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New Developments in France on the Alstom Saga: The French Supreme Court Overrules the Paris Court of Appeal's Decision to Deny Enforcement of the Arbitral Award on the Grounds of Corruption

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It's all still to play for. After the Paris Court of Appeal refused enforcement of a Swiss arbitral award against Alstom on the grounds of corruption, the French Supreme Court has now overturned that decision, ruling that the judges misinterpreted the evidence before them.

The case may now be referred to the Versailles Court of Appeal which will rule again on whether the award can be enforced. The Versailles Court of Appeal's decision may also be upheld, under certain circumstances, before the French Supreme Court. It is not the final end of the saga.

The factual and procedural background

Alstom Transport SA (incorporated in France) and Alstom Network U.K. Ltd (incorporated in England) ("Alstom") signed three consultant agreements with Alexander Brothers Limited ("ABL"), a company incorporated in Hong Kong, which purpose was for ABL to assist Alstom with the submission of three tender offers for the supply of railway equipment in China. Alstom Transport SA was awarded all three contracts. Two of the contracts were with the Chinese Ministry of Transport for the supply of heavy freight electric locomotives and high-speed passenger railcars and the third with Shanghai Shengton Holding Group to supply rolling stock for the extension of the Shanghai Metro.

All three consultant agreements between ABL and Alstom were governed by Swiss law. Alstom Transport SA paid a portion of the amount due under the first two contracts for the assistance received by ABL but did not pay the balance and made no payment under the third contract.

In 2013, ABL initiated a Geneva-seated ICC arbitration against Alstom, claiming the balance of the invoices allegedly due by Alstom under the three contracts. ABL sought almost 3 million euros plus interest in respect of the invoices, 1.5 million euros in damages and 1 million euros in punitive damages. Alstom refused to pay the balance of the invoices claimed, alleging that such amounts may be used to bribe public officials. Such an act would have been contrary to the provisions of the contract and Alstom's ethical obligations.

The arbitral tribunal handed down its award in January 2016, concluding that there had been no bribery under any of the contracts, ordering Alstom to pay ABL almost 1,5 million euros plus interest and dismissing the remaining claims.

Alstom unsuccessfully attempted to set aside the award before the Swiss Federal Supreme Court in November 2016. When ABL sought to enforce the award in France, Alstom challenged the enforcement of the award in France and in England.

The Paris Court of Appeal's refusal to enforce the Swiss arbitral award in France

In March 2016, ABL was granted permission to enforce the award by the President of the *Tribunal de Grande Instance* of Paris. In May 2016, Alstom appealed against that order, arguing before the Paris Court of Appeal that paying the amount awarded by the arbitral tribunal would have breached the rules of ethics and compliance stipulated in the contract to prevent corrupt practices in international trade. The enforcement of the award would thus give effect, according to Alstom, to an act of corruption in violation of international public policy pursuant to articles 1525 and 1520 5° of the French Civil Code of Procedure.

In its decision on 28 May 2019 (n°16/11182), the Paris Court of Appeal upheld the appeal and rejected ABL's motion to enforce the award.

First, the Court reminded the parties that it is not its role to assess whether or not contractual provisions have been correctly performed, including contractual rules relating to compliance. The Court's role is to ensure that the enforcement or the recognition of the arbitral award does not result in a manifest, effective and concrete violation of international public policy. In other words, it is the court's duty to assess whether enforcement would have the effect of financing or remunerating a corrupt activity or influence-peddling.

In its judgement of 10 April 2018 (*Rev. Arb.* 2018, n°3, p.574), the Paris Court of Appeal ordered the production of various documents by Alstom under penalty, and invited the parties to conclude on the existence of corruption. In the same judgment, it confirmed that it was empowered to examine, both in law and in fact, whether the enforcement of an arbitral award breached French international public policy in a way that it is manifest, effective and concrete.

Second, the Court reiterated that bribing State representatives, either foreign or French, is against French and international public policy.

Third, the Court stated that, considering their hidden nature, it is almost impossible to identify precise acts of corruption. Instead, there should be circumstantial evidence which must be "*sufficiently serious, precise and consistent*".

