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The French approach to enforcement of arbitral awards, international public policy and corruption*

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In recent years, French courts have decided to adopt an uncompromising stance in the fight against corruption in international arbitration. While French enforcement/annulment courts were originally conducting a limited review of arbitral awards dealing with corruption allegations on international public policy grounds, they now carry a full re-examination of such awards accepting that a corruption plea be raised for the first time before them and admitting new evidence. What is at stake, in terms of international public policy, is to define the happy medium between, on the one hand, the necessity to preserve the enforceability of international arbitral awards, and, the necessity to fight corruption. This paper presents the evolution of French case law in the past years and makes a critical assessment of the French approach by comparison with other jurisdictions.

Key Words : Corruption, Enforcement, International Public Policy, France, Red Flags.

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Ⅰ. Introduction

In the words of the late Professor Emmanuel Gaillard, French law is "*one of the most arbitration-friendly in the world*".[1] Principles of international arbitration such as the separability or autonomy of arbitration agreements or the compétence compétence principle were born in France and are today embodied in most modern arbitral legislations.[2]

It is with the same trust in the arbitral system, and to guarantee the international enforceability of arbitration agreements, that French courts have long decided to perform a limited review of arbitral awards and refused to re-examine the merits of the case.

Recent decisions rendered in the context of the international fight against corruption are in stark contrast with this traditional approach and have been denounced as potentially jeopardizing Paris as a safe arbitration seat.

The necessity to fight corruption is reflected in several international instruments such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) or the United Nations Convention against Corruption (2003).

It is by reference to the "*international consensus expressed in those texts*"[3], that French courts have held that the prohibition of corruption forms part of the French conception of international public policy. This means that no arbitral award will be granted enforcement in France if such enforcement directly or indirectly gives effect to deeds of corruption.

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1) E. Gaillard and P. de Lapasse, « Le nouveau droit français de l'arbitrage interne et international », *Recueil Dalloz*, 20 January 2011, p.175: "*C'est la raison pour laquelle, en 2010 encore, le droit français pouvait être considéré comme l'un des droits les plus favorables à l'arbitrage existant dans le monde*".

2) E. Gaillard, « L'apport de la pensée juridique française à l'arbitrage internationale », *JDI* n°2, April 2017.

3) See for instance Paris Court of Appeal, 28 May 2019, N°16/11182, *Société Alstom Transport SA and Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd, Rev. arb.*, 2019.850, note E. Gaillard; *Cah. arb.*, 2020.289, note L-C. Delanoy and R. Dethomas; *JDI* n°2, April 2020, 10, comm. E. Loquin; *Gaz. Pal.*, 2 July 2019, p.22, obs. D. Bensaude; Paris Court of Appeal, 5 April 2022, N°20/03242, *République Gabonaise v. Société Groupement Santullo Sericom Gabon, Rev. arb.*, 2022.620, note I. Fadlallah; *JDI* n°2, April 2022, chron. 4, K. Mehtiyeva; *D. Actualité*, 20 May 2022, J. Jourdan-Marques. (unofficial translation of "l*e consensus international exprimé par ces textes*").

For corruption is an "*insidious plague*", an "*evil phenomenon*", a "*scourge*".[4] In the words of the UN Secretary-General Kofi A. Annan, corruption "*undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.*"[5]

Nearly twenty years after Kofi A. Annan penned these words in the foreword to the UN Convention against Corruption, corruption remains a critical issue at global level affecting all countries, whether developed or developing.[6] Its global cost is estimated to be at least around $2.6 trillion, or 5 percent of the global gross domestic product (GDP), with "*businesses and individuals pay[ing] more than $1 trillion in bribes every year*".[7]

In addition, the standard profile of corruption cases has evolved in a worrying manner. As can be read in the 2022 annual report of the Basel Institute on Governance, "[f]*or decades corruption was seen primarily as an instrument for personal, short-term enrichment. Today, we see political forces, business and other non-state actors alike wielding corruption as part of their domestic, geopolitical or corporate agendas*".[8]

Corruption is thus still very much a reality and fighting it remains an absolute necessity.

In this context, the extent of the review that must be exercised by French enforcement courts on international public policy grounds is being heatedly debated by French scholars and practitioners.

The debate arose further to recent decisions of the Paris Court of Appeal, in which the Court conducted an extensive review of arbitral awards dealing with allegations of corruption, including on the basis of new evidence in instances where corruption had not been raised before the arbitral tribunal.

Prior to these decisions, French courts had limited themselves to a rather superficial

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4) United Nations Convention against Corruption (adopted on 31 October 2003, entered into force on 14 December 2005), foreword by Kofi A. Annan.

5) United Nations Convention against Corruption (adopted on 31 October 2003, entered into force on 14 December 2005), foreword by Kofi A. Annan.

6) "The Sustainable Development Goals Report 2022", p.59, at https://unstats.un.org/sdgs/report/2022/.

7) In 2018 – See https://press.un.org/en/2018/sc13493.doc.htm.

8) Annual Report 2022 (published June 2023), Basel Institute on Governance, foreword by Gretta Fenner, managing director and Peter Maurer, president, p. 4.

control, which had been criticized by certain commentators as being too lenient with the risk of giving effect to arbitral awards tainted by corruption.[9)]

Whereas supporters of the so-called "minimalist approach" argue that the French judge should carry out a limited review of arbitral awards dealing with corruption to ensure their finality, supporters of the "maximalist approach" contend that the fight against corruption justifies a full re-examination of the law and the facts forming the basis for the award, as well as the admission of new evidence.

In terms of international public policy, the key challenge is therefore to define the happy medium between, on the one hand, the necessity to preserve the enforceability of international arbitral awards, and, on the other hand, the absolute necessity to fight corruption.

After a presentation of the evolution of French case law in the past years that went

9) C. Greenberg, « Le contrôle de la conformité de la sentence à l'ordre public international: les questions en suspens », *Revue de l'Arbitrage*, Volume 2022, Issue 1, pp. 227-250, p. 233: "*The justification for* "minimalist" *review in the name of the prohibition of the review of the merits of awards is based on an error of reasoning with far-reaching consequences for our legal system, which has become a* "colander" *capable of giving effect to awards that are incompatible with the fundamental principles and values that make up the international public order*". (unofficial translation of: "*La justification du contrôle* « minimaliste » *au nom de l'interdiction de la révision au fond des sentences repose sur une erreur de raisonnement lourde de conséquences pour notre ordre juridique, devenu une* « passoire » *susceptible de donner effet à des sentences incompatibles avec les principes et valeurs fondamentaux qui forment l'ordre public international.*"); A-M. Lacoste, "Corruption as a Bar to Award Enforcement in France", in M. Scherer (ed), *ASA Bulletin*, Kluwer Law International 2018, Volume 36, Issue 1, pp. 31-52, p. 39: "*The minimalist approach favors the autonomy of the arbitration. It is justified by the principle that the Court of Appeal should not review awards on their merits (révision au fond). This approach has been heavily criticized, as it is not necessarily an efficient method in the context of the review of an award's conformity with international public policy. The issue with the minimalist approach involves its superficiality of review. On the one hand, instances of blatant corruption exposed through minimal review are rare. On the other, more intricate instances would lie beyond the scope of the minimalist approach and thus go unsanctionned*"; C. Seraglini, « Le contrôle par le juge de l'absence de contrariété de la sentence à l'ordre public international : le passé, le présent, le futur », Revue de l'arbitrage, Volume 2020, Issue 2, pp. 347-376, p. 353, §11: "*However, while the first proposition, that of the need for an* "actual and concrete" *violation, can hardly be criticized, the second, that of a* "blatant" *violation within the framework of the principle of prohibition of review of the merits of arbitral awards, is much more questionable, in that it leads to an illusory review, limited to the obvious, of the award's conformity to international public policy*". (unofficial translation of: "*Or, si la première proposition, celle de la nécessité d'une violation* « effective et concrète », *ne peut guère être critiquée, la seconde, celle d'une violation « flagrante » encadrée par le principe de prohibition de la révision au fond des sentences arbitrales, est beaucoup plus contestable en ce qu'elle conduit à un contrôle illusoire, limité aux évidences, de la conformité de la sentence à l'ordre public international*").

from a *prima facie* review to a full examination of the conformity of arbitral awards with international public policy (I), a critical assessment of the French approach by comparison with other jurisdictions will be conducted (II).

Ⅱ. Evolution of the control of the conformity of arbitral awards with international public policy when corruption is involved

Over the last decade, the French standard of review of the conformity of awards with international public policy has tremendously evolved. With the endorsement of the *Cour de Cassation*, the Paris Court of Appeal departed from its *prima facie* review (1), in the years 2014-2016 (2), to carry a full examination of arbitral awards dealing with allegations of corruption from 2017 onwards (3).

1. The minimal review era: 2009-2014

Either when seized of a motion for annulment of an award rendered in France or of an appeal against an order granting enforcement to a foreign arbitral award ("*ordonnance d'exequatur*"),[10] French courts have interpreted their power of review

10) In both cases, the grounds of review are listed in Article 1520 of the Code of Civil Procedure that provides: "*An award may only be set aside where*:
(1) the arbitral tribunal wrongly upheld or declined jurisdiction; or
(2) the arbitral tribunal was not properly constituted; or
(3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or
(4) due process was violated; or
(5) recognition or enforcement of the award is contrary to international public policy".
Unofficial translation of "*Le recours en annulation n'est ouvert que si : 1° Le tribunal arbitral s'est déclaré à tort compétent ou incompétent ; ou 2° Le tribunal arbitral a été irrégulièrement constitué ; ou 3° Le tribunal arbitral a statué sans se conformer à la mission qui lui avait été confiée ; ou 4° Le principe de la contradiction n'a pas été respecté ; ou 5° La reconnaissance ou l'exécution de la sentence est contraire à l'ordre public international*". The same goes for the recognition or enforcement of foreign awards, as per Article 1525 al. 4 of the French Code of Civil Procedure which provides: "[t]*he Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520*" (unofficial translation of: "*La cour d'appel ne peut refuser la reconnaissance ou l'exequatur de la sentence arbitrale que dans les cas*

restrictively and refused to act as an appellate court that would judge *de novo* the merits of the case (prohibition of the "revision" of arbitral awards).

In the French conception, by entering into an arbitration agreement, the parties withdraw the power to judge from the domestic courts to give it to the arbitral tribunal. Enforcement courts are therefore judge of the admission of the award in the French legal order, as opposed to judge of the underlying case. With respect to international public policy, their only task is to examine whether granting enforcement to the award would violate the French conception of international public policy.[11)]

In the years 2000, relying on the principle according to which the annulment judge cannot revise the merits of awards, French courts held that an award will be annulled or refused enforcement for violation of international public policy only in cases where the alleged violation would be blatant.

