴ and the English statute,¹⁵ such grounds enable the award to be challenged.

In many jurisdictions, the opportunities for judicial review are limited. For example, the Second Circuit has referred to the 'heavy burden' on an applicant 'of showing that the award falls within a narrow set of circumstances delineated by statute and case law'.¹⁶ The Second Circuit 'does not recognize manifest disregard of the evidence as a proper ground for vacating an arbitrator's award'.¹⁷ One can pass through the eye of the needle by showing that the award was made in 'manifest disregard of the law', identifying law which was 'well defined, explicit and clearly applicable to the case',¹⁸ and which the arbitrators knew of and refused to apply, or ignored altogether.¹⁹ This jurisdiction springs not from the words of the Federal Arbitration Act but has been shaped judicially

¹⁴ 9 U.S.C. §10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers).

¹⁵ The 'serious irregularity' jurisdiction under Arbitration Act 1996, s. 68.

¹⁶ *Dufenco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003); *Wallace v. Buttar*, 378 F.3d 182 (2d. Cir. 2004); John Fellas (ed.), *Transatlantic Commercial Litigation and Arbitration* (Oceana, 2004), pp. 654–656.

¹⁷ *Wallace v. Buttar*, 378 F.3d 182 (2d. Cir. 2004).

¹⁸ *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d. Cir. 1997).

¹⁹ *Bear Stearns & Co. v. 1109580 Ontario*, 409 F.3d 87 (2d. Cir. 2005). In applying the 'manifest disregard' test the court does not assume that the arbitrators should approach the law with the same level of sophistication as would be brought to bear by a 'highly skilled attorney'. Normally, an arbitrator is assumed to start the arbitration with a 'blank slate', and has to be educated in the course of it: *Wallace v. Buttar*, 378 F.3d 182 (2d. Cir. 2004); so the less the legal submissions made in the arbitration the more closed the eye of the needle.

based on a dictum in the US Supreme Court.²⁰ In England there can be an appeal on a point of law but only with leave of the court, which will be normally only be granted when the award is obviously wrong.²¹ This deference to awards of arbitrators reflects the agreement of the parties that the merits of their dispute are to be decided by arbitration;²² respect for that agreement involves upholding awards even if they could be wrong. It is a policy which applies to issues of fraud, which are within the four walls of an agreement to arbitrate.

The Second Circuit described the case as ‘highly unusual’, ‘without clearly governing precedent, where the analysis essentially pits the public policy favouring arbitration ... against the judicial policy of refusing to lend [the court’s] power to assist or protect a fraud’, citing from a Supreme Court case, decided more than a century ago, where the court refused to enforce a trust which arose out of a transaction procured by the plaintiff’s fraud.²³ The judgment continued: ‘the district court ... did not consider whether liquidation in Bermuda could affect the results of the arbitration ... and did not have the opportunity to consider Commercial Union’s allegations [about] phase II’ in which EMLICO had been awarded over US\$36 million, when Commercial Union contended that had there been a liquidation in Massachusetts it would only have been responsible for US\$191,000. The appeal was allowed and the case remitted to the District Court to ‘address whether liquidation in Bermuda ... could affect the results of the arbitration, and whether confirming the awards in phases I and II would violate the court’s equitable principles’.

On the one hand, it can be said that the decision of the Second Circuit in this case transferred the issue of the consequences of the fraud from the arbitrators to the district court, and thus by-passed the awards. If it applied to a case in which arbitrators found that there was fraud by one party on the other, the decision of the arbitrators about the consequences of that fraud would be open to review on the merits. But this does not appear to be the policy of the Federal Arbitration Act, which directs the court to order arbitration, and contains no exception for issues about the consequences of an established fraud.²⁴ One can understand why there is a strong public policy of ensuring that a fraudster does not benefit from his fraud, but it is also to be expected that commercial arbitrators would understand and apply this policy. The tribunal’s clarification of the award in phase 1 illustrated this. On this argument what should have prevailed was the federal policy favouring arbitration and the awards should have been left alone.

²⁰ *Wilko v. Swan*, 346 U.S. 427 (1953), the decision itself was subsequently overruled; see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

²¹ *CMA CGM SA v. Beteiligungs-KG MS ‘Northern Pioneer’* [2003] 1 WLR 1015.

²² *First Options of Chicago Inc v. Kaplan*, 514 U.S. 938 (1995) explaining why the deference does not extend to the issue of whether the respondents had agreed to arbitrate the dispute.

²³ *Kütchen v. Rayburn*, 86 U.S. 254, 262 (1873).

²⁴ 9 U.S.C. §4 (‘The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement’).

On the other hand, the contrary argument justifies the decision as application of a federal public policy deterring fraud on public authorities. Since the arbitrators had already decided in phase I that there had been a deception of the authorities in Massachusetts and Bermuda, the award on its face engaged the public policy and required its enforcement. The case was outside the Federal Arbitration Act,²⁵ because the award was not ‘procured by corruption, fraud, or undue means’.²⁶ The judgment spoke of a ‘well defined’ and ‘dominant’ policy that the court must not assist a fraud. It was the grip of an overarching public policy, one which is specific, limited in scope, and of high importance, which produced the setting aside of the awards because the fraud of the party who deceived the authorities must not be allowed to pay.

A public policy issue can arise on an application to enforce an award. It can be argued with some force that where a public policy point arises which would be relevant to enforcement of the award by the reviewing court, there should be a corresponding power of review. It would be odd if that court refused to review the award, leaving it as a valid award available for enforcement abroad, but then declined itself to enforce it on grounds of public policy. In *Soleimany v. Soleimany*,²⁷ the arbitral tribunal found on the face of the award that there was a joint venture between father and son to smuggle Persian carpets out of Iran illegally under Iranian law. The London Beth Din, which was the arbitral tribunal, applying Jewish law, considered the illegality to be irrelevant. The English Court of Appeal refused to enforce the award because it was founded on a contract to commit acts of smuggling in Iran. The reasons for the decision regarded the arbitration agreement as valid and did not justify refusal of enforcement of the award by reference to any absence of jurisdiction of the arbitral tribunal.²⁸ The decision refused enforcement of the award as being contrary to English public policy. In principle the same result would be open to a foreign court which had been asked to enforce that award under the terms of the New York Convention.²⁹

There is a dictum in *Soleimany v. Soleimany*³⁰ which states that the public policy point would not have grounded an appeal against the award, citing Sir Thomas Bingham MR at an earlier stage of the case. Under section 69 of the Arbitration Act 1996, leave to appeal on a point of law can only be granted if the question of law was ‘one which the tribunal was asked to determine’.³¹ In fact, the smuggling was disclosed to the Beth Din but the pleadings and argument had not raised the point of law, and so section 69 could not be successfully invoked. However, under section 68, the court has a power to set an award aside when there has been ‘serious irregularity affecting ... the award’. Section 68(2)(g) of the Act provides

²⁵ 9 U.S.C. §10(a).

²⁶ Which can include sufficiently immoral or illegal means.

²⁷ [1999] QB 785.

²⁸ [1999] QB 785 at 797C–798B.

²⁹ Article V.2(b) allowing refusal of recognition and enforcement where this would be ‘contrary to the public policy of that country’.

³⁰ [1999] QB 785 at 804 A–C.

³¹ Arbitration Act 1996, s. 69(3)(b).

that serious irregularity includes ‘the award ... being contrary to public policy’. So the reasons for the refusal to enforce would have been equally relevant to an application by the defendant to set aside the award under section 68 because it was contrary to public policy. On this analysis, *Commercial Union v. Lines*³² and *Soleimany v. Soleimany*³³ can be viewed as applications of specific public policies of deterring fraud on public authorities, or smuggling, whether at the seat of the arbitration or abroad, and which are enforced through setting aside an award or refusing to enforce it.

A significant aspect of both decisions is that the improper conduct was found to have occurred on the face of the award. Once the facts engaging the public policy were in the award, the importance of the public policy gave no scope for deferring to the decision of the arbitrators. These cases are different from those where the award is silent about the alleged fraud, or where the arbitrators have positively found that there was no fraud, which give rise to a preliminary question on just how far the court should inquire into the fraud allegation.

If one changed the facts in *Commercial Union v. Lines* and the seat of the arbitration had been abroad and the award had been confirmed by the court exercising supervisory jurisdiction, nevertheless the same public policy would have been relevant to whether the federal court should have refused to enforce the award based on the public policy of the enforcing state, the ground in Article V.2(b) of the New York Convention. An enforcing court has to apply the particular public policy of that state on enforcement of an international award; there is no single ‘global standard’.³⁴ The approach adopted by most courts has been severely to limit the grounds on which a public policy objection will be entertained, in favour of a strong policy of enforcing Convention awards.³⁵ The number of cases where enforcement is refused on this ground are few. Often cited are the words of Judge Joseph Smith in the Second Circuit that enforcement of a foreign arbitral award may be denied on public policy grounds ‘only where enforcement would violate the forum state’s most basic notions of morality and justice’.³⁶ There are public policies of different strengths and it is only those of sufficient power and importance in the enforcing state which can overcome the current in favour of the enforcement of a Convention award.

Because there was on the face of the award in phase I a finding of fraud on a public authority in the USA, as well as fraud on the authorities in Bermuda, this could well have sufficed to open up to close judicial scrutiny the large financial award made in phase II to see whether enforcement would have been contrary to

³² 378 F.3d 204 (2d, Cir. 2004), decided by Feinberg and Cabranes, Circuit Judges, under Second Circuit Local Rule 0.14 (b), Judge Kravitz having recused himself.

³³ [1999] QB 785.

³⁴ Audley Sheppard, ‘Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?’ in (2003) 1(2) *Oil Gas and Energy Law Intelligence* (March).

³⁵ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, 2004), pp. 452–453; and see *Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir, 2004) under section II A of the judgment.

³⁶ *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l’Industrie du Papier RAKTA and Bank of America*, 508 F. 2d 969 (2nd Cir., 1974).

public policy in this sense. Similarly, crucial in *Soleimany v. Soleimany* was the public importance of discouraging smuggling. A contract for corruption through bribery of foreign public officials would fall within this category.³⁷ Some other illegal conduct abroad, which was not in itself immoral or of great turpitude or damaging to the public interest, would not suffice. The narrowness of this eye of the needle can be seen from the fact that an award may be enforced in a state even though had the claim been fought out on the merits in the courts of that state there would have been a ‘public policy’ defence to the claim on the merits. An example is *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd*³⁸ where the illegality was the employment of a ‘middle man’ to obtain a public contract, there was no bribery or corruption, and the award was enforced in England under the Convention. Because this performance of the contract was illegal abroad, at the place of performance, it would have given rise to an English public policy defence to a claim on the contract in England, whether or not that contract was governed by English law, because performance involved the doing of an act in a friendly foreign state which was illegal there.³⁹ What one sees from these cases is that once fraud or corruption is proved, there is unleashed a public policy against enforcement of an award which is of great force.

