

WESTACRE INVESTMENTS INC V. JUGOIMPORT LAW INTERNATIONAL

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NATURE OF CASE

An appeal was filled to set aside the contract on the basis of Public Policy.

FACTS

Westacre Investment Company has served as a consultant for Yugoslavian government for obtaining contracts for the sale of military instruments in Kuwait. So they entered into an agreement, which was governed by the Swiss law and there was also an arbitration clause, according to which the rules of the International Chamber of Commerce [ICC] would apply. A dispute arose between them and therefore Westacre initiated arbitration proceeding. Defendants alleged that contracts is obtained through bribes in Kuwait and therefore this agreement is null and void on the ground of public policy. But the arbitration tribunal dismissed this argument of the defendant and gave its judgement in favor of Westacre. Arbitration tribunal found out that there was no evidence of any bribery or other illegality in obtaining that contract with Kuwait, so on the basis of the findings of arbitration tribunal the Swiss Federal Tribunal upheld the decision of tribunal and it declined to rescind the award on public policy grounds. Westacre thereafter sought to enforce the award in England. Plaintiff appealed in the court of appeal, but the court of appeal rejected plaintiffs appeal.

RULE OF LAW

Public policy; Article 5 (2) of New York Convention talks about the public policy. It concerned about violation of public policy under the law of forum. It laid down the grounds on which a court may refuse enforcement of a contract on its own motion.

ISSUES INVOLVED

Plaintiff appealed that the agreement between Westacre and Kuwaiti Government was void on the grounds that it violated “ordre public international” or “bonos mores”.

HOLDING AND DECISION

The arbitration tribunal held that the defendant has not succeeded in proving its case and hence made an award of \$50m in favour of the plaintiff. The defendant appealed to the Swiss Federal Tribunal, on the ground that the award was contrary to public policy under Kuwaiti law. But the Court upheld the decision of arbitration tribunal and dismissed the appeal of defendant.

DISSENT

There is no dissenting opinion of any judge in this case.

ANALYSIS

The arbitration tribunal found in this case that the contract between the plaintiff and Kuwaiti officer was not obtained through fraud, or through other illegal means, tribunal found out that the contract was just a commercial contract between the plaintiff and Kuwaiti government and hence tribunal held that the allegation by the defendant cannot be taken into consideration in conducting preliminary inquiry in this case. Due to this reason the defendant cannot challenge the findings of the tribunal.

Justice Colman stated that "where arbitrators had the power and made a positive decision upon their own jurisdiction, the court should "prima facie" not deny enforcement of the award on that ground".

Public policy is considered as a ground for refusing the enforcement of an award/ foreign under Article V (2) of the New York Convention. Determination of universal public policy is an impossible act because public policy varies with legal system of various country. There has been instances in which foreign awards are not enforced by arbitration tribunals, court because those awards has offended the public policy of the state. Article 5 of the New York Convention says that "recognition or enforcement of an award may be refused if it would be contrary to public policy to recognize or enforce the award." So according to this article, the tribunals can interpret "maybe refused" as their discretionary power for rejecting the enforcement of award on the ground of public policy. In *Lemenda Trading Co. Limited v. African Middle East Petroleum Co. Limited*, there was a contract between two parties, under which an intermediary was obliged to use personal influence in order to acquire a contract in Qatar. Judges in this case refused to enforce that contract on the grounds that it was contrary to English public policy founded on general principles of morality. Article 5 of the NYC has provided for a list of grounds for infringement of public policy, which are too wide and not specific enough and therefore many courts have applied this doctrine of public policy in a narrow approach. For instance *Zimbabwe Electricity Supply Commission v. Genius Joel Maposa*, in which court construed that instances such as bribery, corruption, and fraud is sufficient for the infringement of public policy. But in this present case (Westacre case) fraud was considered as a small issue which is not enough to constitute the infringement of public policy. In *Soleimany v. Soleimany*. In this case the arbitral tribunal found that there was smuggling of Persian carpets out of the country of Iran illegally, under the Iranian law if there is prima facie sign of an illegal transaction, then in such case, the court would conduct a preliminary inquiry to determine whether complete faith and credit can be given to the arbitral tribunal's award, otherwise a new trial should be conducted to determine the question of illegality. But in this case the arbitral tribunal held illegality irrelevant because Jewish law was silent on this. However English court rejected the enforcement of award as it was contrary to English public policy principle. In *Soleimany v. Soleimany*, there were pronouncements with regard to the "illegal" allegation, these dicta were not considered as favorable by the majority of the judge, but in Westacre

Investments Inc. v. Jugoinport the judges unanimously refused to apply the common law approach on foreign judgements. Article 5 (2) (b) of the NYC has given rise to a lot of complexities. In my opinion it would have been much easier for the courts to decide about the enforceability of an award if Article V of the NYC were less extensive and more specific related to the list of issues which are supposed to be against the public policy of a state.

