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# French Supreme Court Confirms Sorelec: Towards a Substantive Review on the Merits

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In a decision dated 7 September 2022, the French Supreme Court confirmed the *Sorelec* decision issued by the Paris Court of Appeal in 2020. For the first time, France's highest civil court has directly approved a shift in the jurisprudence of the Paris Court of Appeal that might have important implications for France as a place of arbitration. This post explains the background of the *Sorelec* award and demonstrates the significance of its annulment by the Paris Court of Appeal based on allegations of corruption. It goes on by analyzing the confirmation of the new approach by the French Supreme Court and concludes that while the effectiveness of this approach in the global fight against corruption is doubtful, the avenue taken has some important drawbacks.

**Background: The *Sorelec* Awards**

In 1979, the French company Sorelec S.A. ("Sorelec") concluded a contract with the Libyan government for the construction of schools and apartments. When the parties disagreed on the execution of the contract, they submitted their dispute to ICC arbitration in 2013 under the France-Libya bilateral investment treaty (BIT). In 2017, the arbitral tribunal recorded in a partial award a settlement between the company and the Libyan government. The State was finally ordered to pay the sum of 230,000,000 EUR by a final award in 2018. This settlement agreement and the circumstances leading to its conclusion proved to be crucial for the annulment proceedings before the Paris Court of Appeal.

**The Annulment by the Paris Court of Appeal**

The Libyan government sought to set aside the two arbitral awards, alleging that the settlement agreement was the result of bribery of the public officials in charge at the time, which in addition only represented a part of the country (there were two governments at the time). Libya argued that by validating bribery ex post, the award violated France's international public policy ("ordre public international").

An interesting element is that this allegation was neither raised nor discussed before the arbitral tribunal. Nevertheless, the Paris Court of Appeal felt entitled to conduct a full investigation, without limits, in law and in fact. It tried to justify such an investigation by reference to its powers

to ensure the award was consistent with the interest of (French) international public policy, as distinguished from a (still prohibited) review of the award on the merits. Yet, what it did was nothing other than a substantive review – a review on the merits. It assessed in detail circumstantial evidence for corruption raised by the Libyan government in the annulment proceedings.

The benchmark was whether the indicators were 'grave, precise and congruent' enough to establish corruption (the "bunch of indicator" test for criminal allegations was for the first time used by the Paris Court of Appeal in its *Belokon* decision in 2017, and has developed into a *jurisprudence constante* since then, see e.g. the *Alstom*, *Cengiz* and *Global Voice* decisions). Direct evidence of corruption was not required. Instead, it was sufficient for the Paris court that the Libyan government referred to external circumstances (the context of the Libyan civil war, where two governments existed at the same time; but also the 'general climate of corruption') and circumstances of the negotiations of the settlement agreement (the minister had changed his legal opinion suddenly, the negotiations lasted only one day and were not documented). As a result, the burden of proof shifted towards the investor to justify the irregularities. This was strengthened by the fact that the settlement essentially resulted in the Libyan government conceding all of Sorelec's positions, without having an objective interest in doing so. The only evidence that was missing was direct evidence of payments of bribes to the acting officials, and the court waived the requirement.

The *Sorelec* decision shows that the Paris Court of Appeal's willingness to investigate the allegation of corruption, even raised before the set aside court for the first time. It thus operated a review on the merits although this is said to be prohibited since the groundbreaking decisions in *Thales* and *Cytec*. The court accepted circumstantial evidence in order to "establish" corrupt practices that violated (French) international public policy.

## Indirect Confirmation in the Supreme Court's *Alstom* Decision

The Paris Court of Appeal also operated a full review on the merits in the two recent *Alstom* cases (see here and here), where the court even ordered the parties to produce additional evidence. This was also the first case where the French Supreme Court had to rule on the new standard of review – and avoided a direct answer. It quashed the decision ruling that the Paris court had distorted evidence before it. However, the control operated was not questioned by the Supreme Court as such, neither was the reopening of the debate – the Supreme Court seemed to get involved in the debate itself. This already indicated a confirmation of the approach taken by the Paris Court of Appeal, however, the Supreme Court did not expressly say so.

## Direct Confirmation in the *Sorelec* Decision

In its *Sorelec* decision dating 7 September 2022, the French Supreme Court has now confirmed the shift undertaken by the Paris Court of Appeal, for the first time explicitly. According to the court, the assessment of international public policy may not be determined by the attitude of one party during the arbitration. Accordingly, the allegation that the Libyan State has proven to be "disloyal" by not invoking the corruption defense before the arbitrators, but only in the set aside proceedings, does not deprive the court of conducting its own research on the issue. In other words, the Supreme Court refuses to recognize the established principle of preclusion, i.e., the principle whereby a party that fails to invoke arguments or related evidence before the arbitrators may not invoke it at a

later stage.

Also, the Supreme Court reaffirms the specificity of French jurisprudence in recent years, according to which the Court of Appeal, in its control of the arbitral decision, is without limits regarding its powers to investigate 'in law and in fact'. Consequently, the Paris Court of Appeal was entitled to examine all the evidence submitted, no matter whether it was raised before the arbitrators at an earlier stage. Furthermore, the Supreme Court did not take offence with the Paris Court of Appeal conducting its assessment on the basis of circumstantial evidence.

**Implications**

The French approach as confirmed by the Supreme Court marks a shift from a practice of domestic courts favoring the autonomy of international arbitration and the effectiveness of arbitral awards: towards a more substantive review, accepting circumstantial evidence ('red flags'). So far, other jurisdictions are hesitant to follow (the *Alstom* award, for example, was sanctioned in France, after a Swiss court had refused to set it aside; the English High Court even granted enforcement after the decision of the Paris Court of Appeal). Given that French courts do not operate in a legal void, there might be some concerns. The potential for the corruption defense to be abused as an additional 'joker card' is inherent, especially if States (or certain public officials) are complicit in corrupt practices, or even encourage them. Unpopular investors might be discredited and discouraged from pursuing international arbitration for fear of being condemned for corruption without direct evidence on the basis of presumptions or just in the 'court of public opinion'.

Unpredictability as to which 'red flags' are used and to the outcome of set aside cases might hamper Paris as a place of arbitration. As long as the review on the merits, combined with the 'red flag' approach, is applied this strictly only in France, investors might avoid Paris as a place for arbitration. More international coordination and cooperation is thus needed. Otherwise, contradictory outcomes like in the *Alstom* case risk to undermine the legitimacy, not mainly of the system of international arbitration, but of the role that domestic courts play in the fight against corruption.

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