JUDGMENT : Mr Justice David Steel : Commercial Court. 3rd July 2008

1. The claimant ["R"] makes two applications:
   i) a challenge to an award under section 68(2)(g) of the Arbitration Act 1996 on the grounds that the award is contrary to English public policy; and
   ii) a challenge to enforcement of the same award under section 81(1) (c) of the Act on the grounds that the award is contrary to public policy at common law.

   The public policy on which R relies is that against the upholding of corrupt practices including influence peddling: see ***Montefiore v Menday Motor Components [1918] 2 KB 241*** and ***Lemenda Trading v African Middle East Petroleum [1988] QB 448).***

2. The award was made on 12 December 2007 in London under the auspices of the ICC. The tribunal was made up of three distinguished arbitrators: Dr Laurent Levy, Arthur Marriott Q.C. and Prof. Dr. Siegfried Elsing. By the award the Tribunal upheld a claim by the Defendant ["V"] for immediate payment of $3 million and substantial further payments due on the achievement of specified oil production figures.

3. The claim was brought under the terms of a Consultant Agreement ["*the Agreement*"] dated 25 March 2002. V was beneficially owned by a Mr. F whose personal services as a consultant were being retained by R. The contract was no doubt entered into in the name of V, a BVI company, primarily for Mr. F's tax purposes.

4. The recitals to the agreement recorded that V had expertise in Libya concerning the oil industry. (Indeed Mr F had been retained by R and a number of other oil companies as a consultant in this field for some years.) The recitals identified the specific objects of the Agreement as follows:

   "*Whereas R. desires to use the Consultant to advise and assist [R's subsidiary] in its negotiations with NOC [the National Oil Company of Libya] with the purpose of obtaining for [R's subsidiary] the approval of the development plans and production quotas submitted for the discoveries in Blocks NC 186, NC 187 and M4 … in terms and conditions acceptable for [R's Subsidiary].*"

5. The Agreement provided as follows:

   "*ARTICLE 2 - OBLIGATIONS OF THE CONSULTANT*

   2.1 Consultant agrees that during the term of this Agreement it will, subject to the terms and conditions hereinafter expressed, and use its best efforts in connection with the following obligations and duties which Consultant undertakes to respect and carry out.

   The Consultant shall assist R in connection with the promotion of its interests related to the Blocks as follows:

   a) Consultant shall obtain all possible relevant formal and informal information on NOCs requirements for a successful approval of the development plans for the discoveries in the Blocks;

   b) Consultant shall obtain all possible relevant formal and informal information in NOCs requirements for a successful approval of the production quotas for the discoveries in the Blocks;

   c) Consultant represents that it has inside knowledge of the Libyan petroleum industry, and has long term experience in dealing with Libyan authorities;

   d) During the term of this Contract Consultant shall provide consulting services related to the scope of this Contract exclusively to R. Consultant shall not engage in any other agreement to provide similar services to other persons for a period of 6 months from the termination of this Contract.

   e) For the avoidance of doubt, Consultant is not appointed R's representative, and shall not commit or bind R without R's prior written approval.

   f) Assist R in negotiations with Government officials, and State and private corporations in the territory, when requested by R.

   g) Advise R with respect to the preparation and presentation of R's offers for the Blocks, in order to optimise the form and content of R's offers so that they are properly prepared;

   h) Promote and defend the image and reputation of R, in light of the reliability of R's services and the professionalism of its staff;

   i) Advise R, and assist if necessary, with respect to the negotiation strategy and the tactics to be adopted concerning the Blocks….

   ARTICLE 4 - COMPENSATION

   4.2 R shall pay Consultant, as the sole and exclusive compensation for Consultant's services hereunder, the following:

   a) in respect of the successful approval of the first development plan with a plateau production level of 40,000 BOPD by the management committee under the EPSA relating to any discovery in the Blocks, a success fee of four million five hundred thousand US dollars (US $ 4,500,000) to be paid within thirty days after the date of approval of the first development plan under the EPSA 97.

   b) in respect of the successful approval of the second development plan with a plateau production level of 25,000 BOPD by the management committee under the EPSA relating to any discovery in the Blocks, a success fee of three million US dollars (USS 3,000,000) to be paid within thirty days after the date of approval of the first development plan by the Management Committee under the EPSA 97.

   c) in respect of the successful approval of the third development plan with a plateau production level of 20,000 BOPD by the management committee under the EPSA relating to any discovery in the Blocks, a success fee of

three million US dollars (USS 3,000,000) to be paid within thirty days after the date of approval of the first development plan under the EPSA 97.

