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World Duty Free Company LTD v. The Republic of Kenya

[...]

III. The Legal Consequences

Kenyan ordre public

13. Corrupting Governmental officials is an offence in Kenya. Article 4 of the Prevention of Corruption Act, first introduced in 1956, provides that any person who:

   "corruptly gives or agrees to give or offers any gift, loan, fee, reward, consideration or advantage whatever, to any agent as an inducement or reward for doing or forbearing to do ... any act in relation to his principal's affairs or business ... shall be guilty of a felony".4

14. The crime is punishable by up to ten years imprisonment.

15. Kenyan law also denies the fruits of such criminality the force of law. As a matter of Kenyan public policy, contracts tainted with illegality are unenforceable. Thus, in a recent case in which the High Court of Kenya declared a contract "void by reason of illegality",5 it relied on Birkett v Acorn Business Machines Limited, in which the English Court of Appeal held that:

   "The courts had an overriding duty in the public interest not to order enforcement of a contract that was tainted with illegality. [...]"

illegality, the court might refuse to enforce it even if illegality had not been pleaded or alleged."6

16. As this Kenyan High Court judgment makes clear, the reference in the Contract to the applicability of both Kenyan and English law (see Articles 9(2)(c) and 10 of the House of Perfume Contract dated 27 April 1989 at Exhibit 1 to the Claimant's Memorial) does not change the legal consequences of the Claimant's criminal behavior. On this fundamental issue of public policy, Kenyan and English law are unsurprisingly the same.7

English ordre public
17. The most authoritative commentary on the English law of contract explains the consequences of illegality thus:

"Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide any other remedies arising out of the contract. The benefit of the public, and not (he advantage of the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract. 'The principle of public policy' said Lord Mansfield, 'is this: ex dolo malo non oritur actio. No court will lend its aid to a man who finds his cause of action upon an immoral or illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted'."

18. In recent years, the English Courts have had cause to consider issues of corruption, and the enforceability of illegal contracts, at length in the context of applications to enforce arbitral awards arising from international contracts tainted with illegality. These cases confirm that contracts involving bribery and corruption (and awards giving effect to them) are unenforceable as a matter of English law.

19. In *Soleimany v. Soleimany* the English Court of Appeal refused to enforce an award giving effect to a contract between a father and son, which involved the smuggling of carpets out of Iran in breach of Iranian revenue laws and export controls. In that case, the father and son had agreed to submit their dispute to arbitration by the Beth Din, the Court of the Chief Rabbi in London, which applied Jewish law. As a matter of the applicable Jewish law, the illegal purpose of the contract had no effect on the rights of the parties and the Beth Din proceeded to make an award enforcing the contract. In declining to enforce the award, the Court of Appeal held that:

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

20. Both the High Court and the Court of Appeal considered similar issues in *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd*. This dispute arose from a "consultancy" agreement for the procurement of contracts for the sale of military equipment in Kuwait. Westacre commenced arbitration claiming payment of its "consulting fee". Jugoimport defended the claim on the grounds that, in violation of Kuwaiti law and public policy, the contract involved *Westacre* bribing various Kuwaitis to exert their influence in favour of entering sales contracts with Jugoimport.

21. The agreement between Westacre and Jugoimport was governed by Swiss law and provided for arbitration in Switzerland. The arbitral tribunal found that there was no evidence of corruption, and that lobbying by private enterprises to obtain public contracts was not illegal under Swiss law. The award was first challenged in the Swiss Federal Court, which rejected the challenge on the basis that allegations of corruption had already been dealt with and rejected by the arbitral tribunal. Attempts to enforce the award were subsequently challenged in the English Courts, where Jugoimport filed new affidavit evidence in support of its allegation of corruption.

22. In decisions that have attracted some critical commentary, the English Court rejected the challenge to enforcement both at first instance and in the Court of Appeal. This decision appeared to turn, however, on the following factors:

(i) the arbitral tribunal itself had considered the allegations of bribery and found that they had not been substantiated;

(ii) "lobbying" was not, as such, an illegal activity under the governing law chosen by the parties;

(iii) the Court was faced with international arbitration awards that had been upheld by with Swiss Federal Tribunal and, therefore, had to balance the public policy of discouraging international commercial corruption with the public policy of sustaining international arbitration awards.

23. Of particular relevance to the Claimant's affirmation of corruption in this case, however, the plaintiff in *Westacre* (i.e.
the party seeking to enforce the allegedly illegal contract) accepted in the Court of Appeal that if the defendants were entitled to establish the new evidence of corruption presented in the affidavit (which the plaintiff did not accept), and if those facts proved to be correct, then the enforcement of the award should be refused.13

24. Although these cases relate to enforcement proceedings (here, of course, there will be no such second review of the Tribunal's award by a court of enforcement), and although in Westacre actual corruption was disputed, their point of departure is clear: where there is a finding of corruption or other illegality, English public policy denies effect to both the contract and the arbitral award resulting therefrom.

International ordre public

25. Under Article 42 of the ICSID Convention, international law as well as Kenyan and English law governs cases in the absence of an explicit stipulation of applicable law. The interplay of national and international law under Article 42 has given rise to much erudite commentary, but the distinction is of no moment here since there is no conceivable inconsistency with respect to the stigma that attaches to corruption.

