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The Permissible Extent of Court Review of Arbitral Tribunal Findings at the Setting Aside and Enforcement Stages: Examples Addressing Corruption in International Arbitration

1. Introduction

The purpose of the paper is to illustrate the different approaches adopted by national courts with regard to the extent of judicial scrutiny of the findings of arbitral tribunals and identify the approach most appropriate for balancing two competing considerations: the principle of finality of arbitral awards; and the discouraging of corruption in international trade. This article also reviews the standards of intervention which are given preference by the Supreme Court of Georgia, based on the tendency revealed in its rulings. Furthermore, the article provides analysis of the legislation applied when rendering decisions and the appropriateness and accuracy of such application using examples of important rulings rendered since 2003.

International arbitration has long been practiced as a means of international dispute resolution. As one commentator noted "commercial arbitration

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must have existed since the dawn of commerce."[1] Correspondingly, arbitral tribunals often have to deal with issues involving corruption while resolving commercial and investment disputes.

Corruption is rife in international commercial relationships and the problem is worsening. The consequences are severe and dramatic; therefore, it is logical that corruption is generally abhorred and widely denounced. In recent years a number of states have acceded to multilateral conventions condemning illegal contracts, bribery of public officials, and other forms of corruption.[2]

Accordingly, there is unanimity on the issue that corruption violates the main tenets of international public policy. Violation of the fundamental tenets of public policy has long been grounds for setting aside or refusing recognition and enforcement of arbitral awards. Accordingly, the purpose of this paper is to illustrate the different approaches adopted by national courts with regard to the extent of judicial scrutiny of the findings of arbitral tribunals and identify the approach most appropriate for balancing two competing considerations: the principle of finality of arbitral awards; and the discouraging of corruption in international trade.

2. The Permissible Extent of Court Review of Arbitral Tribunal Findings at the Setting Aside and Enforcement Stages

An arbitral tribunal is allowed to set aside or refuse to enforce an award if one of the grounds stipulated in international arbitration rules is established. Article V(2)(b) of the New York Convention and Article 36(1) of UNCITRAL Model Law provide that: *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: The recognition*

1 Lord Mustill, Arbitration: History and Background, in: Journal of International Arbitration 1989, Volume 6, Issue 2, p. 43.

2 OECD (Organisation on Economic Cooperation and Development) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997; United Nations Convention against Transnational Organized Crime, 2000.

or enforcement of the award would be contrary to the public policy of that country.[3]

In similar terms, Article 34(2)(b)(ii) of UNCITRAL Model Law provides that an award *may* be set aside on grounds of public policy. Accordingly, an arbitral tribunal may still enforce an award even if that entails contravention of public policy. The court has the discretion to determine the nature and significance of the illegality and decide whether it would be reasonable or not to enforce an award.[4] Two competing considerations arise while exercising that power: protecting the forum state's public policy interests; and respecting the finality of the arbitral award. Choosing between these two considerations involves several trade-offs which must be taken into account.

The principle of finality of arbitral awards is reflected in most national and international arbitration rules.[5] This principle clearly reflects the spirit of international arbitration; i.e. to resolve the dispute in one instance without the possibility of appeal. Respecting the finality principle has several advantages: avoiding relitigation of the merits already adjudicated in arbitration; increasing the predictability of dispute resolution through international arbitration; preserving the principle of international comity; and respecting the capacities of foreign and transnational tribunals.[6] On the other hand, public policy covers a broad area of state interest and goes beyond the policy objectives underlying preservation of the finality of the award. For the present purposes, the most relevant and significant manifestation of public policy that is in tension with finality of the award is prohibition against contracts that violate good morals and/or public order, such as agreements involving bribery and other obvious forms of corruption. It is therefore understandable that national courts are usually reluctant to enforce agreements which are deemed contrary to the main interests and fundamental moral values of the

3 New York Convention 1958, Article V(2)(b;) UNCITRAL Model Law 2006, Article 36(1).

4 Takahashi, Koji, Jurisdiction to Set Aside a Foreign Arbitral Award, in Particular an Award Based on an Illegal Contract: A Reflection on the Indian Supreme Court's Decision in Venture Global Engineering, in: American Review of International Arbitration 2008, Vol. 19, Issue 1, p. 183.