Notwithstanding the foregoing, when the total production reaches 85,000 BOPD, even in the case that the above referred development plans have not been reached, the Consultant shall be entitled to receive ten million five hundred thousand US dollars (USS 10,500,000).

d) Furthermore in respect of total daily production from all the fields in production in the Blocks, a success fee dependent of production level reached as per the table below provided such level of production is maintained during a period of thirty (30) consecutive days:

Daily Production, BOPD	***Success Fee, Million USS***
Above 100,000	2,5
Above 150,000	2,5
Above 200,000	2,5

For the avoidance of doubt, the success fee in respect of any of the production levels reached will be calculated on the basis of the combined production from the Blocks and will be due and payable only once, i.e. when the relevant production level is reached for the first time. The payment shall be made in United States dollars to the bank account duly notified in writing by Consultant to R.

ARTICLE 12 - APPLICABLE LAW AND ARBITRATION

12.1 The laws applicable to any dispute arising in connection with this Agreement shall be the laws of England.

12.2 Any of these disputes which cannot be settled amicably by the Parties shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC") by three arbitrators appointed in accordance with the aforesaid rules.

12.3 The arbitration shall take place in London, England, and shall be conducted in English."

6. Following approval by the National Oil Corporation of Libya ("NOC") of the relevant development plans, the payments specified in Article 4.2(a) and (b) were duly made. The arbitration claim was concerned with the issue of liability for the payments under Article 4.2(c) and (d). These were said by V to have been earned by way of "*strategic assistance*" under the terms of the agreement in like manner to the earlier payments.

7. It appears from the award that at the arbitration R had contended that the Agreement was unenforceable on three grounds:
   i) that it was not supported by consideration;
   ii) that Mr. F was in breach of his fiduciary duty and was precluded from obtaining any personal benefit from the Agreement;
   iii) that the Agreement was illegal under Libyan law and contrary to English public policy in regard to influence peddling.

8. R lost on all three grounds. For present purposes it is only necessary to have regard to the Tribunal's conclusions on illegality and public policy. The tribunal held that R had failed to establish that the Agreement (or V's performance of it) were illegal under Libyan law. The Tribunal also held that the Agreement and V's performance under it did not violate English public policy.

9. The question therefore arises whether it is open to the court to look behind the findings of the Tribunal in the context of an application under section 68 or 81 of the 1996 Act. In this connection it must be borne in mind that there is no basis for any challenge under Section 67 to the Tribunal's jurisdiction to determine the matter and furthermore no basis, given Article 28(6) of the rules of ICC arbitration, for any appeal under section 69 of the Act.

10. At first blush it may be somewhat surprising that, with the initial payments having been made to V without complaint, there should nonetheless be an objection on the grounds of illegality to the later payments. However it is clear that a new management broom came into R in the meantime and given the sums involved it is perhaps not entirely surprising that some doubts were expressed as to the appropriateness of the payments. In the circumstances, it is also clear that the arbitrators had well in mind the need to be vigilant given the nature and terms of the Agreement to ensure that the arbitral process was not used to further unlawful and corrupt ends.

11. Before turning to the authorities it is desirable to consider the terms of the Act. Section 68 provides:

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

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(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—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal); …..

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;"

12. It was R's case that the subsection contemplated three forms of irregularity - an award obtained by fraud: an award procured in a manner contrary to public policy: an award contrary to public policy. It was said that the present award was an example of the third kind.