This *prima facie* review is said to originate from a *Thalès decision* of 18 November 2004[12)] concerning the violation of European competition law. In this decision, the Paris Court of Appeal held that to cause the annulment of an award: "*the violation of international public policy within the meaning of article 1502-5° of the* [Code of Civil Procedure] *must be blatant, actual and concrete*".[13)]

The same requirement of a "*blatant, actual and concrete*" violation of international public policy, was applied to cases involving allegations of corruption. In the *Schneider* decision of 2009 that allegedly involved corruption in the context of the procurement of public contracts in Nigeria, the Paris Court of Appeal refused to review the arbitral tribunal's findings on corruption. The motion to set aside the award was dismissed on the ground that the Paris Court of Appeal's "*review is limited to the blatant, actual and concrete nature of the alleged violation*".[14)] The decision was

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prévus à l'article 1520").

11) I. Fadlallah, « L'ordre public dans les sentences arbitrales », *Collected courses of the Hague Academy of International law*, 1994, Volume 249, pp. 369-430, p. 390, §21.

12) Paris Court of Appeal, 18 November 2004, N° 2002/19606, *S.A. Thalès Air Défense v. G.I.E. Euromissile, Rev. crit. DIP,* 2006.104, note S. Bollée; *JDI*, 2005.357, note A. Mourre; *RTD com.*, 2005.263, obs. E. Loquin; *Rev. arb.*, 2005.529, note L. Radicati di Brozolo; D., 2005.3050, obs. T. Clay; *JCP* 2005, II, 10038, note G. Chabot; *JCP* 2005, I, 134, obs. Ch. Seraglini.

13) Paris Court of Appeal, 18 November 2004, N° 2002/19606, *S.A. Thalès Air Défense v. G.I.E. Euromissile* (unofficial translation of "*la violation de l'ordre public international au sens de l'article 1502-5° du NCPC doit être flagrante, effective et concrète*").

14) Paris Court of appeal, 10 September 2009, N° 08/11757, *Société M Schneider Schaltgerätebau und Elektroinstallationen GmbH v. Société CPL Industries Limited, D.*, 2010. 2933, obs. T. Clay; *Rev.*

upheld by the *Cour de Cassation* in 2014 that held that "*the annulment judge is the judge of the award to admit or refuse its insertion in the French legal order and not the judge of the matter for which the parties have concluded an arbitration agreement*" approving the Paris Court of Appeal for stating that "*the motion for annulment was actually aiming at a new investigation of the matter*".[15]

This minimal review was strongly criticized by French scholars. Some of them blamed the French Courts for "*sacrificing the protection of public interests and turning France into a heaven for awards that violate international public order*".[16] It was stressed that this standard of review was unfit to the fight against corruption because the violation of international public order as a result of corruption is rarely blatant, actual and concrete[17] whereas arbitration could be the "*ideal breeding ground for this type of practices*".[18]

French scholars and practitioners called for a change.

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arb., 2010. 548, note L.-C. Delanoy (unofficial translation of "…*le contrôle se limite au caractère flagrant, effectif et concret de la violation alléguée*").

15) *Cour de Cassation, Civ. 1ère*, 12 February 2014, N° 10-17.076, *M. Schneider Schaltgerätebau und Elektroinstallationen GmbH v. Société CPL Industries Limited, Rev. arb.*, 2014.389, note D. Vidal; *Cah. arb.*, 2014.585, note L.-C. Delanoy; *D.*, 2014.1967, obs. S. Bollée; *D. Actualité*, 19 February 2014, obs. X. Delpech; *JCP G*, 2014.474, note P. Chevalier; *JCP G*, 2014.475, note D. Mouralis; *Procédures n°4*, April 2014, comm. 107, note L. Weiller; *Gaz. Pal.*, 28 June 2014, p. 15, obs. D. Bensaude. (unofficial translation of: "*le juge de l'annulation est juge de la sentence pour admettre ou refuser son insertion dans l'ordre juridique français et non juge de l'affaire pour laquelle les parties ont conclu une convention d'arbitrage ;* […] *que le recours en annulation tendait, en réalité, à une nouvelle instruction au fond de l'affaire*…").

16) J. Jourdan-Marques, « Chronique d'arbitrage : la Cour de cassation crève l'abcès sur l'ordre public international », *Dalloz Actualité*, 20 May 2022 (unofficial translation of: "… *de sacrifier la protection des intérêts publics et de faire de la France une terre d'accueil pour les sentences violant l'ordre public international*"). See also C. Greenberg, « Le contrôle de la conformité de la sentence à l'ordre public international : les questions en suspens », *Revue de l'Arbitrage*, Volume 2022, Issue 1, pp. 227-250, pp. 233-234; A-M. Lacoste, "Corruption as a Bar to Award Enforcement in France", *in* M. Scherer (ed), *ASA Bulletin*, Kluwer Law International 2018, Volume 36, Issue, 1, pp. 31-52, p. 39; C. Seraglini, « Le contrôle par le juge de l'absence de contrariété de la sentence à l'ordre public international : le passé, le présent, le futur », *Revue de l'arbitrage*, Volume 2020, Issue 2, pp. 347-376, p. 353, §11.

17) A.-M Lacoste, "Corruption as a Bar to Award Enforcement in France", in M. Scherer (ed), *ASA Bulletin*, Kluwer Law International 2018, Volume 36, Issue 1, p. 39.

18) T. Clay, « Arbitrage et modes alternatifs de règlement des litiges », *Recueil Dalloz* 2014, p.2541: "… *le lieu d'épanouissement idéal de ce type de pratique.*"; see also L.-C. Delanoy, « L'arrêt M. Schneider du 12 février 2014 : feu rouge pour la « révision », feu vert pour la corruption ? », *Cahiers de l'arbitrage* 2014 n°3, p. 585.

2. Towards a broader review by the Paris Court of Appeal: 2014-2016

Several decisions of 2014 paved the way for a more thorough control. In the *Gulf Leaders*[19], *Commisinpex*[20] and *Man Diesel*[21] cases, the Paris Court of Appeal, distanced itself from the *Thalès* "*minimalist*" test holding that "*whenever it is alleged that an award gives effect to a contract obtained by corruption, the annulment judge* [...] *must conduct a legal and factual enquiry of all the elements necessary to assess the alleged illegality of the agreement and whether the recognition or enforcement of the award would actually and concretely violate international public policy*".[22]

In the *Man Diesel* decision for instance, a company was resisting the enforcement of a Swiss award on the ground that the fees owed to its Iraqi representative were in fact illicit commissions. The Paris Court reviewed all the factual elements taken into consideration by the arbitral tribunal such as the commission rate charged, the reality of the services provided, and the weakness of the evidence but found that no corruption had taken place.[23]

In or around 2016, the Paris Court of Appeal replaced the requirement of a

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19) Paris Court of Appeal, 4 March 2014, N° 12/17681, *Société Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France, D.*, 2014.1967, obs. S. Bollée; *D.*, 2014.2541, obs. Th. Clay; *Rev. arb.*, 2014.955, obs. L. C. Delanoy; *Gaz. Pal.*, 28 June 2014, p. 16, obs. D. Bensaude.

20) Paris Court of Appeal, 14 October 2014, N° 13/03410, *République du Congo v. SA Commissions import export, Rev. Arb.*, 2014.1030; *D.*, 2014.2541, obs. Th. Clay.

21) Paris Court of Appeal, 4 November 2014, N° 13/10256, *SAS Man Diesel & Turbo France v. Société Al Maimana General Trading Company Ltd, RTD com.*, 2015.67, obs. E. Loquin; *Rev. arb.*, 2015.543, note A. de Fontmichel.

22) Paris Court of Appeal, 4 March 2014, N° 12/17681, *Société Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France;* Paris Court of Appeal, 14 October 2014, N° 13/03410, *République du Congo v. SA Commissions import export;* Paris Court of Appeal, 4 November 2014, N° 13/10256, *SAS Man Diesel & Turbo France v. Société Al Maimana General Trading Company Ltd* (unofficial translation of: "... *lorsqu'il est prétendu qu'une sentence donne effet à un contrat obtenu par corruption, il appartient au juge de l'annulation* [...] *de rechercher en droit et en fait tous les éléments permettant de se prononcer sur l'illicéité alléguée de la convention et d'apprécier si la reconnaissance ou l'exécution de la sentence viole de manière effective et concrète l'ordre public international*").

23) Paris Court of Appeal, 4 November 2014, N° 13/10256, SAS *Man Diesel & Turbo France v. Société Al Maimana General Trading Company Ltd, RTD com.*, 2015.67, obs. E. Loquin; Rev. arb., 2015.543, note A. de Fontmichel.

"*concrete*" and "*actual*" violation of international public policy with a "*manifest, actual and concrete*" violation of international public policy.[24] Certain scholars deplored a contradiction in the French case law noting that, on the one hand, the Court affirms its commitment to an extensive control, while on the other hand, it still mentions the requirement of a "*manifest*" violation of public order whereas the term "*blatant*" that appeared in the *Thalès decision* had previously been abandoned.[25]

These changes of semantics and the substitution of "*blatant*" by "*manifest*" gave rise to endless debates between practitioners and scholars about the impact of the choice of words on the intensity of the review carried by French courts and the standard of proof.[26]

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24) Paris Court of Appeal, 27 September 2016, N° 15/12614, *SA Ancienne Maison Marcel Bauche v. Société Indagro, Rev. arb. 2017.942; JDI* n°4, 2017, 20, note E. Gaillard; *JCP G*, 2017.1326, n° 5, obs. Ch. Seraglini; RTD com. 2020. 283, obs. E. Loquin. See also for instance: Paris Court of Appeal, 27 October 2020, N° 19/04177, *République du Bénin v. Société Securiport Bénin et Société Securiport LLC, Rev. arb.*, 2021.748, note P. Mayer; Paris Court of Appeal, 17 November 2020, N° 18/02568, *Etat de Libye v. SA Société orléanaise d'électricité et de chauffage électrique Sorelec, Rev. arb.*, 2021.762, note P. Mayer; Paris Court of Appeal, 25 May 2021, N° 18/18708, *République Gabonaise and Commune de X v. Webcor ITP Ltd. et autre, Rev. arb.*, 2021.778, note P. Mayer; *Gaz. Pal.*, 13 July 2021, p. 24, obs. D. Bensaude; *JDI*, 2022, comm. 11, note S. Manciaux.

