

ARBITRAGE

XX Arbitration and Corruption: What Type of Control Do Judges Have Over Arbitration Awards?



SALOMÉ GARNIER,

avocate aux Barreaux de Paris et de New York, collaboratrice chez Navacelle

JULIE ZORRILLA,

avocate au Barreau de Paris, associée chez Navacelle

Solution. - Le 29 septembre 2021, la Cour de cassation a cassé le célèbre arrêt *Alstom* de la cour d'appel de Paris en date du 28 mai 2019 qui avait statué sur une demande d'exequatur de sentence arbitrale. Pour la Haute juridiction, la cour d'appel a dénaturé les éléments de preuve lui ayant été soumis en interprétant mal les transcriptions de l'audience d'arbitrage.

Impact. - Un renvoi devant la cour d'appel de Versailles a été prononcé, créant une interrogation quant à la confirmation jurisprudentielle de la nécessité pour les juges de procéder à un contrôle étendu de la véracité des allégations de fraude et de corruption pour décider de l'*exequatur* d'une sentence arbitrale.

Cass. 1^{re} civ., 29 sept. 2021, n° 19-19.769

1. A Retrospective on the *Alstom* Case

The *Alstom* decision has been the subject of much debate due to the divergent approaches of the Swiss¹, English² and the French³ courts regarding their level of review of arbitral awards when faced with corruption allegations⁴.

The initial dispute concerned consulting contracts concluded between two subsidiaries of the Alstom group and a Chinese company Alexander Brothers (hereinafter "ABL"). The objective of the contracts was to assist Alstom in tendering for Chinese railroads. Although Alstom won all the tenders for which the consultant contracts had been signed, it

refused to pay certain sums, alleging a criminal risk as these payments may have been used to bribe public officials.

As a result, in 2016, ABL filed for arbitration in Geneva before the International Chamber of Commerce. The Arbitral Tribunal rendered its award rejecting Alstom's defense in which it argued that it had grounds to suspect corruption by ABL and ordered Alstom to pay the balance of the commissions due as it concluded that the circumstantial evidence of corruption did not meet the standard of proof required under Swiss law.

ABL obtained on 30 March 2016 an order for *exequatur* of the award in France, which Alstom challenged before the Paris Court of Appeal arguing that there was circumstantial evidence of corruption in the performance of the underlying contracts and that the sums paid under the award might be used to finance bribery and thus, the *exequatur* of such award in France would be contrary to public policy.

Following such challenge, the Paris Court of Appeal, after rendering a first award ordering the production of documents⁵ and inviting the parties to file briefs regarding the allegations of corruption, rendered a subsequent decision, dated 28 May 2019, in which it overturned the order for *exequatur* and ruled that there was "serious, specific and consistent" evidence that the sums paid by Alstom to ABL financed and

1 See *Swiss Federal Court, Decision, 4A_136/2016, 3 Nov. 2016.*

2 See *Judgment of the High Court of Justice of England and Wales [2020] EWHC 1584, 18 June 2020.*

3 See *CA Paris, pôle 1, ch. 1, 28 mai 2019, n° 16/11182, Alstom Transport SA c/ Sté Alexander Brothers Ltd : JurisData n° 2019-025321.*

4 See *S. Bonifassi and E. Fedorova, Three takes on the same corruption allegations: Global Arbitration Review, 23 July 2020 ("The courts through which ABL v Alstom passed, in the UK, France and Switzerland, are all arbitration-friendly. However, the case's various incarnations show how difficult it is to realise the international consensus against corruption. When every jurisdiction has its own standards to prove illegality on a case-by-case basis, the result is less uniformity and predictability").*

5 See *CA Paris, 10 avr. 2018, n° 16/11182.*

remunerated activities of bribery of public officials and thus that “the recognition or *exequatur* of an award which orders [the company] to pay sums intended to finance or remunerate corrupt activities was contrary to international public policy”⁶.

This decision was consistent with its previous rulings⁷, as it establishes a list of red flags and confirms the shift by French national courts, from a “minimalist” approach when assessing an award’s conformity to a more “in-depth” review of it, where corruption allegation are made.

