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ARBITRATION, CORRUPTION AND POST-AWARD CONTROL IN FRENCH AND ENGLISH COURTS

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Abstract In September 2021, the French *Cour de Cassation* reversed the annulment that the Paris *Cour d'appel* earlier had granted in regard to an arbitral award in *Alexander Brothers v Alstom* on grounds of corruption. This brought French courts in line with their English counterparts, at least in that one case, the latter having accepted the *Alexander Brothers* award as enforceable. Noteworthy beyond the welcome consistency that the recent French judgment imparts in one case, that and other recent judgments cast light on several issues in international arbitration, including the arbitrability of allegations of fraud or corruption, the relevance of evidence of corruption 'downstream' from a contract, and the legal effects (if any) on third parties of internal compliance regimes that enterprises adopt in response to national regulatory and enforcement actions in respect of corruption.

Keywords: international arbitration, recognition and enforcement, corruption, fraud, corporate compliance, French courts, English courts.

I. INTRODUCTION

Divergences between French and English courts in recent post-award recognition and enforcement proceedings call attention to the difficulties that award creditors sometimes face after arbitration. A noteworthy example involved post-award challenges by Alstom, the French infrastructure company, against an award in favour of Alexander Brothers, a Chinese consulting firm.[1] The *Cour d'appel de Paris* annulled the arbitration award.[2]

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[1] For a summary at an earlier phase of the English proceedings, including by a junior who acted for Alexander Brothers, see S Tulip and C Jones, 'Enforcing Arbitral Awards—Limits to Public Policy Arguments Clarified' (*LexisNexis*, 25 June 2000) <https://www.lexisnexis.co.uk/legal/news/enforcing-arbitral-awards-limits-to-public-policy-arguments-clarified-alexander-brothers-v-alstom>. See also S Hawley, 'Practice Alert: Alstom's China Agent Wins Arbitration Award in UK Despite "Serious Indicia of Bribery"' (*The FCPA Blog*, 24 June 2020) <https://fcpablog.com/2020/06/24/practice-alert-alstoms-china-agent-wins-arbitration-award-in-uk-despite-serious-indicia-of-bribery/>.

[2] *Arrêt de la Cour d'appel de Paris, du 28 Mai 2019*, n° 16/11182 *(Alexander Brothers Ltd c Alstom Transport SA et Alstom Network UK Ltd)*.

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The High Court in London, by contrast, refused Alstom's request to set aside the award, leaving it undisturbed and enforceable in the United Kingdom.[3] Both courts heard allegations that the consulting firm had engaged in corrupt practices which, the award debtor argued, placed the award within the scope of the international public policy exception to recognition and enforcement.[4]

A judgment of the French *Cour de Cassation* of 29 September 2021[5] reversed the *Cour d'appel*'s annulment and so the award is now recognised and enforceable in both France and the UK, alleviating immediate concerns regarding conflicting approaches to post-award controls. However, it is too early to conclude that the *Alstom* proceedings auger new-found harmony among enforcement jurisdictions.[6] They join a series of recent cases concerning corruption and post-award control that merit reflection.

National authorities, in particular in the United States, are intensifying their focus on international corruption, and guidance on this matter in the arbitral setting is to be welcomed. Among the specific issues considered in the present article are the arbitrability of allegations of fraud or corruption, the relevance of evidence of corruption 'downstream' from a contract (as distinct from contracts procured by corruption or for corrupt purposes), and the legal effects (if any) on third parties of internal compliance regimes that enterprises adopt in response to national regulatory and enforcement actions in respect of

[3] *Alexander Brothers Ltd v Alstom Transport SA* [2020] EWHC 1584 (Comm), [2021] 1 Lloyd's Rep 179.

[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention) art V(2)(b):

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that … *(b)* The recognition or enforcement of the award would be contrary to the public policy of that country.

