Awards Masking Corruption: How French Courts Lead the Way

By Gustavo Laborde[1]

Abstract: International arbitration is routinely—and rightly—celebrated for two of its best-known attributes—the autonomy of the parties and its flexibility. Yet these same attributes also leave it open to abuse: parties can use it as a surreptitious vehicle to "launder" and legally enforce corrupt deals. In only 18 months, the Paris Court of Appeal, one of the most arbitration-friendly jurisdictions in the world, set aside and refused exequatur of three international arbitration awards from prominent tribunals, in all instances by virtue of corruption and bribery of foreign public officials in deals worth hundreds of millions of euros. To do so, it examined in detail all evidence shedding light on the question of corruption and bribery, even ordering the production of new evidence. By contrast, confronted with the same scenario, the Swiss Supreme Court and the English High Court let the award be enforced. Did the French court go too far? Or did the Swiss and English courts not go far enough? This essay looks at the judgments of the Paris Court of Appeal and then examines these questions.

Resumen: Se suele exaltar al arbitraje internacional—y con razón—por dos de sus más conocidos atributos: la autonomía de las partes y su flexibilidad. Pero estos mismos atributos lo tornan vulnerable ante posibles abusos: las partes pueden valerse de él como un instrumento clandestino para "lavar" y ejecutar legalmente acuerdos corruptos. En tan sólo 18 meses, la Corte de Apelación de París, una de las cortes más favorables al arbitraje en el mundo, anuló y se negó a ejecutar tres laudos internacionales de eminentes tribunales, en los tres casos por causa de corrupción y soborno de funcionarios públicos extranjeros en relación con acuerdos por cientos de millones de euros. Para ello, examinó en detalle toda la evidencia que pudiera echar luz sobre la cuestión de corrupción y soborno, dictaminando incluso la exhibición de documentos nuevos. Por el contrario, enfrentados con el mismo escenario, la Corte Suprema de Suiza y el Tribunal Superior de Inglaterra ejecutaron el laudo. ¿La corte francesa fue demasiado lejos? ¿O las cortes suizas e inglesas se quedaron cortas? Este ensayo analiza las sentencias de la Corte de Apelación de París y luego explora estas cuestiones.

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I. Introduction: The Problem of Awards Masking Corruption

It is rare for national courts to set aside or refuse to recognise international arbitral awards.[2] But when it happens three times in barely eighteen months, and the national courts in question are from a top arbitral jurisdiction known for its pro-arbitration bent (France), reviewing the awards of some of the finest arbitrators in the world (one of whom chaired the *Yukos* arbitrations no less), issued under the auspices of one of the world's premier arbitral institutions (the ICC), in all three instances on grounds of corruption, it is no longer just rare—it is downright extraordinary.

This is exactly what happened in France between May 2019 and November 2020. In the space of eighteen months, the Paris Court of Appeal (or the "**CAP**") set aside and refused to recognise three different international arbitral awards on the exact same legal ground: that they were all contrary to French public policy against corruption. In particular, against the bribery of foreign public officials—from China and Libya. The three awards were denied all legal effects as a matter of French law—one of the most arbitration-friendly laws anywhere.

The CAP's judgments are noteworthy for three reasons. First, because they were predicated on the corruption and bribery of foreign public officials—important issues in their own right. Second, because the CAP examined in-depth the issue of corruption, going well past the "four corners" of the arbitration: going beyond the tribunal's factual findings and the allegations of the parties. Third, because the approach of the CAP stands in opposition to that of Swiss and English courts, which in the same scenario let the award be enforced—but for different reasons.

To the naked eye, it is hard to fathom this court split amid high-level courts from three of the uppermost arbitration venues globally. All three jurisdictions are pro-arbitration and anti-corruption. But of course, the disagreement takes place at a subtler level of analysis. The issue is not just corruption. The issue is corruption masked under the respectable veneer of an international arbitration award. One issued by prominent arbitrators acting under the auspices of a premier arbitral institution.

When corruption finds its way into an arbitral award, it puts on a collision course legal principles that make up the very foundations of international arbitration. It is no longer just a matter of corruption. It is also about the finality of the award; the deference to the decisions and findings of the tribunal; and to the so-called sanctity of contracts. All these legal principles come into play and clash with one another. How this conflict is resolve ultimately is a matter of the value system of each jurisdiction—that is, what value is prioritised in case of conflict. This is not a conflict of laws, but a conflict of values. It thus raises deep philosophical issues going to the heart of international arbitration—and its inherent limitations.

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2 C. Seraglini and Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, 2nd edition, 2019, p. 1005 (noting in the context of a discussion about the appropriate level of judicial review that an in-depth review of the award will be "rare" and that refusing to recognise the effects of the award will be "rarer still). *See* also, Teresa Giovannini, *What are the grounds on which awards are most often set aside?,* The Institute for Transnational Arbitration, Dallas Workshop, 15 June 2000, p. 3 (this study puts the percentage of awards annulled in France in the period 1981-1990 at 16%, but noted that this percentage was "clearly decreasing"; in Switzerland, the percentage of annulments for the same period was 5%).

The stakes are high; the issues relevant; the solutions fragmented. The stakes are high because these decisions appear to reveal that parties are not hesitating to use international arbitration to enforce corrupt deals involving hundreds of millions of euros of public money. Seeing international arbitration used to enforce corrupt deals designed to siphon off state money should be of serious concern. The issues are relevant because corruption and bribery of public officials will not be going away anytime soon. If anything, parties will become more and more sophisticated, making it ever harder to detect corruption-masking awards. Finally, the solutions have been fragmented, with courts in Switzerland, France and England split over how to deal with awards (allegedly) masking corruption.

The roadmap for this essay is as follows. Section II summarises the facts and legal issues of the judgments from the Paris Court of Appeal examined in this essay. Section III looks into greater detail at some of the issues these judgments raise. In the first part of this section, the two judgments of the CAP are compared and contrasted on a number of issues; in the second, the spotlight centres on the question of whether the CAP's heightened scrutiny was appropriate or excessive, further comparing it with the scrutiny exercised by the Swiss Supreme Court—the *Tribunal fédéral*—and the English High Court. Finally, Section IV draws the essay to a close with brief parting thoughts.