Consequently, according to the Paris Court of Appeal ruling, it is for the judge, seized with an action based on a request of *exequatur* of an award, to investigate, in law and in fact, all the elements that make it possible to rule on the alleged illegality and to assess whether the recognition or enforcement of the award “effectively and concretely” violates international public policy⁸.

2. The Overturning of the Alstom Decision of May 2019: a Possible Return to a Minimalist Control in Case of Corruption Allegations in Arbitration?

Following the decision of the Paris Court of Appeal to overturn the order for *exequatur*, ABL petitioned the French Supreme Court (hereinafter “*Cour de cassation*”). While ABL supported its appeal on three grounds of cassation, the Court only ruled on the second ground to quash and annul the decision rendered on 28 May 2019, as it considered that the evidence was distorted due to a misreading of the arbitral transcript⁹.

6 See CA Paris, pôle 1, ch. 1, 28 mai 2019, n° 16/11182, *Alstom Transport SA c/ Sté Alexander Brothers Ltd* : *JurisData* n° 2019-025321.

7 See CA Paris, pôle 1, ch. 1, 21 févr. 2017, n° 15/01650, *République du Kirghizistan c/ Valeriy Belokon* : *JurisData* n° 2017-029841. - CA Paris, pôle 1, ch. 1, 16 janv. 2018, n° 15/21703, *MK Group c/ SARL Onix* : *JurisData* n° 2018-002910.

8 See E. Loquin, *Le contrôle par le juge de l’annulation en fait et en droit du respect de l’ordre public par les sentences arbitrales* : *RTD com.* 2020, p. 283 (“The award is very instructive. On the one hand, the Court carries out an “extrinsic” which covers not only the grounds of the award, but also all of the documents in the file, in particular evidence subsequent to the award and not analyzed by the arbitral tribunal. On the other hand, the Court rules on facts and issues that were never raised or argued before the arbitral tribunal”).

9 See S. Perry, *French bribery ruling overturned in Alstom case: Global Investigation Review*, 14 Oct. 2021 (“On 29 September, the Court of Cassation overturned a 2019 ruling by the Paris Court of Appeal, saying it had distorted the evidence submitted to it by misreading the transcripts of the arbitration hearing”).

The Court of Appeal had allegedly found in the transcript of the arbitration hearing that ABL (in the person of its director) refused to provide answers to questions regarding the obtaining of confidential documents and information, as well as questions regarding how ABL won the various tenders.

Yet, according to the Cour de cassation, the arbitration transcript show that these questions were answered and that ABL only refused to answer questions from the British authorities once the arbitration proceeding had been initiated. It thus concluded that the Court of Appeal distorted the evidence submitted by misreading the arbitral transcripts¹⁰.

The case is consequently remanded to the Versailles Court of Appeal and this decision is already highly awaited by the arbitral community. Indeed, with the reading of the “attached grounds” (“*moyens annexés*”), ABL reproaches, among other things, that the Paris Court of Appeal carried out a new investigation on the merits of the case, whereas the judge should stay judge of the award and not of the case itself. It also implies that the Court failed to comply with the principle of non-revision of arbitral awards.

At a time when allegations of corruption in arbitration cases are becoming more and more frequent, the question of the nature of the control performed by the French judges before the *exequatur* of an award is therefore important since the effectiveness of such an award depends on it.

The decision of the Versailles Court of Appeal will not only clarify the French courts position respectively to the nature of the exercised control by judges when faced with cases involving allegations of fraud and corruption but also provide guidance to arbitrators as to the criteria to be met to ensure the effectiveness of their award.

10 See Cass. 1^{re} civ., 29 sept. 2021, n° 19-19.769 (“In so ruling, whereas the transcript of the arbitration hearing mentions, first, the answers given by Ms. [C] [R], during her interrogation by the arbitral tribunal, regarding the conditions for obtaining confidential documents from Chinese interlocutors identified by name, second, that she only refused to answer the requests of Alstom’s counsel before the British anti-corruption services due to the introduction of the request for arbitration, and, lastly (...) the Court of Appeal distorted the clear and precise terms of the said transcription (...)”).