III. FRAUD AND THE AGREEMENT TO ARBITRATE

(a) *Substantive Jurisdiction of Arbitrators*

The substantive jurisdiction of an arbitral tribunal depends on the agreement of the parties to arbitrate. Sometimes the argument is that there is simply no agreement at all, the contract is void; it never existed. Examples are where the respondent says that the contract has been forged, or he never signed it,⁴⁰ or that there was no authority to conclude it on his behalf,⁴¹ or that the agreement to arbitrate was with someone else, or that his signature to an agreement was affected by a fundamental mistake: he thought he was signing a Christmas card and in fact signed the contract. In both England and under the Federal Arbitration Act it is for the court to decide whether there was a binding agreement, and the arbitrators’ decision on that issue is open to attack on the merits in court.⁴² There is an exception when the parties have agreed to arbitrate that issue.⁴³

³⁷ *Westacre Investments Inc. v. Jugo-Import SPDR Ltd* [2000] QB 288 at 315A–F (‘public policy of the greatest importance’).

³⁸ [1999] 2 Lloyd’s Rep. 222.

³⁹ *Regazzoni v. K.C. Sethia (1944) Ltd* [1958] AC 301 at 317.

⁴⁰ *Chastain v. Robinson Humphrey Co.*, 957 F 2d 851 (CA 11 1992).

⁴¹ *Sandoik AB v. Advent International Corp.*, 220 F.3d 99 (CA 3, 2000) (holding that the party suing on a contract containing an arbitration clause could require the issue of whether there is a contract to be decided by the district court when the defendant denied that it had been signed with its authority).

⁴² William W. Park, ‘The Arbitrability Dicta in *First Options v Kaplan*: What sort of Kompetenz-Kompetenz has crossed the Atlantic?’ in (1996) 12 *Arb. Int.* 137; Peter Aeberli, ‘Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map’ in (2005) 21 *Arb. Int.* 253; *Vee Networks Ltd v. Econet Wireless International Ltd* [2005] 1 Lloyd’s Rep. 192 at [22]–[25].

⁴³ *Vee Networks Ltd v. Econet Wireless International Ltd* [2005] 1 Lloyd’s Rep. 192 at [26].

(b) *The Supreme Court Decision in Prima Paint*

However, there are cases in which an agreement was made and the argument is not that the contract is void but that it was voidable and has been avoided. In the USA, for cases under the Federal Arbitration Act a solution has been found based on the interpretation of that legislation, and the notion that the arbitration clause is a separate contract from the agreement containing it. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁴⁴ a consultancy agreement with the defendant had been entered into shortly before the plaintiff agreed to purchase the defendant's business. The plaintiff alleged that the earlier agreement had been obtained by fraudulent misrepresentation about the solvency of the business. There was nothing to suggest that the arbitration clause itself was the subject of some separate fraud inducing agreement to it. The minority judgment in the Supreme Court stated that:

Section 4 merely provides that the court must order arbitration if it is 'satisfied that the making of the agreement for arbitration ... is not in issue'. That language, considered alone, far from providing an 'explicit answer', merely poses the further question of what kind of allegations put the making of the arbitration agreement in issue.

However, the majority judgment held that section 4 required the court to order arbitration when it was not in issue that the agreement to arbitrate had been made. The legislative wording only allowed an inquiry into the validity of the agreement to arbitrate itself, and did not permit an investigation into the separate question of whether the contract containing the arbitration clause had been induced by fraud. Because the arbitration clause in the consultancy agreement was a distinct contract from the consultancy agreement itself, the fraud allegation concerning conclusion of the consultancy agreement did not make the arbitration agreement invalid.

The reasoning in *Prima Paint* is also applicable in the USA to arguments about the invalidity of an arbitration agreement based on illegality under state law. In *Buckeye Check Cashing Inc. v. Cardegna*,⁴⁵ the defendants entered into deferred payment transactions with the petitioner which included an arbitration clause, and subsequently alleged that the transactions charged 'usurious interest' and were illegal under Florida legislation which protected borrowers. The Supreme Court of Florida declined to enforce the arbitration clauses because of the allegations of illegality. To do so 'could breathe life into a contract that not only violates state law, but also is criminal in nature'. The Supreme Court reversed. There was a distinction between impugning the agreement in which the arbitration clause was contained and impugning the agreement to arbitrate. The Federal Arbitration Act 'created a body of federal substantive law'⁴⁶ which applied to state claims in

⁴⁴ 388 U.S. 395 (1967), approving *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, cert. granted, 362 U.S. 909, dismissed, 364 U.S. 801.

⁴⁵ Decided 21 February 2006.

⁴⁶ *Southland Corp. v. Keating*, 465 U.S. 1 (1984) at 12, referring to *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* 460 U.S. 1, 25, and note 32.

state courts, as well as claims in federal courts. The majority followed *Prima Paint*, holding that the arbitration clause was severable and that unless there was a challenge to the validity of the arbitration clause itself the issue of the validity of the main agreement was for the arbitrator.

The Supreme Court of Florida had applied state law in holding that the legislation in Florida would have the effect of invalidating the arbitration clause as well as the transaction if that transaction contravened the legislation. The Supreme Court held that this was inconsistent with section 2 of the Federal Arbitration Act and the national policy underlying it, supporting the enforcement of arbitration agreements. Section 2⁴⁷ provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The words ‘involving commerce’ taken with the legislative history pointed towards the provision having been enacted under the Commerce Clause of the US Constitution for the purpose of regulating commerce. If state legislation could invalidate an arbitration clause this would be a substantial inroad into the federal policy favouring arbitration and could stultify that policy. Therefore, Congress by the Federal Arbitration Act had withdrawn the power of the states to require the resolution of claims in a court, which the contracting parties had agreed in writing ‘in any maritime transaction or a contract evidencing a transaction involving commerce’ to resolve by arbitration. The words ‘save upon such grounds as exist at law or in equity for the revocation of any contract’ do not extend to grounds of invalidity of the arbitration clause based on state legislation, and therefore that legislation was to that extent invalid under the Supremacy Clause of the US Constitution.⁴⁸ The word ‘contract’ in the section includes a purported contract which might be invalid under state legislation. It is only federal and not state legislation which can potentially have the effect of invalidating an arbitration clause which comes within section 2 of the Federal Arbitration Act. This would be so whether the state legislation purported to make the arbitration clause void or voidable.⁴⁹

The reasoning is consistent with the potential for a national policy of sufficient strength invalidating an arbitration clause, for example an arbitration clause in a contract to import illegally cocaine into the USA would be struck down by the

⁴⁷ 9 U.S.C. §2.

⁴⁸ Applying *Southland Corp. v. Keating*, 465 U.S. 1 (1984) at 4–5, which also decided that the US Supreme Court should hear the appeal on the issue of the validity of the arbitration clause before the state litigation proceeded further, because otherwise the national policy would be eroded.

⁴⁹ This point was raised by Ginsburg J in the course of the oral argument: Transcript at p. 12(7)–(13) and p. 32(1)–(19).

national policy underlying federal legislation controlling drugs.⁵⁰ An extreme example relied on by the respondent in argument was an arbitration clause in a contract to commit a murder. The respondent suggested that because murder is a criminal offence under state law, if the argument of the appellant were correct such an arbitration clause would be valid under section 2, and this would be an unacceptable conclusion. However, a contract to commit a murder is contrary to public policy at common law, and the agreement to arbitrate would itself be part of the agreed plot. That example would therefore come within the words ‘save upon such grounds as exist at law ... for the revocation of any contract’. The same reasoning could apply to an arbitration clause in a contract which on analysis was a conspiracy to defraud third parties, or part of a document which was itself to be used to deceive and defraud a public authority.

(c) *Effects of an Allegation that the Main Contract is ‘Voidable’ and has been Avoided*

Under English law there are various matters which affect conclusion of the contract which can be spoken of as rendering it ‘voidable’. Examples are duress, misrepresentation, undue influence, and non-disclosure on an insurance contract. In the case of fraudulent misrepresentation, the victim has a choice whether to rescind the contract or to affirm it and that choice remains open until either he has elected between these choices or where the lapse of time is so great that he may be treated as having elected to affirm the contract.⁵¹

In *Heyman v. Darwins*,⁵² the House of Lords decided that where a contract is discharged by repudiation or frustration, the arbitration agreement still applies. The case of voidness was distinguished. The distinction was drawn between the enforceability of an arbitration agreement and of the agreement containing it:⁵³ in England it is established both by case law and by statute⁵⁴ that subject to contrary agreement, which would include contrary provision by the proper law governing the arbitration agreement, ‘The arbitration clause constitutes a self-contained contract collateral or ancillary to the [contract containing it]’.⁵⁵ In *Heyman v. Darwins*, Lord Macmillan, with whom Lord Russell agreed, drew that distinction. But he also said:

a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside.

⁵⁰ *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) assumed that this could happen, thereby rendering a claim non-arbitrable, but rejected the argument in the context of civil enforcement of antitrust legislation in an international arbitration.

⁵¹ *Clough v. London and North Western Railway Co.* (1871) LR 7 Ex. 26 at 34 and 35, followed in *Kwei Tek Chao v. British Traders* [1954] 2 QB 459 at 474–475.

⁵² [1942] AC 356.

⁵³ [1942] AC 356 at 473 (Lord Macmillan), 378 (Lord Wright), 392 (Lord Porter).

⁵⁴ Arbitration Act 1996, s. 7.

⁵⁵ *Bremer Vulkan v. South India Shipping* [1981] AC 909 at 980 per Lord Diplock;⁵⁵ *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] 3 WLR 129 at [21]: ‘It is part of the very alphabet of arbitration law’.

On the other hand, a different view was expressed by Lord Wright and Lord Porter. Lord Wright said of 'fraud, or duress, or mistake, or illegality' that 'it would be a question of construction whether the collateral arbitration clause could be treated as severable and could be invoked for settling such a dispute'.⁵⁶ Lord Porter could envisage a suitably clearly worded arbitration agreement which foresaw a dispute about fraud or concealment and to which effect would be given.⁵⁷ He added that 'It may require very clear language to achieve this result'.