II. Three Awards Before the Paris Court of Appeals

In May 2019 and November 2020, the Paris Court of Appeal handed down three judgments refusing to recognise and setting aside three awards on grounds of corruption. The May 2019 judgment followed the *ABL v. Alstom* arbitration ("***Alstom***").[3] The November 2020 judgments followed the *Sorelec v Libya* arbitration ("***Libya***"), which resulted in both a partial and a final award. The key findings of the Paris Court of Appeal in these matters are summarised below.[4]

A. THE *ALSTOM* DISPUTE

In 2004 and 2009, ABL and Alstom concluded three consulting contracts whereby ABL would assist Alstom in the preparation of bids for public tenders for railway equipment in China.

The first two contracts were for tenders from the Chinese Ministry of Transport for the supply of heavy freight electric locomotives and high-speed passenger coaches. The third contract related to a tender from a Chinese state-owned entity—the Shanghai Shengton Holding Group—for the supply of material for the extension of the Shanghai metro line. All three contracts included an ICC arbitration clause, with the seat in Geneva and Swiss law as the applicable law.

With ABL's assistance, Alstom was awarded all three contracts—collectively worth in excess of € 1 billion. Under the consulting contracts, ABL was entitled to a commission equal to a percentage of the value of the contracts awarded to Alstom, namely: around € 3.7 million for the first contract (a 1% commission on

3 Paris, 28 May 2019, n° 16/11182.

4 Paris, 17 November 2020, n° 18/07347 and n° 18/02568.

the value of Alstom's contract); around € 3.1 million for the second contract (a 0.5% commission); and € 672,000 for the third contract (a 2% commission). In total, ABL was to receive from Alstom a commission of € 7.5 million.

Alstom paid most—but not all—of the commissions due under the first and second contracts, but did not pay anything under the third contract. In all, Alstom settled nearly EUR 4.5 million worth of commissions. ABL brought claims in arbitration against Alstom for the balance—some EUR 3 million—, adding other heads of damages as well.

In the arbitration, the Geneva-seated tribunal was composed of Mr Konrad, chair, along with Mr Dietschi and Mr Schimmel, co-arbitrators. The role of ABL under the consulting contracts became clear in the arbitration: it was to use its influence and contacts in the Chinese government to ensure that Alstom would be awarded the tenders. The tribunal held that, as a matter of Swiss law, these contracts are legal unless an "intent" to engage in bribery or corruption is shown. No such showing was made in the arbitration. In fact, neither party even alleged that the consulting contracts were tainted with corruption.

The tribunal ordered Alstom to pay the balance due under the first and the second contracts, but dismissed the claim under the third contract.[5] In all, Alstom was ordered to pay EUR 2.4 million, plus interests and part of the arbitration costs. In substance, ABL prevailed in the arbitration.

Alstom applied to the Swiss *Tribunal fédéral*—the Supreme Court—to set aside the award. The Supreme Court dismissed the application. It accepted the tribunal's factual findings—notably, the absence of corruption—on the well-known ground that its role is not to review the merits of the case. The arbitral tribunal found no evidence of corruption. This conclusion, *"based on an appraisal of the evidence, is one which this Court cannot review"*, the Swiss Supreme Court held.[6]

ABL then sought to enforce the ICC award in France, where Alstom has its centre of operations and headquarters. ABL secured an exequatur from the first instance court of Paris—the *tribunal de grande instance*.[7] Alstom appealed this decision before the Paris Court of Appeal.

The Paris Court of Appeal then broke new ground. First, the CAP ordered Alstom to produce *new* evidence or face a penalty.[8] It also invited the parties to make submissions on the question whether the consulting contracts disguised a corrupt arrangement below the surface. Second, the CAP methodically dissected the evidence before it—the one filed in the arbitration *and* the new one. It found

5 The arbitral tribunal drew a distinction between the first and the second contract, on one hand, and the third contract, on the other. All three contracts required ABL to provide evidence of its services together with each invoice. ABL had never provide such evidence. However, under the first and the second contracts, where there had been partial payments, Alstom never contested this lack of evidence. The tribunal deemed this to be a waiver. There had been no such waiver under the third contract, because no payments had yet been made (*Alstom*, p. 9).

6 Judgement of the Swiss Supreme Court dated 3 November 2016, ¶ 4.2.1.

7 Order of the *tribunal de grande instance*—the first instance court—of Paris granting exequatur, dated 30 March 2016.

8 Emmanuel Gaillard, *'La corruption saisie par le juge du contrôle de l'ordre public international, sous Paris, 28 mai 2019'*, Revue de l'Arbitrage, Volume 2019 Issue 3, p. 871.

that there was a *"serious, specific and consistent body of circumstantial evidence"*[9] showing the three contracts masked corruption and bribery of Chinese public officials.

It is revealing to enumerate the indicia of corruption upon which the CAP based its finding. These indicia included:

- No evidence that ABL rendered actual consulting services to Alstom.
- Evidence that ABL shared with Alstom confidential documents, with details about the offers of competing bidders, produced by Chinese public officials in charge of the tender. ABL could not explain how it obtained these documents. *"In a public tender, sharing with a bidder confidential information produced by the tender officials…is a particularly serious indication of corruption."*[10]
- Contemporaneous notes from ABL showing that both Alstom and ABL knew the outcome of the tender before the official announcement, including that Alstom would win even though another bidder had a better overall score.
- The suspicious bookkeeping of ABL, including high expenses paid into personal accounts, without proper documentation showing their purpose, and high "entertainment" outlays.
- No evidence that ABL had offices, employees or records of prior activity prior to its consulting contracts with Alstom.
- Alstom's payments under the consulting contracts were ABL's sole source of revenue, with 90% being distributed to ABL's three shareholders.[11]

Accordingly, the Paris Court of Appeal, reversing the decision of the lower court, denied the exequatur of the award, depriving it of all legal effects as a matter of French law.[12]

B. THE *LIBYA* DISPUTE

In 1979, Sorelec—a French limited liability company—and the State of Libya, through its Ministry of Education, concluded a contract for the construction of schools and outbuildings for lodging and other purposes.

