



# Why arbitrators need to confront corruption allegations

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*Stéphane Bonifassi and Elena Fedorova of Bonifassi Avocats, a Paris boutique specialising in international litigation relating to complex financial crimes, welcome the French courts' increasing willingness to reopen arbitral tribunals' findings on corruption – and argue that arbitrators need to confront such allegations head on, even when parallel criminal proceedings are pending.*

France has a longstanding tradition of supporting arbitration and upholding arbitral awards. Consequently, the country's courts have taken a hands-off approach that empowers arbitrators in the international sphere.

This absence of scrutiny may prove detrimental to the developing jurisprudence of arbitration. Especially in cases brought against sovereign nations, the public's perception of closed-door proceedings has soured. Arbitration often is seen as a game played to benefit greedy Western interests, not those who must suffer the consequences – that is, the respondent state's citizens.

The public policy exception, which takes those citizens' interests into account, is one of five challenges available to parties resisting enforcement of non-ICSID awards before French courts. The widely used public policy defence is generally defined as referring to “matters which the laws of a state or state courts have determined to be of such fundamental importance that the contracting parties are not free to avoid or circumvent them.”

Thus, the public policy challenge allows parties to argue that an arbitral award should not be enforced in France for a broad range of reasons including allegations of corruption, money-laundering, violations of antitrust laws, etc.

Still, because France is an arbitration-friendly nation, courts that review international arbitral awards have narrowly interpreted the scope of public policy and they have rarely been set aside on this basis. Thus, between 2000 and 2012, French courts adopted restricted control over arbitral awards (see, for example, the *Thalès v Euromissile* case in 2004). On the other hand, French courts have increasingly felt the need to protect parties from violations of fundamental principles and rights.

For this reason, 2012 saw the beginning of a counter-trend, as French courts started to consider the need for greater control over arbitral awards. Annulment still requires a “flagrant, effective and concrete” violation of public policy (a formula that courts previously used to express the intensity of their control over arbitral awards), but French

courts have now found they are able to review all relevant legal and factual elements of the case instead of simply relying on the arbitral tribunal's findings, at least when such important issues as corruption are at stake. (See the decision rendered by the Paris Court of Appeal in the *Gulf Leaders* case in 2014: "When it is alleged that a contract was obtained through corruption, the annulment judge has to review in fact and in law all the elements to decide whether the arbitration clause is illicit and whether the recognition and enforcement of the award violate international public policy in a concrete and effective manner".) This rethinking has opened the door to greater control over arbitral awards when transnational public policy violations such as corruption and money-laundering are alleged.

### **The *Alstom* case**

In 2018, the Paris Court of Appeal's decision in *Alstom Transport v Alexander Brothers* confirmed the new trend of extensive control over arbitral awards in annulment proceedings when important public policy issues, such as corruption, are at stake. When first confronted with this case, the court did not render a decision on the merits, but ordered the parties to reopen discussions, stressing that the court would not be bound by the arbitral tribunal's limited findings.

The *Alstom* case was about the sale of railway equipment by France-based multinational Alstom Transport and its UK subsidiary to the Chinese government. Alstom contracted with a consulting company, Alexander Brothers, to prepare tenders for the deal. Given the sensitive nature of such contracts, they required Alexander Brothers to provide written evidence of its activities before payment.

As Alstom's tenders were accepted, the payment to Alexander Brothers came due in several installments, according to the consulting contracts. After paying some of the installments, Alstom refused to pay the total amount. Alstom argued that Alexander Brothers had failed to provide sufficient evidence of its activities, thereby exposing Alstom to penalties levied by several anti-corruption authorities if it made the remaining payments.

An ICC tribunal rejected Alstom's corruption allegations. Its 2016 arbitral award ordered Alstom to make the remaining payments because, the ICC tribunal reasoned, by making some of the contractual payments without demanding additional evidence, Alstom had tacitly consented to abandon the special evidentiary requirements.