In *Monro v. Bognor Urban District Council*,⁵⁸ there was a very widely formulated arbitration clause in a building contract, covering any dispute 'upon or in relation to or in connection with the contract'. The plaintiff builder alleged that he had been induced to enter into that contract by fraudulent misrepresentation. He claimed damages for the fraudulent misrepresentation and a *quantum meruit* for the work he had done. The Court of Appeal refused to stay the action. Pickford LJ considered that, because it was not an action on the contract, it did not come within the arbitration clause. Bankes LJ held because 'the claim' was formulated in the way that it was and asserted the consequence that 'the contract never was binding', therefore the dispute did not come within the clause. This case has often been cited in argument in subsequent cases for the proposition that where a plaintiff avoids the contract for fraud he is not bound by the arbitration clause. But the reasoning of Pickford LJ is perplexing because the clause depended on there being a nexus between the 'dispute' and the contract, and there appeared to have been more than sufficient connection because the defence to the claim was about whether the contract governed the substantive rights of the parties. The criticisms about the reasoning based on interpretation of the clause made by the Court of Appeal in *Ashville Investments Limited v. Elmer Contractors*⁵⁹ were entirely justified.

However, May LJ said that where the contract has been rescinded for fraudulent misrepresentation, the arbitrator cannot have jurisdiction to decide the dispute because he cannot 'adjudicate upon his own jurisdiction',⁶⁰ and Balcombe LJ observed trenchantly that the judgment of Bankes LJ had 'a ratio ... which is clearly right: an arbitrator cannot have jurisdiction to decide that the contract under which he is appointed is void or voidable, since by doing so he would be destroying the very basis of his own position'.⁶¹ Neither judge referred to the contrary dicta of Lord Wright and Lord Porter, two commercial judges of great eminence, nor to the analysis of Diplock LJ in *Mackender v. Feldia*⁶² about the

⁵⁶ [1942] AC 356 at 378.

⁵⁷ [1942] AC 356 at 392.

⁵⁸ [1915] 3 KB 167.

⁵⁹ [1989] QB 488 at 499–500 and 511–512. This was a case holding that a rectification claim came within a widely drawn arbitration clause. A rectification case has the similarity to a misrepresentation case in that it concerns whether as a matter of interpretation of the arbitration clause it includes within its scope a question about the legal effects of precontractual conduct leading up to conclusion of the main contract.

⁶⁰ [1989] QB 488 at 499A–499G.

⁶¹ [1989] QB 488 at 504B–H.

⁶² [1967] 2 QB 670.

effect of alleged voidability of an insurance contract caused by non-disclosure. Bingham J found the judgment of Pickford LJ ‘puzzling’ and that of Bankes LJ:

not ... entirely easy to follow ... but it may perhaps have been in his mind that an arbitrator could not have jurisdiction to decide a claim advanced by a party who challenged the existence of the contract from which the arbitrator’s jurisdiction was said to derive.

In *Mackender v. Feldia*, the Court of Appeal gave effect to an exclusive jurisdiction clause in favour of the courts of Belgium, setting aside leave to serve out of the jurisdiction English proceedings concerning the insurance contract, notwithstanding that the insurance contract was said by the plaintiff to have been avoided. The plaintiff remained bound by the clause. Diplock LJ said:

The fallacy in the argument [of the plaintiff] ... is that when what is said to be a ‘voidable’ contract is said to be ‘avoided’, that does not mean that the contract never existed but that it ceases to exist from the moment of avoidance, and that upon its ceasing there may arise consequential rights in respect of things done in performance of it while it did exist which may have the effect of undoing those things as far as practicable. It is sometimes sought to assimilate the concept of avoidance of a voidable contract to the concept of *non est factum* which prevents a contract coming into existence at all ... [T]his is specious ... fraud may raise other considerations into which it is not necessary to go.

This passage, up until the last sentence, is describing that the effect of entering into an agreement as a result of inducement by non-disclosure is that there is a valid contract. This must be so because the inducee has the option of avoiding the contract, but no obligation to do so. The same is the case for fraudulent misrepresentation. The victim may lose that right of rescission through delay or affirmation. Therefore, to refer to a contract induced by fraud as ‘never binding’ or a nullity is incorrect. Bankes LJ in *Monro*, and the minority judgment in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁶³ did just that.

The last sentence quoted from Diplock LJ is referring to the strong policy of English law denying the perpetrator any advantage from his fraud, to give the victim proper redress, and not to allow fraud to pay. It is a purpose of the law both to deter fraud, and to carry into effect a moral imperative to provide the victim with redress.⁶⁴

In *Harbour Assurance Co. (UK) v. Kansa General International*,⁶⁵ it was alleged by the plaintiffs that the contracts of insurance written by the defendants and retroceded to the plaintiffs had been written without authorisation from the DTI and were therefore illegal and rendered ‘void’ by statute. It was argued that the alleged illegality also rendered ‘void’ the arbitration agreement in each contract of retrocession. The Court of Appeal decided that public policy did not strike down

⁶³ 388 U.S. 395, 412 (1967): ‘If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated’.

⁶⁴ *Smith New Court Securities v. Citibank NA* [1997] AC 254 at 279F–280C.

⁶⁵ [1993] QB 701.

the arbitration clause in the retrocession agreements. Steyn J at first instance⁶⁶ considered that it was possible for the issue of fraudulent misrepresentation to fall within the scope of an arbitration agreement. He said that 'the inexorable logic of *Mackender v. Feldia* requires me to hold that a question of voidability for fraudulent misrepresentation is just as much capable of being referred to arbitration as an issue of avoidance for innocent misrepresentation'.⁶⁷ It was argued on the appeal that this was incorrect,⁶⁸ but as Hoffmann LJ pointed out: 'In every case ... the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause'. This is the same distinction as that drawn by the majority of the US Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* As he pointed out, there is a question of policy whether the rule which invalidates the contract containing the clause should also as a matter of policy strike down the validity of the arbitration clause. That policy question is one which applies to allegations of fraudulent misrepresentation.

Hoffmann LJ also pointed out in his judgment that because the arbitration agreement is collateral to the main agreement, there is the possibility of having a valid arbitration agreement even though the main agreement is void.⁶⁹ The agreement to arbitrate is not formulated subject to a condition precedent that the main agreement is valid. There is consideration for it either because that consideration consisted of the act of purporting to conclude the main contract, or because it provides its own consideration, being for the benefit of each contracting party. If one considers the position where the main agreement is said to have been avoided, because the arbitration agreement is a separate agreement there is no inconsistency in saying that it remains in full force and effect. The position is now confirmed by section 7 of the Arbitration Act 1996, which covers the case where the main agreement 'is invalid, or did not come into existence or has become ineffective' and provides that, subject to contrary agreement,⁷⁰ the arbitration clause is to be treated as a distinct agreement. The effect of this provision is that where the arbitration clause is governed by English law there is a presumption as a matter of interpretation that it gives rise to a separate contract. That presumption will also apply to arbitral proceedings having their seat in England and Wales, when there is an arbitration clause governed by a foreign law, being a presumption rebuttable by evidence of a contrary agreement or contrary provision made by that proper law.

There are two good policy reasons for saying that the arbitration agreement remains valid notwithstanding avoidance of the main agreement. First, it obviates

⁶⁶ [1992] 1 Lloyd's Rep. 81 at 91.

⁶⁷ *ibid.*

⁶⁸ [1993] QB 701 at 712 A–B.

⁶⁹ [1993] QB 701 at 723–724 referring to *Sojuznefteexport v. JOC Oil Ltd*, (1994) XV *Yearbook of Commercial Arbitration* 384, where the main agreement was said to be void for want of authority, but the same objection did not apply under the proper law to the arbitration clause, which the Court of Appeal of Bermuda held was binding; *Vee Networks Ltd v. Econet Wireless International Ltd* [2005] 1 Lloyd's Rep. 192 at [21].

⁷⁰ Cf. Article 16(1) of the Model Law which is in mandatory terms ('shall be treated as an agreement independent of the other terms of the contract').

the need for an investigation by the court of the fraud issue, when the parties have chosen to have their disputes resolved in arbitration by the tribunal they have chosen. Secondly, it avoids disputes being split up so as to have the fraud issue decided by the court and then contingently on the outcome of the issue, the remaining issues decided either by the court or in arbitration. As a general proposition all disputes should be decided at the same time before a single tribunal because this is what is fair to the parties and avoids delays, and because this is what reasonable people would have intended when the arbitration agreement was made.⁷¹ In practice, it is common in disputes to have various claims made for breach of contract and other claims which are for misrepresentation.

In *Harbour Assurance Co. (UK)*, the question as to whether the arbitration clause was invalid because of the Insurance Companies Act was a matter of interpretation of that legislation and application of the public policy underlying it to the arbitration agreement. This was because there was no equivalent to the Constitutional point which arose in *Buckeye Check Cashing Inc. v. Cardegna* disabling state legislation from having this effect on an arbitration clause falling within section 2 of the Federal Arbitration Act. Leaving aside this point, the reasoning in the two cases is the same on separability of the arbitration clause, the fact that a cause invalidating the main contract does not necessarily invalidate the arbitration clause, and that the correct analysis is to look at whether the agreement to arbitrate is valid.

It is now time to pull the threads together. Where the arbitration agreement itself has been induced by fraud, the victim of that fraud should be able to insist on his rights being decided by the court, without any constraints. This is because the basis for holding a person bound by the agreement to arbitrate is consent. If the consent to the actual arbitration agreement itself has been obtained by fraud, the victim should be entitled to disclaim it; this has been recognised both in the USA⁷² and in England.⁷³ There is an elementary justice in not permitting a person to take advantage of and thereby consummate his own fraud upon a victim.

But what about where there is an allegation of fraudulent misrepresentation inducing the contract generally but not the arbitration clause? In principle, commercial parties can agree after the dispute has arisen that such a dispute is to be arbitrated. Since this is the case, why can they not agree it beforehand in a separate agreement, which is what the arbitration agreement is? There is no public policy preventing issues of fraud going to arbitration. The public policy is to prevent fraudsters obtaining any profit or advantage from their fraud. There

⁷¹ *Ashville Investments Ltd v. Elmer Contractors* [1989] QB 488 at 517E–F.

⁷² *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967) holding that a charge of fraud in the inducement of the arbitration agreement itself was a question for the court; *Campaniello Imports Ltd v. Saporiti Italia SpA*, 117 F.3d 655 (2d. Cir. 1997) holding that there must be some substantial relationship between the fraud and the agreement to arbitrate, distinguishing *Moseley v. Electronic & Missile Facilities Inc.*, 374 U.S. 167 (1963); *Garten v. Kurth*, 265 F.3d 136 (2d. Cir. 2000).