A number of disputes arose during the execution of this long-running contract. The parties signed a series of succeeding settlement agreements in 1993, 1994 and 2003. Under the 2003 settlement agreement, it was agreed that Libya would pay

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9 Free translation. In the original French, this classic forensic formula reads "*a faisceau d'indices suffisamment graves, précis et concordants*" (*Libya*, p. 7).

10 *Alstom*, p. 13. The CAP time and again referred to the cross-examination of Ms Qi during the arbitration hearing, in the course of which she refused to answer question after question as to how she obtained the confidential documents she passed on to Alstom.

11 The CAP also mentioned that the Chinese public officials who interacted in this matter with Ms Qi, of ABL, were convicted to life imprisonment in China for corruption (*Alstom*, p. 22).

12 *Alstom*, p. 23. The CAP also ordered ABL to pay the procedural expenses and to return EUR 1.8 million seized from Alstom following the decision of the lower court granting exequatur.

Sorelec the amount of about EUR 36.8 million. Because this amount was never settled, Sorelec sued Libya in arbitration on the basis of the French-Libyan bilateral investment treaty (the "**BIT**"), under the aegis of the ICC. In the arbitration, Sorelec claimed about EUR 109 million in damages. The arbitral tribunal was composed of Yves Fortier, chair, along with Bernard Hanotaiu and Eric Loquin, co-arbitrators. The arbitral seat was Paris, France.

Three years into the arbitration, Sorelec and Libya entered into an agreement to settle all claims in the arbitration (the "**Settlement Agreement**"). The Minister of Justice, Mr Omran, signed the agreement on behalf of Libya. Pursuant to the Settlement Agreement, Libya was to pay EUR 230 million to Sorelec within 45 days from the notification of the award—as the Settlement Agreement was to be issued by consent award. In the absence of payment within that time limit, Libya would have to pay EUR 452 million to Sorelec.

Sorelec made an application to the tribunal requesting that the Settlement Agreement be issued by consent award. In December 2017, the tribunal issued a partial award by consent, ordering Libya to pay EUR 230 million within 45 days. Libya failed to pay within the time limit. As a result, in April 2018 the tribunal rendered a final award, this time ordering Libya to pay EUR 452 million.

Libya filed actions before the Paris Court of Appeal to have both awards—the partial and the final one—set aside. Libya submitted that there was a *"serious, specific and consistent body of circumstantial evidence"* demonstrating that the Settlement Agreement was the product of corruption. The CAP once again methodically dissected the evidence before it, concluding that the Settlement Agreement covered up illicit and corrupt machinations.

The Paris Court of Appeal examined the following indicia of corruption:

- The political climate in Libya: A climate of corruption, with Libya being listed as one of the most corrupt countries in the world (172nd out of 177). The Settlement Agreement was concluded at a time of chaos and civil war, when a provisional government was in power.[13]

- Mr Omran bypassed the procedures to sign the Settlement Agreement as a matter of Libyan law: Mr Omran, Minister of Justice, was required to seek the approval of the state's litigation department to be able to enter into the Settlement Agreement. He bypassed this legal obligation. This is a *"serious and specific indication"*[14] of corruption and collusion between Sorelec and Mr Omran.

- No evidence of negotiations preceding the Settlement Agreement: Whilst the Settlement Agreement states in its preamble that the negotiations were "strenuous", they only lasted for one day, there are no records of any exchanges or documents leading to the negotiation, or of meeting minutes

13 *Libya*, pp. 10-11.

14 *Libya*, p. 12. In fact, the evidence of a parallel arbitration relating to the same facts—Ghenia—showed that the state's litigation department had dismissed an earlier attempt to settle the claim with Sorelec.

or notes in the course of the negotiations. These are further *"serious and specific indicia"*[15] of corruption.

- The terms of the Settlement Agreement: The settlement terms meant that Libya accepted all of the claims Sorelec submitted in the arbitration, including in full the EUR 109 million claim for the principal. However, in the arbitration, Libya asked for these claims to be dismissed. Also, Libya was at the time *"materially"*[16] unable to pay EUR 230 million within 45 days in the light of its chaotic political and economic situation at the time. In this way, the Settlement Agreement was imbalanced, with nothing on its face that would make it worthwhile for Libya to sign it.

Therefore, the Paris Court of Appeal, on the same day, set aside both the partial and the final awards, ordering Sorelec to bear the costs of the proceedings and to cover part of Libya's legal fees.[17]

III. Analysis

This Section examines some of the legal and policy issues raised by the Paris Court of Appeal' judgments in *Alstom* and *Libya*. First, the two cases are juxtaposed to shed light on similarities and differences (1). Second, the vital question of the appropriate degree of judicial scrutiny is examined (2).

1. The Two Cases Compared

There are points in common and important differences between the *Alstom* and the *Libya* judgments.

First, in both cases the CAP denied the awards any legal effects on the grounds of corruption and bribery of foreign public officials. However, in the *Alstom* case it was a denial of exequatur—or recognition—of the award in France, whereas in *Libya* the award was set aside.[18] This difference is not without consequence. Under the New York Convention, the set-aside judgment—but not the decision to refuse recognition—may be relied upon by other domestic courts outside France to refuse recognition of the award.[19] From this viewpoint, the *Alstom* award has better prospects of being enforced outside France than the *Libya* one.

Second, *Alstom* was a commercial arbitration; *Libya*, an investment one. In *Alstom*, there was a contract between two private parties—Alstom and ABL. The arbitration was commenced on the basis of the arbitration clauses in the three contracts. There was no government official involved in the execution of these three contracts. The arbitration ended with the tribunal adjudicating the dispute

15 *Libya*, p. 14.
16 *Libya*, p. 14.
17 *Libya*, p. 16.
18 The difference has to do with the seat. In *Alstom*, the seat of the arbitration was Geneva, Switzerland, where it was not set aside; then ABL had recourse to the French courts to have it enforced in France, where Alstom is headquartered and thus presumably has sufficient assets. In *Libya*, the seat of the arbitration was Paris, France, and thus the Paris Court of Appeal had original jurisdiction over the set-aside action.
19 New York Convention, Article V.1(e).

in a final award. That said, these private contracts were part of a scheme intended to bribe public officials. The contracts *preceded* that bribery.

