

Commentary

Court Review Of Awards On Public Policy Grounds: A Recent Decision Of The English Commercial Court Throws Light On The Position Under The English Arbitration Act 1996

By
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How deeply should a national court review an arbitral award where the losing party alleges that the award (rather than the way in which it was obtained) is contrary to public policy? This question is being increasingly posed in the context of international arbitrations raising issues of antitrust law and corruption.² In his July 3, 2008 judgment in *R v V* [2008] EWHC 1531, David Steel J in the English Commercial Court has addressed this issue for the first time under the English Arbitration Act 1996 and has adopted an approach which will be welcomed by many international arbitration practitioners.

The Background

In *R v V*, the arbitration respondent ("R") was a subsidiary of an oil company. It entered into a consultant agreement, governed by English law, pursuant to which "V" assisted R in obtaining approvals from the national oil company of a North African country for development plans. Although R had made two payments in the past to V, R's new management refused to pay the third success fee that had become due.

V started an ICC arbitration in London in 2006.³ R argued, *inter alia*, that V was merely influence peddling and that the agreement was, accordingly, contrary to the *lex loci solutionis* and English public policy.⁴ By a final award rendered in December 2007, the arbitral tribunal (made up of three well respected

European arbitrators) ordered R to pay the third success fee. It found that the consultant agreement was legitimate and that it was contrary to neither the *lex loci solutionis* nor English public policy.

R challenged the award, pursuant to section 68(2)(g) of the English Arbitration Act 1996, on the basis that it was contrary to public policy.⁵

The Applicable Legislation And Previous Case-Law

Section 68 of the English Arbitration Act 1996 provides the basis for a public policy challenge against an arbitral award rendered in England:

"(1) A party to arbitral proceedings may . . . apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

. . .

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant —

. . .

(g) the award being obtained by fraud or the award or the way in which it was procured being

contrary to public policy . . .
(Emphasis added.)⁶

In the context of enforcement of New York Convention awards, Section 103(3) of the 1996 Act provides, similarly, that “[r]ecognition or enforcement of the award may . . . be refused if . . . it would be contrary to public policy to recognize or enforce the award.”

Neither provision, however, gives any guidance as to the intensity of the review which the English courts should apply when public policy issues are raised.

Soleimany. Public policy has only once been successfully invoked before the English courts by a losing party against an arbitral award, and that was in the context of an application to enforce an award rather than a challenge. In Soleimany v Soleimany [1999] QB 785, the Court of Appeal reversed the High Court’s decision to enforce an arbitral award (rendered by the Beth Din in England under Jewish law) which enforced a contract to smuggle carpets out of Iran. In that case, unlike R v V, the breach of public policy was apparent on the face of the arbitral award: the Beth Din had itself found that the contract was illegal as a matter of Iranian law.⁷

Nevertheless, Waller LJ (giving the judgment of the Court of Appeal) provided his (*obiter*) view as to what the reviewing court should do where an arbitral tribunal has not found that there was illegality:

“In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the Arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered Tribunals in international trade but in many other circumstances.

We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the Arbitrator’s award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality.”⁸

In other words, the Court of Appeal in Soleimany held that if there is prima facie evidence of illegality, then the reviewing court should conduct a preliminary inquiry (“inquire further to some extent”) to determine whether to give “full faith and credit” to the arbitral award or else to conduct a full-scale trial into the question of illegality. This left open the difficult question of what such a preliminary inquiry should involve: should the reviewing court conduct a fresh review of the evidence that had been submitted to the arbitral tribunal, or should it merely conduct an audit of the quality of the review already performed by the arbitral tribunal?⁹

Westacre. Shortly after its decision in Soleimany, the Court of Appeal revisited the same issue in Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd [2000] QB 288. In that case, unlike in Soleimany, the arbitral tribunal (sitting in Geneva and applying Swiss law) had made no finding of either illegality or breach of public policy. It had found that there had been neither corruption nor influence peddling. The Court of Appeal was unanimous in holding that there was no reason to refuse to enforce the award. Two of the judges, however, doubted the approach that had been suggested by Waller LJ in Soleimany.¹⁰ Thus, Mantell LJ held:

“From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could

be no justification for refusing to enforce the award.”¹¹

Referring to the preliminary inquiry proposed by Waller LJ in Soleimany, he held:

“For my part I have some difficulty with the concept and even greater concerns about its application in practice . . .”