5 German Arbitration Law 1998, Section 1055; Swiss Federal Code on Private International Law 1987. Article 190; English Arbitration Act 1996, Section 98.

6 Unites States Supreme Court, 83-1569, Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc, 1985.

forum state, and which therefore undermine the principles of fair competition and integrity in public administration.[7]

The crucial issue that arises during the weighing of these two competing considerations is the following: whether the courts are entitled to re-examine the arbitral tribunal's findings; or they have to base their judgments purely on the findings obtained during arbitration proceedings. In practice, after an award is rendered and no evidence of corruption is found, the dissatisfied party usually challenges the arbitral ruling on the following grounds: that the relevant evidence of corruption was discovered only after the close of arbitral proceedings; and that either the arbitral tribunal did not properly consider the evidence proving corruption or it did not correctly apply the law governing issues of corruption and illegality. Even courts belonging to the same jurisdiction sometimes take different approaches with regard to the extent of judicial review of the arbitral tribunal's findings. Attitudes toward judicial scrutiny of arbitral awards can be placed in the following categories: i) minimal judicial review; ii) maximal judicial review; and iii) contextual judicial review.[8]

2.1. Minimal Judicial Review

Courts conducting minimal judicial review tend to be reluctant to scrutinize and re-examine evidence of corruption on the part of arbitrators issuing an award. However, under certain circumstances courts following the minimal judicial review approach may reinvestigate the issue of corruption and therefore re-examine the award's findings of law and fact.[9]

This paper analyzes situations in which a given court showed a high degree of deference to the tribunal's findings and consequently upheld the

7 Hwang, Michael and Lin, Kevin, Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, August 2011, Singapore, supra note 25, p. 51.

8 Sayed, Abdulhay, Corruption in International Trade and Commercial Arbitration, Kluwer Law International, Hague 2004, p. 391–421.

9 Harbst Ragnar, Korruption und Andere Ordre Public-Verstöße als Einwände im Schiedsverfahren – Inwieweit Sind Staatliche Gerichte an Sachverhaltsfeststellungen des Schiedsgerichts Gebunden, Zeitschrift für Shciedsverfahren 2007, Vol. 17, Issue 1, p.26.

award. *Northrop v. Triad*[10] is an apt illustration of that particular aspect of the minimal judicial review approach.

In that case, an American defense company, the Northrop Corporation (Northrop), sought to sell military equipment and related backup services to the government of Saudi Arabia. For those purposes, the company entered into an intermediary agreement with two Liechtenstein-based companies wholly owned by a well-known Saudi businessman, Mr. Adnan Khashogi. The dispute arose due to the commission for intermediary services, payment of which was resisted by Northrop. Northrop argued that a Saudi decree prohibited the sale of military equipment to the Saudi government, thereby claiming that the intermediary agreement was unenforceable. However, the arbitral tribunal came to the conclusion that, despite the promulgation of the Saudi decree, under California Law (the governing law) Northrop was obliged to perform the agreement. As a consequence, the arbitral tribunal rendered the award enforcing payment of the commission to the intermediary. Although Northrop successfully challenged the award in a US court, the Ninth Circuit Court of Appeal later reversed the lower court's judgment setting aside the award. The Court of Appeal held that: *The mere error of interpretation of California law would not be enough to justify refusal to enforce the arbitrators' decision...The arbitrators' conclusions on legal issues are entitled to deference here. The legal issues were fully briefed and argued to the Arbitrators; the Arbitrators carefully considered and decided them in a lengthy written opinion*.[11]

It is evident that the court relied fully on the findings of the tribunal and did not reconsider the issue of illegality of the intermediary agreement. Thus, this judgment demonstrates a high degree of deference to the principle of finality of arbitral awards.