Art 1520(5) of the Code of Civil Procedure (France) provides that '[a]n award may … be set aside where: … (5) recognition or enforcement of the award is contrary to international public policy'. The provisions of the Code of Civil Procedure (as amended on 13 January 2011) relating to arbitration are available at <http://www.parisarbitration.com/wp-content/uploads/2014/02/French-Law-on-Arbitration.pdf>. Section 103(3) of the Arbitration Act 1996 (UK) provides that '[r]ecognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award'. Statutory text available at <https://www.legislation.gov.uk/ukpga/1996/23/section/103>. Further to the public policy exception under Section 103, see *Alexander Brothers Ltd v Alstom Transport SA* [2020] EWHC 1584 (Comm) paras 63–75.

[5] *Arrêt de la Cour de Cassation, Première Chambre Civile, du 29 Septembre 2021, sous le numero de pourvoi 19-19.769* (*Alexander Brothers Ltd c Alstom Transport SA et Alstom network UK Ltd*) FR:CCASS:2021:C100558.

[6] Proceedings between Kout Food Group and Kabab-Ji SAL provide a recent example of divergence between English and French courts on another issue—applicable law and the arbitration agreement—as to which see *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 and comment by L Kazimi, 'Can't Budge: The Curious Case of Kabab-Ji and the New York Convention' (*Kluwer Arbitration Blog*, 15 November 2021) <http://arbitrationblog.kluwerarbitration.com/2021/11/15/cant-budge-the-curious-case-of-kabab-ji-and-the-new-york-convention/> and <https://www.shearman.com/Perspectives/2021/11/Kabab-Ji-SAL-v-Kout-Food-Group--Latest-UK-Supreme-Court-Judgment?sc_lang=ja-JP>.

corruption. The English and French cases demonstrate a judicial approach towards corruption that, notwithstanding the different approaches courts in common law and civil law systems take to precedent, may have implications for parties and for arbitrators in future cases, as well as for counsel seeking to assure the resilience of a future arbitral award at the recognition and enforcement phase.

II. SCRUTINISING FOR CORRUPTION: RECENT FRENCH ANNULMENTS

A. Alexander Brothers v Alstom (Cour d'appel de Paris)

A question of possible corruption arose when Alstom refused to settle invoices from Alexander Brothers for services rendered under consulting contracts. Alstom argued that Alexander Brothers had engaged in corrupt practices when carrying out activities ostensibly in performance of the consulting contracts and that to settle outstanding sums owed to the consultants under those contracts would have been to further a corrupt purpose. Alstom's sensitivities to such concerns were likely heightened by the $772 million penalty it had recently paid in the United States for offences under the Foreign Corrupt Practices Act (FCPA) and its £16.4 million penalty in the UK following a conviction for bribery.[7] The unpaid invoices from Alexander Brothers were for €2,975,480.[8]

In December 2013, Alexander Brothers requested arbitration in respect of the unpaid invoices.[9] Arbitration proceeded in Geneva under International Chamber of Commerce (ICC) rules, and the tribunal awarded Alexander Brothers €1.55 million.[10] On 30 March 2016, Alexander Brothers obtained an exequatur from the *Tribunal de Grand Instance* (as it then was) in Paris; Alstom took the matter to the *Cour d'appel*.[11] At the *Cour d'appel*, Alstom alleged that the award creditor had engaged in corrupt acts when it pursued business on its behalf in China and that giving effect to the award would therefore violate international public policy, as understood in France.[12]

Alstom also argued that paying the consultants would place the company in renewed jeopardy with regulators and enforcement agencies. In support of this argument, Alstom argued that Alexander Brothers' conduct did not accord with Alstom's internal ethics and compliance program. According to Alstom, the consultants had failed to supply supporting documents called for under that program to demonstrate that their activities had been proper. Alstom said that the program existed to serve the public interest in preventing international

[7] Hawley (n 1). Referring to the US Department of Justice agreements with Alstom regarding corruption in Indonesia, Saudi Arabia, Egypt, and the Bahamas, see *Arrêt de la Cour d'appel de Paris, du 28 Mai 2019* (n 2) para 111.

[8] *Arrêt de la Cour d'appel de Paris, du 28 Mai 2019* (n 2) para 4.

[9] ibid.