13. It is accepted however that this does not appear on the face of the award. To the contrary the award expressly finds that the Agreement and its performance was not illegal under Libyan law (the law of the place of performance) and thus not in that sense contrary to Libyan public policy and further that the Agreement was not contrary to English public policy. Further no complaint is made as to want of due process. Equally no complaint is made as to any reprehensible or unconscionable conduct on the part of V in the arbitral process.

14. What is said is that the arbitrators were wrong both as a matter of law and fact. Yet it is well established that Section 68 cannot be used to circumvent the restrictions on the court's power of intervention: ***Lesotho Highlands Development Authority v Impreglio SpA** [2005]* ***UKHL 43***. In any event the parties had waived, so far as legitimate, their right to any form of recourse. Given the validity of the arbitration clause, the quality of the arbitration panel, the accepted consensual jurisdiction of the arbitrators to determine the issue of illegality, the full and enthusiastic participation by R in the reference and the detailed reasons provided by the arbitrators, it is difficult to see on what basis it can be said that R has suffered "substantial injustice" flowing from the chosen form of dispute resolution even if the outcome might have been different if the issue had been litigated in the English courts.

15. This leads to Section 81. This provides:

"81 Saving for certain matters governed by common law

(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to — ......

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.

(2) Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award."

16. Again it has to be noted that there is no conflict with public policy on the face of the award. To the contrary, the suggested violation of English public policy was rejected by the tribunal and that accordingly the Agreement was enforceable. On the face of it therefore there is no basis for challenging the award or its enforcement under either Section 68 or Section 81.

17. Is there any basis for going behind that the tribunal's conclusion? This leads to two decisions of the Court of Appeal. First ***Soleimany v Soleimany** [1999]* ***QB 785***. Here it was apparent from the face of the award that the arbitration concerned an illicit enterprise in the form of smuggling carpets out of Iran. The arbitrator concluded that any such illegality was irrelevant as he was applying Jewish law within the Beth Din.

18. The court (Morritt, Waller LJJ and Sir Christopher Staughton) summarised the relevant principles as follows:

"An English court exercises control over the enforcement of arbitral awards as part of the lex fori, whatever the proper law of the arbitration agreement or the place where the arbitration is conducted. If a claimant wishes to invoke the executive power in this country to enforce an award in his favour, he can only do so subject to our law. For the purposes of the present dispute, that means s 26 of the Arbitration Act 1950. There was no express provision in that section that an award would not be enforced if enforcement was contrary to public policy; but there was such a provision in relation to foreign awards in s 37(1), and it is hard to suppose that a more liberal regime applied to English awards. (It is now expressly provided in s 68(2) of the Arbitration Act 1996 that an award may be challenged on the ground that it is contrary to public policy; and s 2(2)(b) of that Act in effect provides that the enforcement of awards shall be governed by English law even if that is not otherwise the law applicable to the arbitration). It follows that an award, whether domestic or foreign, will not be enforced by an English court if enforcement would be contrary to the public policy of this country": at p. 798.

The Court went on to hold that the award could not be enforced. *"Where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality that gave rise to it"*: p. 800.

19. The Court then went on to express views about the situation that would arise if an arbitrator had entered into the topic of illegality but held that there was none:

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

It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should 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 decided at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality": at p. 800.

20. This decision was made before the hearing of the second appeal which calls for consideration. This was against the earlier decision of Colman J in ***Westacre Investments Inc. v Jugoimport SPDR Holding Co. Ltd** [1999] **QB 740***. That had concerned a Swiss Law contract whereby the claimants had been appointed as consultants for the sale of military equipment to Kuwait. The defendants had argued unsuccessfully at the ensuing ICC arbitration in Geneva that the arrangement was contrary to public policy because it had been for procuring sales by bribery or other illicit personal influence.

21. Following dismissal of an appeal by the defendants to the Swiss Federal Tribunal the claimant sought to enforce the award in England. The defendants opposed enforcement on the grounds that the award was contrary to public policy. The defendants also sought to introduce by amendment a further ground of defence, namely that the claimants' witnesses had given perjured evidence at the arbitration.