[10] United States District Court, C.D. California, CV83-7945, Northrop Corp. v Triad Financial Establishment, 1984.

[11] *Ibid*., para. 1269.

2.2. Maximal Judicial Review

Maximal judicial review is defined as the total scrutiny of the arbitral tribunal's findings of fact and law.[12] The main justification for courts taking this approach is to preserve state values and interests as enshrined in public policy.

The first main characteristic of the maximal judicial review approach is that the arbitral tribunal's findings can be re-examined *de novo*. The court has the freedom to re-evaluate the findings of facts and re-examine not only the non-application, but also the wrong interpretation of the law.[13] Second, the court may consider evidence which was available and obtainable at the time of the arbitral proceedings but was not presented before the tribunal by the challenging party.[14] Third, the court has the *"total control"* over *de novo* review of allegations regarding the facts, even if those allegations were rejected by arbitral tribunal.

The maximal judicial review approach has been adopted by many European courts, including the Court of Appeals of Brussels, the Court of Appeal of The Hague, the Higher Court of Düsseldorf, and the Federal Court of Germany. All of these courts have taken the view that they are entitled to judicially scrutinize arbitral awards without any limitation.

However, recent practice shows that the judicial attitude of European courts toward the maximal review approach has shifted somewhat. Below, this paper analyzes cases in which courts belonging to jurisdictions supporting the maximal judicial review approach opted not to undertake *"total control"* of the arbitral award and therefore did not conduct *de novo* review of the tribunal's findings of fact and law. For illustration of that practice, this paper analyzes the practice of the Paris Court of Appeal. The Paris Court of Appeal's reluctance to conduct de novo review of awards dates back to its decision in the *SA Thales Air Défense v. Euromissile case*,[15] where the court held that, on

12 Sayed, Abdulhay, Corruption in International Trade and Commercial Arbitration, Kluwer Law International, The Hague 2004, p. 406.

13 Ibid., p. 407-408.

14 Enonchong Nelson, The Enforcement of Foreign Arbitral Awards based on Illegal Contracts, in: Lloyd's Maritime and Commercial Law Quarterly 2000, Vol.20, Issue 4, p.514.

15 Paris Court of Appeal, No. 2002/60932, SA Thales Air Défense v. Euromissile, 2002.

the public policy ground, an award may be reviewed de novo if recognition or enforcement of that award would "breach French legal order 'in an unacceptable manner," such breach constituting a 'manifest' violation of an essential rule or a fundamental principles."[16] Accordingly, in France there is no longer unanimous support for the maximal judicial review approach.

Similarly, German courts in several cases have opted against conducting maximal judicial review of arbitral awards. In the High Regional Court of Hamburg, an alleging party was challenging the enforcement of an arbitral award rendered in Swiss arbitration on grounds that the money paid under the contract constituted a bribe and not payment for performing services. However, the High Regional Court of Hamburg held that the court's power to re-view arbitral awards was limited to procedural errors and therefore it was impermissible to re-examine the findings of the tribunal.[17]

The same approach was adopted by the High Regional Court of Bavaria, which held that it is generally forbidden for the court to replace the evidence of the arbitral tribunal with its own evidence. It also underlined the independence of arbitration and the finality principle of arbitral awards.[18]

Hence, the approaches to judicial review taken by courts can vary even among courts belonging to the same jurisdiction.

2.3. Contextual Judicial Review

In order to strike a balance between two important public policy considerations – sustaining international arbitration awards, on the one hand, and discouraging corruption in international trade, on the other – courts must conduct contextual judicial review of arbitral awards. Contextual review is a two-stage process which provides a structure under which the competing considerations can be balanced.[19]

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16 Gaillard, Emmanuel, Extent of Court Review of Public Policy, in: New York Law Journal, 05.04.2007, p.3.