25) L. d'Avout and S. Bollée, « Droit du commerce international août 2016-juill. 2017 », Recueil Dalloz 2017, p. 2054: "*On the one hand, the Court broadly reaffirms its willingness to apply an extensive control; on the other hand, it mentions the requirement of a "manifest" violation of public order, whereas until recently it had purely and simply abolished the requirement of blatancy, in a clear rejection of the minimalist approach.*" (unofficial translation of "*D'un côté, la Cour y réaffirme largement sa volonté de pratiquer un contrôle étendu ; mais de l'autre, elle fait mention de l'exigence d'une violation « manifeste » de l'ordre public là où, il y a encore peu, elle avait purement et simplement supprimé la condition de flagrance pour signer le rejet net de la conception minimaliste*"); A-M. Lacoste, "Corruption as a Bar to Award Enforcement in France", in M. Scherer (ed), *ASA Bulletin*, Kluwer Law International 2018, Volume 36, Issue 1, pp. 31-52, p. 40: "*However, more importantly, recent case law suggests that it is progressively less clear whether the expression "manifest, actual and concrete" actually leads to a minimal review of the award. To the contrary, as far as corruption allegations are concerned (and recently, white collar crime), the Court of Appeal tends to follow a maximalist approach*".

26) J. Jourdan-Marques, « Chronique d'arbitrage : la Cour de cassation crève l'abcès sur l'ordre public international », *D. Actualité*, 20 May 2022 and cited references: E. Gaillard, note sous Cass. Civ. 1re, 13 Sept. 2017, JDI 2017, 20; E. Gaillard, note sous Paris, 16 janv. 2018, *JDI* 2018.13; S. Bollée, note sous Paris, 16 janv. 2018, JDI 2018. 12. See also C. Seraglini, Le contrôle par le juge de l'absence de contrariété de la sentence à l'ordre public international : le passé, le présent, le futur, *Revue de l'Arbitrage*, Volume 2020 Issue 2, pp. 347-376, p. 361, §25; C. Greenberg, « Le contrôle de la conformité de la sentence à l'ordre public international : les questions en suspens », *Revue de l'Arbitrage*, Volume 2022 Issue 1, pp. 227-250, p. 247.

3. The consecration of a maximum review by the French Courts: 2017 - 2023

In three emblematic cases examined below, the Paris Court of Appeal affirmed its intention to carry a full re-examination of arbitral awards potentially tainted with corruption, thereby sending a strong signal to both arbitrators and parties. The "*maximalist approach*" received the full endorsement of the *Cour de Cassation*.

(1) The admission of circumstantial evidence with the "*red flags method*" in the *Alstom* saga

This case concerned the enforcement of an award in France issued in Switzerland against French company Alstom Transport SA and British company Alstom Network UK Ltd (both referred to as "*Alstom*"). Alstom had concluded three consultancy agreements with Hong Kong company Alexander Brothers Ltd to obtain assistance in a public bidding for the supply of railway equipment in China. Being sued for the payment of the related consultancy fees after it obtained the contracts, Alstom relied on its compliance program to refuse to pay the balance of the fees to its consultant. After the arbitral tribunal rejected this defence and the Swiss courts dismissed the motion for annulment in 2016, Alstom resisted enforcement in France arguing, among others, that enforcement would breach international public policy.

The *Alstom* case gave rise to no less than two decisions of the Paris Court of Appeal, one decision of the *Cour de Cassation* and one decision of the Versailles Court of Appeal.

In a first decision of 10 April 2018, the Paris Court of Appeal operated a major shift from its previous case law.[27)]

First, the Court made clear that, with regards to the conformity of awards with international public policy, it was not bound by the previous findings of arbitral tribunals or the law chosen by the parties.[28)]

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27) Paris Court of Appeal, 10 April 2018, N° 16/11182, *Société Alstom Transport SA and Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd, D.* 2018. 1934, obs. L. d'Avout; *RTD com.*, 2019.42, obs. E. Loquin; RTD com. 2020. 283, obs. E. Loquin; *Rev. arb.* 2018. 574, note E. Gaillard; *Cah. arb.* 2018. 465, note A. Pinna; *JDI* n°2, April 2019, chron. 4, K. Mehtiyeva.

28) Paris Court of Appeal, 10 April 2018, N° 16/11182, *Société Alstom Transport SA and Société*

Second, the Court stated that the "*potential bad faith*" of the party raising a corruption argument to resist enforcement is "*irrelevant since what is at stake is the refusal of the French legal order to offer the support of its legal means to enforce an illicit contract*".[29] This meant that a party could invoke corruption to refuse to execute a corrupt contract to which it had previously consented.

Third, and most importantly, with regard to the standard of proof of corruption, the Court resorted to a new method, the red flags technique[30] stating that "*the characterisation of a contract of such nature could result from a body of indicia*"[31] (a "*faisceau d'indices*"). The Court also listed in its decision relevant indicators of corruption aimed at assessing the reality of the services provided such as *inter alia*: a disproportion between the nature of the services provided and the remuneration received; the attribution of the market to a company despite a better notation obtained by its competitors or the fact that the country in question or certain of its sectors of activity be notoriously corrupt.[32]

Alstom Network UK Ltd v. Société Alexander Brothers Ltd: "Whereas it is for the court, acting on the basis of articles 1525 and 1520, 5° of the French Code of Civil Procedure to review an appeal against an exequatur order for an award made abroad, to investigate, in law and in fact, all the factors relevant to assessing whether the recognition or enforcement of the award violates, in a manifest, actual and concrete manner, the French conception of international public policy; it is not bound, in this examination, either by the assessments made by the arbitral tribunal, or by the substantive law chosen by the parties." (unofficial translation of "*Considérant qu'il appartient à la cour, saisie sur le fondement des dispositions des articles 1525 et 1520, 5° du code de procédure civile, de l'appel de l'ordonnance d'exequatur d'une sentence rendue à l'étranger, de rechercher, en droit et en fait, tous les éléments permettant d'apprécier si la reconnaissance ou l'exécution de la sentence viole de manière manifeste, effective et concrète la conception française de l'ordre public international; qu'elle n'est liée, dans cet examen, ni par les appréciations portées par le tribunal arbitral, ni par la loi de fond choisie par les parties*").

29) Paris Court of Appeal, 10 April 2018, N° 16/11182, *Société Alstom Transport SA and Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd (unofficial translation of: "… l'éventuelle mauvaise foi […] est indifférente, dès lors qu'est seulement en cause le refus de l'ordre juridique français de prêter le secours des voies de droit à l'exécution d'un contrat illicite").*

30) See ICC Guidelines on Agents, Intermediaries and Other Third Parties, 2010.

31) Paris Court of Appeal, 10 April 2018, N° 16/11182, *Société Alstom Transport SA and Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd* (unofficial translation of: "… *la caractérisation d'un contrat de cette nature peut résulter d'un faisceau d'indices…*").

32) Paris Court of Appeal, 10 April 2018, N° 16/11182, *Société Alstom Transport SA and Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd: "… – l'absence ou l'insuffisance de production de documents – tels que rapports, études techniques, projets de contrats ou d'amendements, traductions, correspondances, procès- verbaux de réunions, etc. – précis et probants et dont l'origine peut être établie avec certitude, – l'insuffisance des moyens matériels et*

Finally, for the first time in enforcement proceedings, the Court decided to reopen the debates to hear the parties' submissions on the issue of corruption and ordered Alstom to produce additional evidence (already produced or debated in the arbitration) in order to ascertain whether corruption had occurred.

In its second decision of 28 May 2019, the Paris Court of Appeal, after a thorough review of the evidence before it, held that the sums that Alstom was held liable to pay in the award would serve to remunerate the bribery of Chinese public officials and annulled the enforcement order for breach of international public policy.[33)]

With respect to the "*red flags method*", the Court stressed that "*in view of the concealed nature of corruption activities*", the judge's examination "*can only be based on the gathering of a body of indicia*" *i.e.*, not on direct but on circumstantial evidence. The Court further specified that said indicia must be "*sufficiently serious, precise and consistent*" ("*grave, précis et concordant*") to establish that corruption has occurred.[34)]

Yet, on 29 September 2021, the *Cour de cassation* overturned the Paris Court decision on the ground that it had misinterpreted the evidence before it, namely the hearing transcripts.[35)] The French Supreme Court, however, did not set out its policy regarding the scope of the French courts' power of review. It sent back the matter to

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humains du consultant au regard de l'importance des diligences revendiquées, - la disproportion entre les diligences ostensibles du consultant, telles qu'elles résultent des pièces produites par lui, et sa rémunération, - la rémunération au pourcentage, - une comptabilité lacunaire ou insincère du consultant, - le caractère inexplicable de l'attribution d'un marché au client du consultant, alors que son offre était moins bien notée que celle de ses concurrents, - le fait que le pays en cause ou certains secteurs d'activité de ce pays soient notoirement corrompus et que le client du consultant soit mis en cause pour des pratiques habituelles de corruption".

33) Paris Court of Appeal, 28 May 2019, N° 16/11182, *Société Alstom Transport SA and Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd, Rev. arb.*, 2019.850, note E. Gaillard; *Cah. arb.*, 2020.289, note L.-C. Delanoy and R. Dethomas; *JDI* n°2, April 2020, 10, comm. E. Loquin; *Gaz. Pal.*, 2 July 2019, p.22, obs. D. Bensaude.

34) Paris Court of Appeal, 28 May 2019, N° 16/11182, *Société Alstom Transport SA and Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd* (unofficial translation of: "*L'examen par le juge de l'exequatur [···] ne saurait porter, eu égard au caractère occulte des faits de corruption, que sur la réunion d'un faisceau d'indices. C'est sur [···] leur caractère suffisamment grave, précis et concordant, et non sur des faits de corruption précisément identifiés, que porte, en l'espèce, l'exercice des droits de la défense.*")

35) *Cour de Cassation, Civ. 1*ère, 29 September 2021, N° 19-19.769, *Société Alexander Brothers Ltd v. Société Alstom Transport SA and Société Alstom Network UK Ltd, Rev. arb.*, 2021.687, note Ch. Jarrosson; *D. Actualité*, 19 November 2021, obs. J. Jourdan-Marques.

the Versailles Court of Appeal for re-examination.

In a long-awaited decision of 14 March 2023, the Versailles Court of Appeal re-examined the evidence before it applying the same circumstantial evidence test but found, unlike the Paris Court, that Alstom had not provided "*precise, serious and consistent indicia of corruption likely to result in a characterized breach of international public policy*".[36]

Following the *Alstom* case, the Paris Court did not depart from the "*red flags method*" to which it resorted in subsequent decisions, sometimes leading to the annulment of the award (*e.g.*, in the *Sorelec*,[37] *Webcor*[38] and *Groupement Santullo*[39] cases) and sometimes not (e.g. in the *Securiport*[40], *Global Voice*[41] and *Cengiz*[42] cases).