Sir David Hirst agreed with Mantell LJ and in addition approved the first instance decision of Colman J, who had held that in deciding not to conduct a full-scale inquiry it was relevant that the alleged offence was less serious than, say, drug-trafficking.¹²

The Judgment In R v V

The fact situation in R v V was closer to that in Westacre than that in Soleimany: the parties had fully debated the illegality/public policy issue, experts had given evidence on the relevant foreign law and the arbitrators had decided that the agreement was contrary to neither the *lex loci solutionis* nor English public policy. Accordingly, it ought to have followed from the views expressed by the majority of the Court of Appeal in Westacre that there should be no preliminary inquiry.

In order to distinguish its case from that in Westacre, and thus to avoid the majority view of the Court of Appeal, R pointed out that it was challenging an award rendered in England, whereas Westacre had concerned an objection to enforcement of a New York Convention award. R argued that the reviewing court should apply a greater degree of scrutiny when deciding a section 68 challenge against an award rendered in England: where the reviewing court was exercising its “supervisory jurisdiction” (*i.e.*, in respect of an award rendered in England), the scrutiny should, so R argued, be greater than in cases where it was enforcing a New York Convention award.

In a judgment rendered less than one month after the hearing, David Steel J rejected this argument and held that he was bound by “the decision in Westacre . . . in respect of which there is no material factual distinction from the present case.”¹³ He reiterated the concerns about Waller LJ’s approach that had been expressed by the majority in Westacre:

“The difficulty with the concept of some form of preliminary inquiry is of course assessing how far that inquiry has to go. This must be all the more so where R does not seek to deploy any new evidence (let alone evidence not available at the time of the original reference).”¹⁴

In any case, David Steel J held that he would “accord the award full faith and credit, even if it were appropriate to embark on any form of preliminary inquiry.”¹⁵ This was for the following reasons: (a) there was plenty of material before the arbitral tribunal to show that the contract was not illegal under the *lex loci solutionis*; (b) the arbitrators had expressly found that the contract was not illegal; (c) the arbitrators were well known, experienced and highly competent; and (d) there was nothing to suggest that there had been any collusion or bad faith in obtaining the award.¹⁶

Nevertheless, the judge went on to review the merits. He found that the tribunal’s “conclusion that the [consultant] agreement was not illegal as a matter of [the *lex loci solutionis* was] unimpeachable;”¹⁷ and he found that the agreement was not contrary to English public policy either.¹⁸

R did not seek permission to appeal David Steel J’s judgment.

Commentary

What should a national court do when faced with an allegation that an award (rather than the way in which it was obtained) is contrary to public policy? Should it conduct a minimal review of the award, in order to protect the principle of finality of awards and thus encourage parties to resort to arbitration? As Redfern and Hunter state: “There is a belief that, so far as international arbitrations are concerned, the parties should be prepared to accept the decision of the arbitral tribunal even if they consider it to be wrong, so long as the correct procedures are observed. If a court is allowed to review this decision on the law or on the merits, the speed and, above all, the finality of the arbitral process is lost. Indeed, arbitration then becomes merely the first stage in a process that may lead, by way of successive appeals, to the highest appellate court at the place of arbitration.”¹⁹

Or should the national court instead conduct a more extensive review, possibly even hearing new evidence as well as legal argument, in order to ensure that the award is not contrary to public policy? After all, public policy by definition goes beyond the will of the parties and cannot be waived by their mere agreement.

The choice between these two approaches is difficult not only because there are good arguments in favor of both,²⁰ but also because there is in reality no halfway house: once the court engages in a preliminary review of the type suggested by Waller LJ in *Soleimany*, it is stepping onto a slippery slope leading to a complete reopening of the merits. The preliminary enquiry was relatively simple in *R v V*, because of the inherent difficulties in R's case and the quality of the arbitral tribunal,²¹ but even there it required a one-and-a-half-day hearing and substantial legal fees. In other cases, the preliminary enquiry could be considerably more difficult to perform.

