

## Three takes on the same corruption allegations

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The ICC award was made against Alstom (Credit: Shutterstock.com/Carsten Reisinger)

**Stéphane Bonifassi and Elena Fedorova** of *Bonifassi Avocats* in Paris argue that the Swiss, French and UK courts' different treatment of an ICC award against Alstom highlights the need for more uniformity in the approach to corruption allegations in international arbitration.

When the Commercial Court in London rendered its decision on the *Alexander Brothers Limited (ABL) v Alstom* award on 18 June, it became the third state court to address the same cutting-edge arbitration issue by ruling on a single set of facts. Rarely does one case provide such a broad view of different jurisdictions. The issue is how courts should deal with allegations of corruption in international arbitration.

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.

Consider *ABL v Alstom*'s progress through the courts.

### **First round: arbitration**

The litigation, which started in 2013, was brought by ABL against Alstom, a French rail transport group, before a Geneva-seated ICC arbitral tribunal. It was chaired by **Christian Konrad**, with co-arbitrators **Willi Diestschi** and **Daniel Schimmel**. The arbitral award governed by Swiss law was rendered in 2016.

The award ordered Alstom to make payments under five consultancy agreements, by which ABL was to assist Alstom in obtaining government railway contracts in China. ABL is a family company run by a former employee of the Alstom group. Alstom had made full payment to ABL under two of the five agreements. However, only partial payment was made for the three remaining contracts (dated 2004 and 2009).

Before the arbitral tribunal and all the state courts that were involved, Alstom argued that the reason for its refusal to pay ABL's outstanding invoices of around €3 million was a criminal investigation in the United States and UK against the Alstom group, which began in 2009.

As a result of these investigations, in 2019, the English court ordered Alstom Network UK to pay £16.4 million in fines for a conspiracy to corrupt. In 2014, four entities of the Alstom group pleaded guilty to a corruption charge brought by the US Department of Justice and were ordered to pay a total fine of US\$772 million. Notably, the fines paid in both jurisdictions did not relate to Alstom activities in China.

Alstom claimed that these criminal investigations caused it to adopt a more rigorous approach to the application of its internal ethics and compliance policies and, as a result, Alstom suspended payments to ABL. In court, Alstom claimed that enforcement of the consultancy agreements would be contrary to public policy because they were tainted by illegality in ABL's performance.

### **Alstom's attempt to annul the award in Switzerland**

First, Alstom tried to annul the arbitral award on this ground in Switzerland, the seat of arbitration. In 2016, the Swiss Federal Supreme Court rejected Alstom's arguments. While the court allowed that corruption is indeed contrary to Swiss public policy, it limited itself to an analysis of the facts that the arbitral tribunal set out in the award.

The court stated that its role is neither to complete nor question the facts as presented by the arbitral tribunal. The court found that the facts of the case as established by

the arbitral tribunal were not questionable enough to be considered contrary to public policy as it is defined by the Swiss legal system, and thus to establish corruption.

### **Alstom challenges enforcement in France**

After ABL obtained an order for enforcement of the award in France, Alstom challenged that order before the Paris Court of Appeal. The court ruled in May 2019 that there were “serious, precise and consistent indicia” that payments made to ABL by Alstom had been used to bribe Chinese government officials. Refusing enforcement, the court said that the sums held to be due under the award were “intended to finance or remunerate acts of bribery”.

The Paris court had already issued an interim decision in 2018 requiring the parties to disclose documents and information about the performance of the consultancy agreements.

In an unusual and largely welcomed solution, the Paris court established a list of red flags, the presence of which in the parties’ submissions could mean that the agreements were indeed tainted by corruption. Thus, the Paris court adopted an approach that is not yet widely used in international arbitration, but is starting to gain more trust in international practice. The court implicitly admitted that the standard of proof accepted in cases where illegality is at stake consists of circumstantial evidence that establishes serious and consistent indices of illegal conduct.

The main departure from the Swiss court’s approach was the Paris court’s indication that, while French law forbids a review of the case on the merits, the court is not limited by factual presentations made to the arbitral tribunal. Therefore, it could accept any new evidence referring to allegations of corruption to decide the case, with no regard to whether or not it had been presented in the course of arbitral proceedings.

The Paris court explained that its jurisdiction reaches not the arbitral award itself, but the enforcement of this award in France. Since the enforcement of an award giving effect to acts of corruption is contrary to French public policy, the court is entitled to analyse all evidence to decide whether or not the enforcement can take place.

ABL’s appeal is pending before the Cour de cassation.

### **Alstom fails to prevent enforcement in the UK**

Finally, on 18 June 2020, the Commercial Court in London upheld enforcement of the arbitral award in the UK, despite Alstom’s same proffered allegations of corruption. Prior to the decision, in April, the English court granted Alstom permission to file expert evidence in support of its case that payment of the award would expose it to criminal liability in France.

Rejecting Alstom's arguments, the English court said that Alstom had not "run an overt and positive case of bribery" in the arbitration, but rather, had made a "tacit" case relying on alleged indicia of bribery to justify its non-payment.

Considering that the arbitral tribunal found "the seriousness of the accusation of corruption, moreover, requires specifically clear and convincing evidence" and referred to the "conclusive evidence" standard of proof, the London court said Alstom had not advanced the necessary case as a matter of law and could not approach the required standard of proof. As a result, the court considered it an abuse of process to now, at the enforcement stage, raise corruption allegations.

Finally, the English court said it is not bound by the French court's refusal to enforce because Alstom had not persuaded the English court that there was any mandatory rule of EU law or public policy to preclude enforcement. According to the English court, notwithstanding that the EU has "set its face against corruption", it has not instituted mandatory laws or rules (as it did concerning money laundering). Consequently, the individual member states are free to adopt those measures that seem appropriate to them.

### **A perplexing and disappointing decision**

This new decision in the *ABL v Alstom* case is perplexing. While it is clear to practitioners that direct evidence of corruption is quite impossible to get, the English court insisted on the necessity of clear and convincing evidence, saying this standard of proof is required by applicable law (Swiss, in this case).

It seems, however, that such issues as corruption should not be regarded just as a matter of the law applicable to the contract at stake, but rather as a matter of international public policy. By deciding to apply the standard of proof established by the applicable law, the London court seems to consider that "the public policy in favour of enforcement" is stronger than the public policy prohibiting corruption.

Furthermore, the interest of combating corruption on the international level should require state courts to take a closer look when suspicions of illegal conduct are raised before them, without caring if those allegations arise first at the enforcement stage. Compared to the Paris court's decision, the English one is disappointing from the anti-corruption standpoint.

In conclusion, the *ABL v Alstom* case clearly shows the need for the effort that is currently being made by different institutions, such as the Basel Institute on Governance, to bring together highly qualified specialists in arbitration and criminal law. By thinking through issues of corruption in international arbitration, they can develop a salutary, common approach to dealing with such allegations. Differences in case law concerning issues of illegality should not stymie joint efforts to combat corruption, money laundering and other illegal conduct.