(2) The maximum review and the admission of new evidence endorsed by the *Cour de Cassation* in the *Belokon* case

The *Belokon case* against Kyrgyzstan further reinforced the uncompromising stance taken by French courts in the international fight against corruption, this time with the express approval of the *Cour de Cassation*.

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36) Versailles Court of Appeal, 14 March 2023, N° 21/06191, *Société Alstom Transport SA and Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd, Rev. Arb.*, 2023.371, note I. Fadlallah; *D. Actualité*, 30 May 2023, obs. J. Jourdan-Marques; *JDI*, n°3, July-August-September 2023, chron.5, note K.Mehtiyeva (unofficial translation of: "*…il ne résulte pas des productions des parties, et notamment des sociétés Alstom, des indices précis, graves et concordants de corruption susceptibles d'entraîner une violation caractérisée de l'ordre public international*").

37) Paris Court of Appeal, 17 November 2020, N° 18/02568, *Etat de Libye v. SA Société orléanaise d'électricité et de chauffage électrique Sorelec, Rev. arb.*, 2021.762, note P. Mayer.

38) Paris Court of Appeal, 25 May 2021, N° 18/18708, *République Gabonaise and Commune de X v. Webcor ITP Ltd. et autre, Rev. arb.*, 2021.778, note P. Mayer; *Gaz. Pal.*, 13 July 2021, p. 24, obs. D. Bensaude; JDI, 2022, comm. 11, note S. Manciaux.

39) Paris Court of Appeal, 5 April 2022, N° 20/03242, *République Gabonaise v. Société Groupement Santullo Sericom Gabon, Rev. arb.*, 2022.620, note I. Fadlallah; *JDI* n°2, April 2022, chron. 4, K. Mehtiyeva; D. Actualité, 20 May 2022, J. Jourdan-Marques.

40) Paris Court of Appeal, 27 October 2020, N° 19/04177, *République du Bénin v. Société Securiport Bénin and Société Securiport LLC, Rev. arb.*, 2021.748, note P. Mayer.

41) Paris Court of Appeal, 7 September 2021, N° 19/17531, *République de Guinée and Autorité de régulation des postes et des télécommunications de la Guinée v. Société Global Voice Groupe S.A., Rev. arb.*, 2021.974; D. Actualité, 19 November 2021, obs. J. Jourdan-Marques.

42) Paris Court of Appeal, 25 May 2021, N° 18/27648, *Etat de Libye v. Cengiz İnsaat Sanayi ve Ticaret A.S, Rev. arb.*, 2021.1154, note G. Bertrou, H. Piguet and D. Bayandin; *D. Actualité*, 18 June 2021, obs. J. Jourdan Marques; JDI, 2022. Comm. 4, note S. Manciaux.

In 2007, Mr. Belokon, a Latvian national, acquired a Kyrgyz bank which was later seized by the State of Kyrgyzstan on the ground that it was used as a vehicle for money laundering. Mr. Belokon initiated arbitration proceedings against the State for breach of, amongst others, the fair and equitable treatment provision of the Latvia-Kyrgyzstan BIT. In the arbitration, Kyrgyzstan alleged that Mr. Belokon's investment in the bank was aimed at setting up money laundering and/or tax-evasion schemes. The arbitral award rejected the money laundering defence and awarded compensation to Mr. Belokon, further to which Kyrgyzstan filed a motion to set aside the award.

In a decision of 21 February 2017, the Paris Court of Appeal annulled the award finding that its enforcement "*which would have the effect of allowing Mr. [Belokon] to benefit from the proceeds of criminal activities, manifestly, actually and concretely violates international public policy*".[43] The decision sets out a series of "*serious, precise and consistent*" indicia establishing acts of money laundering including, *inter alia*, the irregularity of the public bid that led to the acquisition of the bank, the inappropriate relationship between Mr. Belokon and the president's son or the inexplicable success of the bank in light of the deplorable economic situation of the country.

The decision is interesting for several reasons.

First, the Paris Court of Appeal states, in unequivocal terms, its intention to deploy all the legal means at its disposal to fight corruption in international arbitration stating that its assessment "*is not limited to the evidence produced before the arbitrators*" and that it is not "*bound by their findings, appreciations and qualifications*".[44] With respect to the production of new evidence, the Court specifies, in conformity with the adversary principle, that each party must be given an equal opportunity to present its case.[45]

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43) Paris Court of Appeal, 21 February 2017, N° 15/01650, *République du Kirghizistan v. M. Belokon, Rev. arb.*, 2017.915, note S. Bollée and M. Audit; *JDI* n°4, 2017, 20 (3e esp.), note E. Gaillard; D., 2017.2054, obs. S. Bollée; D., 2017.2559, obs. Th. Clay; *RTD com.*, 2019.42, obs. E. Loquin; *RTD com.*, 2020.283, obs. E. Loquin; *JCP G.* n°50, 2017, doctr. 1326, obs. Ch. Seraglini, *ASA Bull.*, 2017.551, note L.-C. Delanoy (unofficial translation of: "… *qui aurait pour effet de faire bénéficier M. [K] du produit d'activités délictueuses, viole de manière manifeste, effective et concrète l'ordre public international*…").

44) Paris Court of Appeal, 21 February 2017, N° 15/01650, *République du Kirghizistan v. M. Belokon* (unofficial translation of: "… *n'est pas limitée aux éléments de preuve produits devant les arbitres, ni liée par les constatations, appréciations et qualifications opérées par ceux-ci*").

Second, and this is important, the Paris Court of Appeal addresses the criticisms of those who complain that its extensive review constitutes a prohibited re-examination of the merits of arbitral awards ("*revision*"). The Paris Court of Appeal explains, in the decision, the difference between the prohibited "*revision*" of arbitral awards and the review it carries on international public policy grounds. For the Paris Court of Appeal, the prohibition of "*revision*" does not mean that the annulment judge cannot review the facts and the law underlying the award and conduct an extrinsic review of the evidence. While both the arbitrators and the judge examine the same facts, the office of the judge differs from the office of the arbitrators: the latter will examine the fact to judge the merits of the case whereas the annulment judge will examine the facts to determine whether enforcing the award would breach international public policy.

In the words of the Paris Court of Appeal:[46]

> "[The object of the control] *is not to verify whether or not the decisions to place Manas Bank under provisional administration and then under sequestration had been taken lawfully under Kyrgyz law nor whether the actions of the KYRGYZ Republic constitute breaches of the obligation of fair and equitable treatment provided for in the BIT, but, as stated, to ensure that the enforcement of the award is not of such nature as to allow a party to benefit from the proceeds of criminal activities*."

The approach taken by the Paris Court in the fight against corruption was fully endorsed by the *Cour de Cassation* in a decision of 23 March 2022.[47] The *Cour de*

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45) Paris Court of Appeal, 21 February 2017, N° 15/01650, *République du Kirghizistan v. M. Belokon*: *"The Court must only ensure that the production of evidence before it respects the principles of contradiction and equality of arms and that each party has been able to present its case under conditions which do not place it at a substantial disadvantage vis-à-vis its opponent"* (unofficial translation of: "*Que la cour doit seulement s'assurer que la production des éléments de preuve devant elle respecte le principe de la contradiction et celui d'égalité des armes et que chaque partie a été mise en mesure de présenter sa cause dans des conditions qui ne la placent pas dans une situation substantiellement désavantageuse vis-à-vis de son adversaire*")

46) Paris Court of Appeal, 21 February 2017, N° 15/01650, *République du Kirghizistan v. M. Belokon* (unofficial translation of: "… *que le contrôle exercé par le juge de l'annulation sur la sentence arbitrale en vertu de l'article 1520, 5° du code de procédure civile n'a pas pour objet de vérifier si les décisions de placement sous administration provisoire puis sous séquestre de la Manas Bank ont été prises légalement ou non au regard du droit kirghize, ni si les agissements de la République du KIRGHIZSTAN sont des violations de l'obligation de traitement juste et équitable prévue par le TBI, mais, ainsi qu'il a été dit, de s'assurer que l'exécution de la sentence n'est pas de nature à faire bénéficier une partie du produit d'activités délictueuses*").

Cassation held that the Court of Appeal "*did not proceed to a new instruction or a review of the merits of the arbitral award, but assessed the facts differently in light of the only compatibility of the recognition or enforcement of the award with international public order*…".[48]

In its decision, the *Cour de Cassation* also put an end to the semantic quarrel and replaced the words "*manifest, actual and concrete*" violation of international public policy used by the Paris Court of Appeal with the requirement of a "*characterised violation*" of international public policy.[49] As mentioned above, French scholars had indeed criticized the choice of the words "*manifest, actual and concrete*" underlying the paradox between the extensive review now carried by French courts and the requirement of a "*manifest*" violation of international public policy by the arbitral award.[50] French courts will consider that such a "*characterized violation*" of international

47) *Cour de Cassation, Civ. 1ère*, 23 March 2022, N° 17-17.981, *M. Belokon v. République du Kirghizistan, Rev. arb.*, 2022.945, note S. Bollée and M. Audit; *JCP G.*, 2022.676, note B. Remy, *JCP G.*, 2022, Doctr. 724, obs. Ch. Seraglini; *D. Actualité*, 10 May 2022, obs. V. Chantebout; *RTD civ.*, 2022.701, obs. P. Théry; *Gaz. Pal.*, 2022, n° 15, p. 11, obs. L. Larribère; *Procédures* n°7, 2022, comm. 173, obs. L. Weiller; JCP E, 2023.1067, obs. D. Mainguy; *JDI* n°2, April 2022, chron. 4, K. Mehtiyeva; *JDI*, 2023, comm.3, note E.Loquin.

48) *Cour de Cassation, Civ. 1ère*, 23 March 2022, N° 17-17.981, *M. Belokon v. République du Kirghizistan*, §10 (unofficial translation of: "…*la cour d'appel* […] *n'a pas procédé à une nouvelle instruction ou à une révision au fond de la sentence, mais a porté une appréciation différente sur les faits au regard de la seule compatibilité de la reconnaissance ou de l'exécution de la sentence avec l'ordre public international*…").