In *Libya*, by contrast, the Settlement Agreement was concluded between a private party and a state entity—Sorelec and Libya, respectively. The arbitration was brought on the basis of the French-Libyan BIT. A government official was directly involved in the execution of the agreement—Mr Omran. The arbitration ended with two awards by consent—a partial one and a final one. Unlike *Alstom*, the agreement in *Libya* did not precede the bribery; rather, the *agreement itself* was the bribery. In a nutshell, in *Alstom* the three contracts were *intended* to cause the bribery of public officials; in *Libya*, the agreement was the *product* of such bribery.[20]

Third, in both *Alstom* and *Libya* the CAP applied the same method: the same test for breach, the same standard of proof, and the same in-depth scrutiny. In both cases, the question was whether the integration of the award into the French legal order was in breach of its public policy.

The test for breach, the CAP held, is whether the recognition or enforcement of the award would result in a "manifest, tangible and actual" ("*manifeste, effective et concrète*") breach of French public policy.[21] The use of this legal test to deny legal effects to three international awards consolidates a departure from previous case law—*Thalès-Cytec*[22]—that was deemed to impose too high a test for breach.[23] Therefore, the *Alstom-Libya* test of "manifest, tangible and actual" breach may now be considered to be *jurisprudence constante*. However, the CAP did not shed further light on the specific meaning of "manifest"—the one new element in this test and thus the one that has caused the most debate in France.[24]

The CAP also applied the same standard of proof. This standard applies in the specific context of an exequatur or annulment judge confronted with allegations of corruption in breach of French public policy. In this scenario, the judge will deny legal effects to the award—either by refusing exequatur or by annulling the award—only if there is a "serious, specific and consistent body of circumstantial evidence" showing corruption. Further, for purposes of this inquiry, the judge will

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20 *See* also Thomas Clay, '*Arbitrage et des modes alternatifs de règlement des litiges*', panorama annuel 2020, Recueil Dalloz 2020, pp. 2484 and 2497.

21 *Alstom*, p. 6; *Libya*, p. 7.

22 The *Thalès-Cytec* test for breach was whether the breach was "flagrant, tangible and actual" ("*flagrant, effective et concrete*"). The only difference with the new test—as embodied in *Alstom-Libya*—is that the term "flagrant" was replaced with the term "manifest". The difference in wording is not entirely clear, with a leading French scholar aptly noting that the difference between "flagrant" and "manifest" is "neither manifest nor flagrant!" (Seraglini & Ortscheidt at note 1, p. 997). *See* also Christophe 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, p.347, para. 25; Pierre Duprey and Clement Fouchard, *'Recours en annulation contre une sentence rendue en matière internationale : des précisions de nature procédurale et une (petite) révolution en matière de contrôle de la contrariété à l'ordre public ?, note sous Paris, Pôle 1 – Ch. 1, 26 février 2013*', Revue de l'Arbitrage, Volume 2014 Issue 1, p. 90, paras. 20-26 ; Christophe Seraglini, *'Le contrôle de la sentence au regard de l'ordre public international par le juge étatique: mythes et réalités*', Gazette du Paris, 21 mars 2009, p. 5.

23 The *Thalès-Cytec* test imposed "drastic" conditions such as the "flagrancy" requirement (Seraglini, p. 993).

24 The prevailing view amid scholars appears to be that "manifest" refers to the nature of the violation, as opposed to how easy it should be to detect the violation or to the degree of the violation. *See* Jean-Baptiste Racine, *'Le contrôle de la sentence par le juge de l'annulation en matière de corruption*', note sous Paris, Pôle 1 – Ch. 1, 16 mai 2017', Revue de l'Arbitrage, Volume 2018 Issue 1, pp. 254 and 259; Sylvain Bollée and Mathias Audit, *'La lutte contre le blanchiment, nouvel avatar d'un contrôle renforcé du respect de l'ordre public international*', note sous Paris, Pôle 1 – Ch. 1, 21 février 2017', Revue de l'Arbitrage, Volume 2017 Issue 3, p. 929, paras. 11-12.

carry out an in-depth examination: it will look into "all the elements in law and in fact"[25] to decide if there is a breach of public policy—again, *jurisprudence constante*.

With respect to the evidence, a few points are worth noting. In *Alstom*, the CAP took the ground-breaking step of ordering the production of new evidence *sua sponte* as part of its inquiry.[26] Ordinarily, the finding of new facts—and corruption was a new fact—is not part of an enforcement action. This was taking the case law of the *Cour de cassation*—the French Supreme Court—in *Plateau de Pyramides*[27], under which the annulment judge must look into "all elements", to new heights. In *Libya*, by contrast, the CAP issued no such order. This suggests that, for the CAP, corruption was apparent on its face in the *Libya* matter, but not so—or at least less so—in *Alstom*.[28]

Interestingly, in both *Alstom* and *Libya* the CAP relied on the *absence* of evidence as one of the signs of corruption. In *Alstom*, it was the absence of evidence that ABL had rendered actual consulting services; in *Libya*, the absence of evidence of negotiations leading to the Settlement Agreement.[29] This may resemble a reversal of the burden of proof. It is not. The absence of evidence must be seen as part of the evidence as a whole. In both cases there was other evidence pointing towards corruption. It is in that context that this absence of evidence must be read—as one more corroborating piece of evidence.

Furthermore, in both cases the CAP relied on the breach of foreign domestic laws as evidence of corruption. It is the CAP itself that deems these laws to have been breached. In *Alstom*, it was the breach of the Chinese law on public contracts of 2002, pursuant to which the bidding process in public tenders is confidential.[30] Alstom received from ABL confidential information about other bidders intended for Chinese public tender officials. In *Libya*, it was the breach of a 1971 Libyan law requiring the approval of the state's litigation department to conclude a settlement agreement with Sorelec. Mr Omran sidestepped this obligation when it settled with Sorelec. In both cases, the breach of foreign law was used as a *piece of evidence* supporting the court's conclusion.[31]

Fourth, the CAP addressed the notion of "international public policy" set forth in Article 1520, paragraph 5, of the French Code of Civil Procedure. The reference

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25 *Libya*, p. 7. Ironically, the CAP did not expressly mention this formula in its *Alstom* judgment, even though it applied to the letter, by ordering Alstom to produce fresh evidence that was not part of the arbitral record.