The ILA Report. This question (*i.e.*, the appropriate degree of scrutiny by national courts where public policy issues are raised) has been considered by the International Law Association ("ILA")'s Committee on International Arbitration. That Committee recommended in its 2002 Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards that:

"When the violation of a public policy rule of the forum alleged by the party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the facts of the case, the court should be allowed to undertake such reassessment of the facts."²²

The Final Report explained that there had been debate among the Committee members as to whether the reviewing court should:

"(a) only look to the *dispositif* of the award and whether its enforcement would be contrary to public policy; (b) also be entitled to review the reasoning in the award; or (c) also be entitled to review the underlying facts and any new evidence presented by the party resisting

enforcement. The majority of the Committee concluded that the court, when enforcement is resisted on grounds of *lois de police*, should be entitled to review the underlying evidence presented to the tribunal and, in exceptional cases, any new evidence. However, the court should undertake a reassessment of the facts only when there is a strong *prima facie* argument of violation of international public policy."²³

The English courts' approach. In light of the *R v V* judgment, it appears that the English courts have followed a different direction, adopting option (b) as described in the ILA's Final Report (*i.e.*, a review of the reasoning in the award only), at least in respect of the situation where the public policy issue has been raised before the arbitral tribunal.²⁴ Thus:

- Where it is clear from the tribunal's reasoning that the award is contrary to public policy (*e.g.*, because the tribunal has found that the contract was illegal in its place of performance), then the English courts will not uphold the award. See the Court of Appeal's judgment in *Soleimany*;
- Where, on the other hand, it is not possible to determine from the tribunal's reasoning that the award is contrary to public policy (*e.g.*, because the tribunal has found that the contract was not illegal in its place of performance), then the English courts will uphold the award, without conducting any kind of preliminary enquiry. See the Court of Appeal's judgment in *Westacre*. This is so regardless of whether the public policy issue is raised on a challenge under section 68 of the Arbitration Act 1996 or by way of an objection to enforcement of a New York Convention award. See the High Court's judgment in *R v V*.

The approach of the English courts in this respect is to be applauded, particularly by those who wish to promote London as a place of arbitration. So also is the speed with which David Steel J delivered his

judgment. They should help to deter the kind of wasteful post-award litigation which has in the past made commercial parties reluctant to choose London as a place of arbitration.²⁵ The clear message sent by the English courts, yet again, is that attempts to second-guess arbitral tribunals will not be tolerated in England (except of course where section 69 of the Arbitration Act 1996 allows an appeal on a point of English law).²⁶

Comparison with other jurisdictions. Moreover, the approach of the English courts appears to be more or less in line with the approach taken by courts in other arbitration-friendly jurisdictions. For example, the French courts have for the past decade held that a violation of public policy must be “flagrant, effective and concrete” (*flagrante, effective et concrète*) in order to give rise to an annulment.²⁷ The term “flagrant” has been defined by Yves Derains as meaning that the award must “contain the ingredients of the breach” of public policy.²⁸

At the same time, the French courts have claimed full power to review arbitral decisions where public policy is at stake.²⁹ However, this has in practice not led to detailed review of arbitral awards, and in the vast majority of cases where awards have been attacked on the basis that they are contrary to public policy, the awards have been upheld.³⁰

In Switzerland, the courts appear to be even more reluctant to review arbitral awards where public policy issues are raised. As explained by Poudret and Besson, on a challenge application “the Federal Tribunal cannot review the assessment of the evidence by the arbitrator.”³¹ Where the public policy issue is raised in the context of an enforcement application rather than a challenge, the position is apparently less clear. Nevertheless, so Poudret and Besson explain, “even in this second case, the judge cannot freely review the facts as determined by the arbitral tribunal solely because the defeated party invoked a violation of public policy.”³²

Waiver. Returning to England, the question remains what approach the courts should take in a case where the public policy issue was never raised before the arbitral tribunal. (The discussion above concerns only those cases where the public policy issue has been raised before, but rejected by, the arbitral tribunal.) In other words, what should the

reviewing court do where the losing party decides to raise a public policy argument for the first time at the challenge or enforcement stage? Should the losing party be deemed to have waived its right to raise that point? There appears as yet to be no decided case in this respect.³³

This question may not arise often in respect of arbitrations held in England, because section 68(1) of the Arbitration Act 1996 (which applies only to such arbitrations)³⁴ provides:

“. . . A party may lose the right to object (see section 73) . . .”

Section 73 (“Loss of right to object”) in turn provides:

“(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection — . . . (d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise the objection later, before . . . the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.”

This would appear to exclude those cases where the losing party decides to hold the public policy argument up its sleeve until the challenge stage.

There will, however, remain some cases where the public policy issue only becomes apparent after the award is rendered and the right to object is accordingly not lost. In addition, as explained above, section 73 does not apply to arbitrations held outside England. In these two categories of cases, what are the English courts to do? They do not have the benefit of the arbitral tribunal’s reasoning on the public policy issue to review. Accordingly, they are faced with a difficult choice between two options, neither of which is really satisfactory: (a) dismissing the public

policy issue without its ever having been considered by either the arbitral tribunal or the national court; or (b) hearing new evidence and legal argument on the point, thus depriving the arbitral process of two of its key attributes, speed and finality.³⁵

The English courts may prefer the second of these options in cases where the losing party has not acted in bad faith. After all, why should it be penalized for raising an issue for the first time which it had no reason to know about before the award was rendered?