49) *Cour de Cassation, Civ. 1ère*, 23 March 2022, N° 17-17.981, *M. Belokon v. République du Kirghizistan*, §11: "[the Court of Appeal] *accurately inferred from this that the recognition or enforcement of the award, which would have the effect of allowing Mr. [K] to benefit from the proceeds of criminal activities, was in a characterized violation of international public policy, and therefore had to be annulled*" (unofficial translation of: "…[la cour d'appel] *en a exactement déduit que la reconnaissance ou l'exécution de la sentence, qui aurait pour effet de faire bénéficier M. [K] du produit d'activités délictueuses, violait de manière caractérisée l'ordre public international, de sorte qu'il y avait lieu d'en prononcer l'annulation*").

50) L. D'avout and S. Bollée, « Droit du commerce international août 2016-juill. 2017 », *Recueil Dalloz* 2017, p. 2054; A-M. Lacoste, "Corruption as a Bar to Award Enforcement in France", *in* M. Scherer (ed), *ASA Bulletin*, Kluwer Law International 2018, Volume 36, Issue 1, pp. 31-52, p. 40. See also C. Jarrosson, « La jurisprudence Belokon-Sorelec, ou l'avènement d'un contrôle illimité des sentences », *Revue de l'Arbitrage*, Volume 2022, Issue 4, pp. 1251-1286, p. 1257, §7: "*To conclude on* "blatancy", *it should be added that there is no necessary or even desirable link between the prohibition of review of the merits and the possible confinement of review to a blatant violation. These are two different issues, neither of which explains or justifies the other. It is worth noting that the particularly extensive review carried out by the Paris Court in the Belokon decision did not prevent this court from referring to a "manifest, actual and concrete" violation. This really goes to show that all these epithets are useless, and that simplicity and*

public policy exists where there is a "*serious, precise and consistent*" body of indicia establishing corruption.[51] This new terminology therefore clarifies the standard of evidence required by the French courts.

This same terminology of a "*characterized violation*" was adopted less than a month later by the Paris Court of Appeal in the *Groupement Santullo* case in which an ICC award was annulled to the benefit of the State of Gabon in the context of public contracts allegedly procured through the corruption of Gabonese public officials.[52]

(3) The *Sorelec* case and the possibility to raise corruption for the first time before the annulment judge based on new evidence

With the *Sorelec* case, the French courts even went a step further accepting that corruption be raised for the very first time before the annulment judge based on entirely new evidence.[53]

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clarity would benefit from them finally being abandoned." (unofficial translation of: "*Pour terminer sur la* « flagrance », *il convient d'ajouter qu'il n'y a pas de lien nécessaire ni même souhaitable entre l'interdiction de la révision au fond et le cantonnement éventuel du contrôle à une violation flagrante. Ce sont deux questions différentes et aucune n'explique ni ne justifie l'autre. On remarquera que le contrôle particulièrement étendu opéré par l'arrêt Belokon de la Cour de Paris n'a pas empêché cette juridiction de se référer à une violation* « manifeste, effective et concrète ». *C'est bien la preuve que toutes ces épithètes sont inutiles et que la simplicité et la clarté gagneraient à ce qu'elles soient enfin abandonnées*").

51) *Cour de Cassation, Civ. 1*ère, 23 March 2022, N° 17-17.981, *M. Belokon v. République du Kirghizistan*, §§10-11: "*the Court of Appeal* [...] *considered that there were serious, precise and consistent indications that Insan Bank had been taken over by Mr. [K] in order to develop, in a country where his privileged relations with the holder of economic power guaranteed him the absence of any real control over his activities, money-laundering practices which could not have flourished in the less favourable environment of Latvia* [...] *it deduced exactly from this that the recognition or enforcement of the award, which would have the effect of allowing Mr. [K] to benefit from the proceeds of criminal activities, was in characterized violation of international public policy.*" (unofficial translation of: "l*a cour d'appel [···] a estimé souverainement qu'il en résultait des indices graves, précis et concordants de ce qu'Insan Bank avait été reprise par M. [K] afin de développer, dans un Etat où ses relations privilégiées avec le détenteur du pouvoir économique lui garantissaient l'absence de contrôle réel de ses activités, des pratiques de blanchiment qui n'avaient pu s'épanouir dans l'environnement moins favorable de la Lettonie* [···] *elle en a exactement déduit que la reconnaissance ou l'exécution de la sentence, qui aurait pour effet de faire bénéficier M. [K] du produit d'activités délictueuses, violait de manière caractérisée l'ordre public international*").

52) Paris Court of Appeal, 5 April 2022, N° 20/03242, *République Gabonaise v. Société Groupement Santullo Sericom Gabon, Rev. arb.*, 2022.620, note I. Fadlallah; JDI n°2, April 2022, chron. 4, K. Mehtiyeva; *D. Actualité*, 20 May 2022, J. Jourdan-Marques.

53) Paris Court of Appeal, 17 November 2020, N° 18/02568, *Etat de Libye v. SA Société orléanaise*

The case concerned the performance of a settlement agreement entered between Sorelec and the State of Libya further to a dispute that arose out of the construction of schools and housing units. In a partial award, the ICC tribunal held Libya liable to pay to Sorelec the amount due under the settlement agreement. For the first time before the annulment judge, Libya alleged that the settlement agreement was a corrupt contract resulting from the bribery of public officials. The partial award was set aside on this ground by the Paris Court of Appeal on 17 November 2020. After reviewing the evidence submitted by Libya, the Court concluded that there was indeed a body of serious, precise and consistent evidence establishing that the settlement agreement was a contract obtained by corruption which enforcement would breach international public policy.[54]

Concerning the circumstance that corruption was raised for the first time before the annulment judge, the Paris Court of Appeal held that "[a]*bidance with the French conception of international public policy implies that the domestic judge in charge of the review [of the award] can assess the ground based on a breach of international public policy notwithstanding the fact that it was not raised before the arbitrators and that it was not brought by them to the debates*".[55]

The Paris Court of Appeal also reassured its readers that its review did not amount

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d'électricité et de chauffage électrique Sorelec, Rev. arb., 2021.762, note P. Mayer; Cour de Cassation, Civ. 1ère, 7 September 2022, N° 20-22.118, *SA Société orléanaise d'électricité et de chauffage électrique Sorelec v. Etat de Libye, D.*, 2022.1773, obs. S. Bollée; *D. Actualité*, 28 October 2022, obs. J. Jourdan-Marques.

54) Paris Court of Appeal, 17 November 2020, N° 18/02568, *Etat de Libye v. SA Société orléanaise d'électricité et de chauffage électrique Sorelec: "It is thus demonstrated by a body of sufficiently serious, precise and consistent indicia that the Protocol between the State of Libya and SORELEC covered underlying relations between the latter and Mr. Omran, enabling SORELEC to derive benefits from this illicitly obtained Protocol."* (unofficial translation of: "*Il est ainsi démontré par un faisceau d'indices suffisamment graves, précis et concordants que le Protocole entre l'Etat de Libye et SORELEC a couvert des relations sous-jacentes entretenues entre cette dernière et M. Omran, permettant à SORELEC de retirer les bénéfices de ce Protocole obtenu de manière illicite*").

55) Paris Court of Appeal, 17 November 2020, N° 18/02568, *Etat de Libye v. SA Société orléanaise d'électricité et de chauffage électrique Sorelec* (unofficial translation of: "*Le respect de la conception française de l'ordre public international implique que le juge étatique chargé du contrôle puisse apprécier le moyen tiré de la contrariété à l'ordre public international alors même qu'il n'a pas été invoqué devant les arbitres et que ceux-ci ne l'ont pas mis dans le débat.*"). See also: Paris Court of Appeal, 25 May 2021, N° 18/18708, *République Gabonaise and Commune de X v. Webcor ITP Ltd. et autre, Rev. arb.*, 2021.778, note P. Mayer; *Gaz. Pal.*, 13 July 2021, p. 24, obs. D. Bensaude; *JDI*, 2022, comm. 11, note S. Manciaux.

to a "*revision*" of the award because "*the review of the annulment judge has a specific and distinct purpose from that of the arbitral tribunal*" adding that "[t]*he annulment judge can therefore, in compliance with the principle of non-revision of the award, investigate in the entirety of the facts submitted to it, the indicia of such nature as to establish the illegality of the Protocol*…".[56]

The matter was elevated to the *Cour de Cassation* which, again, validated in clear and unequivocal terms the full power of review of the Paris Court of Appeal, even in instances where corruption had not been pleaded in the arbitration. In a decision of 7 September 2022, the *Cour de Cassation* held that:[57]

> "*While the mission of the Court of appeal, acting by virtue of this text [Article 1520 of the Code of Civil Procedure], is limited to examining the grounds listed therein, there is no limitation on its power to investigate in law and in fact all the elements concerning the grounds in question.*
>
> *Having been seized of a plea alleging that the recognition or enforcement of the award was contrary to international public policy in that the settlement it was approving had been obtained by corruption, the Court of Appeal rightly verified the reality of this allegation by examining all the supporting evidence, regardless of the fact that it had not previously been submitted to the arbitrators.*"

From that point in time, whether they agreed or disagreed with the maximalist review, most French scholars concurred that, by accepting that parties raise corruption

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56) Paris Court of Appeal, 17 November 2020, N° 18/02568, *Etat de Libye v. SA Société orléanaise d'électricité et de chauffage électrique Sorelec* (unofficial translation of: "… *le contrôle du juge de l'annulation a une finalité propre et distincte de celui du tribunal arbitral* […]. *Le juge de l'annulation peut ainsi, dans le respect du principe de non révision de la sentence, rechercher dans l'ensemble des faits qui lui sont soumis, les indices de nature à caractériser l'illicéité du Protocole*…").

57) *Cour de Cassation, Civ. 1ère*, 7 September 2022, N° 20-22.118, *SA Société orléanaise d'électricité et de chauffage électrique Sorelec v. Etat de Libye, D.*, 2022.1773, obs. S. Bollée; *D. Actualité,* 28 October 2022, obs. J. Jourdan-Marques, §11-12 (unofficial translation of: "*Si la mission de la cour d'appel, saisie en vertu de ce texte, est limitée à l'examen des vices que celui-ci énumère, aucune limitation n'est apportée à son pouvoir de rechercher en droit et en fait tous les éléments concernant les vices en question. Saisie d'un moyen tiré de ce que la reconnaissance ou l'exécution de la sentence heurterait l'ordre public international en ce que la transaction qu'elle homologuait avait été obtenue par corruption, la cour d'appel a vérifié à bon droit la réalité de cette allégation en examinant l'ensemble des pièces produites à son soutien, peu important que celles-ci n'aient pas été précédemment soumises aux arbitres*").

for the first time in enforcement proceedings based on extrinsic new evidence, the *Cour de Cassation* was allowing French judges to perform a revision of arbitral awards on international public policy grounds.[58)]

Professor Charles Jarrosson summarizes the current state of law as follows:[59)]

> "*if one were to sum-up the situation as it now results from the reasoning adopted by this case law, the reviewing judge assesses all the grounds provided for in article 1520 of the Code of Civil Procedure, without any limitation on its power to investigate in law and in fact all the elements relating to them, its search not being limited to the evidence submitted to the arbitrators, nor bound by the findings, assessments and qualifications made by them.* "

Ⅲ. Prohibition of corruption vs. enforceability of arbitral awards: foreign perspective and critical assessment of the French approach

While the French approach seems to remain unique to date (1) and has given rise to harsh criticism in France, the current case law should be approved (2).