17 High Regional Court of Hamburg, 6 U 110/97, 1998.

18 High Regional Court of Bavaria, 4Z Sch 23/02, 2003.

19 Leong, Chong Yee, Commentary on AJT v AJU, Singapore International Arbitration Centre, p.4.

The leading form of contextual review was suggested in the *Soleimany v. Soleimany* case, where an English court at the enforcement stage looked behind an award rendered by Beth Din. The court considered issues regarding corruption and illegality of the underlying contract. Notably, Waller L.J., when delivering the court's judgment, explained how a court must scrutinize an award which does not find any illegality underlying the contract of the parties. The court took the view in *obiter dictum*, that in order to respect both aforementioned public policy concerns, a two-stage process should be adopted. At *the first stage*, the court has to determine whether the alleging party provided prima facie evidence about the illegality of the contract, and then the court must conduct preliminary enquiry (short of full-scale investigation) in order to determine whether *"full faith and credit"* should be given to the arbitral award.[20] Waller L.J. suggested that it was unnecessary to conduct full-scale investigation in the first stage since it *"would create the mischief which the arbitration was designed to avoid*.[21] Only after the court concludes that *"full faith and credit"* should not be given to the arbitral award should a full-scale enquiry into the issue of illegality be conducted as a *second stage*.[22]

The following is an illustration of the factors that must be considered at the *first stage* in order to determine the necessity of a full-scale enquiry as a *second stage*. Sayed restated these factors, as follow:

1. Available evidence of legality and illegality;
2. The manner in which the arbitrator reached his or her conclusion of illegality;
3. The degree of competency of the arbitrator; and
4. The manner in which the arbitration was conducted. Care must be taken to verify whether the award was procured by fraud, collusion, or bad faith.[23]

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20 Enonchong Nelson, The Enforcement of Foreign Arbitral Awards based on Illegal Contracts, in: Lloyd's Maritime and Commercial Law Quarterly 2000, Vol.20, Issue 4, p.506.

21 Court of Appeal of England, 97/0882 CMSI, Sion Soleimany v Abner Soleimany, 1999, para. 824.

22 Leong, Chong Yee, Commentary on AJT v AJU, Singapore International Arbitration Centre, p.3.

23 Sayed, Abdulhay, Corruption in International Trade and Commercial Arbitration, Kluwer Law International, The Hague 2004, p.415.

Waller L.J made it clear that while evaluating the illegality of the underlying contract (at both stages) the court had the freedom to consider not only fresh evidence, but new evidence as well; it may even consider the evidence already submitted before the arbitral tribunal. Such broad discretion to consider all kinds of evidence echoes the standards of maximal judicial review, whereas preliminary enquiry — rather than full-scale investigation at the first stage — illustrates the degree of deference to the arbitral tribunal's findings. This is in line with the standards of minimal judicial review.[24] Thus, the contextual judicial review approach holds an intermediary position between minimal and maximal review standards.

2.4. The Appropriate Standard of Judicial Review

The main question involves determining which of the above approaches better balances the two competing public policy considerations: the finality of awards; and the discouragement of corruption in international trade.

First, this paper discusses the minimal judicial review approach, which demonstrates a great degree of deference to international arbitration and the finality of arbitral awards. Although respecting the principle of finality of arbitral awards serves a number of functions and therefore has number of advantages, it is also undisputable that the minimal judicial review approach ignores other fundamental public policy concerns, such as the discouragement of morally-repugnant and/or corrupt agreements. By contrast, the maximal judicial review standard goes too far, ignoring the public policy goals that underlie the principle of finality of arbitral awards. It is correctly argued that arbitration cannot be a "means to circumvent public policy rules"[25]. Therefore, contextual judicial review, which holds the intermediary position that both the minimal and maximal review standards, can be the appropriate way to balance the two competing considerations, depending on the context. Through contextual judicial review there is a greater chance of

[24] Hwang, Michael and Lin, Kevin, Corruption in Arbitration: Law and Reality, paper presented at Herbert Smith-SMU Asian Arbitration Lecture, August 2011, Singapore, p.66.

