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ENFORCEABILITY OF AWARDS AND CORRUPTION

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KIEV ARBITRATION DAYS 2014: Think Big!
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Judicial Challenge on Grounds of Public Policy

- Article V(2)(b) of the New York Convention:

"*Recognition and enforcement of an arbitral award may be refused if the competent authority of the country where recognition and enforcement is sought finds that…*

(b) The recognition or enforcement of the award would be contrary to the public policy of that country"

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Judicial Challenge on Grounds of Public Policy (2)

- Article 34(2)(b)(ii) of the UNCITRAL Model Law:

  "*An arbitral award may be set aside by the court specified in article 6 only if…the court finds that… the award is in conflict with public policy of this State*"

- Many developed national arbitration statutes are broadly similar to the UNCITRAL Model Law

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Competing Considerations

- Courts have wide discretion: there is no mandatory requirement to annul the award or to refuse to enforce it, even if a breach of public policy is made out
- Tension between respecting the finality of the arbitral awards and policing public policy concerns, including prohibition against agreements contrary to good morals or public order, such as contracts for corruption or bribery

Competing Judicial Attitudes

- Significant degree of variation between jurisdictions, as well as between different courts within the same jurisdictions
- Three different attitudes towards court scrutiny of arbitral awards:
  - Minimal Review
  - Maximal Review
  - Contextual Review

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Minimal Review

- Respects the principle of finality of arbitral awards
- Examples:
  - *Thomson-CSF v Frontier AG, Swiss Federal Tribunal's Judgment of 28 January 1997, 16 (1) ASA Bulletin 118 (1998)*
  - *Northrop Corporation v Triad Financial Establishment, 593 F. Supp. 928 (1984)*

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Minimal Review (2)

- The court will refrain from:
  - reviewing the tribunal’s identification and application of law
  - re-opening the tribunal’s findings of fact
- Exceptions:
  - fresh evidence of illegality
  - if tribunal errs in its identification or interpretation of the forum’s public policy

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Maximal Review

- Other end of the spectrum from minimal review
- Applied by the courts that consider their main duty to be the preservation of national values and public policy
- Allows for "*total scrutiny of the award both as a matter of fact and of law*"

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Maximal Review (2)

- Key principles:
  - Findings of fact and law can be reviewed *de novo*, application of law by the tribunal can be re-examined and re-evaluation of the facts is permitted
  - Courts may consider evidence that could have reasonably been obtained during the arbitral proceedings, but was not raised
  - Arguably total control also allows the courts to conduct a review of facts that were rejected by the tribunal

- Example: The Paris Court of Appeal decision in *European Gas Turbines SA v Westman International Ltd XX Y.B. Comm.Arb. 198 (1995)*

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Contextual Review

- Middle ground between minimal review and maximal review

- *Soleimany v Soleimany [1998] 3 WLR 811* two-stage test:
  - If there is *prima facie* evidence of illegality, the court should first conduct a preliminary enquiry to see if the award should be given full faith and credit (Stage 1)
  - If so, then the award should be upheld by the court. If not, then the court should proceed to conduct a full scale enquiry to determine the issue of illegality (Stage 2)

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Contextual Review (2)

- *Soleimany* two-stage test was considered in *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd [1999] EWCA Civ 1401*
  - Disagreement between *Westacre* majority and the dissenting judgment by Waller L.J.
- The English High Court followed *Westacre* majority recently in *R v V [2008] EWHC 1531*:
  - "*The difficulty with the concept of some preliminary enquiry is of course assessing how far that inquiry has to go*"

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Conclusion

- Clear tension between the finality of arbitral awards and the need to preserve public policy
- There are weaknesses in all judicial approaches
- Middle ground needs to be found, but further details of how the approach should work in practice are yet to be determined

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