1. Comparative perspective

For the time being, the French approach remains quite isolated on the international scene.

In this regard, the *Alstom* case provides a good comparator of the approach followed in other highly regarded arbitral seats, namely Switzerland and the United Kingdom.

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58) C. Jarrosson, « La jurisprudence Belokon-Sorelec, ou l'avènement d'un contrôle illimité des sentences », *Revue de l'Arbitrage*, Volume 2022, Issue 4, pp. 1251-1286, pp. 1269-1271, §26.

59) C. Jarrosson, « La jurisprudence Belokon-Sorelec, ou l'avènement d'un contrôle illimité des sentences », *Revue de l'Arbitrage*, Volume 2022, Issue 4, pp. 1251-1286, p. 1253, §2 (unofficial translation of: "*Si l'on résume la situation telle qu'elle résulte désormais des motifs adoptés par cette jurisprudence, le juge du contrôle apprécie l'ensemble des vices prévus par l'article 1520 du Code de procédure civile , sans qu'aucune limitation soit apportée à son pouvoir de rechercher en droit et en fait tous les éléments les concernant, sa recherche n'étant pas limitée aux éléments de preuve produits devant les arbitres ni liée par les constatations, appréciations et qualifications opérées par eux*").

In a decision of 3 November 2016,[60] the Swiss Federal Tribunal dismissed Alstom's motion for annulment of the arbitral award limiting itself to a minimal review of the award and setting a very high standard for annulment on corruption grounds.

The Federal Tribunal first affirmed that it will not re-examine the facts underlying the award, even in instances where the arbitral tribunal's assessment would be flawed:[61]

> "*The Federal Tribunal issues its decision on the basis of the facts found in the award that is challenged [···] It cannot rectify or supplement ex officio the findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law [···] Indeed, its mission, when seized of a civil plea against an international arbitral award, is not to decide with full power of review as an appellate court would, but only to examine whether the admissible grievances raised against the award are established. Allowing parties to rely on facts other than those found by the arbitral tribunal, beyond the exceptional cases reserved by case law, would no longer be compatible with this mission, even if the facts were established by evidence found in the arbitration file*···"

Second, and more importantly, the Federal Tribunal, after acknowledging that promises to pay bribes would contravene Swiss public policy, held that for a challenge to be accepted on this ground, "*corruption must be established but the arbitral tribunal [must have] refused to take it into account in its award*···".[62]

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60) Judgment of the Swiss Federal Tribunal, 3 November 2016, 4A_136/2016.

61) Judgment of the Swiss Federal Tribunal, 3 November 2016, 4A_136/2016, §3.1 (unofficial translation of: "*Le Tribunal fédéral statue sur la base des faits constatés dans la sentence attaquée* [···] *Il ne peut rectifier ou compléter d'office les constatations des arbitres, même si les faits ont été établis de manière manifestement inexacte ou en violation du droit* [···] *Aussi bien, sa mission, lorsqu'il est saisi d'un recours en matière civile visant une sentence arbitrale internationale, ne consiste-t-elle pas à statuer avec une pleine cognition, à l'instar d'une juridiction d'appel, mais uniquement à examiner si les griefs recevables formulés à l'encontre de ladite sentence sont fondés ou non. Permettre aux parties d'alléguer d'autres faits que ceux qui ont été constatés par le tribunal arbitral, en dehors des cas exceptionnels réservés par la jurisprudence, ne serait plus compatible avec une telle mission, ces faits fussent-ils établis par les éléments de preuve figurant dans le dossier de l'arbitrage* ···" - the English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-136-2016); see "Fighting International Corruption in Domestic Courts – Alstom, Sorelec and the Review of Arbitral Awards", *in* J. Risse, G. Pickrahn, et al. (eds), SchiedsVZ | *German Arbitration Journal*, Kluwer Law International 2023, Volume 21, Issue 2, pp. 91-98, pp. 95-96; S. Besson, « Le contrôle des sentences arbitrales par le juge suisse : aperçu de quelques traits caractéristiques et confrontation avec le droit français », *Revue de l'Arbitrage*, Volume 2022, Issue 3, pp. 867-898, pp. 889-891.

This is to say that in Switzerland, an award will only be annulled on corruption grounds in two instances: either where the arbitral tribunal explicitly decided to give effect to a corrupt contract *i.e.*, finding corruption and refusing to take it into account which will basically never happen, or where new evidence supporting a motion for "*revision*" of the arbitral award under the strict conditions set forth by Swiss law will come to light after the arbitration.[63]

Likewise, in a decision of 18 June 2020, the English High Court dismissed Alstom's application to set aside the enforcement order of the award of 15 October 2019, making clear that, save in exceptional circumstances such as "*a strong prima facie case*" or "*evidence [that] was not available or reasonably obtainable*", the English judge will refuse to revisit the merits of awards allegedly tainted with corruption.

On the relevant principles, Justice Cockerill stated that:[64]

> "*1) The authorities demonstrate that where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts, there is very nearly no scope for this Court to re-open the issue of illegality. The general rule is that the Court will not do so; though it remains conceptually possible that it might be done in exceptional circumstances.*
>
> *2) That result is probably best regarded as a position reached as a result of performing an overall balancing exercise between public policy in favour of finality and public policy against illegality; but it will in general preclude the need for the Court to perform a detailed balancing exercise in an individual case falling within this category.*
>
> […]
>
> *4) The basis for the court's approach of nearly always refusing to revisit an issue decided by the foreign tribunal is primarily grounded in the very great*

62) Judgment of the Swiss Federal Tribunal, 3 November 2016, 4A_136/2016, §4.1 (unofficial translation of: "…*que la corruption soit établie, mais que le Tribunal arbitral ait refusé d'en tenir compte dans sa sentence*…". The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-136-2016).

63) A.-C. Hahn, "Judicial Scrutiny of Corruption-Tainted Arbitral Awards at the Setting Aside and Enforcement Stage", *in* A.Meier and C. Oetiker (eds), *Arbitration and Corruption, ASA Special Series*, Volume 47, pp. 71-80, p. 73.

64) Judgment of the High Court of Justice of England and Wales, 18 June 2020 [2020] EWHC 1584, §105.

> *importance given to respecting the decision of international arbitration tribunals and foreign courts (taken together with the public policy in favour of finality) …*"

The High Court also took into account the fact that Alstom had failed to present to the arbitral tribunal during the proceedings "*the materials for a bribery case which therefore prima facie could and should have been brought before that Tribunal. There is no explanation for why this was not done*".[65]

Justice Crockerill also emitted some reservations with respect to the indicia test used by the Paris Court of Appeal noting that "*the indicia test is essentially an expression of a policy line drawn by the French Courts as to when it will refuse enforcement. This is important because not only may the conception of what constitutes public policy vary from country to country [···] so too may its line as to what needs to be proved to reach the hurdle for refusing enforcement. Different countries may place the public policy in favour of enforcement as a higher or lower priority against the public policy against corruption; and that will have an impact on what they require to have proved before refusal of enforcement is deemed appropriate*".[66]

The Swiss and English courts are therefore aligned.

In the Netherlands, however, courts may be willing to follow the French path as illustrated by a decision of the Hague Court of Appeal of 22 October 2019. As underlined by a commentator of this decision:[67]

> "*Confronted with the allegation of corruption in order to set aside an arbitral award, the Dutch court deemed as a "fundamental principle of Dutch legal order" not to attach legal consequences to an agreement linked to corruption. This mandatory principle was not to be impeded by "restrictions of procedural nature", whereby the prohibition of a disguised appeal, the limitation to facts*

65) Judgment of the High Court of Justice of England and Wales, 18 June 2020 [2020] EWHC 1584, §174.

66) Judgment of the High Court of Justice of England and Wales, 18 June 2020 [2020] EWHC 1584, §196.

67) "Fighting International Corruption in Domestic Courts – Alstom, Sorelec and the Review of Arbitral Awards", *in* J. Risse, G. Pickrahn, et al. (eds), SchiedsVZ | *German Arbitration Journal*, Kluwer Law International 2023, Volume 21, Issue 2, pp. 91-98, pp. 95-96. The decision is available in Dutch - see for a summary in English: R. Hansen, "*Bariven S.A. v. Wells Ultimate Service LLC, Court of Appeal of The Hague, 200.244.714/01, 22 October 2019", A contribution by the ITA Board of Reporters, Kluwer Law International.*

established by the arbitral tribunal, and the restriction of defenses that should have been raised earlier may be disregarded in light of the public interest to fight corruption.

Having admitted a substantive review, it relied on two pillars: strong indicators of corruption and the lack of substantive explanations by Wells LLC (the opposing party) for the inconsistencies. Unlike the arbitral tribunal, which had applied a high standard of proof ("clear and convincing evidence"), the Hague court assessed "independently" the allegation and based its finding on the circumstantial evidence, underscoring that companies would do everything to conceal corruption and therefore direct proof was difficult to obtain. The Hague court did not "establish" corruption (like the Paris court did), but "assumed" that it had taken place, which was nonetheless sufficient for it to annul the award."

While the decision was quashed by the Dutch Supreme Court on 16 July 2021, the Dutch Supreme Court did not criticize the scope of review and method followed by the Hague Court of Appeal.[68] Sweden would also tend to adopt the same "maximalist" approach.[69]

2. Critical assessment of the French approach

French case law has been harshly criticized by certain French scholars,[70] Professor Fadlallah going as far as asserting that "*the new case law [is] a radical motive to run away from Paris as a seat of arbitration*" and "*will have marked the end of the golden age of the French arbitration way*".[71]

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68) See W. J.L. de Clerck, "Dutch Supreme Court Finds for the First Time on Corruption and Arbitration in Context of Annulment Proceedings", *in* M. Scherer (ed), *Journal of International Arbitration*, Kluwer Law International 2022, Volume 39, Issue 6, pp. 881-904, pp. 888-895. The decision is available in Dutch - see for a summary and translation to English: '*Wells Ultimate Service LLC v. Bariven S.A., Hoge Raad der Nederlanden, No.20/00207, 16 July 2021', in* S. W. Schill (ed), *ICCA Yearbook Commercial Arbitration 2021* – Volume XLVI, Yearbook Commercial Arbitration, Volume 46, pp. 656-659.