26 Thomas Clay, '*Arbitrage et des modes alternatifs de règlement des litiges*', panorama annuel 2019, Recueil Dalloz 2019, pp. 2435 and 2448.

27 Cass. 1ere civ., 6 January 1987. *See* also Cécile Chainais, *'Réflexions prospectives sur les voies de recours en matière d'arbitrage'*, Revue de l'Arbitrage, Volume 2018 Issue 1, p. 177, para.28

28 It further suggests that the term "manifest" in the test for breach of public policy does not have to do with how obvious or easy to detect the breach is. By ordering production of new evidence in *Alstom*, it seems fair to assume that the CAP did not consider it "obvious" that there was corruption—else no such production would have been ordered. Yet, it found all the same that the breach of public policy was "manifest". Hence, the term "manifest" does not seem to refer to how obvious or apparent the breach is.

29 *Alstom*, pp. 11-12, 14-15; *Libya*, pp. 12-13.

30 *Alstom*, p. 13.

31 Emmanuel Gaillard, *'The emergence of transnational responses to corruption in international arbitration*', in William W. Park (ed), Arbitration International, (Oxford University Press 2019, Volume 35 Issue 1), pp. 1 , 8-10. On the question of the breach of foreign law as a sign of corruption, *see also* Sophie Lemaire, *'La preuve de la corruption*', Revue de l'Arbitrage, Volume 2020 Issue 1, p. 185, para. 29; Thomas Clay, '*Arbitrage et des modes alternatifs de règlement des litiges*', panorama annuel 2017, Recueil Dalloz 2017, pp. 2559 and 2571.

to "international" is misguiding. In reality, "international" public policy is very much French public policy—its "*conception française*", in the words of the CAP.[32] What "international" really means in this context is "universal": even a breach of public policy in an international context—outside France—will have effects in France—the refusal to recognise or enforce the award. This is the classic *geographic view* of international public policy: a breach of a principle so essential that it will be taken into account *in France* regardless of where it happened. The prohibition of corruption—e.g. the bribery of public officials—is one such principle.[33]

Yet the CAP may have found an additional basis for international public policy: international consensus. In both *Alstom* and *Libya*, the CAP used the same three paragraph at the beginning of its analysis about corruption and public policy. In *Alstom*—the first case—it stated that the prohibition against corruption is part of French international public policy. It then specified that there is an "international consensus" against corruption, as reflected in the 1999 OECD Convention and the 2003 UN Convention.[34] In *Libya*, the CAP reversed the order: it first explained that the "international consensus" against corruption—referring again to the OECD and UN Conventions—and *only then* did it conclude that the prohibition against corruption was part of France's international public policy.[35]

It is submitted that this reversal was not accidental. In *Libya*, the CAP appears to have used this "international consensus" against corruption—of which France is naturally a part—as an additional justification to hold that the prohibition against corruption is part of French international public policy. Notably, the CAP based the definition of "bribery of public official" on this international consensus. In this way, the CAP at the very least defined the precise contours of French public policy by reference to such international consensus. In brief, it appears that the CAP relied on this international consensus in two ways: to justify "international" French public policy against corruption and to define what corruption means.

Fifth, in neither case—*Alstom* or *Libya*—did the parties put forward allegations of corruption in the arbitration. Yet there is a difference in the two case. In *Libya* the question of corruption was neither alleged nor insinuated. The award was issued by consent following the parties' settlement. There is no way to surmise what the *Libya* tribunal thought about the Settlement Agreement. In *Alstom*, by contrast, Alstom did insinuate that ABL had engaged in corruption, and the issue was hence brought to the tribunal's attention—even if obliquely so. The tribunal addressed the matter forensically: Alstom did not allege or prove corruption, as required by Swiss law; thus, the tribunal did not need to make a finding of fact on this point.[36]

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32 *Libya*, p. 7.

33 "The prohibition against the bribery of public officials is one of the principles whose breach the French legal order cannot tolerate even in an international context" (*Libya*, p. 7).

34 *Alstom*, p. 6. The 1999 OECD Convention on Combating Bribery of Public Officials in International Business Transactions (the "**OECD Anti-Bribery Convention**"); and the 2003 United Nations Convention Against Corruption (the "**UN Anti-Corruption Convention**").

35 Libya, p. 7.

36 *Alstom*, p. 9. The High Court of Justice of England and Wales also ruled that the factual issue of bribery "was not decided on the facts by the tribunal" (*ABL v. Alstom* [2020] EWHC 1584 (Comm), Judgment of 18 June 2020). One wonders what the members of the *Alstom* arbitral tribunal truly thought about the nature of the three consulting contracts between Alstom and ABL. It may well be that, just like the Paris Court of Appeal, they fully understood what was going on and aimed to find a balanced solution, accepting some of the claims and dismissing others.

This brings into sharp focus an important point examined below: in arbitration, the parties alone frame the facts in dispute.

Sixth, and finally, there is an important difference between how the Paris Court of Appeal dealt with the allocation of legal costs in *Alstom* and *Libya*. In French law, Article 700 of the Code of civil procedure gives the judge discretion to order a party—typically the losing party— to bear some or all of the legal costs of the other side. In *Alstom*, the CAP dismissed the Article 700 claims of both parties, notably of Alstom which fully prevailed in its claims on the merits—i.e. the refusal of exequatur of the award.[37] In *Libya*, by contrast, the CAP did order Sorelec to compensate Libya—which prevailed in its annulment bid—to the tune of EUR 150,000 under Article 700.[38]

Both Alstom and Libya prevailed in equal measures: in both cases, their requests were granted and the awards denied all legal effects under French law. So why did Libya receive compensation under Article 700 but not Alstom? The reason seems to be this. For the Paris Court of Appeal, Alstom seems to have been part of the corruption and bribery of the Chinese foreign officials: it knew what the payments to ABL were for, and it drew substantial benefits from it.[39] Conversely, Libya was a victim of the corruption and bribery: only a handful of rogue officials—from a provisional government no longer in power—was to benefit from it. In a nutshell, both of them prevailed, but whereas Alstom was also a wrongdoer, Libya was a victim of the bribery.