By contrast, the first option may be preferable in respect of New York Convention awards where the losing party has effectively kept the public policy argument up its sleeve. There is no reason to treat the losing party in such a case any better than it would be treated if the award had been rendered in England, Wales or Northern Ireland.³⁶ In neither case should the losing party be allowed to act in such bad faith.

EC competition law. However, in cases where the public policy issue concerns EC competition law, the English courts will need to take account of the judgment of the European Court of Justice (“ECJ”) in Eco Swiss China Time v Benetton International NV [1999] ECR I-3055. In that case, the Dutch *Hoge Raad* referred to the ECJ the question whether an award should be annulled on the basis that it was contrary to Article 81 of the EC Treaty, notwithstanding the fact that in that case neither party had relied upon Article 81 during the course of the arbitration.

The ECJ replied that:

“a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC . . . , where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.”³⁷

Accordingly, the ECJ felt it unnecessary to respond to the *Hoge Raad*'s specific question about the parties' failure to raise the competition law issue during the arbitration.³⁸ It would appear from this that an award which is contrary to EC competition law should be

annulled even where the losing party has deliberately kept the competition law arguments up its sleeve.³⁹ However, the position is not entirely clear in this respect.

More generally, the Eco Swiss judgment may raise the question what intensity of court review should be applied where EC competition law issues are raised, whether or not they have previously been raised before the arbitral tribunal. The argument may perhaps be made that, where the public policy issue concerns EC competition law, the courts are required to conduct a closer review, because the public policy is that of the EC and not of England. However, it is submitted that this argument should be rejected. There is in fact no reason to treat EC competition law differently from national rules of public policy (*e.g.*, relating to corruption). To the contrary, the ECJ's judgment in Eco Swiss v Benetton makes it clear that EC competition law is to be treated in the same way as national rules of public policy, no worse but also no better.⁴⁰

Conclusion

As can be seen, some questions still remain about the English courts' approach to reviewing awards on public policy grounds. Nevertheless, in the majority of cases where a losing party raises a public policy defense at the challenge/enforcement stage, it now appears, following the judgment in R v V, that the English courts will restrict themselves to reviewing the reasoning of the arbitral tribunal, instead of seeking to review the underlying facts. Unless it is clear from the award itself that there has been a breach of public policy, the award will not be overturned on that basis. This shows a laudable understanding by the English courts that arbitration is a substitute for, and not merely a prelude to, litigation.

Endnotes

1. The author thanks his Jones Day colleagues Dr. Michael Bühler, Lee Coffey, Carroll Dorgan and Pierre Heitzmann for their helpful comments. However, the views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated. As explained in note 3 below, Jacob Grierson was a member of