⁷³ *Harbour Assurance Co. (UK) v. Kansa General International* [1993] QB 701 at 723E–F, recognising that an arbitration agreement is a separate agreement from that containing it and may be valid, notwithstanding that the agreement containing it is void or voidable.

remains the question whether in an international commercial agreement between parties from different countries, a widely drafted arbitration clause for arbitration under the rules of a well respected institution, should not be enforced when there are allegations of fraudulent misrepresentation and avoidance of the main contract?

Allegations of misrepresentation and fraudulent misrepresentation inducing a commercial contract are not uncommon in international commercial disputes. If one asked whether an international businessman could foresee the possibility that such allegations might be made, the answer usually would be that, remote as the possibility might be, the widely drawn arbitration clause providing for arbitration in accordance with the rules of a well respected international arbitral institution is there to deal with it. Part of the function of the clause is to provide a dispute resolution process which applies to claims for fraudulent misrepresentation. This consideration shows that normally a commercial party will not be able to say that, because his agreement to the main agreement was induced by fraud, so was his agreement to the arbitration clause. Furthermore, for the same reason, and because the clause in no sense gives the alleged fraudster an advantage, for the purpose of application of the public policy deterring fraud, such a clause could not itself be said to be an 'advantage' to the alleged fraudster obtained by his fraud.

Times have changed since *Monro v. Bognor Urban District Council*, when arbitration was viewed⁷⁴ as not appropriate to fraud disputes. It is the approach adopted by the US Supreme Court under the Federal Arbitration Act which is in tune with modern international commercial views. As a matter of English law, the reasoning of Bankes LJ in *Monro* and the subsequent dicta endorsing its approach should now be regarded as wrong.

It is suggested that for arbitration clauses in commercial contracts not governed by English law as the proper law and in arbitrations not governed by the 1996 Act or the Model Law, logic and good policy should still produce the same result. This is through (1) interpretation of the wording of the arbitration agreement to give it its full intended commercial effect; (2) application of the principle that the arbitration clause is a separate agreement⁷⁵ (the existence of this principle in international arbitration is part of the context in which the arbitration agreement has been concluded, and would usually be relevant under the governing proper law to interpretation of that contract); (3) the correct analysis of what is meant by a 'voidable' contract; (4) drawing the distinction

⁷⁴ The minority in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* referred to Cohen & Dayton, 'The New Federal Arbitration Law' in (1926) 12 *Va. L. Rev.* 265 at p. 281: 'Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact, quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law, the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned'.

⁷⁵ Article 16(1) of the Model Law; Arbitration Act 1996, s. 7 and supported by numerous cases in different jurisdictions.

between what induced the main agreement and what induced the arbitration agreement; and (5) correct definition of the content of any public policy rule concerning fraud, applicable under the proper law of the arbitration agreement or the curial law of the arbitration.

IV. FRAUD OBTAINING AN AWARD

(a) *Limbs of Arbitration Act 1996, Section 68(2)(g)*

Under section 22 of the Arbitration Act 1950 there was a general jurisdiction in the High Court, which was purely statutory and had no common law counterpart, to remit awards for reconsideration of the tribunal. Under this jurisdiction, awards could be remitted on the ground that there had been found fresh evidence which ought to go before the arbitrators, but there was a general principle in favour of finality of awards which resulted in a requirement that the evidence could not previously have been obtained with the exercise of due diligence and that it would have a material bearing on the outcome of the arbitration.⁷⁶

Under the Arbitration Act 1996, the statutory power to remit has gone and section 81(2) states that the Act has not revived the former jurisdiction to set aside or remit an award for an error of fact or law appearing on the face of the award. 'A major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process'.⁷⁷ Under section 68, which is a mandatory provision not subject to contrary agreement of the parties, there is a jurisdiction to challenge an award for 'serious irregularity'. This is defined in section 68(2), which imposes two requirements. The first is of the irregularity causing 'substantial injustice to the applicant'. The second is that the irregularity comes within one of nine heads listed as (a) to (i). Section 68(2)(g) states:

the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.

The starting point for considering the interpretation of the 1996 Act is the ordinary meaning of its words, as they would appear to a layman, and free from pre-Act authorities or technicalities⁷⁸. First, 'fraud' is not defined in the Act and it seems to be used in its ordinary meaning of dishonesty. Secondly, there are three alternative limbs to the subsection, namely (1) 'the award being obtained by fraud', (2) 'the award ... being contrary to public policy' and (3) 'the way in which [the award] was procured being contrary to public policy'. The words 'fraud' and 'public policy' are addressing different concepts, and the three limbs

⁷⁶ *Eleftheria Niki Compania Naviera SA v. Eastern Mediterranean Maritime, The Eleftheria Niki* [1980] 2 Lloyd's Rep. 252 and the other cases are collected in Mustill and Boyd, *Commercial Arbitration* (1st edn), p. 505.

⁷⁷ *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] 3 WLR 129 at [26] per Lord Steyn.

⁷⁸ *Lesotho Highlands Development Authority v. Impregilo; Cetelem v. Roust Holdings* [2005] 1 WLR 3555 at [19].

comprise distinct heads of irregularity. For example, *Soleimany v. Soleimany*⁷⁹ concerned an award which was within limb (2). An example of limb (3) might be where the victorious party has conducted the arbitration proceedings with repeated and inflammatory derogatory references to the religious beliefs of the lawyer for the losing party intending to prejudice an arbitrator against the loser, and the court considered that this might have influenced the arbitrator's award. Thirdly, the words of limb (1) seem to be broad enough to include not only dishonest behaviour unrelated to the merits, such as bribing an arbitrator, but also dishonesty affecting decision on the merits, such as perjury by a party, a party knowingly adducing false evidence, fraudulent concealment by a party of relevant documents which ought to have been disclosed under a disclosure order,⁸⁰ and a party knowingly putting before an arbitrator false documents. These latter examples will usually involve no imputation against the arbitral tribunal. They concern the decision on the substantive merits of the dispute itself, and open up the possibility of relitigating in court those merits for the purpose of proving a fraud within limb (1). Fourthly, the Act does not say that the award has to be 'obtained' by the fraud of the winning party.

Section 10(a)(1) of the Federal Arbitration Act provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration.

(1) Where the award was procured by corruption, fraud, or undue means.

This provision likewise does not say that the award has to be procured by 'corruption, fraud, or undue means' of a party. In practice, applications under that provision are rarely successful and nearly always concern culpable conduct of a party or his representatives.

One can see two possible explanations for limb (1) not using the words 'of a party'. The first is that this restriction was not intended. The second is that on analysis the purpose of the section is so clear that those words would have been an unnecessary addition.

(b) Obtained by Fraud of a Party?

In litigation in England, if a judgment were obtained by perjured evidence given by a witness when a party was unaware of this, that would be grounds for an appeal. The Court of Appeal could admit further evidence addressed to that issue. Even if there had already been an appeal which was concluded, if the perjury was that of a person to be regarded as a party, or if the false evidence was known to be false by the party or his representatives, the judgment could be reopened on the grounds that it had been obtained by fraud of that party. This would be by separate action brought for this purpose under the jurisdiction

⁷⁹ [1999] QB 785.

⁸⁰ *Profitali Italia S.r.L. v. Paine Webber Inc.* [2001] 1 Lloyd's Rep. 715 at 719-720.

inherited by the High Court from the High Court of Chancery to review its own judgments through the procedure of an action for review.⁸¹ The existence of the appellate jurisdiction of the Court of Appeal has in large measure overtaken the need for the action for review. Almost exactly 100 years after the Judicature Acts, in *Re Barrell Enterprises*,⁸² the Court of Appeal, when considering the judge's jurisdiction to reopen a case after giving judgment orally but before the order is drawn up, observed that there had apparently only been one attempt to reopen for fresh evidence under the action of review in the previous century and that had been unsuccessful, and said: 'Even if, technically, the High Court was at first clothed with this jurisdiction ... this cause of action has long since lapsed'. There would also be the possibility since the decision in *Taylor v. Lawrence*,⁸³ to invite the Court of Appeal to entertain a 'second appeal' on grounds not confined to fraud of a party. In that case, a five judge Court of Appeal presided over by Lord Woolf CJ observed that although not specified in the statute creating the Court of Appeal, that court had a residual jurisdiction to entertain certain appeals in cases which had already been heard and determined, where the interests of justice so required. This decision over 125 years after the Court of Appeal was established by statute, resulted in a flood of litigants seeking to have cases reopened, almost all of which have been refused. It has also produced decisions from differently constituted Courts of Appeal applying different tests for so-called 'second' appeals; in one case the test applicable to admitting fresh evidence in a 'first appeal',⁸⁴ and in the other deciding that this was not sufficient.⁸⁵

However, it is established that for the purpose of interpreting the 1996 Act, it is appropriate to refer to the Departmental Advisory Committee reports⁸⁶ as providing the context in which the legislature acted. In paragraph 280 of the first report it appears that the jurisdiction was there to deal with irregularities in the arbitral process which simply could not be defended as the consequence of going to arbitration. In the same paragraph the committee observed that:

⁸¹ D.M. Gordon QC, 'Fraud or New Evidence as Grounds for Actions to Set Aside Judgments' in (1961) 77 LQR 358 at 533.

⁸² [1973] 1 WLR 19.

⁸³ [2003] QB 528.

⁸⁴ *Couwenbergh v. Valkova* [2005] EWCA Civ 145, a case in which the Court of Appeal were not invited to and did not address whether the defendant had obtained probate through perjured evidence, and ordered, seven years after the original trial, and 14 years after the death of the testatrix, a retrial on the merits on the grounds of 'fresh evidence'.

⁸⁵ *Re Uddin (A Child)* [2005] 1 WLR 2398; [2005] EWCA Civ 52.

⁸⁶ *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] 3 WLR 129 at [27]; *Cetelem v Roust Holdings* [2005] 1 WLR 3555 at [40]; *Halki Shipping Corp. v. Sopex Oils Ltd* [1998] 1 WLR 726; *Azov Shipping Co. v. Baltic Shipping Co.* [1999] 1 Lloyd's Rep 68; *ABB Lummus Global Ltd v. Keppel Fels Ltd (formerly Far East Livingston Shipbuilding Ltd)* [1999] 2 Lloyd's Rep. 24; *Laker Airways Inc. v. FLS Aerospace Ltd* [2000] 1 WLR 113; *Federal Insurance Co. v. Transamerica Occidental Life Insurance Co.* [1999] 2 Lloyd's Rep. 286; *Harbour General Works Ltd v. Environment Agency* [2000] 1 WLR 950; *Vale do Rio doce Navegação SA v. Shanghai Bao Steel Ocean Shipping Co. Ltd* [2000] 2 Lloyd's Rep. 1; *Hussman (Europe) Ltd v. Al Ameen Development & Trade Co.* [2000] 2 Lloyd's Rep. 83; *Warborough Investments v. S. Robinson & Sons (Holdings) Ltd*, *The Times*, 9 July 2003; *Collins (Contractors) Ltd v. Baltic Quay Management (1994) Ltd* [2004] EWCA Civ. 1757.