69) S. Arvmyren and C. Heydarian, "Chapter 14: Corruption and Arbitration: Swedish Perspectives Against a French Backdrop", *in* A. Calissendorff and P. Schöldström (eds), *Stockholm Arbitration Yearbook 2022 Stockholm Arbitration Yearbook Series*, Volume 4, pp. 231-256.

70) See for instance C. Jarrosson, « La jurisprudence Belokon- Sorelec, ou l'avènement d'un contrôle illimité des sentences », *Revue de l'Arbitrage*, Volume 2022, Issue 4, pp. 1251 – 1286; I. Fadlallah, « Note under Cour d'appel de Versailles, 14 March 2023, Société Alstom Transport et autre c/ société Alexander Brothers Ltd »., *Revue de l'arbitrage*, Volume 2023, Issue 2, pp. 416-422.

The author of this paper opines that, far from deterring parties from choosing Paris as a seat of arbitration, this avant-gardist case law will reinforce users' trust in the French arbitral system and efficiently contribute to the international fight against corruption. Other countries may also be expected to follow the French approach.

The main criticisms addressed to French case law will be addressed in turn below.

(1) French courts perform a prohibited "*revision*" of the merits of arbitral awards

It has been said that this unlimited power of review would constitute a prohibited "*revision*" of arbitral awards which would be incompatible with, and even jeopardize, paramount principles of international arbitration such as the deference to be given to arbitrators, the finality of awards, *res judicata* or legal predictability.

First, it must be recalled that the sacrosanct prohibition of the "*revision*" of arbitral awards does not originate from any French statute or international instrument. Article V(2)(b) of the 1958 New York Convention allows state parties to review the conformity of arbitral award in light of their public order.[72] The French prohibition finds its origin in French case law on the recognition and enforcement of foreign judgments that was later extended to arbitration. The solution results from a *De Wrède* decision of 9 May 1900[73] prior to which, to give effect to foreign judgments, French courts were judging *de novo* the entire merits of the case already judged abroad. The review of foreign judgments has later been limited to five criteria[74] subsequently brought down to three

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71) I. Fadlallah, « Note under Cour d'appel de Versailles, 14 March 2023, Société Alstom Transport et autre c/ société Alexander Brothers Ltd », *Revue de l'arbitrage*, Volume 2023, Issue 2, pp. 416-422, p. 421, §19 (unofficial translation of: "*la nouvelle jurisprudence* [est] *un motif radical pour fuir Paris comme siège de l'arbitrage* [···] *La volonté innocente de lutter contre la corruption aura sonné la fin de l'âge d'or de l'arbitrage à la française*".

72) Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958:

"2. *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:* [···]

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

73) P. Mayer, « Corruption : nouvelles orientations dans le contrôle de la conformité de la sentence à l'ordre public international, note sous Paris, 27 octobre 2020, Paris, 17 novembre 2020, Paris, 25 mai 2021 », *Revue de l'Arbitrage*, Volume 2021, Issue 3, pp. 788-799, p. 794, §15; *Cour de Cassation*, 9 May 1900, *Prince De Wrède v. Dame Maldaner*.

74) *Cour de cassation, Civ. 1*re, 7 January 1964, *Munzer, JDI*, 1964.302, note B. Goldman. The five

criteria[75], namely: the indirect jurisdiction of the foreign court; compliance with international substantive and procedural public policy and the absence of legal fraud.

In the words of certain commentators analysing the current case-law, the prohibition of revision is nothing short of "*a self-imposed restriction of domestic courts which can be lifted as easily as it has been introduced*".[76]

French courts applying this principle to arbitration may have in fact misunderstood its true meaning. Professor Pierre Mayer highlights in this regard that when a French judge reviews each of the criteria to give effect to a foreign judgment, such as compliance with international public policy, the review of the facts and the law with respect to each of those conditions is not only valid but also necessary for the judge to be able to exercise his power of review.[77] The prohibition of "*revision*" therefore simply means that the annulment judge cannot re-judge the merits of the dispute deferred by the parties to the arbitrators by entering into an arbitration agreement. As rightly explained by the French courts in the above-mentioned decisions, the control of the award performed by domestic courts, including when they review new evidence, only aims at determining whether the enforcement of the award would contravene the French conception of international public policy under Article 1520 of the Code of Civil Procedure. The objective pursued is therefore entirely distinct from that of the arbitrators who determine the dispute on the merits based on the original claims raised before them by the parties.

Second, the prohibition of revision cannot and should not have the effect of preventing domestic courts from exercising a full review of arbitral awards to protect

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criteria were the following: the jurisdiction of the foreign court; the regularity of the foreign proceedings; the application of the applicable law according to French rules on conflicts; compliance with international public policy; and the absence of fraud.

75) *Cour de cassation, Civ. 1re*, 20 February 2007, N° 05-14.082, *Cornelissen, D.* 2007. 1115, note L. d'Avout and S. Bollée; *Rev. crit. DIP* 2007. 420, note B. Ancel and H. Muir Watt; *JDI* n°4 2007.1195, comm. 19, note F.-X. Train: "*le juge français doit s'assurer que trois conditions sont remplies, à savoir la compétence indirecte du juge étranger, fondée sur le rattachement du litige au juge saisi, la conformité à l'ordre public international de fond et de procédure et l'absence de fraude à la loi*".

76) "Fighting International Corruption in Domestic Courts – Alstom, Sorelec and the Review of Arbitral Awards", *in* J. Risse, G. Pickrahn, et al. (eds), SchiedsVZ | *German Arbitration Journal*, Kluwer Law International 2023, Volume 21, Issue 2, pp. 91-98.

77) P. Mayer, « Corruption : nouvelles orientations dans le contrôle de la conformité de la sentence à l'ordre public international, note sous Paris, 27 october 2020, Paris, 17 November 2020, Paris 25 May 2021 », *Revue de l'arbitrage*, Volume 2021, Issue 3, pp. 788-799.

superior interests declared worthy of protection on an international scale. This is exactly what the Paris Court of Appeal means when it refers in its decisions to the "*international consensus*" expressed in the OECD and UN Conventions on the fight against corruption declaring that "[t]*he prohibition of corruption of public agents is among the principles which violation cannot be tolerated by the French legal order, even in an international context*".[78]

The control of domestic courts is indeed the necessary counterweight of the trust placed in the arbitral system by states. As rightly put by a commentator "*when the award is likely to be contrary to the public interest*, [⋯] *for instance by violating values that are legally protected by criminal sanctions, the trust placed in the arbitrators should not limit the protection owed by the judge to society*".[79] Given both the international necessity to fight corruption and the difficulty to prove it, the review of the compliance of awards with international public policy necessarily requires a review of the facts and evidence likely to have an impact on the judge's assessment of the conformity of the award with international public policy.

(2) The right to raise corruption and produce evidence for the first time before the annulment judge and the overarching principle of procedural loyalty

French courts have also been criticized for allowing parties to raise corruption for the first time in enforcement proceedings.[80] In the *Sorelec* decision, the *Cour de*

78) Paris Court of Appeal, 17 November 2020, N° 18/02568, *Etat de Libye v. SA Société orléanaise d'électricité et de chauffage électrique Sorelec* (unofficial translation of: "*La prohibition de la corruption d'agents publics est au nombre des principes dont l'ordre juridique français ne saurait souffrir la violation même dans un contexte international*"); United Nations Convention against Corruption (adopted on 31 October 2003, entered into force on 14 December 2005); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed on 17 December 1997, entered into force on 15 February 1999).

79) V. Chantebout, « Étendue du contrôle du juge sur les violations de l'ordre public par l'arbitre : enfin le revirement espéré », *Dalloz Actualité*, 10 May 2022 (unofficial translation of: "⋯ *lorsque la sentence est susceptible de contrevenir à l'intérêt général* [⋯] *comme en l'espèce, en portant atteinte à des valeurs que le droit protège par des sanctions pénales, la confiance que les parties ont placée en l'arbitre ne saurait imposer ses limites à la protection que le juge doit à la société*").

80) C. Jarrosson, « La jurisprudence Belokon-Sorelec, ou l'avènement d'un contrôle illimité des sentences », *Revue de l'Arbitrage*, Volume 2022, Issue 4, pp. 1251-1286, p. 1264; I. Fadlallah, « Note under Cour d'appel de Versailles, 14 March 2023, Société Alstom Transport et autre c/

Cassation indeed made clear that "[c]*ompliance with substantive international public policy cannot depend of the conduct adopted by one of the parties before the arbitrator*" [81] and approved the Paris Court of Appeal for not having given any consideration to the alleged disloyalty of Libya which raised corruption for the first time in enforcement proceedings.

It has been pointed out that such solution may encourage parties, and states in particular, that have participated in corrupt practices, to act disloyally by using corruption as a "*safety net*" or "*joker card*" in future enforcement proceedings, in case they are dissatisfied with the outcome of the arbitration.[82] The evilest state parties could even be tempted to fabricate false evidence of corruption to avoid payment.[83] French courts would thereby allow disloyal parties to benefit from their own wrongdoings. This would be particularly deplorable since loyalty is the most important principle in civil procedure, guarantees due process and eventually ensures that justice be made.[84] The current case law would also jeopardize legal predictability. It would be counterproductive in terms of time and cost efficiency because, after years of arbitration, parties would face extensive post-arbitral proceedings with the ensuing costs, as illustrated by the four decisions rendered in the Alstom case.[85]

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société Alexander Brothers Ltd », *Revue de l'arbitrage*, Volume 2023, Issue 2, pp. 416-422, §14.

81) *Cour de Cassation*, Civ. 1ère, 7 September 2022, N° 20-22.118, *SA Société orléanaise d'électricité et de chauffage électrique Sorelec v. Etat de Libye, D.*, 2022.1773, obs. S. Bollée; *D. Actualité*, 28 October 2022, obs. J. Jourdan-Marques, §7 (unofficial translation of: "*Le respect de l'ordre public international de fond ne peut être conditionné par l'attitude d'une partie devant l'arbitre*"); Paris Court of Appeal, 17 November 2020, N° 18/02568, *Etat de Libye v. SA Société orléanaise d'électricité et de chauffage électrique Sorelec, Rev. arb.*, 2021.762, note P. Mayer.