[25] Hanotiau, Bernard, Satisfying the Burden of Proof: The Viewpoint of a Civil Law Lawyer, in: Arbitration International 1994, Vol. 10, Issue 3, p. 804.

discovering corruption and other illegalities – in contrast to the minimal judicial review standard. This paper concludes that the intermediate approach allowing courts to interfere in the award in cases where there is new but not necessarily fresh evidence is the most appropriate means for balancing the two competing public policy considerations.

3. Review of the Practice of the Supreme Court of Georgia on Deciding on the Recognition and Enforcement of Foreign Arbitral Awards

The practice of the Supreme Court of Georgia on deciding on the recognition and enforcement of foreign arbitral awards dates back to 2003. The first such ruling by the Supreme Court of Georgia was rendered on 4 July 2003.[26] In that case, an arbitral award was rendered by the court of arbitration under the Chamber of Commerce of the Russian Federation. Following that award, the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia invoked Articles 62-63 of the Law of Georgia "on Private International Law", which concerns the petition for legal assistance and the granting of such petition; and Article 51 "b" of the Minsk Convention "on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters", which concerns the recognition and enforcement of awards. According to Article 51 "b" of the Minsk Convention, each of the contracting states should recognise and enforce the following judgements rendered in other contracting states: a) judgments rendered by institutions of justice in civil and family cases, including amicable settlements approved by the courts in such cases and notarial documents relating monetary obligations; and b) judgments rendered by the courts in criminal cases ordering compensation for damages. This provision clearly demonstrates that the court of arbitration incorrectly cited paragraph "b" of Article 51, as the case concerned arbitral proceedings on a civil dispute. Furthermore, the ruling states that the motion had to be

[26] Supreme Court of Georgia, no. 3a-102, 4 July 2003, Collection of Civil Cases no. 8, 2003, p.213.

granted on the basis of Article 69 of the law "on Private International Law" concerning decisions on marriage issues. The ruling clearly indicates that the disputed parties were two legal persons, meaning that the foregoing ground was also used incorrectly, presumably due to a technical inaccuracy. The court had to apply Article 68 of the same law, according to which it had to assess the issue of recognition of decisions of foreign countries.

It is noteworthy that Georgia joined the 1958 New York Convention "on the Recognition and Enforcement of Foreign Arbitral Awards" in 1994. Contracting states to the New York Convention should apply the rules of the convention when deciding upon issues of recognition and enforcement of arbitral awards rendered in foreign states. However, the Supreme Court of Georgia referred to the convention for the first time in its ruling of 16 September 2005.[27]

The ruling rendered by the Chamber of Civil Cases of the Supreme Court of Georgia on 31 January 2011 is also noteworthy.[28] It is the first ruling which refers to the Law of Georgia "on Arbitration" enacted on 1 January 2010. In its prior rulings, the Chamber of Cassation only referred to the Law of Georgia on "Private International Law" and the Minsk Convention. In particular, it is worth noting that the Law "on Arbitration" is in place precisely to regulate the issue of recognition and enforcement of foreign arbitral awards, and while Georgia has been a party to the New York Convention since 1994, the Court of Cassation invokes the Law "on Private International Law" and the Minsk Convention. This practice indicates a major shortcoming in judicial practice. In the motivational section of the foregoing ruling, the Chamber of Cassation also refers to the New York Convention, but the resolutive section states that the Supreme Court of Georgia relied upon Article 68 of the Law on "Private International Law" while making the decision. The motivational section of the ruling thus provides reasoning on the basis of the New York Convention and the Law of Georgia "on Arbitration" while the resolutive section incorrectly states that the Court was guided by the Law on "Private Inter-

[27] Supreme Court of Georgia, no. a-2156-sh-63-05, 16 September 2005, Collection of "Civil Process" no. 6, 2005, p.74.