2. The CAP's Judicial Scrutiny of the Awards: Excessive or Appropriate?

A key question—perhaps *the* key question—the *Alstom* and *Libya* matters raise is whether the scope of judicial review from the Paris Court of Appeal was appropriate or excessive. Notably, the CAP went beyond the allegations of fact made in the arbitration, making inquiries about facts that had never been brought up in the arbitration. In *Alstom*, it even ordered the production of new documents. In other words, the CAP went beyond the "four corners" of the arbitration, as framed by the parties. The CAP made the right call.

International arbitration is rightly praised for the broad autonomy and flexibility the parties enjoy. But surely this freedom cannot be left unchecked in the face of corruption. Precisely because of that freedom, international arbitration may be abused by parties seeking to enforce corrupt deals—as was the case in *Alstom* and *Libya*. International arbitration allows parties to these underhanded deals to have the certainty of a legal recourse—should one side not comply—with much lower risks of being caught up. After all, these parties can conveniently swipe under the rag of arbitral autonomy any facts likely to discredit their deal—or them. The corrupt deal can be passed off as a legitimate transaction—a "consulting" contract. In this way, international arbitration can be used as means to "launder" corrupt deals.

37 *Alstom*, p. 23.
38 *Libya*, p. 16.
39 "The refusal to give effect to a corrupt contract transcends the interests of the parties…little does it matter that this benefits the party that relies on its own turpitude [i.e., Alstom]" (*Alstom*, p. 22).

International arbitration is ill-suited to deal with corruption of this ilk. This is both for legal and practical reasons. Legally, the parties have the power to frame the dispute and the facts in issue. This is perhaps best illustrated in the well-known ICC "terms of reference"[40]—and both *Alstom* and *Libya* were ICC matters. Tribunals are not allowed to venture beyond those four corners of the dispute as framed by the parties. In fact, they would run the risk of seeing the award set aside if they do so—an arbitrator's greatest fear.[41] So arbitrators are naturally unwilling to rely on facts not pleaded by the parties. Also, since they lack coercive powers, the fact-finding abilities of tribunals are severely limited as a matter of law. In brief, any tribunal daring to go beyond the parties' factual allegations will feel like it is treading on thin ice—unsafe and powerless.[42]

But the practical reasons are even more compelling. Arbitrators are not simply adjudicators; they are first and foremost businesspeople in a competitive market. They provide a service; and the parties are their clients. In fact, two-thirds of the tribunal will typically have been hand-picked by the parties, and possibly interviewed before they got the job. Often, the parties or their legal counsel know the arbitrators. In those circumstances, to expect the arbitrators to turn on their clients and to make inquiries *sua sponte* into whether they engaged in bribery and corruption is to stretch the limits of human nature. No arbitrator will want to do that—especially not party-appointed ones. Nor can they be expected to: they have nothing to win and all to lose.

If arbitral tribunals are ill-equipped and ill-placed to deal with corruption of this nature, who then can guard against it? There is only one possible answer: domestic courts. If courts are the only ones properly equipped to guard against awards masking corruption, it is then not a matter of *whether* they should look into this issue—when called upon to recognise or enforce an award—but of *when* they should do so. To exercise a meaningful control, courts must be able to go beyond the facts and allegations made in the arbitration—beyond its four corners.

Take for example what happened with the *Alstom* award before the Swiss *Tribunal fédéral*. In the arbitration, there were no allegations of corruption; Alstom merely insinuated that the consulting contracts were tainted with corruption. Naturally, for the tribunal this was not enough; there was no finding of corruption. In the annulment proceedings, the *Tribunal fédéral* held its judicial review is based on the "factual findings" of the tribunal. Because the tribunal found there was no corruption, this was for the *Tribunal fédéral* an unreviewable finding of fact.[43] The annulment application was dismissed.

This very limited judicial review plays straight into the hands of arbitration parties masking corruption. The *Tribunal fédéral* interpreted rather broadly what counted as a "factual finding" of the tribunal. In reality, the tribunal only noted that none of the parties had alleged corruption and, on that basis alone, held that there was

40 2021 ICC Arbitration Rules, Article 23 (Terms of Reference).

41 For instance, under French law it is ground for annulment for the arbitrator to fail to adhere to the "task" entrusted to him or her (Art. 1520, para. 3 of the French Code of Civil Procedure).

42 S*ee* Emmanuel Gaillard, *'La corruption saisie par les arbitres du commerce international'*, Revue de l'Arbitrage, Volume 2017 Issue 3, p. 805, paras. 36-37; Kathrin Betz, *'Economic crime in international arbitration'*, ASA Bulletin, 2017 Volume 35 Issue 2), pp. 281, 287- 288.

43 Judgment of the Swiss *Tribunal fédéral*, 3 November 2016, at ¶ 3.1 and ¶ 4.2.1.

no corruption. That is hardly a "finding"—that is merely taking notice. There was no real factual inquiry into this question. By labelling this a "factual finding", the matter became *ipso facto* unreviewable. This means that parties to a corrupt deal can get the mighty power of the state apparatus to enforce it as long as they keep quiet about it in the arbitration: the tribunal will not go beyond the allegations of the parties and the annulment judge will then consider it an unreviewable finding of fact. This cannot be right.