82) "Fighting International Corruption in Domestic Courts – Alstom, Sorelec and the Review of Arbitral Awards", *in* J. Risse, G. Pickrahn, et al. (eds), SchiedsVZ | *German Arbitration Journal*, Kluwer Law International 2023, Volume 21, Issue 2, pp. 91-98, p. 97.

83) See C. Jarrosson, « La jurisprudence Belokon-Sorelec, ou l'avènement d'un contrôle illimité des sentences », *Revue de l'Arbitrage*, Volume 2022, Issue 4, pp. 1251-1286, p. 1283, §52; "Fighting International Corruption in Domestic Courts – Alstom, Sorelec and the Review of Arbitral Awards", *in* J. Risse, G. Pickrahn, et al. (eds), SchiedsVZ | *German Arbitration Journal*, Kluwer Law International 2023, Volume 21, Issue 2, pp. 91-98; C. Greenberg, « Le contrôle de la conformité de la sentence à l'ordre public international : les questions en suspens », *Revue de l'Arbitrage*, Volume 2022, Issue 1, pp. 227-250, p. 244.

84) C. Jarrosson, « La jurisprudence Belokon-Sorelec, ou l'avènement d'un contrôle illimité des sentences », *Revue de l'Arbitrage*, Volume 2022, Issue 4, pp. 1251 – 1286, p. 1272, §30.

85) See for instance I. Fadlallah, « Note under Cour d'appel de Versailles, 14 March 2023, Société Alstom Transport et autre c/ société Alexander Brothers Ltd », *Revue de l'arbitrage*, Volume 2023, Issue 2, pp. 416-422, p. 421; I. Fadlallah, « La corruption corrompt l'arbitrage, note sous Paris, 5

There is indeed little debate that the current case law may encourage disloyal behavior and dilatory tactics with the attached consequences on the costs and duration of post-award proceedings. That said, such risk is relative and may be worth taking considering the objective pursued, which is of global concern.

First, parties relying on their own wrongdoings to resist enforcement in public proceedings may expose themselves to judicial investigation and therefore think twice before doing so for dilatory reasons. Although states may not face the same risk, on the international scene, corruption practices can deter investors from investing and, international institutions, such as the World Bank, from granting funding. States may therefore also choose to be cautious before unduly raising this defense.

Second, in most cases, if corruption is eventually established, the party who was claiming payment in the arbitration and seeking enforcement before the domestic courts, will be either an active or passive accomplice of corruption. The interests of such a party may not be so worthy of protection. In other words, the question may be posed of whether the cardinal rule of procedural loyalty should potentially protect a party seeking to benefit from a corrupt contract. But what if the corruption plea against the party seeking enforcement turns out to be groundless? While that innocent party will have defended itself in groundless proceedings potentially during several years, the protections offered by the law should not be disregarded since they constitute concrete mitigation factors. Like in many jurisdictions, Article 700 of the French Code of Civil Procedure entitles the prevailing party to claim its counsel fees and expenses. Compensation for abusive proceedings may also be claimed if that party is able to establish a specific harm either to its economic or non-economic interests. The impact of annulment proceedings on the enforcement of the award will also be potentially limited since, in France, like in many arbitration-friendly countries, motions for annulment do not suspend the immediate enforceability of arbitral awards.

In fact, this case law may very well raise awareness and incentivize arbitrators to investigate corruption during the arbitration proceedings in order to subsequently diminish the risk of prolonged enforcement proceedings and annulment. This would be particularly true in disputes involving large scale infrastructure projects that took place in countries known to have a high index of corruption. In particular, one may

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avril 2022 », *Revue de l'arbitrage*, volume 2022, Issue 2, pp. 640-646, p. 645, §22.

contend that arbitrators who have a duty to render enforceable awards shall *sua sponte* invite parties to make submissions on corruption issues where certain elements on record raise suspicion as to the legality of the transaction before them.

(3) The "*red flags method*" and the risk of judicial error

The admission of circumstantial evidence with the so-called "*red flags method*" has also been criticized on the ground that it is vague and imprecise. An author notes a "*certain laxity in the assessment. Suspicions are turned into evidence; cash payments are considered without regard to their origin*".[86] It has also been said that the enforcement judge does not have the same resources as arbitrators. There would therefore be a risk of mischaracterization of central elements of the case and of unjustified annulments.[87]

The decisions rendered in the past years suggest otherwise. A closer look at the French decisions shows that the threshold set by French courts to refuse enforcement or annul an award on corruption grounds is high.[88] A careful examination of French case law confirms that the Paris Court of Appeal does not act lightly and proceeds to a thorough examination of each of the elements and indicia submitted by the parties in support of their motions. As illustrated by the *Alstom* case, this is under the strict

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86) I. Fadlallah, « La corruption corrompt l'arbitrage, note sous Paris, 5 avril 2022 », *Revue de l'arbitrage*, volume 2022, Issue 2, pp. 640 – 646, p. 643, §11 (unofficial translation of: "… *un certain laxisme dans l'appréciation. Des soupçons sont transformés en preuves ; des versements d'espèces sont retenus sans égard pour leur origine*").

87) C. Seraglini, « Le contrôle par le juge de l'absence de contrariété de la sentence à l'ordre public international : le passé, le présent, le futur », *Revue de l'Arbitrage*, Volume 2020, Issue 2, pp. 347-376; C. Jarrosson, « La jurisprudence Belokon-Sorelec, ou l'avènement d'un contrôle illimité des sentences », *Revue de l'Arbitrage*, Volume 2022, Issue 4, pp. 1251-1286, pp. 1282-1283, §§49-50.

88) See for instance Paris Court of Appeal, 25 May 2021, N° 18/18708, *République Gabonaise and Commune de X v. Webcor ITP Ltd. et autre, Rev. arb.*, 2021.778, note P. Mayer; *Gaz. Pal.*, 13 July 2021, p. 24, obs. D. Bensaude; *JDI*, 2022, comm. 11, note S. Manciaux; Paris Court of Appeal, 16 May 2017, N° 15/17442, *République démocratique du Congo v. Custom and Tax Consultancy LLC, Rev. arb.*, 2018.248, note J.-B. Racine; Paris Court of Appeal, 16 January 2018, *Société MK Group v. SARL Onix et autres, Rev. arb.*, 2018.401, note S. Lemaire; *JDI*, July 2018, comm. 12, p. 883, note S. Bollée; *JDI*, July 2018, comm. 13, p. 898, note E. Gaillard; *D.*, 2018.1635, note M. Audit; *D.*, 2018.1934, obs. L. d'Avout; *D.*, 2018 2448, obs. Th. Clay; Paris Court of Appeal, 25 May 2021, N° 18/27648, *Etat de Libye v. Cengiz İnsaat Sanayi ve Ticaret A.S, Rev. arb.*, 2021.1154, note G. Bertrou, H. Piguet and D. Bayandin; *D. Actualité*, 18 June 2021, obs. J. Jourdan Marques; *JDI*, 2022. Comm. 4, note S. Manciaux.

control of the *Cour de Cassation* that will not hesitate to sanction any mischaracterization by the lower judges of the evidence submitted by the parties to establish corruption. Both the Paris Court of Appeal and the *Cour de Cassation* have also insisted that the production of new evidence must be in accordance with the principles of contradiction and equality of arms.[89]

To address the concerns of those who point out to an increased risk of annulment, as noted by Jean-Baptiste Racine, who made an inventory of the awards that have been annulled or refused enforcement by the French courts on corruption grounds since 2011: "*the quantitative importance of annulments (or refusal of enforcement) is to be noted. Case law is obviously getting stricter and will not tolerate any passivity from arbitrators in this respect. Quite to the contrary, it compels arbitrators to have an active behavior when the dispute submitted to them is likely to involve facts of corruption, wherever located. To temperate this tendency, it is also noteworthy that out of all the decisions mentioned, if four decisions have admitted a lack of conformity of the award with international public policy, eight have dismissed it*".[90] Since that note was published in 2022, the *Alstom* award was reinstated by the Versailles Court of Appeal[91] while the Paris Court of Appeal annulled the *Santullo* award.[92]

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89) Paris Court of Appeal, 21 February 2017, N° 15/01650, *République du Kirghizistan v. M. Belokon: "The Court must only ensure that the production of evidence before it respects the principles of contradiction and equality of arms and that each party has been able to present its case under conditions which do not place it at a substantial disadvantage vis-à-vis its opponent"* (unofficial translation of: "*Que la cour doit seulement s'assurer que la production des éléments de preuve devant elle respecte le principe de la contradiction et celui d'égalité des armes et que chaque partie a été mise en mesure de présenter sa cause dans des conditions qui ne la placent pas dans une situation substantiellement désavantageuse vis-à-vis de son adversaire*")

90) J.B. Racine, « Le contrôle de la conformité de la sentence à l'ordre public international un état des lieux », *Revue de l'arbitrage 2022*, Issue 1, pp. 179-226, §26 (unofficial translation of: "*L'importance quantitative des annulations (ou des refus d'exequatur) est à relever. La jurisprudence se durcit à l'évidence et ne tolère aucune passivité des arbitres à cet égard. bien au contraire, elle oblige les arbitres à avoir un comportement actif lorsque le litige qui leur est soumis est susceptible de porter sur des faits de corruption, où qu'ils soient localisés. Pour tempérer cette tendance, il convient aussi de remarquer que sur l'ensemble des décisions citées, si quatre ont admis la contrariété de la sentence à l'ordre public international, huit l'ont au contraire rejetée*").

91) Versailles Court of Appeal, 14 March 2023, N° 21/06191, *Société Alstom Transport SA and Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd, Rev. Arb.*, 2023.371, note I. Fadlallah; *D. Actualité*, 30 May 2023, obs. J. Jourdan-Marques; JDI, n°3, July-August-September 2023, chron.5, note K.Mehtiyeva.

92) Paris Court of Appeal, 5 April 2022, N° 20/03242, *République Gabonaise v. Société Groupement*

Ⅳ. Conclusion

In light of the above, the stance taken by French courts can only be approved as reasonable and justified considering the devastating effects of corruption. Just as international arbitrators shall be trusted when they address the merits of a dispute, French courts shall be trusted to ensure an adequate balance between the necessary protection of the French conception of international public policy and the finality of arbitral awards. It is the duty of major arbitral seats to make clear to users that awards tainted with corruption will not be enforced. By signaling to arbitrators, parties, and institutions that they will actively fight corruption, French courts can only increase trust in the arbitral system and give more incentive to arbitrators to play their part in the global fight against corruption, leading *in fine* to less annulments and more enforcements.

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