The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate not litigate.

In paragraph 282 the report stated that:

by setting out a closed list of irregularities (which it will not be open to the court to extend) ... [the draft section reflects] the internationally accepted view that the court should be able to correct serious failure to comply with the 'due process' of arbitral proceedings: *cf* article 34 of the Model Law.

The Model Law in Article 34(2)(b)(ii) permits an award to be set aside if the court finds that 'the award is in conflict with the public policy of this State', and there is no separate head if the award has been obtained by fraud. This was because the grounds for setting aside an award followed the grounds in Article 36 for not recognising or enforcing an award, and these followed those permitted by the New York Convention for not recognising or enforcing a Convention award. In the New York Convention, there is no separate head addressing an award obtained by fraud. During discussions, the UK delegation expressed concern that 'public policy', as understood in common law jurisdictions, might not cover all cases of injustice such as awards tainted by fraud, corruption or perjured evidence. It was decided not to include an additional head for fraud but to clarify the position in the Commission Report that public policy in the Model Law covered 'fundamental notions and principles of justice, as well as procedural respects. Thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside', and that the public policy ground 'was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at'.⁸⁷ The reference in paragraph 282 of the first DAC report to 'due process' is to what is regarded internationally as fundamental principles necessary for proceedings to be fair.⁸⁸ Thus, in contrast to Article 34 of the Model Law, section 68(2) of the Arbitration Act 1996 provides a carefully defined list not intended to be open to judicial rewriting on the grounds of lack of definition of 'public policy'.

As a general principle a dispute should only be litigated once between the same parties, otherwise there would be no end to litigation. There comes a stage when the law prefers certainty to perfection. This principle lies at the root of *res judicata* and issue estoppel. In *The Amphill Peerage* [1977] AC 547, 569 Lord Wilberforce explained the position:

⁸⁷ Commission Report at A/40/17, para. 297; The Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards by the Committee on International Commercial Arbitration of the International Law Association London Conference (2000), pp. 9–10; Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2nd edn, 2005), para 7-023.

⁸⁸ *Cf. State of Trinidad and Tobago v. Boyce* [2006] 2 WLR 284 at [14] per Lord Hoffmann describing 'due process of law' as 'fundamental principles which are necessary for a fair system of justice'.

The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interests of peace, certainty and security it prevents further enquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality.

Cases in which substantive issues of fraud are resolved come within this principle. However, if there has been fraud by a party in obtaining the judgment said to give rise to the bar, there is an exception to the principle. The reason is the public policy that the party is not allowed to take advantage of his own dishonesty. It might be suggested that any fraud by a witness or other person which produces a judgment should be sufficient ground for vacating that judgment in the interests of justice. As a matter of the law of *res judicata* and issue estoppel, at least in courts below the House of Lords, the fraud exception is limited to the fraud of a party.⁸⁹ The reasons for this are that (1) this is formulated as an exception to the general principle which binds the parties to litigation to the result, and precludes those parties from relitigating what was decided, and (2) it is an intrusion into the public policy favouring finality of judgments, which has to be justified by the importance of the public policy that a fraudulent wrongdoer shall obtain no advantage from his fraud.⁹⁰ In *Odyssey Re (London) Ltd v. OIC Run Off Ltd*,⁹¹ the Court of Appeal divided on whether the perjury of an ex-managing director of a party who was no longer even an employee when he gave evidence came within the exception, the majority holding that it did because that would be the fair result, and the dissenting judge relying on the absence of connection between the witness and the party when he gave his evidence.

Section 68(2) is a narrow exception to the principles of respecting the autonomy of arbitral tribunals, an award being final and binding, and a court not re-examining the substantive merits of the dispute.⁹² The DAC report refers to 'due process' and process which would be internationally unacceptable. If evidence is incorrect and is relied upon by the tribunal the Act provides no redress. If that evidence has been given with the witness knowing of its falsity but without any knowledge of its falsity by the party calling the witness, or his representatives, there is no failure of the arbitral process. The process remains fair, but error has appeared through the dishonesty of a third party. A case exposing the falsity of that evidence is simply an example of fresh evidence on the

⁸⁹ *Odyssey Re (London) Ltd v. OIC Run Off Ltd*, *The Times*, 17 March 2000.

⁹⁰ The principle was stated in wide terms in the *Duchess of Kingston's Case* (1776) 20 St. Tr. 355 at 537, 544 note; see also *Aboulloff v. Oppenheimer* (1882) 10 QBD 295; *Vadala v. Lawes* (1890) 25 QBD 310; *Owens Bank Ltd v. Bracco* [1992] 2 AC 443.

⁹¹ *The Times*, 17 March 2000.

⁹² *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] 3 WLR 129 at [30] to [31] per Lord Steyn commenting on the limited function of s. 68(2)(b) by reference to both the wording and established narrowness of effect of Article V.(1)(c) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 10 June 1958, (1959) UNTS 3320 (Cmnd 6419); see further W.W. Park, 'The Nature of Arbitral Authority: a Comment on *Lesotho Highlands*' in (2005) 21 *Arb. Int.* 483.

merits. It does not come within any of the limbs of section 68(2)(g), and there is no provision made for it in the Act,⁹³ because of its policy on finality. In *Lesotho Highlands Development Authority v. Impregilo SpA*,⁹⁴ Lord Steyn said:

It will be observed that the list of irregularities under section 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the 'correct decision' could afford a ground for challenge under section 68.

'Fresh evidence' as a ground for reopening the merits of a case usually arises when a tribunal has made a finding (including not finding a fact), which although on the evidence available may have been justified, can be seen with the 'fresh evidence' to have been incorrect. The justification for admitting the 'fresh evidence' is that the substantive rights of the parties should be adjusted by reference to the true facts. However, it is apparent both from its wording and the DAC report that unless the non-availability of the fresh evidence is connected with fraud affecting the integrity of the arbitral process, section 68 is not engaged. It follows that the fraud must be fraud for which the party or his representatives are responsible.⁹⁵ 'Fresh evidence' can still be very relevant, if not essential, in explaining why an allegation of fraud has been taken so late in proceedings or addressing a contention that it is too late to raise it.

(c) A Distinction Between 'Intrinsic' and 'Extrinsic' Fraud?

If the party could without difficulty have clearly established that the evidence was untrue by some small investigation and called the witness suspecting that the evidence was false and without doing the check, then it is suggested that this would be dishonest and within limb (1). It is suggested that to be within limb (1), there has to be some dishonest conduct of or on behalf of a party which has thereby interfered with the fairness and thus the integrity of the arbitral process. If a party or his representative adduces what he knows to be false evidence then the section is engaged. On this, the words of the section do not restrict its scope by importing a distinction between, on the one hand, such matters as perjured evidence, concocted documents and knowing concealment of documents ordered to be disclosed, so-called 'intrinsic' fraud, and other frauds, such as lying to the other party about whether an application had been issued to fix a date for the hearing, so-called 'extrinsic' fraud. Such a distinction has been made in certain jurisdictions, on the basis that it is a common incident of proceedings that witnesses tell lies and that part of the function of the process is to provide an opportunity to a party to show this. The policy argument is that the opportunity to address issues about perjured evidence and concocted documents is given by the hearing itself and therefore there does not need, as a matter of justice and fair

⁹³ *Profilati Italia S.r.L v. Paine Webber Inc.* [2001] 1 Lloyd's Rep. 715 at [22].

⁹⁴ [2005] 3 WLR 129.

⁹⁵ *Thyssen Canada Ltd v. Mariana Maritime SA* [2005] 1 Lloyd's Rep. 640 at [14]–[16].

play, for there to be a further opportunity after the case has been finally decided on the merits.

The clarification in the Commission Report of the ‘public policy’ head in Article 34(2)(b)(ii) of the Model Law draws no such distinction.⁹⁶ However, it is a distinction which seems to be made in the Hague Convention on Choice of Court Agreements concluded on 30 June 2005, to obtain international recognition and enforcement of agreements providing for exclusive jurisdiction of a national court, and of judgments resulting from proceedings based on such agreements. Article 9 provides that recognition or enforcement of a resulting judgment:

may be refused if:

- (d) the judgment was obtained by fraud in connection with a matter of procedure;
- (e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

This is a ground of exception to Article 8.1 which provides that the judgment shall be recognised and enforced in other contracting states. Article 9(d) is limited by the words ‘in connection with a matter of procedure’, which would appear apt to include, for example, lying to the other party about whether an application had been issued to fix a date for the hearing, but to exclude perjured witnesses and concocted documents. Article 9(e), the ‘public policy’ ground, includes ‘procedural fairness’ such as, for example, hearing both parties and giving each party access to all the material before the court deciding the dispute. This wording does not encourage the view that refusal can be based on an allegation that a party committed perjury, however strong the evidence might be. The possibility of proceedings in the state which rendered the judgment being reopened there for perjury or on other ‘intrinsic’ fraud grounds, make more palatable the words of the Convention.⁹⁷

The policy which underlies section 68(2)(g) of the Arbitration Act 1996 is that fraud in its nature is concealed, may not be uncovered until after the case has been decided, and that a fraudster should normally be denied any advantage from his fraud, including any advantage from its lying concealed and undiscovered, provided that the victim acts diligently in uncovering the evidence and applying to the court.

(d) Test under Limbs (2) and (3)

For limb (1), ‘fraud’ requires dishonesty. However, limbs (2) and (3) have no such requirement – they depend on the award or the way it was procured being contrary to ‘public policy’. Under limbs (2) and (3), logically it would be

⁹⁶ Commission Report at A/40/17.

⁹⁷ Article 8.4 provides that ‘Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired’.

insufficient to point on its own to perjury or fraud or some other misconduct by a third party, because that would simply be a case of ‘fresh evidence’.

In the Federal Arbitration Act, section 10(a)(1) includes ‘or undue means’. These extend the jurisdiction to cases not involving fraud as such, and have been relied on in certain cases⁹⁸ as conferring jurisdiction to set aside for such matters as intimidation of an arbitrator, where an arbitrator accepts social hospitality or where there have been discussions with an arbitrator about how the rest of the panel is viewing the case.