Before the Paris Court of Appeal, Alstom argued that enforcing the arbitral award would violate international public policy because it would give legal force to corrupt practices. In essence, Alstom alleged that the very failure to enforce contractual provisions explicitly designed to prevent corruption itself constitutes a violation of international public policy.

Although the court did not rule on this point directly in 2018, it implicitly extended previous decisions to this situation by emphasising that it would not be bound by the arbitral tribunal's previous findings. Moreover, in its preliminary decision, the court drew up a non-exhaustive list of red flags that could convince it to consider proof of corruption. Based on new evidence brought by the parties, the court [set aside the arbitral award](#) in 2019.

In the *Alstom* case the court's remand to the ICC tribunal was perfectly in line with its prior decisions in [Kyrgyzstan v Belokon](#) and [MK Group v Onix](#), which had empowered courts to extend their control over arbitral awards, namely by accepting new evidence while important public policy questions are raised.

### **Should parallel criminal proceedings take precedence?**

The acceptable extent of arbitrators' autonomy underlies an ongoing debate over whether arbitrations should be stayed pending the completion of parallel criminal proceedings.

The short answer to that question should be no. That is the position traditionally adopted by French courts (see the Paris Court of Appeal's 2002 decision in the *Republic of Congo v Commisimpex* case). It is also the position that the International Law Association recommended in its 2009 report on *lis pendens* and arbitration.

Thus, French courts hold that the principle of civil courts being bound by findings established in criminal proceedings doesn't apply in international arbitration. Because arbitral tribunals are independent of any domestic law system and, therefore, the award is not binding on the criminal judge as far as the court's findings are concerned, there is no reason to oblige an arbitral tribunal to defer to the criminal judge by suspending the arbitration.

Otherwise, the role of arbitrators is to deal with a particular commercial transaction or investment and not to decide on a party's possible criminal conduct, which means that they only need to assess evidence of illegality for the purposes of arbitration, not for the purposes of conviction. They can accomplish that without waiting for a criminal court's decision. Suspension also opens the gate to all sorts of disfavoured, dilatory tactics. Indeed, in both investment and commercial arbitration it has become a widely used tactic to bring a criminal complaint against the party that brought a claim in arbitration in an attempt to obtain a suspension of arbitral proceedings, which are relatively quick, pending criminal proceedings that may last for years.

However, in 2019 the Spanish Supreme Court annulled an award on the public policy ground because an arbitrator failed to suspend proceedings pending a criminal investigation. The decision was "a huge step backwards," Alexis Mourre, president of the ICC International Court of Arbitration, said at a [workshop](#) on the legal consequences of corruption and money laundering in international arbitration in Basel, Switzerland, in January 2020.

Suspension should be a power of the arbitral tribunal, not an obligation, Mourre asserted. We agree, and extend the logic of the argument to say that if arbitrators are viewed as having the authority to decide if a proceeding should be suspended or continued, that authority must be exercised responsibly.

Autonomy in arbitration cannot be complete and unfettered. There cannot be *carte blanche* in cases of alleged corruption, money-laundering or other kinds of financial crimes. The arbitrator may simply be wrong or unaware of evidence that has yet to surface.

Far-reaching scrutiny is crucial where a core transnational public policy issue such as corruption is at stake, and national courts must have a say in the outcome where awards are tainted by allegations of financial improprieties. Therefore, arbitrators should not only tolerate judicial review, but welcome it.

Arbitrators should pay more attention to these issues, not turn a blind eye to them. Basic psychology tells us that they will be more likely to do so if they know a day of reckoning is coming. That is, they will be closely reviewed for not only superficial errors, but for failing to root out corruption while they had the opportunity.

We believe that expanding judicial review of arbitral awards, as is happening in France, does not violate claimants' rights and is, indeed, the right thing to do. If basic policy issues are not thoroughly examined, the public will view arbitration as a whole suspiciously, instead of embracing it as an efficient mechanism that should be preserved to render justice in the international arena.

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