22. The application to amend failed on the grounds that the evidence had been available (and indeed deployed) in the Swiss court, being the court of supervisory jurisdiction. As regards the application to set aside leave to enforce the award, it was held by Colman J that where the arbitrators in the exercise of their legitimate jurisdiction had determined that the contract was not illegal, the court would prima facie enforce the resulting award. In contrast he held that where the enforcement was revisited on the basis of facts not placed before the arbitrators which demonstrated that the contract was illegal, the court would then consider whether the public policy against the enforcement of illegal contracts was outweighed by the countervailing public policy in support of finality of awards.

23. Whilst in general agreement with this conclusion, the court in ***Soleimany v Soleimany*** made this comment at p. 803: *"In other cases, Colman J holds that prima facie the court would enforce the resulting award; and with that too we agree. But, in an appropriate case it may enquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. We thus differ from Colman J, who limited his sixth proposition to cases where there were relevant facts not put before the arbitrator."*

24. In the Court of Appeal in ***Westacre** [2000] **QB 288***, the appeal was dismissed. The initial point considered by the court (Waller and Mantell LJJ and Sir David Hirst) was whether the arbitrators' conclusions (without going behind the award) amounted to a finding that the agreement was a contract for the purchase of personal influence akin to that considered by Phillips J in ***Lemenda Trading Co Ltd v African Middle East Petroleum Co. Ltd** [1988] **QB 448***.

25. The court concluded that the effect of ***Lemenda*** was:
    i) there are some rules of public policy which will when infringed lead to non-enforcement whatever the proper law or wherever the contract is to be performed e.g. terrorism, drug trafficking.
    ii) contracts for the sale of influence are not an example.
    iii) such contracts if to be performed in England will not be enforced but if to be performed abroad will not be enforced only if performance would be contrary to the domestic public policy of that country as well.

    The appellants were thus faced with the immediate problem that the award expressly stated that the contract was not illegal by the laws of Kuwait and was silent on whether the contract was contrary to the public policy of Kuwait.

26. Waller LJ said in a passage with which both Mantell LJ and Sir David Hirst agreed:
    *"It is in this context, in my view, that albeit the award is not isolated from the underlying contract, it is relevant that the English court is considering the enforcement of an award, and not the underlying contract. The English court takes cognisance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as there may be, have been considered by the arbitral tribunal. It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view. On the **Lemenda** point accordingly I would hold that the judge was right, and thus that unless the defendants are entitled to go behind the facts as found by the arbitrators there is no public policy answer to the enforcement of the award"*: at p. 305.

27. Pausing there, it was submitted on behalf of R in the present proceedings that different considerations apply as the contract is governed by English law and the arbitration was a domestic arbitration in the sense that the curial law was also English law. But, accepting that distinction, it does not in my judgment take matters further:
    i) As regards contracts for the purchase of personal influence, it is only if performance of the contract would be contrary to the domestic public policy of the country of performance that it would not be enforced in England:
    ii) The tribunal has concluded that the agreement was not in violation of the relevant provisions of the Libyan Penal Code in the sense that V has held itself out as having influence over any public employees. In any event, the tribunal has found that far from merely interceding on R's behalf in the form of improper influence, V undertook real work.
    iii) Accordingly, in the light of a reported decision of the Libyan Supreme Court and the expert evidence put before the tribunal, it was concluded that the contract was legal and enforceable in Libya. It was not suggested that the Agreement was in conflict with Libyan public policy in any other respect.

iv) The tribunal went on to consider English public policy as a discrete topic and the submission that the circumstances were on all fours with ***Lemenda*** but concluded that the activities required of, and performed by V, were substantial and, insofar as any analogy with the decisions of the English courts was appropriate, the situation was similar to that in ***Tekron Resources Ltd v Guinea Investment Co Ltd [2004] 2 Lloyd's Rep. 26*** that is to say an agreement for legitimate lobbying and negotiating activity.

v) Whilst of course by virtue of the English law and arbitration clause this court is the relevant supervisory court, this merely re-emphasises the limitations on intervention if, as has to be asserted here, the tribunal was in error, these limitations it is to be noted are expressly reinforced in the express terms of Section 81.