In the present case, the Paris Court of Appeal decided that there was sufficient circumstantial evidence to conclude that the enforcement of the award would have given rise to a corrupt transaction. It thus refused ABL's motion to enforce the arbitral award in France.

The Paris Court of Appeal's decision was, and still is, of particular interest because it explains what type of circumstantial evidence is to be taken into account to challenge the enforcement of an award in France and to block its application on the grounds of corruption (that is, possible red

flags). According to the Court, serious, precise and consistent circumstantial evidence to prove corruption could include, for instance:

- limited evidence of the services provided. The only contemporaneous pieces of evidence presented by ABL on the services provided for which it claimed payment were (i) a confidential document obtained under unclear circumstances, presumably illicit according to the Court; (ii) translations or summaries from the Ministry of Railways and other Chinese entities without further analysis or explanations or recommendations from ABL;
- disproportion between the services rendered and the price claimed;
- limited human and material resources. ABL did not have any activity before contracting with Alstom;
- distortion of competition. Alstom was informed of the evaluation of the tenders before they were published and one of the contracts was thus awarded on the basis of criteria that remain unclear considering that another bidder had a better score than Alstom;
- irregular accounting. The Court concluded that ABL was essentially a vehicle for transferring funds to its partners, for uses that could not be verified (or could hardly be verified). In addition, funds were used to purchase expensive goods;
- one of the parties was not new to bribing foreign State representatives. Alstom recognized before the US Ministry of Justice that it had previously engaged in bribery practices through alleged consultants (with acts being carried out in Indonesia, Saudi Arabia, Egypt and Bahamas). This red flag is interesting because, despite Alstom's bad faith, ABL was not able to benefit from the principle of *nemo auditor propriam turpitudinem allegans* ('no one shall be heard, who invokes his own guilt'). Such a principle was considered by the French judges to be irrelevant in these circumstances where the interest of the parties is less important than an act of corruption and compliance with international public policy;
- State representatives involved in the project had been sentenced to life imprisonment for bribery. The Chinese Ministry of Transport and its Deputy Chief Engineer involved in the project had been sentenced to life imprisonment for bribery on another case.

ABL appealed against the Paris Court of Appeal's decision before the French Supreme Court.

The French Supreme Court decision: the judges' obligation not to distort written evidence submitted to them

On 29 September 2021, the French Supreme Court decided that the Paris Court of Appeal had distorted the evidence before it in reaching its conclusion on the risk of participation in corrupt activities through the enforcement of the award (n°19-19769).

The Paris Court of Appeal referred to the transcript of the arbitration hearing, in particular to the witness examinations of two of ABL's employees, a manager and an accountant. According to the Paris Court of Appeal, the first refused to answer questions asked of him in relation to the source of certain documents and information (confidential documents sent to Alstom, the reasons Alstom won the tender, etc.). The second witness, on the other hand, maintained that operational expenses paid using credit cards linked to the partners' personal accounts were supported by documents, without however recognizing that such documents were actual invoices or that they were exhaustive evidence of invoices upon which payment could be claimed under a consultancy agreement.

However, the French Supreme Court underlined the fact that the arbitration hearing transcript did not mention the above and that the judges had misread its content.

First, the manager had answered the questions relating to the confidential documents obtained from the Chinese authorities, but she refused to answer the questions of Alstom's counsel before the British anti-corruption authorities (and not before the arbitral tribunal) because the arbitration proceedings had been initiated in the meantime.

Second, the accountant affirmed, during the hearing, that the statement according to which the operational expenses had only been justified by bank card receipts and that their purpose was not indicated was incorrect.

The French Supreme Court concluded that the judges of the Paris Court of Appeal had “*distorted the clear and precise terms of the transcript*”. Accordingly, the decision of the Court of Appeal could not be upheld and the issue should be referred to the Versailles Court of Appeal.