[10] Award (29 January 2016) (Konrad, President; Dietschi and Schimmel, Co-Arbitrators) cited in *Arrêt de la Cour d'appel de Paris, du 28 Mai 2019* (n 2) para 5.

[11] *Arrêt de la Cour d'appel de Paris, du 28 Mai 2019* (n 2) para 7.

[12] ibid para 13.

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corruption, and so a failure to adhere to its procedures was not just an internal corporate matter, or a matter between the company and one of its vendors, but was also a matter of public concern: failing to adhere to the company's compliance program constituted, Alstom said, a distinct breach of international public policy.[13]

Alstom established to the satisfaction of the *Cour d'appel* that there were 'serious, precise, and consistent indicators' that sums which it had already paid to the consultants 'financed and remunerated corrupt activities of public officials'[14] and that it would therefore be inconsistent with international public policy to enforce the award which would result in Alstom paying further sums to the consultants. The *Cour d'appel* by a judgment of 28 May 2019 annulled the award and ordered Alexander Brothers to pay restitution to Alstom.[15] Importantly, when reaching its judgment, the *Cour d'appel* did not find that the contracts between Alstom and Alexander Brothers had been procured by fraud or corruption or that there was an intention that either party would engage in fraud or corruption, a point to which we will return.

In the two years following *Alexander Brothers v Alstom,* the *Cour d'appel* considered other high-profile annulment cases, including *Sorelec v Libya*[16] and *Webcor v Gabon*[17]which merit particular note.

B. Sorelec v Libya

Applying the 2004 France–Libya BIT, an ICC tribunal in *Sorelec v Libya* awarded the claimant $452 million in an interconnected Partial Award and Final Award.[18] Libya resisted enforcement, inter alia, on grounds that a contract between the State and the claimant (to build schools in Libya) was 'obtained by unlawful means which make its execution through the [arbitral award] contrary to international public order'.[19] The *Cour d'appel* in a judgment dated 17 November 2020 annulled the award.

In reaching its decision to annul, the *Cour d'appel* recalled the proper role of a court under French law in the post-award phase. According to the *Cour d'appel*,

> [w]here it is claimed that an award gives effect to an agreement of the parties tainted with corruption, it is up to the annulment judge, seized of an appeal based on Article 1520, 5^0 of the [French] Code of Civil Procedure, to seek in law and in fact all the elements making it possible to rule on the alleged illegality of this agreement and to assess if the recognition or enforcement of

[13] ibid para 12. [14] ibid para 109. [15] ibid para 112.

[16] *Arrêt de la Cour d'appel de Paris, du 17 Nov 2020*, n° 18/02568 *(Sorelec v Libya)*, annulling Partial Award of 20 December 2017 and Final Award of 10 April 2018 (Fortier, President; Hanotiau and Loquin, Arbitrators) (ICC Case No 19239/MCP/DDA).

[17] *Arrêt de la Cour d'appel de Paris, du 25 Mai 2021*, n° 18/18708 *(Webcor v Gabon)*, annulling Award of 21 June 2018 (Synvet, President; Jarrosson and Cohen, Arbitrators) (ICC Case No 21458/MCP/DDA).

[18] See *Arrêt de la Cour d'appel de Paris, du 17 Nov 2020* (n 16) para 8.

[19] ibid para 29. All translations from the French are the author's.

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> the award manifestly, effectively and concretely violates international public order.[20]

Libya claimed that the contract was tainted by corruption—ie that the 'illegality of th[e] agreement' deprived the arbitral proceedings of a legal basis. Libya's claim thus addressed the contract directly. This may be contrasted with Alstom's claim in the *Alexander Brothers* annulment proceedings where the award debtor argued that it was the conduct of the other contracting party that was corrupt. The claims in the two cases concerned different stages in the parties' relationship: Libya's claim concerned conduct in the course of the process leading to a contract; Alstom's claim concerned subsequent conduct. Moreover, Libya's claim concerned a corrupt transaction between the parties (or between the investor and particular agents or organs of the State) whereas Alstom's claim was that the other party, Alexander Brothers, had been, in effect, on a corrupt frolic of its own.