[28] Supreme Court of Georgia, no. a-2652-sh-72-2010, 31 January 2011, Collection of "Foreign Court Decisions", no. 3, 2012, p.85.

national Law." This clearly poses a problem for the court with respect to the recognition and enforcement of foreign arbitral awards. Only two rulings of the Supreme Court of Georgia, the ruling of 24 February 2012[29] and the ruling of 14 February 2012[30], refer to Article 731 of the Law of Georgia on "Private International Law", pursuant to which arbitration decisions adopted outside Georgia's territory shall be recognized and executed under the procedures established by the Law of Georgia on Arbitration. Despite the above-mentioned provision having been in force since 1 January 2010, the Chamber of Cassation had been invoking the Law of Georgia on "Private International Law" in its decisions adopted before and after the above-mentioned rulings, a clear indication of inexperience and lack of professionalism with respect to arbitral awards.

The ruling of 24 February 2012 is also noteworthy for the fact that the Court of Cassation specifies the scope of court intervention in arbitral proceedings, indicating that "the court may not address the merits of the case." This once again demonstrates that the Supreme Court of Georgia applies the minimal standard of court intervention when deciding upon issues of recognition and enforcement of foreign arbitral awards. The latter court is to be highly respected for its protection of the principle of finality of international arbitration awards. Although many aspects of the principle of finality of arbitral awards are respected – and therefore the foregoing principle has many advantages – it is undisputable that the minimum standard of intervention denies other fundamental principles of public order; for instance, contracts concluded as a result of corrupt agreements that contradict public order.

4. Conclusion

The underlying theme of this paper has been illustration of the discrepancy between denunciation of corruption in international commercial relation-

29 Supreme Court of Georgia, no. v-56-sh-5-2012, 24 February 2012, Collection of "Foreign Court Decisions", no. 3, 2012, p.89.

30 Supreme Court of Georgia, no. a-562-sh-13-2012, 14 February 2012, Collection of "Foreign Court Decisions", no. 3, 2012, p.108.

ships and persistent resistance to such denunciation. Corruption contravenes the main aims of public policy in virtually every national jurisdiction; it is thus internationally condemned and denounced. At first glance, such condemnation is reinforced by arbitral and judicial practice. However, this study finds that arbitral tribunals and national courts often take different approaches while dealing with cases involving corruption. This paper provides an explanation as to why there is no uniformity in international dispute resolution practice with regard to usage of the public policy defense as grounds for rulings based on allegations of corruption.

The main cause of this discrepancy, which is analyzed in this paper, is that the approaches adopted by national courts with regard to the extent of judicial review of arbitral tribunal findings of law and fact, are so divergent that they lead to disparate court decisions even in the cases having similar circumstances.

Overview and study of the practice of the Supreme Court of Georgia with respect to its decisions on the recognition and enforcement of foreign arbitral awards demonstrates that the Court of Cassation applies the minimum standard of court intervention; i.e., studies and examines only the facts that influenced the award, which is insufficient even for reducing obstacles caused by corruption in international arbitration. While studying the practice of the Supreme Court of Georgia on the foregoing topic, becomes clear that judicial practice is not uniform in this respect. Although Georgian arbitration legislation is being updated to adopt the approaches to arbitration law practiced at the international and national levels, it is a fact that many problems remain with respect to the recognition and enforcement of foreign arbitral awards.

This paper provides possible solutions some of the above-mentioned controversies existing in arbitral and judicial practice. However, questions remain as to the level on which arbitral awards should be examined. It is undisputable that harmonization of the different jurisdictions with regard to this issue will reduce the discrepancies currently existing in the practice of international dispute resolution of corruption cases.