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**Position Paper  
on  
Illegality**

by

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## 1 INTRODUCTION

This text poses a number of questions. No one need answer them all - Except me ! I would very much welcome suggestions as to possible answers and also as to questions I ought to have asked. I have spent much of the last 40 years trying to understand the common law position which I think would be thought by most common lawyers not to be the best feature of the common law of contract and hope that this does not colour what follows too much.

## 2 PRELIMINARY QUESTIONS

### 2.1 Should there be more than one level of illegal contract?

In common law and I believe some civil law systems not all illegal contracts are equally illegal. So in English law an employment contract which contained a provision for payment of salary dressed up as expenses would be treated differently from an employment contract with an invalid promise not to compete after the end of the contract. Should we make such a distinction? If so how should we describe them? For the moment I will call them black and grey.

2.2 Many systems have a category of contracts prohibited by statute. Unidroit is not a sovereign state and does not have a legislature. Does this mean that we do not need this category?

2.3 There are many English cases involving perfectly valid contracts which one of the parties has performed by breaking the law. A classic example involved a contract of carriage of goods by sea where the carrier overloaded the ship. Do we need to deal with problem? What should be the rule?

## 3 DEFINITION OF ILLEGALITY

3.1 The problem of definition might be approached in a number of different ways; by a broad general statement; by such a statement accompanied by examples or by a list of prohibited heads. I am inclined to the second alternative which is the style adopted by the American Restatement.

3.2 Some specific problems.

Many of the traditional heads of illegality are unlikely to occur in international commercial contracts or perhaps (since special financial arrangements with one's mistress may occur in any organisation) rather be unlikely to be the subject of an arbitration. There are some problems which can easily arise;

### 3.2.1 Corruption.

This is likely to be present in a significant number of cases. Claims actually to recover bribes are perhaps unlikely but actions on contracts which have been facilitated by payments to intermediaries are likely. Should we have a rule ? What should it be?

### 3.2.2 Competition.

Both English and American law in this area have many cases on restraint of trade. To a large extent in both countries this has been overtaken by legislation as is the case in most countries and of course within the European Union. Does this mean that we do not need to deal with this topic?

### 3.2.3 International Conventions.

Many international conventions have mandatory rules. One might imagine parties choosing the UNIDROIT principles in order to avoid the application say of the Hague rules. Is this a problem? If so, how should we approach it? This may be an example of a wider problem as to whether we should deal with conflict of laws problems

### 3.2.4 Speculative transactions.

Gambling transactions are treated as covered by the public policy rules in the United States. In England they have been covered by a complex series of statutes going back to 1710 which have just been repealed (though the repeal has not yet been brought into force.) Experience has shown that there are very popular forms of transaction which are sold by banks and finance houses which are not as a matter of analysis easy to distinguish from gambling. Is it right to leave this area alone?

## 4 THE EFFECTS OF ILLEGALITY

### 4.1 Enforcement

In general one would expect an illegal contract not to be enforceable either by Specific Performance or by the award of damages. There at least two possible qualifications

4.1.1 There are facts not known to the plaintiff which make the contract illegal. The classic English example is the landlord who lets a flat to a lady who intends to use it for prostitution Should this be the rule?

4.1.2 In the case of grey illegality it may be that although the illegal part of the contract cannot be enforced, the balance can. Should this be the rule?

### 4.2 Restitution

Questions quite often arise after the contract has been partly performed. Can one party recover money or property that has been transferred? The common law has made very heavy weather of this question and this has led in several jurisdictions to proposals to give the court a wide discretion to do what is fair Is this the right way to go?