28. The court in ***Westacre*** then turned to the issue as to whether the facts found by arbitrators could be re-opened. In this context, Waller LJ requoted the passage from ***Soleimany*** set out above. However Mantell LJ and Sir David Hirst expressed somewhat different views. In his short judgment, with which Sir David Hirst agreed, Mantell LJ expressed strong reservations about the obiter passage in ***Soleimany***:-

"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.

*However, in the obiter passage cited by Waller L.J. from the judgment in **Soleimany v. Soleimany [1999] QB 785**, 800, it seems to have been suggested that some kind of preliminary inquiry short of a full scale trial should be embarked upon whenever **"there is prima facie evidence from one side that the award is based on an illegal contract . . . "** For my part I have some difficulty with the concept and even greater concerns about its application in practice…."* at p. 316.

29. Mantell LJ went on to consider how such an inquiry if appropriate might have ended up:

*"…. for the moment and uncritically accepting the guidelines offered, it seems to me that any such preliminary inquiry in the circumstances of the present case must inevitably lead to the same conclusion, namely, that the attempt to reopen the facts should be rebuffed. I so conclude by reference to the criteria given by way of example in **Soleimany v. Soleimany** itself. First, there was evidence before the tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the award. The seriousness of the alleged illegality to which Waller L.J. gives weight is not, in my judgment, a factor to be considered at the stage of deciding whether or not to mount a full-scale inquiry. It is something to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality which can only be performed in response to the second question, if it arises, namely, should the award be enforced? Accordingly I would dismiss the appeal."*

30. 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). Even assuming it is appropriate in the present application to conduct some form of assessment:

i) There was plenty of material before the tribunal that the contract was not illegal under Libyan law including the evidence of [C] former General Manager of R's Libyan subsidiary and the evidence of [Dr. A] Professor of Civil law at University of Alexandria.

ii) The arbitrators have expressly found that the contract was not illegal.

iii) The tribunal is made up of arbitrators who are well known, experienced and highly competent and who are fully familiar with the international commercial law scene.

iv) There is no material whatsoever to suggest that there has been collusion or bad faith in obtaining the award.

31. In short, it is correct in my judgment to accord the award full faith and credit, even if it were appropriate to embark on any form of preliminary inquiry. In doing so I recognise that the questions posed in ***Soleimany*** are unlikely to be exhaustive. But is it legitimate to put into the balancing exercise as between finality and illegality any general examination of the merits of the illegality allegation? Whilst Waller LJ stated in ***Westacre*** that the nature of the illegality, the strength of the case on illegality and the extent to which the issue was addressed by the tribunal were all factors, the majority concluded that the seriousness of the allegation (including presumably the strength of the case in support of it) was not relevant to the threshold for mounting of a "full scale inquiry".

32. Even if such an inquiry was to take place, it is to be noted that the majority in ***Westacre*** accepted that Colman J had accorded "*an appropriate level of opprobrium"* at which to place commercial corruption if such it was. Colman J had summarised the point in this way:

"However, although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug trafficking. On balance I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption" at p. 773.

33. As regards the strength of the case, it would on ordinary principles (accepting the quality of the tribunal and the extensive reasons furnished as part of the award) be illegitimate to treat the potential issue estoppel as undermined because of the fact that the tribunal was arguably wrong and thus allowing the point to be re-argued. At least, consistent with ***Henderson v Henderson (1843) 3 Hare 100***, the tribunal must be shown to be plainly wrong. But even then such would conflict with the exclusion of Section 69 of the Act.

34. In the result, by reason of the decision in ***Westacre*** which is binding on me and in respect of which there is no material factual distinction from the present case, I conclude that R has failed to establish that the award or its enforcement can be challenged on public policy grounds. But since the points were fully argued I will turn briefly to the merits.