- the counsel team acting for V in both the arbitration and the Commercial Court proceedings in R v V.
2. In the SNF v Cytec Industrie case, for example, the French and Belgian courts answered this question in diametrically opposed fashions. In that case, the same award, which was attacked by one of the parties on the basis that it contravened Article 81 of the EC Treaty, was enforced by the *Cour d'appel de Paris* and *Cour de cassation* in France, but then annulled by the *Tribunal de premier instance de Bruxelles*. See Rev. arb. 2007, pp. 100 (*Cour d'appel de Paris*) and 303 (*Tribunal de premier instance de Bruxelles*) and Rev. arb. 2008, p. 473 (*Cour de cassation*). English translations of the decisions of the *Cour d'appel de Paris* and *Tribunal de premier instance de Bruxelles* can be found at Stockholm Int. Arb. Rev. 2007:2, pp. 79 and 99. An English language commentary by the author and Pierre Heitzmann on the *Cour d'appel's* and *Tribunal de premier instance's* decisions can be found at Stockholm Int. Arb. Rev. 2007:2, p. 39.
 3. Jones Day Paris (Dr. Michael Bühler and Jacob Grierson) acted as lead counsel for V, together with Terence Mowschenson QC of Wilberforce Chambers. Before the Commercial Court, Terence Mowschenson QC and Jacob Grierson acted as counsel for V.
 4. English public policy was relevant because English law governed the consultant agreement.
 5. R also relied on section 81(1)(c) of the 1996 Act, which preserves the common law in relation to "the refusal of recognition or enforcement of an arbitral award on grounds of public policy."
 6. It has been suggested by Poudret and Besson that section 68(2)(g) "does not concern the case where the award would as such be contrary to public policy, which is not a ground for challenge under English law, but one where it was obtained in this manner, for example through corruption." Poudret and Besson, Comparative Law of International Arbitration (2nd ed.), p. 751 (emphasis added). However, the language of section 68(2)(g) ("the award or the way in which it was procured being contrary to public policy") does appear to cover both the situation where the award is procured in a way which is contrary to public policy (*e.g.*, because the arbitral tribunal was bribed or deceived) and that where the award itself is contrary to public policy (*e.g.*, because it is contrary to EC competition law).
 7. Under the applicable law, which was Jewish law, the fact that the contract was illegal under Iranian law had no effect on the enforceability of the contract.
 8. Soleimany at 800.
 9. It seems clear, however, that Waller LJ's preliminary inquiry was not intended to include any review of new evidence, since the very purpose of the preliminary inquiry was to decide whether or not to hear such new evidence ("conduct a full-scale trial").
 10. The third judge was Waller LJ, who applied the same approach he had proposed in Soleimany.
 11. Westacre at 316.
 12. Westacre at 317. Waller LJ, by contrast, disagreed with Colman J "as to the appropriate level of opprobrium at which to place commercial corruption."
 13. R v V at ¶ 34.
 14. R v V at ¶ 30.
 15. R v V at ¶ 31.
 16. R v V at ¶ 30.
 17. R v V at ¶ 43.
 18. R v V at ¶ 49.
 19. Redfern and Hunter, Law and Practice of International Commercial Arbitration (4th ed.), p. 412. See also Lew, Mistelis and Kröll, Comparative International Commercial Arbitration, p. 731: "The finality of awards is of paramount importance in international commercial arbitration. There is a recognised international policy in favour of enforcing awards. This ensures a certain degree of certainty and predictability in the international arbitration process essential to international trade."
 20. For eloquent defenses of more extensive reviews, see: Seraglini, "*L'intensité du contrôle du respect par*

l'arbitre de l'ordre public,” Rev. arb. 2001, p. 773; and Hanotiau and Caprasse, “Public Policy in International Commercial Arbitration,” in Gaillard and Di Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards (Cameron May, 2008), pp. 804-818.

21. In addition, it is relevant that the award had been scrutinized by the ICC Court pursuant to Article 27 of the ICC Rules. This kind of quality control is of course not available in respect of *ad hoc* arbitrations. For discussion of the ICC Court’s scrutiny of awards, see Bühler and Webster, Handbook of ICC Arbitration, (2nd ed.) chapter 27.
22. Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19>), Recommendation 3(c).
23. *Ibid.*, ¶ 52.
24. The situation where the public policy issue has not been raised before the arbitral tribunal will be discussed further below, under the heading “Waiver.”
25. Jan Paulsson described the question “Will there be wasteful post-award litigation before the national courts?” as one of only two legal considerations that are “really material for commercial parties” deciding where to arbitrate. See Paulsson, “Arbitration Friendliness: Promise of Principle and Realities of Practice,” Arbitration International (2007) Vol. 23, No. 3, 477.
26. Section 69 provides: “Unless otherwise agreed by the parties, a party to arbitral proceedings may . . . appeal to the court on a question of law arising out of an award made in the proceedings.” Many arbitration clauses “otherwise agree,” either by their wording or via institutional rules (*e.g.*, Article 28(6) of the ICC Rules of Arbitration, which provides: “. . . By submitting their dispute to arbitration under these Rules, the parties . . . shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”). Article 28(6) was held to exclude an appeal in Sanghi v TII [2000] 1 Ll Rep 480, 482. Audley Sheppard has suggested that, where the parties agree to exclude an appeal under section 69, this may also be relevant to the courts’ assessment of a section 68 challenge by one of those parties, “depending upon the nature of the mandatory rule.” See Sheppard, “Mandatory Rules in International Commercial Arbitration — an English Law Perspective,” Am. Rev. of Int. Arb. 2007, p. 212 at 140.
27. The term “*flagrante, effective et concrète*” has been invoked by the *Cour d’appel de Paris* in a number of cases where public policy defenses have been raised, including the well known Thalès Air Defence v Euromissile et al case (judgment of November 18, 2004, Rev arb. 2005, p. 751) and more recently in the Abela case (judgment of September 25, 2008, unreported but summarized at Les Cahiers de l’Arbitrage, 2008/3, page 38).
28. See Derains, Rev arb. 2001, p. 817: “*Pour être flagrante, la violation de l’ordre public, telle un flagrant délit, doit être commise sous les yeux du juge qui la constate. Lorsque la question a été soumise à l’arbitre, ceci implique que la sentence contienne les ingrédients de la violation et les porte à la connaissance de l’autorité de contrôle. La solution susceptible de heurter l’ordre public est alors celle donnée à un litige dont les éléments constitutifs sont délimités par les constatations de fait de l’arbitre et son appréciation des droits des parties.*” See also Fadlallah, Rev. arb. 2008, p. 476 at 484: “*il faut la comprendre comme une violation claire (par opposition à discutable) et substantielle (par opposition à formelle) de l’ordre public.*” (“It must be understood as a clear (not arguable) and material (not formal) breach of public policy.”)
29. See, *e.g.*, the well known European Gas Turbines SA v Westman International Ltd judgment of the *Cour d’appel de Paris*, Rev. arb. 1994, pp. 359, 367 and XX YBCA (1995) 198, 203, where the *Cour d’appel* held: “*le pouvoir reconnu, en matière d’arbitrage international, à l’arbitre d’apprécier la licéité d’un contrat au regard des règles relevant de l’ordre public international et d’en sanctionner l’illéicéité en prononçant en particulier sa nullité, implique, dans le cadre d’un recours en annulation fondé sur la contrariété de la reconnaissance ou de l’exécution de la sentence arbitrale à l’ordre public international . . . un contrôle de la sentence, par le juge de l’annulation, portant en droit et en fait sur tous les éléments permettant notamment de justifier l’application ou non de la règle d’ordre public international et dans l’affirmative,*