The London High Court took a different route, but eventually arrived at the same destination as the Swiss *Tribunal fédéral*. For the London Hight Court, the *Alstom* tribunal made no finding of fact "on the issue of bribery".[44] However, the London High Court reached the same outcome as the Swiss court, removing any obstacles to the recognition and enforcement of the award, for different reasons. The High Court's three reasons were: first, Alstom agreed to settle the dispute in arbitration but never raised the bribery issue in that forum; second, there is no "consensus" that a contract for trading in influence is contrary to public policy; third, there was "very little"[45] evidence of corruption.[46]

On the High Court's second and third reasons, this is a matter of assessment of the evidence. However this much can be added. For the Paris Court of Appeal, the *Alstom* consulting contracts were not just contracts to trade in influence, i.e. to lobby. Rather, they masked an illicit scheme designed to bribe the Chinese state officials in charge of awarding public contracts worth more than EUR 1 billion. On the third reason, it is indeed surprising that, where the Paris Court of Appeal found "serious, specific and consistent" evidence of corruption, the London High Court only found "very little indeed".[47] It is unclear if the High Court had at its disposal all the evidence available to the Paris Court, as it did not compel production of new evidence like the Paris Court did.[48]

It really is the High Court's first reason that looms larger. That is, that the issue of bribery could not be raised before the enforcement judge because Alstom did not raise it in the arbitration. The High Court explained: *"This is a case where the parties agreed a contractual forum* [to settle the dispute]. *Alstom*['s]…*bribery case*… *could and should have been brought before that* [forum]."[49] In other words, for the High Court it is a matter of the sanctity of contracts. Allowing Alstom to make a new case before the domestic court—a bribery case—is a breach of that crucial contractual principle.

The High Court went on to add: *"There is no explanation for why this was not done"*[50]—that is, for why Alstom did not bring its bribery case before the tribunal. That explanation may be easily fathomed. Alstom could have been concerned that, by bringing its bribery case, it could engage its own liability and maybe even incriminate itself. The judgment of the Paris Court of Appeal leaves little doubt:

44 *ABL v. Alstom*, Judgment of the High Court of London, 18 June 2020, ¶¶ 128-130.
45 *ABL v. Alstom*, Judgment of the High Court of London, 18 June 2020, ¶ 169.
46 *ABL v. Alstom*, Judgment of the High Court of London, 18 June 2020, ¶ 176.
47 *ABL v. Alstom*, Judgment of the High Court of London, 18 June 2020, ¶ 169.
48 One telling example is the evidence relating to consulting contract No. 3. For the CAP, this showed how Alstom was told that it would be awarded the contract before the official announcement and despite not being the highest-ranked bidder.
49 *ABL v. Alstom*, Judgment of the High Court of London, 18 June 2020, ¶ 174.
50 *ABL v. Alstom*, Judgment of the High Court of London, 18 June 2020, ¶ 174.

the court did not think Alstom was unaware of the true nature of the three consulting contracts.[51] Aside from the particulars of this case, it is not hard to conceive that a party who is itself involved in bribery might not want to raise the issue in the arbitration.[52]

In a nutshell, three court judgments, three different reasonings—and two polar opposite outcomes. This from three high-level courts in some of the topmost arbitral jurisdictions in the world—Switzerland, Paris and London. All three jurisdictions known to be both pro-arbitration and anti-corruption—though these are admittedly broad-brush labels. The Swiss and English courts gave effect to the award—refusing annulment and granting enforcement, respectively—but for different reasons; the French court denied the award legal effects as a matter of French law—refusing its enforcement. How can this be? How can these three top courts disagree at such basic level on how to deal with the same award?

This could be put down to different reasons. That these three courts were each applying a different law—Swiss, French and English law. Yet the legal ground for challenge is the same in all three jurisdictions: that the award is contrary to public policy. Another possible explanation is that each country applies its own domestic understanding of "public policy". The Paris Court of Appeal refers to the French notion—the "*conception française*"—of public policy.[53] But in all three jurisdictions there is a public policy against corruption.[54] It could be also attributed simply to a different assessment of the evidence. But as noted above, the key differences in the reasoning of the three courts is at the level of principles, not of weighing of the evidence.

None of these explanations is entirely satisfactory. It is posited that the different judgments of each court—Swiss, French and English—ultimately reflects their different *value system*. All three jurisdictions are pro-arbitration, pro-contracts, and anti-corruption. But what happens when these values collide with one another? This is where the differences emerged. In fact, each court prioritised a different value. The Swiss *Tribunal fédéral* prioritised the value of deference to the tribunal and finality of the award (pro-arbitration); the Paris Court of Appeal prioritised the value of fighting corruption and bribery of public officials (anti-corruption); and lastly the London High Court prioritised the value of the sanctity of contracts (pro-contract).[55]

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51 As explained above, the Paris Court of Appeal referred to Alstom's "turpitude" and refused Alstom any compensation for legal fees and costs under Article 700 of the Code of Civil Procedure, despite the fact that prevailing parties are ordinarily entitled to such compensation—as a matter of discretion—and that Alstom fully prevailed (see supra p. 9).

52 Why did Alstom bring its bribery case only at the annulment and enforcement stage? This is a matter of speculation of course. Alstom may have thought that it could prevail in the arbitration without running the risk of making a—potentially self-defeating—bribery case, and that mere innuendo could have sufficed. Alstom may also have thought that the risk of making an explicit bribery case was lower before an annulment or enforcement court, whose role is far more limited than adjudicating the dispute on the merits. The Paris Court of Appeal explicitly makes this point: "It is not the role of this court…to establish whether a party to the arbitration can be declared guilty of corruption…but only to establish whether the recognition or execution of the award" is contrary to French public policy (*Alstom*, p. 6).

53 *Libya*, p. 20.

54 All three countries—Switzerland, France and the United Kingdom—are parties to the OECD Anti-Bribery Convention and the UN Anti-Corruption Convention (see *supra* note 34).

55 Tellingly, this is revealed in how each court begin its analysis. Both the Swiss and English courts began their analysis by enunciating pro-arbitration principles. The Swiss Supreme Court announced its inability to review

Which value should prevail? These are typically questions where there is no right or wrong answer. Subtle discussions about the hierarchy of value systems are not rooted in pure logic or reason. They belong to the realm of moral reflexes and instincts. For the Swiss court, it was unfair to disregard the tribunal's finding of fact and interfere with the award. For the French court, it was unfair to enforce contracts tainted with corruption. For the English court, it was unfair to let Alstom disregard its contract obligations—the commission and the arbitration clause—when it had already secured the benefits of the contracts.