The limited impact of the French Supreme Court's decision

First, the Supreme Court did not disapprove the principle upon which the Paris Court of Appeal based its decision: that is, that in order to prove corruption there should be circumstantial evidence which must be “*sufficiently serious, precise and consistent*” (a principle confirmed by a consistent line of French case law, including Paris CA, 16 May 2017, n° 15/17442 and 15/23790; Paris CA, 17 November 2020 n° 18/07347 and 18/02568; and Paris CA, 7 September 2021, n° 19/17531). Rather, the French Supreme Court simply rejected the Court of Appeal's analysis of the evidence brought before it rather than its underlying rationale. The decision is therefore one based on the circumstances of the case (*arrêt d'espèce*) rather than a decision of principle (*arrêt de principe*).

The Versailles Court may still reach the same conclusion as the Paris Court of Appeal and refuse enforcement of the arbitral award if it considers the evidence brought before it (which is not limited to the evidence cited by the French Supreme Court in its decision) sufficient to prove that the enforcement of the arbitral award would have the effect of participating in a corrupt activity.

The Versailles Court of Appeal will certainly pay more attention to the analysis of the factual evidence, but the outcome remains uncertain and will not necessarily differ from that reached by the Paris Court of Appeal.

Second, in issuing a decision on the factual circumstances of the case, the French Supreme Court missed an opportunity to set a point of principle in this area. In doing so, it indirectly confirmed the approach of the Paris Court of Appeal with respect to the procedure to be followed for assessing whether or not an act of corruption capable of impeding enforcement (or of setting aside) an arbitral award is present, in other words by taking into account circumstantial evidence which must be “*sufficiently serious, precise and consistent*”.

Third, as for the Paris Court of Appeal, any decision on the exequatur of the arbitral award would have consequences only in the country where the party is trying to enforce the arbitral award. Only a set-aside judgment may be relied upon by other domestic courts outside the country of the set-aside procedure (Articles V (e) and VI of the New York Convention). In the present case, Alstom may see the arbitral award being enforced outside France notwithstanding any decision of the

Versailles Court of Appeal.

As a demonstration of this, the Swiss Federal Supreme Court confirmed the validity of the arbitral award in 2016 by refusing to set it aside, and the English High Court has previously confirmed the enforcement of this arbitral award in England.

On 18 June 2020, the English High Court dismissed Alstom's arguments on corruption and its application to resist enforcement (2020 EWHC 1584 (Comm)). The judges considered in the first place whether enforcement should have been impeded by arguments that were or could have been raised before the arbitral tribunal. It concluded that if the arbitral tribunal has already determined this issue and concluded that there was no illegality then there is no need for the Court to re-open the same issue, unless the circumstances are exceptional (for instance, when the allegations of corruption are very serious). In the present case, the High Court considered that the question of bribery had not been addressed in detail before the arbitral tribunal (no witnesses were called on this issue specifically and no defence of corruption was raised), but that Alstom could and should have presented such arguments before the tribunal. The issue could have been re-opened in exceptional circumstances, but such criteria were not met in the case (the corruption was not serious enough – the contract was affected by incidental bribery – and the evidence was not particularly strong).

The Paris Court of Appeal made clear in its judgement of 2019 that it was not bound by the Swiss Federal Supreme Court's judgment and/or by the arbitral tribunal's award.

On the one hand, considering the English court's judgment, a party suspecting acts of corruption (and willing to invoke them) should seriously consider whether to raise them, if already known, during the arbitration procedure. Otherwise, the party may incur the risk of being barred in the future from raising such a defence, potentially during setting-aside or enforcement/recognition proceedings.

On the other hand, public policy issues, such as corruption, may lead to a significant review of arbitral awards before, for instance, the French courts. This approach may oblige arbitral tribunals to investigate any corruption, fraud and/or money laundering allegations more seriously in order to ensure the validity and/or enforceability of the award.

In conclusion, in the present case, in any event, another refusal of enforcement in France (if the Versailles Court of Appeal confirms the Paris Court of Appeal's decision) may have a very limited impact on Alstom's interests. If ABL is successful in enforcing the arbitral award in England, because the other party has sufficient assets to cover the payments awarded, Alstom would have still paid the sums awarded, even if in France enforcement is blocked.

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