d'apprécier, au regard de celle-ci, la licéité du contrat." ("The power, granted to the arbitrator in international arbitration, to ascertain whether a contract is licit in the light of the rules of international public policy, and to sanction its being illicit by holding that it is null and void implies, in annulment proceedings based on the allegation that the recognition or enforcement of the arbitral award would be contrary to international public policy . . . , a review of the award by the annulment court. This review concerns all legal and factual elements justifying (or not) the application of the international public policy rule, and in the former case, the evaluation of the validity of the contract according to this rule.")

30. Indeed, in the Westman case itself, the argument that the award was contrary to substantive public policy was rejected. (The award in that case was annulled on the alternative ground that there had been fraud in the arbitral proceedings.)
31. See Poudret and Besson, Comparative Law of International Arbitration (2nd ed.), p. 861.
32. See Poudret and Besson, *ibid.*
33. By contrast, the point has arisen in other jurisdictions. See, *e.g.*, the French Thalès case referred to at note 27 above and the Dutch Eco Swiss case referred to below. Hanotiau and Caprasse argue that "the fact that an alleged violation of public policy has not been raised before the arbitrators does not prevent a thorough control of compliance with public policy by the enforcement judge. If that were the case, the possibility of control would depend on the attitude of the parties before the arbitral panel or on the initiatives of the arbitrators. Such a situation would be unacceptable."
- See "Public Policy in International Commercial Arbitration," *op. cit.*, note 20 above, p. 816.
34. See Arbitration Act 1996, section 2.
35. The option of remitting the award to the arbitral tribunal for reconsideration might have seemed to be a good solution in the case of a challenge to an English award. However, this would not be open to the reviewing court, as section 68(3) of the Arbitration Act 1996 only gives the court power to remit where "there is shown to be serious irregularity" (*i.e.*, where the reviewing court has already decided that the award is contrary to public policy, not where it has decided that it may be contrary to public policy).
36. To the contrary, the ILC Committee on International Commercial Arbitration has recommended that "no distinction be made between international arbitral awards made in the jurisdiction of the enforcement court or abroad: the test of international public policy should be the same." See Recommendation 1(f) of the Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, *op. cit.*, note 22 above.
37. Eco Swiss (ECJ), ¶ 41.
38. Eco Swiss (ECJ), ¶ 42.
39. In any event, this is how the *Hoge Raad* appears to have understood the ECJ's response. See Eco Swiss (Hoge Raad), XXV YBCA (2000) 475.
40. Audley Sheppard has suggested that the English courts are in fact likely to be more lenient with respect to EC law issues than they would be concerning "a mandatory rule of purely English law." See Sheppard, *op. cit.* (note 26 above), at p. 140. ■