Still, on this particular legal issue—of awards masking corruption—a case can be made that the French value system is the more sensible and coherent, for both moral and practical reasons. For moral reasons, because contracts and arbitration should not be intended to enforce contracts tainted with corruption. The mighty force of the state machinery must not be put to the service of enforcing corrupt contracts.[56] For practical reasons, because under the Swiss and English approaches it is relatively easy for corrupt deals to filter through the system, to be "laundered", and then legally enforced: all the parties to these deals need to do is keep quiet about the corruption in the arbitration—if they do not raise it, the tribunal will not raise it either.

Each of these value systems correlates with a different degree of judicial scrutiny. Under the English approach, the courts will not review past the allegations of the parties in the arbitration. Under the Swiss approach, the courts will not review past the factual findings of the tribunal. Under the French approach, in turn, courts will review past *both* the allegations of the parties and the factual findings of the tribunal—in short, past the four corners of the arbitration. The French approach is the best suited to detect and deny effects to corrupt deals.

As a mental experiment, these different approaches can be put to the test of the *Libya* case, where the parties to the arbitration concluded a Settlement Agreement tainted with corruption and bribery. How would each court have dealt with it? In the case of French courts, we have the actual answer—the CAP annulled the two awards based on that settlement. What about the Swiss and English courts? If they apply the same principles they applied in *Alstom*, it would logically follow that they would enforce the *Libya* awards. Under the Swiss approach, the *Libya* tribunal made no "factual finding" that the Settlement Agreement was corrupt—thus, the award would be enforced. Under the English approach, none of the parties made any allegations of corruption in the arbitration—thus, the award would also be enforced. Will Sorelec try its hand in Switzerland and England?[57]

Turning back to the original question: Was the CAP's degree of judicial scrutiny of the *Alstom* and *Libya* awards appropriate or excessive? Insofar as it looked into

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the factual findings of the tribunal; the English High Court noted that there is a public policy in favour of the enforcement of arbitration awards. By contrast, the Paris Court of Appeal began its analysis with a reference to the OECD Anti-Bribery Convention and the UN Anti-Corruption Convention and the "international consensus" to "fight against corruption" (*Alstom*, p. 6; *Libya*, p. 7).

56 *See* also Charles Poncet, '*Fraud in International Arbitration*', Cahiers de l'arbitrage, 2016 Volume 4, p. 789.

57 Ironically, Sorelec would only stand a chance of having the vacated *Libya* awards enforced in third States, such as Switzerland or England, if the courts in those third States accept the view expressed by the French *Cour de cassation* in *Putrabali*—pursuant to which an award vacated at the seat can still be enforced elsewhere as it exists in an autonomous and transnational legal order.

all the "elements in law and in fact" to shed light on the question of these awards possibly masking corruption, notably going past the four corners of the tribunal's factual findings and the allegations of the parties, it was appropriate. A lesser degree of scrutiny would have failed to unmask the underlying corruption.

A thorny question is *when* this level of heightened scrutiny is appropriate, including when to order new document production. This is a question for another essay. For now, suffice it to say that if a party makes allegations of corruption in the annulment or enforcement proceedings—even if for the first time—and there is some *prima facie* colour to the claim, this heightened level of judicial review appears appropriate.

IV. Conclusion

The finality of awards is a cornerstone of pro-arbitration jurisdictions such as Switzerland, France and the United Kingdom. But it is not an absolute legal value. The same holds true for the sanctity of contracts. They surely must find a limit when they are used to enforce corrupt deals. The difficulty lies in striking the right balance when these different legal values come into collision with one another. Specifically, the question of the appropriate degree of judicial review becomes essential to ascertain when these principles may come into collision in the first place. After all, what qualifies as "corruption" or "bribery" for legal purposes will depend on an assessment of the evidence; in turn, the evidence available will be a function of the degree of judicial review.

The three awards in *Alstom* and *Libya* addressed by the Paris Court of Appeal brought all these questions to the fore. Exceptionally, the CAP denied legal effects to all three awards, refusing exequatur of the *Alstom* award and setting aside the two *Libya* awards. In all three case, on grounds of corruption and bribery of public officials. To make its decision, the CAP applied a heightened level of scrutiny: it reviewed "all elements in law and in fact" to shed light on the question whether there had been corruption and bribery, going as far as to even order the disclosure of fresh evidence in *Alstom*.

Three different courts grappled with these same legal questions—in Switzerland, England and France. Each put the emphasis on a different legal value, throwing into high relief the different value systems of each jurisdiction. The Swiss *Tribunal fédéral* prioritise the finality of the award; the English High Court, the sanctity of contracts; the French CAP, the fight against corruption and bribery. For this reason, only the CAP was willing to reopen the inquiry and to review *de novo* the question of corruption. It is posited that the French approach—as embodied in the CAP's judgments—is the best suited to dissuade parties from using arbitration to enforce their corrupt deals. This aim should override the finality of awards and the sanctity of contracts.[58]

[58] *See also* Robert Bradshaw, '*When there's smoke but no fire: English court rejects defence based on "indicia" of corruption*', Practical Law Arbitration Blog, 4th September 2020, accessible at: http://arbitrationblog.practicallaw.com/when-theres-smoke-but-no-fire-english-court-rejects-defence-based-on-indicia-of-corruption/

What does the future hold in store for awards masking corruption? Hard to tell at this juncture. The *Alstom* matter is still pending before the French Supreme Court. There have also been calls for a uniform approach in how to deal with awards masking corruption. This makes sense. In the absence of uniformity, one might expect parties to corrupt deals to exploit this to their advantage: they can select as a seat "arbitration havens" where the award is subject to very limited or no review at all on matters of corruption. Of course, enforcement courts can always look at the matter *de novo*; still, awards with the stamp of approval of the courts of the seat—especially courts in influential jurisdictions—carry their weight.

For the time being, among courts in three of the topmost arbitration venues in the world—Switzerland, France and England—only French courts are willing to look past the four corners of the arbitration, past the tribunal's factual findings and the allegations of the parties, and to examine *de novo* questions of corruption that may never have been explored or briefed before, even going to the lengths of ordering production of new documents. This is the better approach to unmask corruption hiding behind awards. On this important question, French courts lead the way.