35. The submission made to the arbitrators was that performance of the Agreement was illegal as a matter of Libyan law and thus was invalid and unenforceable as a matter of English law: ***Ralli Bros v. Compania Naviera Sota y Aznar [1920] 2 KB 287***. The part of the Libyan Penal Code primarily relied upon was Art. 257 (although there were in fact other provisions to similar effect):

"*Punishment by imprisonment … is to be imposed on anyone who alleges that he exercises an influence on a civil servant and has, in exchange for his mediating with the civil servant, taken for himself…money or other benefit…"*

36. The tribunal was assisted by legal expert testimony provided by both parties. V's expert, Dr. Atallah, brought the tribunal's attention to a decision of the Libyan Supreme Court dated 24 June 1979 which in the tribunal's view supported the conclusion that the exercise of influence within the meaning of Art.257 meant "*mere intercession*" by way of "*abuse of one's position without providing any real work*".

37. The decision of the Supreme Court was indeed instructive. It concerned a claim for 197.500.000 Dinars by a *"mediator"* who had agreed to promote the interests of a foreign company with the authorities, to give information about industrial opportunities which might be attractive to the company, to introduce the company to the authorities and to furnish general information and advice all for a commission of 5% of the value of any contracts concluded.

38. As the Court put it, *"the appellee company is a foreign company and it does not have any representatives in Libya, and it has charged… its agent with explaining the company's capabilities and specialisation in order to assure its suitability and ability to implement projects competently. Such act serves public order and does not harm it…*"

39. Not surprisingly the arbitration tribunal regarded this decision as of great persuasive significance in considering the legality of the Agreement under Libyan law. R's expert Dr. Bara opined that the Agreement was illegal since a consultant could, in his opinion, only contact a representative of a public authority just the once. However, quite apart from the obvious practical difficulties of any such approach he could not point to any authority supporting his opinion which the tribunal regarded as commercially unreal.

40. It follows that the tribunal almost inevitably concluded, in accordance with the evidence of Dr Attallah that R had to establish that V put itself forward as being in a position to obtain a benefit for R "by mere intercession and without any real work".

41. The burden of R was not eased by the fact that no witnesses were called by R to support the conclusion that V or Mr. F held themselves out as able to obtain a benefit by mere intercession. The purpose of retaining Mr. F was explained in evidence from Mr. C, R's General Manager in Libya:

i) There was a need for an intermediary in arranging meetings with NOC given "*the certain distance*" between NOC and any foreign oil company.

ii) There was a need for a representative to transmit orally in advance the content of any letter to avoid misunderstanding.

iii) There was a need for a local Arabic speaking intermediary in a country suspicious of foreigners.

42. In this capacity, as the tribunal have found, Mr. F:

i) collected information about NOC'S methods

ii) acted as a high-level messenger

iii) helped prepare a development plan

iv) briefed Mr. C and other employees prior to meetings with NOC

v) reviewed minutes of those meetings

vi) chased up NOC to respond to meetings

vii) pleaded R's interest in receiving approval for a maximum level of production.

43. Against that background the tribunal's conclusion that the Agreement was not illegal as a matter of Libyan law is, in my judgment, unimpeachable. This conclusion eliminates any basis for challenging enforcement of the award under ***Lemenda*** principles. But let me go further and assume that contracts for personal influence invite the attentions of English public policy even where the contract is not to be performed within the jurisdiction and is not illegal by the country of performance.

44. R's case on challenging any further payment under the Agreement was primarily based upon the contention that the Agreement was for payment of very large sums for services that were not "*discernable"*. Thus the new management of R submitted that the Agreement had throughout been simply one for "*personal influence*". By personal influence R meant this: a situation where an intermediary, who was in a position to use his personal influence to obtain a benefit for another, charges for using that influence where a pecuniary interest on the part of the intermediary was not apparent to the person being influenced.

45. The question that arises, in my judgment, is what constitutes the essential purpose of the agreement or, put another way, the court has to have regard to what the substance of the transaction is. Jack J (albeit in the context of considering parallel provisions of the French Code) put the point in this way in ***Tekron* at p. 43:**

"The Court should look at the substance of the transaction. It should look to see what genuine and proper services the party was to perform. It should look to see whether the provision of those services was the real object of the contract. It should look to see if the payments to the party were in whole or part for the exercise of "influence" and whether it was the intention that any such influence be abused. It seems to me probable that, if the intention was that influence should be used to secure that a contract should be awarded, or awarded on terms, contrary to the interests, economic, national or other, of the awarding party, or without proper consideration of those interests by the awarding party, then there would be an abuse of influence."