It was not until the French court proceedings that Libya first raised the matter of international public policy. This did not dissuade the *Cour d'appel* from considering the plea or from annulling the award.[21] The Court considered the facts in detail.[22] Then, speaking as it did in *Alstom* of 'serious, precise and consistent indicators', the Court concluded that Sorelec had obtained the contract from Libya by illicit means and annulled the award on this basis.[23]

C. *Webcor v Gabon*

The *Cour d'appel*, on 25 May 2021, in *Webcor v Gabon* again annulled an award in which the parties' underlying transaction was tainted by corruption. In reaching the decision to annul, the Court, as would be expected, was mindful of the limits of its role. The Court recalled that

> it does not fall within [its] mission … to ascertain whether the facts of corruption are established and/or to find that a given person be guilty of a criminal offence under a national legal system, but only to ascertain whether the recognition or enforcement of the award would violate the objective of combatting corruption in that the [monies to be paid under] the award … would have the effect of financing or remunerating a corrupt activity.[24]

This limitation did not prevent the Court from considering factual elements 'which the arbitral tribunal was not aware of at the time of the award'.[25] It emerged that the mayor of Libreville, Gabon had gone on a honeymoon paid for by Webcor at a point in time when the mayor was still deciding whether to award Webcor the contract to build facilities for a new market in the

[20] ibid para 36. For text of Article 1520(5) of the Code of Civil Procedure, see (n 4).
[21] *Arrêt de la Cour d'appel de Paris, du 17 Nov 2020* (n 16) para 37.
[22] ibid paras 40–84.
[23] ibid paras 85, 86.
[24] *Arrêt de la Cour d'appel de Paris, du 25 Mai 2021* (n 17) para 63.
[25] ibid para 67.

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city.[26] The fact that Webcor had paid for the mayor's honeymoon had been concealed.[27] The *Cour d'appel* annulled the award in light of this new information.

The corruption that came to light in *Webcor v Gabon,* as in *Sorelec v Libya,* directly affected the process by which the parties had concluded the contract. However, in its reasoning, quoted above, the *Cour d'appel* in *Webcor* suggested that the term 'corruption' also embraces the situation in which a payment agreed under a contract 'would have the effect of financing or remunerating a corrupt activity'. In saying this, the Court went further than it needed to. The phrase 'hav[ing] the effect' in this setting potentially includes activities of one of the contracting parties, carried out independently of the other party after the conclusion of the contract and not envisaged by the contract. The phrase 'hav[ing] the effect' captures downstream, unilateral conduct, and introduces a degree of uncertainty into the parties' relations. It enlarges the definition of 'corruption' for the purposes of the public policy exception to recognition and enforcement, and it adds uncertainty to its scope, in much the same way as the *Cour d'appel* in *Alstom* had already done.

In each of these judgments, the French courts referred to an 'international consensus' definition of 'corruption' that they said is reflected in the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[28] and the 2003 UN Convention against Corruption.[29] They said as follows:

> According to the international consensus expressed by these texts, corruption of a public official, whether national or foreign, consists in offering the official, directly or indirectly, an undue advantage, for himself or for another person or entity, for the purpose [of getting him to] perform or refrain from performing an act in the exercise of his official functions, with a view to obtaining or maintaining a contract or other undue advantage, in connection with international commercial activities.[30]

Corruption comprising a conferral of *direct* advantage on the public official is a relatively straightforward example. Where the alleged advantage is conferred *indirectly*, a question of scope arises. The *Cour d'appel* in *Webcor v Gabon* suggested a capacious understanding of 'indirect advantage', the Court having indicated that the definition of corruption includes acts (or omissions) that 'would *have the effect of* financing or remunerating a corrupt activity'. In

[26] ibid para 62. [27] ibid.

[28] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 17 December 1997, entered into force 15 February 1999) 2802 UNTS 225.

[29] United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41.