In *Profilati Italia S.r.L v. Paine Webber Inc.*,⁹⁹ Moore-Bick J decided that innocent or negligent failure of a party to disclose a document which ought to have been disclosed did not suffice. It was a case where the challenge failed on the facts. The judge said that it would be unwise to attempt a definition of what was required and went on to express the view that, as a threshold requirement ‘it will normally be necessary to satisfy the Court that some form of reprehensible or unconscionable¹⁰⁰ conduct on [the part of the successful party] has contributed in a substantial way in his favour’. This wording of the threshold has been adopted in other cases where the challenge has failed.¹⁰¹ The court could set aside an award under limb (1) where there was perjury by an employee or former employee, and the party or his representative adducing that evidence was privy to the perjury. Something less than this could suffice under limbs (2) and (3).¹⁰² There must be conduct on the part of the party or his representative which at least meets the required test, but is this formulation of the test correct? It is suggested that the ‘public policy’ referred to in section 68(2)(g) has to be of sufficient power and importance on the facts to override the presumption of finality. The word ‘unconscionable’ has an old-fashioned, Chancery echo to it, and includes conduct of which it would be unfair for a person to take advantage, such as conduct which would give rise to an estoppel.¹⁰³ This might be conduct which was merely careless.¹⁰⁴ It would be best if in the present context it were quietly dropped.

(e) ‘Substantial Injustice to the Applicant’

There is also the statutory requirement that the irregularity caused ‘substantial injustice to the applicant’. Applied to limb (1), this requires a nexus between the impugned conduct and the award. If the conduct would not have made any difference or a trivial difference to the award, then the case is not within the

⁹⁸ See Michael A. Rosenhouse JD, ‘What Constitutes Corruption, Fraud, or Undue Means in Obtaining Arbitration Award Justifying Avoidance of Award under State Law’ in 22 *ALR* (4th) 366.

⁹⁹ [2001] 1 Lloyd’s Rep. 715 at 719–720.

¹⁰⁰ See also *Cuflet Chartering v. Carousel Shipping* [2001] 1 Lloyd’s Rep. 707 at 710, an earlier decision of the same judge, doubting whether anything short of ‘unconscionable conduct’ would suffice.

¹⁰¹ *Thyssen Canada Ltd v. Mariana Maritime SA* [2005] 1 Lloyd’s Rep. 640 at [13]; *Protech Projects Construction (Pty) Ltd v. Al-Kharafi* [2005] 2 Lloyd’s Rep. 779 at [29].

¹⁰² *Thyssen Canada Ltd v. Mariana Maritime SA* [2005] 1 Lloyd’s Rep. 640 at [13]–[16].

¹⁰³ *Amalgamated Property Co. v. Texas Bank* [1982] QB 84 at 104D–E.

¹⁰⁴ *Spiro v. Lintern* [1973] 1 WLR 1002 at 1010F–1011D.

section. But the applicant does not have to show that he lost because of the fraud. Where it can be seen that the dishonest conduct was calculated to obtain victory in the arbitration the court can usually readily conclude that it might have had that effect, and therefore the innocent party has suffered a ‘substantial injustice’.¹⁰⁵ If the alleged fraud would not have made any difference or only a trivial difference, the court can dismiss the application on a summary judgment application.

(f) *Procedural Hurdles*

Besides the narrowness of the statutory ground, there are procedural hurdles which might be relevant. First, a 28-day time limit is imposed by the Act for applications under section 68.¹⁰⁶ There is a limited power to extend that time limit in section 79. In a case which is out of time, the court might well decide to refuse to extend it where the party has not proceeded diligently.¹⁰⁷ Fraud lying concealed after expiry of the time limit and without lack of reasonable diligence by the applicant would be an obvious candidate for an extension of time. Secondly, section 73(1)(d) provides for the applicant to have lost the right to object where he did not raise the objection before the tribunal unless ‘he did not know and could not with reasonable diligence have discovered the grounds for the objection’. This produces a form of waiver of the objection through not taking it before the tribunal when objectively a diligent party could have done so. This would apply, for example, when a party did not allege at the arbitration the other party was lying, or dropped the allegation at the arbitration, and the evidence to prove the allegation was in the party’s hands or reasonably available to him before publication of the award and no application was made to the arbitrators to introduce it.¹⁰⁸ Another example would be where a party discovered that his opponent had bribed a witness to stay away but failed to ask the tribunal to adjourn until the witness was produced, and continued to participate in the arbitration proceedings. However, in a case in which one side or the other is lying and that submission is made to the tribunal, then when that submission is renewed to the court it is not barred by section 73 because the objection was taken in good time before the tribunal.

(g) *Common Law Rule About Enforcement of Foreign Judgments*

Where an allegation of fraud in obtaining the award is made, the arbitrators will be *functus officio* having discharged their mandate, and the award, even if fraud were to be proved, would not be a nullity. The court would then have the powers

¹⁰⁵ See *Vee Networks Ltd v. Econet Wireless International Ltd* [2005] 1 Lloyd’s Rep. 192 at [90], a non-fraud case where the judge referred to an irregularity which ‘might well’ have produced a different result as a case where ‘substantial injustice’ was shown. It is suggested that in a case where fraud is proved it should be enough to set aside the award to show that the fraud might have produced a different result.

¹⁰⁶ Arbitration Act 1996, s. 70(3).

¹⁰⁷ *Thyssen Canada Ltd v. Mariana Maritime SA* [2005] 1 Lloyd’s Rep. 640 at [55].

¹⁰⁸ *Ibid.* at [20]–[21].

in section 68(3) of setting aside the award, remitting it or declaring it to have no effect. The issue of fraud or not has to be determined by the court. In a case where the fraud is said to consist of perjured evidence given by a party to the arbitrators, this could amount to a retrial of the substantive dispute before the court. At common law, where a foreign judgment is sought to be enforced, the defendant is entitled to resist enforcement on the ground that it was obtained by fraud either by the party in whose favour it was given or on the part of the foreign court.¹⁰⁹ In a case where one side or the other must be lying, it has been decided on the highest authority that even though the foreign court has pronounced on the point, the fraud exception results in the same point being relitigated in England on substantially the same material as was before the foreign court, and without any safeguard such as, for example, a requirement that the party alleging fraud can produce newly discovered evidence, which could not have been obtained previously with reasonable diligence and which if it had been produced would have probably affected the result. In principle, a foreign judgment can give rise to a *res judicata* or an issue estoppel.¹¹⁰ There is no *res judicata* or issue estoppel because the issue raised comes within the fraud exception. Recently, courts have found some ways of ameliorating the rule, for example through on the particular facts reaching a conclusion that the attempt to relitigate constituted an abuse of the process of the court,¹¹¹ or recognising an issue estoppel when there had already been a relitigation of the fraud issue abroad in separate proceedings.¹¹² The common law rule allowing in proceedings to enforce the foreign judgment litigation as of right of the defence that the judgment was obtained by fraud, has come in for justified and sustained criticism.¹¹³ In principle, an arbitration award can give rise to a *res judicata* or issue estoppel.¹¹⁴ But just like a foreign judgment, at common law a foreign award will not create any *res judicata* or issue estoppel if it was obtained by fraud.

(h) *Enforcement of a Foreign Award in England under the New York Convention*

In *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd.*,¹¹⁵ a consultancy agreement governed by Swiss law provided for ICC arbitration in Geneva. The defendants refused to make payments under the contract, alleging that the contract was performed through payment of bribes to Kuwaiti officials so as to

¹⁰⁹ *Abouloff v. Oppenheimer* (1882) 10 QBD 295; *Vadala v. Lawes* (1890) 25 QBD 310; approved by the House of Lords in *Owens Bank Ltd v. Bracco* [1992] 2 AC 443, criticised in J.G. Collier, 'Fraud Still Unravels Foreign Judgments' in [1992] *CLJ* 441, pointing out that the English legislation concerning registration of foreign judgments which had adopted the rule, and which was treated by the House of Lords as statutory endorsement of it, only applied to certain jurisdictions, not including, for example, the USA.

¹¹⁰ *The Sennar (No. 2)* [1985] 1 WLR 490.

¹¹¹ *Owens Bank Ltd v. Etoile Commerciale SA* [1995] 1 WLR 44.

¹¹² *House of Spring Gardens Ltd v. Waite* [1991] 1 QB 241.

¹¹³ Dicey and Morris, *The Conflict of Laws* (13th edn, 2000), Rule 43 at p. 518 and the Fourth Supplement (2004) reviews the numerous authorities and traces the debate.

¹¹⁴ *Fidelitas Shipping Co. Ltd v. V/O Exportchleb* [1966] 1 QB 630 at 643 per Diplock LJ: *see also* Lord Denning MR at 640.

¹¹⁵ [2000] 1 QB 288 affirming [1999] QB 740.

obtain arms' contracts. The arbitrators rejected the illegality defence and this was upheld by the Swiss Federal Court which also rejected a new allegation that the claimant was in fact the company of a member of the Kuwaiti government. So the fraud issue had been decided against the defendant by both the arbitral tribunal and the foreign court acting as a court of review. An application was made in England to enforce the award under the Arbitration Act 1975 which gave effect to the New York Convention, and was opposed both (1) on the ground that it would be contrary to English public policy to enforce an award based on a contract for bribes, and (2), because Westacre had put forward a dishonest case at the arbitration supported by perjured evidence of their witnesses. Colman J enforced the award and his decision was upheld by the Court of Appeal. Both courts declined to allow the defendant the opportunity of proving their factual allegations of bribery and dishonest case.

In relation to the bribery defence, the fact that the award had rejected the defence, as had the Swiss Federal Court, had the consequence that in the absence of 'fresh evidence' there was no justification as a matter of public policy on bribery to refuse enforcement of the award under the New York Convention. There were dicta in *Soleimany v. Soleimany*¹¹⁶ in the context of a defence to enforcement of illegality that the court might embark on some enquiry falling short of a full length trial as to the cogency of that illegality allegation. These dicta were not viewed favourably by the majority in *Westacre Investments Inc. v. Jugoinport-SDPR Holding Co. Ltd.*¹¹⁷

On the perjury defence, in the context of this enforcement proceeding all the judges declined to apply by analogy the common law approach on foreign judgments.¹¹⁸ Since the perjury allegations had been pronounced upon by the arbitrators and the court at the seat of the arbitration, the courts considered that for the purpose of the enforcement proceedings under the New York Convention there should be no opportunity to relitigate the issues on the merits on the materials used or which were available to be used in Switzerland: there had to be fresh evidence.