26. The well-known ICC Case No. 111014 involved a dispute as to whether an agreement entered into in 1950 for the payment to Mr X of a 10% commission on the value of industrial equipment then required for a particular public energy project in Argentina also covered the sale of equipment" in 1958 for another similar public project.

27. Testifying before Judge Lagergren, Mr X stated that he ceded certain "participation-" to "influential personalities" among a "clique of people which had a controlling influence upon the Government's economic policy." He denied, however, that he had offered any commission to President Peron personally. Witnesses for the defendant (a foreign supplier) testified that they understood that most of the money was for "Peron and his boys" as the only way to "get business of any scale in Argentina."

28. The entirety of the award was published in 1994.15 There is no indication that the claimant, Mr X, admitted that he bribed governmental officials; the closest he got was to refer to "people" who had "controlling influence on economic policy." (Some early commentators on this well-known award were thus overstating the matter when they described both sides as admitting that their bargain related to the purchase of favours from officials.)

29. Yet the Sole Arbitrator had no hesitation in declaring the contract to be "condemned by public decency and morality." He did so because:

"it is, in my judgment, plainly established from the evidence taken by me that the agreement between the parties contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business."

30. He accepted that influence-peddling "seems to have been more or less accepted or at least tolerated in the Argentine at that time," and that the commissions were not to be used exclusively for bribes. Nevertheless, he concluded: "Such corruption is an international evil; it is contrary to good moral and to an international public policy common to the community of nations," and that the case involved:

"gross violations of good morals and international public policy [which] can have no countenance in any court either in the Argentine or in France [the seat of the arbitration], or, for that matter, in any other civilised country, nor in any arbitral tribunal."

31. Judge Lagergren reached these conclusions as though they were obvious; he did not feel the need to cite a single authority for the proposition that bribery was contrary to international public policy.16 The Government of Kenya submits that what was evident to Judge Lagergren in 1963 has become only more evident in the course of the intervening years.

32. In its 2000 Interim Report on public policy as a bar to the enforcement of international arbitration awards, the
Committee on International Commercial Arbitration of the International Law Association (the ILA) reviewed the development of the concept of public policy during the latter part of the 20th Century.\(^{17}\) The ILA observed that beyond purely domestic public policy, *ordre public interne*, there exists a narrower category of international public policy, *ordre public externe* or *international*, which is confined to the violation of the really fundamental conceptions of the legal order in the country concerned. Narrower still is the concept of a “truly international” or “transnational” public policy, which the ILA described to be “of even more restricted scope, but of universal application - comprising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as ‘civilised nations’”\(^{18}\).

33. In its examination of international public policy, in particular those activities that are regarded as *contra bonos mores*, the ILA reported that:

> “Following the 1997 OECD Convention on Combating the Bribery of Foreign Officials in International Transactions, which reflects the mounting international concern about the prevalence of corrupt trading practices, it is arguable that there is an international consensus that corruption and bribery are contrary to international public policy.”\(^{19}\)

34. Indeed, the ILA went further. In its consideration of the narrower category of "truly international" or "transnational" public policy, it observed that:

> “A number of cases have recognised certain activities, such as corruption, drug trafficking, smuggling and terrorism, to be illicit virtually the world over.”\(^{20}\)

35. As the ILA noted, this "international" or "transnational" public policy is recognised in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.\(^{21}\) It declares that:

> "Bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development and distorts international competitive conditions".

36. Article 1 of the Convention requires each contracting slate party to establish that it is a criminal offence under this law:

> “For any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”\(^{22}\)

37. The OECD Convention does not stand alone. On a regional level, the Council of Europe has promulgated a "Civil Law Convention on Corruption", which was opened for signature in November 1999; the Organisation of American States has also adopted a convention against corruption.\(^{23}\) On a global level, the United Nations itself is in the process of drafting a Convention against Corruption, the last revised drift dating to September 2002.\(^{24}\)

38. The weight of international authority is overwhelming. Bribery of the type that the Claimant has now affirmed is contrary to international public policy. The fruits of such illegality do not have the force of law.
7. Indeed, pursuant to the Kenyan Law of Contract Act 1961, also Annex 1, the English common law of contract applies in Kenya.
10. Ibid, at page 800.
15. Ibid.
16. He rejected the claim by stating that he would not take jurisdiction (stating that parties to such a contract had “forfeited the right to ask for assistance of the machinery of justice”). This approach was as criticised as failing to give effect to the principle of the autonomy of the arbitration clause. However, Dr Wetter's publication of the award 30 years later revealed that there was no such contractual clause; the dispute had been the subject of a compromis. Thus, the decision was tantamount to a rejection of arbitrability.
20. Ibid, at page 7. (Emphasis added.)
22. In the commentary to the Convention, also at Annex 9, the OECD makes clear that: [The] Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe. The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active. Thus, whether a briber initiated the corruption, or was induced to pay a bribe, the illegality of its conduct remains the same.
23. See the Inter-American Convention against Corruption adopted on March 1996.
24. See the revised draft United Nations Convention against Corruption produced the Third Session of the Ad Hoc Committee for the Negotiation of a Convention against Corruption at Vienna, 30 September - 11 October 2002.

Referring Principles:

IV.7.1 - Invalidity of contract that violates good morals ("<em>boni mores"</em>)

IV.7.2 - Invalidity of contract due to bribery