Coursier obtained work in Luxembourg. The bank tried to attach his earnings there. Coursier argued that the French judgment was not enforceable in the State of origin as required by Article 31 of the Brussels Convention. The European Court rejected this argument, however. It took the view that the requirement of enforceability in Article 31 referred only to "the enforceability in formal terms of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin." The contested French judgment bore an order for enforcement; it had been served on the parties; and it had become final in the absence of any appeal against it. There was therefore no ground for denying that it was enforceable in formal terms.

This was, however, a very narrow decision. It refers only to the fact that the court in the State addressed does not need to further consider the issue of enforceability at the stage of the judgment creditor's *ex parte* application for enforcement. It is clear that the Court envisaged the possibility of arguments about material enforceability at the appeal stage. It stated:

> As regards a judgment such as the insolvency judgment which concerns a matter expressly excluded from the purview of the Brussels Convention, it is for the court of the State in which enforcement is sought, in appeal proceedings brought under Article 36 of the Brussels Convention, to determine, in accordance with its domestic law including the rules of private international law, the legal effects of that judgment within its territory.

V. RECOGNITION OF ARBITRAL AWARDS

A number of issues relating to the finality of arbitration awards in the face of arguments based on public and fraud were addressed by the Court of Appeal in *Westacre Investments Inc.* v. *Jugoimport—SDRP Holding Co. Ltd.*[20] The claimant had obtained an arbitration award in its favour in Switzerland which it was seeking to enforce in England. The dispute referred to arbitration concerned a claim for payment of commission. The commission was due under a contract through which the claimant assisted the defendant to obtain a contract for the supply of military equipment to Kuwait. It was alleged in the English proceedings that this contract was invalid since the commission payment in fact amounted to a bribe to a member of the Kuwaiti government. The issue of bribery had been raised before the Swiss arbitral tribunal, but the majority of the tribunal found that they were not required to investigate this issue if the parties led no evidence to prove that it had taken place. The contract between the parties was therefore found valid and binding. An appeal to the Swiss Federal Tribunal was lodged by the defendant for an annulment of the arbitral award. The Federal Tribunal concluded that the nature of its competence to review arbitral proceedings required it to base its decision on the facts found by the Tribunal. It therefore confirmed the award. The defendants then tried to raise the same bribery issue in the enforcement proceedings in England.

The judgment of the Court of Appeal deals with three issues of significance. The main point placed before it was whether it was possible to reopen the facts established in arbitration in order to show that a contract was unenforceable as

20. [1992] 2 Lloyd's Rep. 65.

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against public policy. The Court nevertheless first addressed two less controversial issues. First it provided a further elaboration of the approach of the English courts to contracts to purchase personal influence in breach of the public policy of a foreign friendly State.[21] It was not disputed that the contract with Westacre was for the purchase of influence, and thus if the reasoning in *Lemenda*[22] was applicable, there would be no need to reopen the facts of the case. Waller LJ, with whom the other members of the Court of Appeal agreed on this point, thought that *Lemenda* decided the following: (1) there are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic; (2) contracts for the purchase of influence are not of the former category; thus (3) contracts for the purchase of personal influence if to be performed in England would not be enforced as contrary to English domestic public policy; and (4) where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also that the English court would not enforce it.

The Court continued:

> 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.

Lemenda thus provided no grounds for a refusal to recognise the award.

The second issue raised was whether the defendants were entitled to argue that the award was vitiated by fraud, and that the English court could therefore reopen the issues decided by the arbitral tribunal. The Court of Appeal considered the approach traditionally adopted in relation to the recognition of foreign judgments in *Abouloff* v. *Oppenheimer & Co.*.[23] They noted that the decision had been upheld by the House of Lords in *Owens Bank Ltd* v. *Bracco*,[24] but that it had been distinguished on several occasions and its application weakened wherever possible. The Court found that *Abouloff* did not contain the appropriate rule to apply in the case of arbitral awards. Since disputes were submitted to arbitration by the agreement of the parties, there was a logic in placing foreign arbitration awards into the same category as domestic arbitration awards, rather than the same category as foreign judgments. That being the case, an award would not be reopened on the grounds of fraud unless the evidence to establish the fraud was not available to the party alleging fraud at the time of the original hearing, and,

21. See *Lemenda Trading Co. Ltd* v. *African Middle East Petroleum Co. Ltd* [1988] 1 Q.B. 448.
22. *Ibid.*
23. (1882) 10 Q.B.D. 295.
24. [1992] 2 A.C. 443.

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where perjury is the fraud alleged, the evidence is so strong that it would reasonably be expected to be decisive at a hearing.

The final issue the Court of Appeal had to address was whether the English court should reopen the facts as found by the arbitrators in the face of allegations that the contract was illegal and in order to satisfy the public policy demand that illegal contracts should not be enforced. In *Soleimany* v. *Soleimany*[25] the Court of Appeal held that "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." It also took the view that a preliminary inquiry short of a full-scale trial should be conducted when there was prima facie evidence from one side that an award was based on an illegal contract. The majority of the Court of Appeal in *Westacre Investments* concluded that any preliminary inquiry into the facts before it must lead to the attempt to reopen the facts being rebuffed. The attitude of the Swiss arbitral tribunal and the fact that the competence of that tribunal was in no way impugned were material factors in reaching that decision.

VI. A FOOTNOTE ON THE TREATY OF AMSTERDAM

The Treaty of Amsterdam entered into force on 1 May 1999. In the exercise of its new competences under Title IV of the EC Treaty as amended, the Commission has transformed the Convention on Service of Documents into a draft Directive, and the Brussels II Convention into a draft Regulation, both of which are currently going through the Community legislative procedure. The renegotiated text of Brussels I has also been transformed into a draft Regulation, but the possibility of further amendment is mooted.

Although the United Kingdom, Ireland and Denmark negotiated an "opt out" of Title IV, at the Council meeting (Justice and Home Affairs) on 12 March 1999, the United Kingdom and Ireland announced their intention of being fully associated with Community activities in relation to judicial co-operation in civil matters. For this to have binding effect, it is necessary for them to undertake the procedure set out in Article 3 of the relevant Protocol to the Amsterdam Treaty.

25. [1998] 3 W.L.R. 811.

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