Section 103(3) of the Act, which was based on section 5(3) of the Arbitration Act 1975, provides:

Recognition or enforcement of the award may also be refused if ... it would be contrary to public policy to recognise or enforce the award.

It is the public policy ground which alone permits refusal where the allegation is that the award has been obtained by fraud, and logically it is also the public policy of the state whose court is asked to enforce the award which governs the extent to which that court has to inquire into this issue on the merits before

¹¹⁶ [1999] QB 785 at 800.

¹¹⁷ [2000] 1 QB 288 at 316G–H.

¹¹⁸ Judge Chambers QC agreed with this in *ABCI v. Banque Franco-Tunisienne* [2002] 1 Lloyd's Rep. 511 at [221] to [235].

deciding whether to enforce an award. Section 103(3) is permissive and if the facts proved so far do not suffice to disclose a sufficiently strong case that the enforcing party had obtained the award by fraud, the court can resolve the tension between the competing public policies by declining to permit what would be a lengthy and time-consuming inquiry before enforcing the award.

There are dicta¹¹⁹ in *Westacre* which lay down criteria about what 'normally'¹²⁰ has to be shown before there can be an inquiry into the merits of a perjury allegation in enforcement proceedings under the Convention. There are observations about (1) the need for 'fresh evidence' of perjury; (2) its cogency and importance; (3) when it had first become available and when it would have become available with the exercise of due diligence; (4) whether that fresh evidence could have been used to mount an attack on the award before the court exercising supervisory jurisdiction over the arbitral proceedings; and (5) whether that evidence had already been deployed without success before that court. The actual decision is one which does not and could not rest on the English law of res judicata or issue estoppel. It rests on a refusal not to enforce the award because the public policy defence based on dishonest case and perjury was not made good on the face of the award, was inconsistent with the award and the Swiss court decision, and because, as a matter of policy, in the absence of fresh evidence there should not be an investigation into the underlying facts before the award was enforced.

These dicta in *Westacre* can be criticised as suggesting an approach which could become somewhat inflexible. For example, if the perjury allegation had been rejected by arbitrators on grounds which were less than satisfactory, perhaps technical procedural grounds which looked less than cogent, and the evidence before them of perjury was overwhelming without contrary explanation, one would expect the English court to refuse enforcement pending further inquiry. In that case, 'fresh evidence' would have nothing to do with it. It is suggested that the dicta should be treated as an indication of the importance of (1) the principles that matters should only be litigated once, and that once proceedings have been litigated and decided, a point which has been taken, or could have been taken with reasonable diligence, should not reopened, and (2) the consideration that review of an award by the court having jurisdiction in the country where the award was made or under whose law the arbitration took place (the curial law), is a supervisory jurisdiction specifically envisaged under Article V.1(e) of the New York Convention, and therefore, once an award has been made, the primary tribunal for deciding the fraud issue ought to be that court. Normally, if there is some serious taint to the award, the respondent has, or has had, the possibility of raising that taint either before the arbitrators or the supervisory court. The jurisdiction not to enforce is a safety valve to cater for cases which offend basic notions of morality and justice and which have slipped through the net of the

¹¹⁹ [2000] 1 QB 288 at 309F–H commenting on [1999] QB 740 at 784A–F.

¹²⁰ [1999] QB 740 at 784 A, per Colman J.

arbitral award and review by the supervisory court.¹²¹ Within this constraint there is a spectrum of possible factual cases in which the only safe guide is good judgment.

(i) *Section 68(2)(g) and Importing a Requirement of ‘Fresh Evidence’*

Colman J in the course of his judgment referred to the position in relation to a domestic award as it had stood under section 22 of the Arbitration Act 1950 in connection with applications to reopen arbitration proceedings on the ground of discovery of ‘fresh evidence’. This was similar to the practice applied by the Court of Appeal in litigation before the courts when deciding whether to admit fresh evidence after there had been a trial at first instance.¹²² In the Court of Appeal, Waller LJ referred to this¹²³ and, whilst making it clear that he had not considered fully the position under the Arbitration Act 1996, added:

it is difficult to think that if under section 68(2)(g) it were suggested that an award had been obtained by fraud and that relief should be granted, the court would not insist on the same condition, i.e. unavailability of the evidence produced as at the time of the arbitration, and that such evidence would have an important influence on the result.

Limb (1) of section 68(2)(g) has a number of restrictions under the Arbitration Act 1996, but a requirement of fresh evidence is not among them. With great respect to Waller LJ, this reference to the position about ‘fresh evidence’, as it stood prior to the repeal of section 22 of the Arbitration Act 1950, does not sit well with what should be centre stage on questions of review of an award, namely the provisions of the Arbitration Act 1996 interpreted with the benefit of the DAC reports and without reference to pre-Act authorities or technicalities.¹²⁴

One also has to bear in mind that the actual issue in *Westacre Investments Inc. v. Jugoinport-SDPR Holding Co. Ltd*¹²⁵ was about enforcement in England of a foreign award. The award in *Westacre* had already been reviewed and confirmed by the Swiss court which had supervisory jurisdiction in respect of the arbitral proceedings. This jurisdiction is different in nature and function from the jurisdiction of a court applied to for enforcement of an award, which has already been or could have been reviewed. When parties agree to arbitration in a country, they contemplate the exercise of a supervisory jurisdiction by the courts of that country in accordance with the content of that country’s law governing the supervisory jurisdiction. It is a consequence of the arbitration agreement. In contrast, the jurisdiction to order or refuse enforcement of an award is a jurisdiction exercised by a court having jurisdiction at the place where relevant assets happen to be located or where the defendant is to be found, and is confined

¹²¹ *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All ER (Comm.) 315.

¹²² [1999] QB 740.

¹²³ [2000] 1 QB 288 at 306H–307C.

¹²⁴ *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] 3 WLR 129 at [19].

¹²⁵ [2000] 1 QB 288 affirming [1999] QB 740.

to the question of enforcement in that state. The court asked to enforce the award is not a court agreed by the parties, nor does it decide anything more than whether the award is to be enforced in that country. In contrast, a supervisory court is making a decision which may well impact on whether the award will be enforced anywhere else.

Section 68(2) is providing for what is a supervisory jurisdiction of the English court. A decision that a particular ground will not suffice to preclude enforcement of an award under the New York Convention in England, where England has no supervisory jurisdiction, may be perfectly proper because the award is to be regarded as valid and binding and because the court having supervisory jurisdiction has confirmed it. The decision is by way of international co-operation between states for enforcement of an award which satisfies the requirements of the New York Convention. That was the position in *Westacre*. It does not follow that where England is itself exercising a supervisory jurisdiction the award is not liable to be set aside under the provisions in the Arbitration Act 1996. Two consequences flow from this. First, judicial observations in *Westacre* about what the English court could or might do under its supervisory jurisdiction are obiter. The observations about the relevance of the test under section 22 of the Arbitration Act 1950 for admission of 'fresh evidence' fall into this category. Secondly, judges ought to be cautious about transposing decisions about willingness to enforce a binding award under the New York Convention into decisions not to review an award under the supervisory jurisdiction, particularly the carefully defined and limited one under section 68 of the Arbitration Act 1996. That carries with it the risk of judicial rewriting of the legislation.

(j) *'Fresh Evidence' Cases under the Arbitration Act 1996*

The position under the Arbitration Act 1996 on 'fresh evidence' is very different from that which used to apply under section 22 of the Arbitration Act 1950. Under section 57 of the Arbitration Act 1996, an arbitral tribunal can correct an award to remove 'a clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity'. In addition, if the tribunal has failed to deal with a claim it can make a further award on that claim. These provisions are within narrow compass, and do not create any equivalent to the jurisdiction of the court to reopen the substantive merits on grounds of 'fresh evidence' which existed under the old section 22. This is an aspect of the 1996 Act's policy on finality of awards. Under section 57(1), the parties are at liberty to agree their own rules for the tribunal's powers to 'correct an award or make an additional award', and institutional rules often do just this. For example, Article 29.1 of the ICC Rules (1998) allows correction of 'a clerical, computational, or typographical error, or any errors of similar nature'. The ICC officials at an open day in 2005 could not identify any case in which the words 'errors of a similar nature' had been used to justify a correction. What one has in section 57 is a jurisdiction which is circumscribed by the concept of correcting the award to implement the decision actually arrived at by the arbitrators. It would not extend to reconsidering the substantive merits based on new evidence.

A more extensive power of hearing appeals or reviews could be achieved under the 1996 Act by providing for an appellate process within the arbitration clause or the rules incorporated in it and stipulating that the appellate board could receive fresh evidence. If this was done, the appellate board would become the arbitral tribunal under the Act once that part of the arbitral process was reached, and it would be the award of the appellate board which would then be the final award under the Act. This form of arbitral appeal or review process is expressly contemplated in section 70(2)(a) of the Act, which requires that ‘any available arbitral process¹²⁶ of appeal or review’ be exhausted before any question can arise of an application to the court based on ‘serious irregularity’. In principle, there is nothing in the Act to prevent the parties agreeing that the original tribunal shall be the review board with power to receive fresh evidence on defined grounds. As for the court’s jurisdiction to review under the Arbitration Act 1996, there is no jurisdiction corresponding to what used to be the ‘fresh evidence’ jurisdiction exercised under section 22 of the Arbitration Act 1950, or in other jurisdictions.¹²⁷

What flows from this is added confirmation that the purpose of the jurisdiction under limb (1) of section 68(2)(g) is about whether there has been fraud affecting the integrity of the arbitral process, such that the losing party is entitled to say that it is not just that he be bound by the final award produced by that process. Its words would cover new evidence proving perjury by a party. But the words also cover the case where an award rejects a case that a party has been lying in his evidence but does so on grounds which are patently irrational. In the latter case, there is no ‘fresh evidence’, but under the Act the award is subject to review by the court for ‘serious irregularity’. Under the Act it is not acceptable that a party should be bound by an award procured by his opponent’s fraudulent conduct. Whilst there can be arguments about whether such a policy is too generous to an applicant, it is the words of the Act which govern the policy.

(k) Control of Applications through Granting Summary Judgment or Striking Out for Abuse of Process

Does this mean that the court on an application under limb (1) is bound to apply by analogy the common law approach on foreign judgments? The answer is in the negative. Although under the section it is the court which decides the issue whether there has been fraud or not which procured the award, and there is no procedure under the 1996 Act to remit this issue for decision by the arbitrators,¹²⁸ the court is able to give summary judgment dismissing the application when it has

¹²⁶ Further defined in s. 82(1) to include ‘any process of appeal to or review by an arbitral or other institution or person vested by the parties with powers’.

