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Alstom Arb. Case Shows 3 Approaches To Corruption Claims

By **Harriet Chopra** (June 2, 2023, 12:23 PM BST)

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There has been much debate in recent years about the difficulties of proving corruption in international arbitration. How should corruption be defined in an international context? What is the correct standard of proof to be applied in circumstances where tribunals lack some of the powers of national courts to compel evidence? Who should bear the burden of proving corruption and can the existence of red flags justify a reversal of that burden?

One question that has been brought into sharp focus by the long-running case of Alexander Brothers Ltd. v. Alstom Network U.K. Ltd. is what approach local courts should take, at the post-award enforcement stage, where one party alleges that enforcement would be contrary to the public policy of the state or country where enforcement is sought.

Following the recent decision on March 14 of the Versailles Court of Appeal to allow enforcement of the award in the Alstom case,[1] notwithstanding Alstom's allegations that it would be contrary to French public policy, can it be said that the French, English and Swiss courts are now aligned in their approach?

This article considers the decisions reached and the approaches taken by the English, Swiss and French courts in the Alstom case to try and answer that question.

The Versailles court decision marks the latest development in the long-running dispute between French transport company, Alstom, and family-run Hong Kong company, Alexander Brothers, or ABL. The case arose from a series of consultancy agreements entered into between Alstom and ABL from 2003 onward pursuant to which ABL was to assist Alstom in obtaining railways contracts in China.

For several years there were no issues. Then, in 2009, the U.K. Serious Fraud Office commenced an investigation into the Alstom Group's activities, ultimately resulting in the payment by Alstom in 2014 of £16.4 million ($17.6 million) in fines related to corruption in Tunisia. At around the same time, in 2010, the U.S. Department of Justice had started an investigation into possible acts of corruption committed by four Alstom Group companies, resulting in fines of $772 million.

Against this backdrop, Alstom began to refuse to make payments to ABL under the consultancy agreements, alleging that payments made to ABL had been used to bribe Chinese government officials.

ABL commenced arbitration proceedings against Alstom in 2013 under the consultancy agreements, which were governed by Swiss law and provided for disputes to be resolved by way of Geneva-seated International Chamber of Commerce arbitration. Throughout the course of the subsequent arbitration proceedings, Alstom raised allegations of corruption against ABL but, importantly, by the time of the final hearing, the thrust of Alstom's defense had shifted away from a freestanding corruption defense toward a defense based on contractual noncompliance by ABL.

Specifically, Alstom argued that ABL had failed to comply with Alstom's internal ethics and compliance policy, which was contractually incorporated into the consultancy agreements.

Ultimately, in January 2016, an award was made in favor of ABL and Alstom was ordered to pay the balance due under the consultancy agreements.

Alstom applied to set aside the award in the Swiss Federal Court, alleging that it was incompatible with public order pursuant to Article 190(2)(e) of the Swiss Federal Private International Law Act, the relevant provision of Swiss law that reflects Article V (2)(b) of the New York Convention.

The Swiss court rejected Alstom's application in November 2016,[2] finding that the ICC arbitral tribunal l had already considered and determined the question of corruption and, in those circumstances, refusing to revisit the matter, it said:

> the Arbitral Tribunal, after having analysed the elements of proof that the appellants had provided to it in order to support their implicit allegation of corruption aimed at the respondent, considered that this allegation had not been proved … Such a conclusion arises from an assessment of the evidence that this Court cannot re-examine.[3]

Shortly thereafter, in March 2016, ABL was granted an order by the Paris District Court allowing enforcement of the award in France. Alstom appealed to the Paris Court of Appeal again on the grounds that enforcement would be contrary to French public order pursuant to Article 1520(5) of the French Code of Civil Procedure, the relevant provision of French law embodying Article V (2) (b) of the New York Convention.

The Paris Court of Appeal, however, upheld Alstom's appeal. In doing so, it made two particularly interesting points:

Firstly, the French court said that in determining the question of whether enforcement of an award would be contrary to French public policy, the French courts were not bound by the decision of the tribunal in the award, nor were they bound by Swiss law as the substantive law of the dispute. In order to determine whether enforcement would be contrary to French law, the court held, contrary to the approach adopted by the Swiss court, that it was in fact necessary for the French court to reexamine the evidence of corruption and reach its own conclusion.

Secondly, the French court said that "due to the concealed nature of acts of bribery" it was not necessary to find "precisely identified corrupt acts," but instead corruption could be established "solely on the basis of a set of indicia."[4]

The French court then went on to examine the indicia presented by Alstom and found that it provided "serious, precise and consistent indicia" that the sums paid to ABL by Alstom had been used to bribe public officials.