46. The defendants say that the Agreement was clearly a sale of personal influence. In particular the following points are relied upon as derived in large part, it was submitted, from the statement of claim filed on Mr. F's part in the arbitration:

i) V as such had no presence in Libya: it was an off-shore company whose sole activity was as recipient of the monies payable under the Agreement.

ii) The payments were very large and not proportionate to the effort, risk or expense incurred by Mr. F.

iii) Mr. F was already retained as a legal adviser to R on a retainer of $250,000 p.a., part of his activities being the representation of R "*vis-a-vis the Libyan government*".

iv) Mr F was not permitted to attend formal negotiations between NOC and R and thus had to furnish his "*strategic assistance*" behind the scenes.

v) There was limited evidence (certainly in terms of documentation) as regards that assistance yet the remuneration amounted overall to $18 million.

vi) Mr. F had no technical skills yet was to be involved in discussions regarding the development of oil fields.

vii) Mr. F placed much emphasis on his personal characteristics in obtaining a beneficial result, including access to all the relevant people.

47. The response of V was as follows:

i) A consultancy agreement which imports with it the expectation of the exercise of some form influence is not as such illegitimate. Contracts to undertake negotiations or lobbying are entirely legitimate: see ***Lemenda* at p. 458, *Tekron* p. 45**.

ii) Equally the mere existence of good relations with officials whether as a result of business, social or political activities would not render the engagement of the person concerned inappropriate: ***Marlwood Commercial Inc v. Kozeny et al* [2006] EWHC 872 (Comm).**

iii) The fact that payment was due in some form to V and/or Mr F under the terms of an agreement with R was obvious to the party which on this basis was being influenced, namely NOC: see statement of Mr. S, the Chairman of the relevant Management Committee of NOC.

iv) Mr F was an Arabic speaker and Libyan citizen who was very active in business affairs and had been engaged as a consultant on similar terms for some 10 years by R and also from time to time by other oil companies of repute.

v) The work undertaken by Mr F under the Agreement was over a period of some 4 years.

vi) Although the total of the payments was large, they were payable on a lump sum basis as and when various approvals and/or production levels were achieved. Further they formed a tiny proportion of the sums at stake when seen in the perspective of the development of the oil fields identified in the Agreement.

vii) There was a clear demarcation between the Agreement and the retainer for legal services.

viii) The limited quantity of written material produced as a result of work under the Agreement is fully understandable given the mode of working in Libya where communication by e-mail or post is very limited and where minutes of meetings and other documentary records are not viewed as necessary or even desirable.

ix) The fact that Mr F could not attend formal negotiations does not give rise to any inference that his activities were improper: his value was to have informed access to NOC in the run up to formal negotiations whereby points of concern to NOC could be identified in advance.

48. It is appropriate to seek to unearth the substance of the Agreement having regard to all the surrounding circumstances. Neither the terms of Article 2 of the Agreement nor the activities of Mr F in pursuance to his obligations thereunder can fairly give rise to the conclusion that he was simply selling his influence in a manner which NOC was unaware. It is of some note that none of the *"red flags*" identified by Lord Woolf in his recent report to BAE on Ethical Business as indicating an inappropriate appointment of an *"adviser*" are reflected in the facts found by the arbitrators. The tribunal found that Mr F was required to, and did, undertake *"real work"* under the terms of the Agreement. The tribunal had much in mind the pernicious effects of corruption but held that there was no evidence of the engagement of Mr F being for corrupt purposes or for the exertion of illegal influence let alone any such activity having taken place.

49. As already explained the argument is not in my view open. But I conclude that if the point had been alive the tribunal was correct to conclude that neither the Agreement nor the enforcement of the award made under it were contrary to English public policy principles.

50. It follows that for all these reasons R's application must be dismissed.

Graham Dunning Q.C. & Sara Cockerill (instructed by Ashurst LLP) for the Claimant
Terence Mowschenson Q.C. & Jacob Grierson of Jones Day (instructed by Pitmans) for the Defendant