¹²⁷ In Switzerland, there can be an action for ‘révision de la sentence’ seeking to reopen an international arbitration award, which is different from the action to set aside an award under art. 190 of the Swiss Private International Law Act. The action for ‘révision’ enables the arbitral proceedings to be reopened on the grounds the award was obtained by a crime or a delict or on the grounds of fresh evidence not previously available: Jean-François Poudret and Sébastien Besson, *Droit comparé de l’arbitrage international* (2002), pp. 833–835.

¹²⁸ *Thyssen Canada Ltd v. Mariana Maritime SA* [2005] 1 Lloyd’s Rep. 640 at [16]–[17].

no reasonable chance of success, and there is also the jurisdiction of the court to strike out an application for abuse of the process of the court.¹²⁹ The latter jurisdiction can be shaped by the courts so as to give effect to the statutory purpose behind limb (1), namely to deal with cases where there really is strong cause to believe that there has been some dishonest conduct which procured the award, and to interfere with the autonomy of arbitrators as little as is necessary. In the absence of some cogent and impressive case for why an award comes within section 68(2)(g), an application under that provision can be struck out as an abuse of the process.

(l) Running a Fraud Defence against Enforcement of an Award which falls under the Supervisory Jurisdiction of the Court Exercisable under the Arbitration Act 1996

Sections 67, 68 and 69 only apply where the ‘seat of the arbitration’¹³⁰ is in England and Wales.¹³¹ Section 81(1)(c) preserves any rule of common law ‘consistent with the provisions of this Part’, allowing for refusal of enforcement based on public policy. A defence based on perjury by the claimant could be a defence to enforcement at common law of a foreign judgment.¹³² By parity of reasoning, it could be a defence to enforcement at common law of a foreign award. However, in the case of a domestic award, which could be set aside by the court under a statutory jurisdiction to do so, including on the ground of perjury in obtaining the award,¹³³ the only remedy for a person running that defence was to apply to set aside the award.¹³⁴ This was because the defendant could not be permitted to escape from the constraints of the statutory jurisdiction to set aside, including the time limit for challenging the award. Section 68(2)(g) now covers the area of a defence based on fraud touching the arbitral proceedings, and the 1996 Act imposes restrictions on an application to set aside that award. It would be inconsistent with the restrictions in the Act on an application under section 68 to permit the losing party to resist enforcement of an award made in proceedings which have their seat in England and Wales on the ground of fraud in obtaining the award, and not to require him to apply under section 68.¹³⁵

(m) Arbitration of a ‘Dispute’ that an Award has been Obtained by Fraud

The jurisdiction of the court to set aside an earlier final judgment on the ground that it was obtained by fraud is an aspect of the jurisdiction inherited by the High Court from the Court of Chancery over matters of fraud. From the earliest times

¹²⁹ *Owens Bank Ltd v. Etoile Commerciale SA* [1995] 1 WLR 44.

¹³⁰ Defined as the juridical seat determined as set out in s. 3 of the 1996 Act.

¹³¹ Arbitration Act 1996, s. 2(1).

¹³² *Abouloff v. Oppenheimer* (1882) 10 QBD 295; *Vadala v. Lawes* (1890) 25 QBD 310; *Owens Bank Ltd v. Bracco* [1992] 2 AC 443.

¹³³ *Woollen v. Bradford* (1864) 33 Law Journal (NS) 129.

¹³⁴ *Thorburn v. Barnes* (1867) LR 2 CP 384 at 404 and 405; *Oppenheim & Co. v. Mahomed Haneef* [1922] 1 AC 482. (These are ‘misconduct cases’.)

¹³⁵ This point was not argued in *Soleimany v. Soleimany* [1999] QB 785.

in cases of actual fraud, the courts of Chancery and those of common law exercised a concurrent jurisdiction.¹³⁶ The jurisdiction in Chancery was against the person based upon whether in good conscience that person could retain the fruits of fraud. In *Ellerman Lines v. Read*,¹³⁷ a judgment had been obtained in Turkey by the defendant in breach of contract and through telling lies to the Turkish court, and the Court of Appeal granted an injunction restraining the defendant from enforcing that judgment. The Chancery jurisdiction extended to setting aside an arbitration award obtained by fraud, and depriving the fraudster of his ill-gotten gains.

Can an arbitral tribunal in London grant damages or restitution based on a cause of action for fraud in obtaining an award? As in the case of a judgment alleged to be obtained by fraud, there is no issue estoppel or res judicata bar which would arise from the earlier award. However, the earlier award is valid unless and until it is set aside, and the statutory jurisdiction under section 68 is intended by the Act to provide an exclusive code for the setting aside of an arbitral award, where the seat is in England and Wales. Its restrictions should not be capable of being circumvented by bringing a new claim against the same party before arbitrators for restitution of what has been paid under the award, or for damages in respect of that amount. The remedy is that provided by the statute.

However, this consideration would not operate as a bar against arbitration in London on a claim for compensation because a foreign award had been obtained by fraud. Nor would the New York Convention, if that award had not been recognised by the English courts under the Convention. Where the earlier award has been recognised by the English court, the effect under section 101(1) of the Act is that it is 'binding on the persons as between whom it is made ... and may accordingly be relied on by those persons by way of defence ... in any legal proceedings. The effect of this is to place the award on an equivalent footing with a valid and enforceable English domestic award'.¹³⁸

Fraud in obtaining an award would have been an available defence to an action brought at common law to enforce a domestic award.¹³⁹ It is considered that if a foreign award, including a New York Convention award,¹⁴⁰ is enforced through an action at common law there would be a defence to a subsequent claim for damages or restitution that the award had been obtained by the fraud of a party, because that contention ought to have been raised as a defence in the action for enforcement.¹⁴¹ Fraud is an available defence to recognition and enforcement under the Convention, on the public policy ground¹⁴² for refusal of

¹³⁶ *Nocton v. Lord Ashburton* [1914] AC 932 at 951.

¹³⁷ [1928] 2 KB 144.

¹³⁸ See also New York Convention, Article III.

¹³⁹ See Dicey and Morris, *The Conflict of Laws* (13th edn, 2000), p. 628, Rule 61 and note 77, referring to *Oppenheim & Co. v. Mahomed Haneef* [1922] 1 AC 482 at 487. It would be contrary to English public policy for the process of the court to be used to obtain the proceeds of fraud.

¹⁴⁰ Arbitration Act 1996, s. 104 preserves this jurisdiction.

¹⁴¹ *Yat Tung Investment Co. v. Dao Heng Bank* [1975] AC 581 at 589H–591A based on the abuse of the process principle in *Henderson v. Henderson* (1843) 3 Hare 100 at 115.

¹⁴² Article V.2(b) of the Convention and Arbitration Act 1996, s. 103(3).

recognition in Article V.2 of the Convention. However, as *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd*¹⁴³ shows, that contention when raised may not be tried out by the English court on the merits in the enforcement proceedings under the Convention. If the contention has been raised but not tried out then the English enforcement proceedings do not decide that there was no fraud, and the defendant has not had an opportunity of proving the fraud. In those circumstances, an actual decision to recognise and enforce the award by the English court would not seem in itself to raise any bar against the unsuccessful defendant running an arbitration claim against the successful party for compensation because the foreign award was obtained by him through fraud.

V. ANSWERS TO THE QUESTIONS

One can now return to the questions at the beginning of this article and put forward answers applying English law. A party says that an award has been obtained by fraud and says that the arbitrators were deceived into making it by false evidence. Can it be reopened, who is to decide on the complaint and what is the test? What law governs which test is to be applied?

- (1) Absent a procedure built into the arbitration clause or incorporated rules, this is primarily a question for the court having jurisdiction within the country of the curial law. It is this court which has supervisory jurisdiction in accordance with that curial law over an award made in arbitral proceedings governed by that curial law.
- (2) Whether it is to be reopened and the applicable test depends on the curial law and public policy under that law, and should be decided by the court within the country of the curial law.
- (3) Under the Arbitration Act 1996, there is jurisdiction to reopen for arbitral proceedings having their 'seat' in England and Wales, when the award has been obtained by fraud. It is a necessary ingredient that the opposing party or its representatives have been fraudulent or engaged in conduct so reprehensible that as a matter of 'public policy' in England the presumption in favour of finality is overcome. This jurisdiction under the Act does not depend upon there being 'fresh evidence', nor does the test for reopening import a test from 'fresh evidence' cases in ordinary litigation or from the jurisdiction which used to exist under section 22 of the Arbitration Act 1950.
- (4) The jurisdiction applies whether the fraud is 'intrinsic' or 'extrinsic'. The applicant must show that there has been or will be 'substantial injustice' if the award is allowed to stand, but once fraud is proved the court may readily find that. The right to object on the grounds of fraud will be lost if the applicant has not raised the objection before the arbitrators or the court diligently and promptly.

¹⁴³ [2000] 1 QB 288 affirming [1999] QB 740.

- (5) Under the Arbitration Act 1996, it is the court and not the arbitrators who decide whether there has been fraud. The court is able to deal with unmeritorious applications through granting summary judgment and through its jurisdiction to strike out for abuse of the process. The latter can be shaped by the courts to avoid relitigation of disputes decided by the arbitral tribunal when there is no strong justification for doing so.

If the award is a foreign award, should enforcement of the award be refused? What is the test?

- (1) This is a different question from review by the court in the country of the curial law exercising supervisory jurisdiction over the arbitral proceedings.
- (2) In proceedings to enforce a New York Convention award under section 101(2) of the Arbitration Act 1996:
 - (a) where the award has itself addressed the fraud issue and rejected it, and has been confirmed by the court exercising supervisory jurisdiction, usually the English court would refuse to inquire further into the fraud issue at least unless there is fresh evidence making out a strong prima facie case of fraud, and which could not with reasonable diligence be obtained earlier. This is because the power of refusing to enforce the award is to be exercised within the constraints of the New York Convention and giving effect to the policies of international co-operation underlying that Convention. However, the requirement of 'fresh evidence' should not be elevated into an inflexible requirement regardless of the strength of the case that there has been perjury and how the issue has been addressed by the arbitral tribunal and the supervisory court.
 - (b) If the fraud issue has not been considered by the arbitrators or the court having supervisory jurisdiction, without lack of diligence by the respondent, then one possible course is to stay the application pending diligent recourse by the defendant to that court.
- (3) In proceedings to enforce an award at common law by action on the award, the fraud issue is a defence and would be tried out by the English court on the merits.