But that was not the end of things. In 2019, ABL sought enforcement of the award in England and Alstom once again challenged, this time under section 103(3) of the Arbitration Act 1996.

In June 2020, the Commercial Court, Queen's Bench Division of the High Court of Justice of England and Wales, rejected Alstom's appeal, allowing enforcement. In doing so, it adopted a different approach to that of both the Swiss and French courts.

The High Court agreed, on the one hand, with the Swiss court that, where an arbitral tribunal had already determined the question of corruption, there would be "very nearly no scope" for the English court to reopen the issue. That was as a result, the High Court said, of a careful "balancing exercise" between the public policy in favor of finality, and the public policy against illegality.[5]

In the Alstom case, however, the High Court found that the tribunal had not made a determination on the matter due to the fact that, by the time of the final hearing, Alstom's defense was primarily contractual in nature.

Instead, the High Court held that Alstom was barred from raising corruption as a defense at the enforcement stage because, essentially, it had chosen not to run the point in the arbitration because it didn't think it would meet the Swiss standard of proof. The High Court said:

> bribery being an issue which it seems plain could with reasonable diligence have been brought before the Swiss Tribunal for a determination on the actual evidence, and the argument being based on exactly the same material as was before the Tribunal, and there being no explanation for why it was not so taken, it follows that Alstom will … be barred from raising this point.[6]

In the meantime, ABL had appealed the earlier decision of the Paris Court of Appeal, which, in

2021, remanded the case back to the Versailles Court of Appeal.

The Versailles Court of Appeal handed down its judgment in March 2023, dismissing Alstom's appeal and finding that upon a careful examination of the evidence, it did not provide "serious, precise and consistent" evidence of corruption.

As of March, therefore, the Swiss, French and English courts are united insofar as the outcome of the Alstom case is concerned. It cannot, however, be said that the courts are aligned in terms of the approach adopted generally to post-award challenges based on the public policy exception.

On the one hand, both the Swiss and English courts adopted a noninterventionalist approach, opting to prioritize the public policy in favor of finality and refusing to reinvestigate evidence that had already been examined by the tribunal, whereas the French courts, even the Versailles court, showed a clear willingness to revisit allegations and evidence.

This willingness to reexamine allegations of corruption at the post-award phase can be seen in other judgments of the French courts in recent years.

In Belokon v. Kyrgyzstan[7] the French Supreme Court upheld the decision of the Paris Court of Appeal to set aside United Nations Commission on International Trade Law awards in favor of Latvian businessman Veleri Belekon, finding that the Paris court had acted properly in conducting its own analysis of the evidence, including evidence that had not been relied upon in the arbitration.

The French courts also appear to adopt a different approach to the English courts when it comes to corruption arguments being raised only at the enforcement stage of proceedings.

Whereas the English court in Alstom held that a party would effectively be estopped from raising a defense that could have been run in the arbitration, in Sorelec v. Libya[8] the French Supreme Court held that the fact that the Libyan State had invoked a corruption defense only at the enforcement stage and not before the ICC arbitral tribunal did not prevent the French court from conducting its own analysis for the purposes of a post-award challenge.

It is clearly undesirable that three courts should adopt such varying approaches in one case alone. Those in favor of the French approach say that it will encourage arbitral tribunals to look more proactively at corruption where there are so-called red flags, to avoid their awards being challenged or annulled.

Others fear that the approach will lead to parties strategically saving corruption allegations for the post-award phase and undermine the attractiveness of arbitration as an effective means of dispute resolution, particularly given that one of the primary reasons that many parties choose arbitration over court litigation is the finality of an award. In Alstom's case, it has taken 10 years to achieve finality.

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[1] Alstom v Alexander Brothers, Case No 21/06191 (14 March 2023)

[2] Judgment of the Swiss Federal Court 4A_136/2016, 3 November 2016

[3] Cockerill J, [2020] EWCA 1584 (Comm), paragraph 150 referring to the judgment of the Swiss Federal Court, 4A_136/2016, 3 November 2016

[4] Cockerill J, [2020] EWCA 1584 (Comm), paragraph 56.

[5] Cockerill J, [2020] EWCA 1584 (Comm), paragraph 105

[6] Cockerill J, [2020] EWCA 1584 (Comm), paragraph 150

[7] Cass. Civ. 1ère, 23 March 2022, No. 17-17.981

[8] Cass. Civ. 1ère, 7 September 2022, No. 20-22.118