[30] *Arrêt de la Cour d'appel de Paris, du 28 Mai 2019* (n 2) para 19; *Arrêt de la Cour d'appel de Paris, du 17 Nov 2020* (n 16) para 34; *Arrêt de la Cour d'appel de Paris, du 25 Mai 2021* (n 17) para 49. The *Cour d'appel* used the same definition in *GVC v Guinea and ARPT,* para 71, as to which see further below.

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the 'international consensus' definition, 'indirectly' must be subject to some limits, but the *Cour d'appel* did not appear to adopt very narrow limits. Scrutinising a transaction for indicia of corruption under the Court's formulation would be a potentially far-reaching task.

III. A COURSE ADJUSTMENT ON CORRUPTION CLAIMS? OR A JUDICIAL SIGNAL TO ARBITRATORS?

On 7 September 2021, in *GVC v Guinea and ARPT* the *Cour d'appel* rejected a request for annulment, suggesting that the line of corruption-related annulment decisions might now be tapering off.[31]

An ICC arbitral tribunal had awarded GVC, a Seychelles telecommunications company, $21 million for failure by Guinea's telecommunications regulator to pay invoices for overseas telephone services.[32] Guinea and the regulator, ARPT, sought to annul the award. Invoking the French standard of 'serious, precise and consistent indicators of corruption', the award debtors claimed that a variety of corrupt acts impugned the business relationship between ARPT and GVC.[33] Before the *Cour d'appel*, Guinea and ARPT alleged for the first time that one of GVC's principals had orchestrated fraudulent and concealed transactions with another company in order to siphon off earnings.[34]

The *Cour d'appel* found none of Guinea and ARPT's allegations convincing. The Court recalled that the French conception of international public policy forbids bribery of a foreign public official[35] but emphasised the limited function of the Court in the post-award phase:

> The judge of annulment is not … the judge of the contract … [The] control [function] aims only to ensure that the recognition or enforcement of the award does not result in a manifest, effective and concrete violation of international public order.[36]

The Court observed that there is no presumption that an 'unbalanced' contract (ie a contract that arguably favours one party over the other) is the result of corruption.[37] The existence of a 'general climate of corruption' in a country does not prove that a particular transaction was corrupt.[38] Newspaper reports that the claimant engaged in corrupt activities in other countries were not relevant to the case.[39] The *Cour d'appel* noted that Guinea and ARPT had not contested the legality of the contract with GVC during the arbitral proceedings.[40]

It was of central importance to the reasoning of the *Cour d'appel* that the arbitrators had not ignored evidence of corruption that Guinea and ARPT had

[31] *Arret de la Cour d'appel de Paris, du 7 Sept 2021*, n° 19/17531 (*GVC v Guinea and ARPT*).
[32] *GVC v Guinea and ARPT*, ICC Case No 22467/DDA, Award (18 July 2019) (Nappert, President; Jarrosson and Núñez-Lagos, Arbitrators).
[33] *Arrêt de la Cour d'appel de Paris, du 7 Sept 2021* (n 31) para 65.
[34] ibid para 66.
[35] ibid para 72.
[36] ibid paras 73–74.
[37] ibid para 89.
[38] ibid paras 98–99.
[39] ibid para 102.
[40] ibid para 100.

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presented in the arbitral proceedings. To the contrary, the arbitrators had carefully considered evidence concerning the corruption 'indicators' relevant to international public policy (as understood in French law) but found the respondents' evidence on each lacking.[41] The *Cour d'appel* drew specific attention to sections of the award in which the tribunal had considered particular claims of corruption,[42] observing that it was 'rightly incumbent' on the arbitral tribunal to perform this analysis.[43] In short, making new factual allegations to try to resuscitate a corruption plea that had failed in arbitration is unlikely to prevail in court without some serious indication as to why those allegations had not been made in front of the arbitrators.

Where an arbitral tribunal fails to give appropriate care and attention to serious evidence of corruption, the tribunal leaves a control instance, such as the *Cour d'appel*, no adequate record on which to recognise and enforce. A tribunal taking a cavalier approach to corruption, indeed, might open its award to challenge. In this respect, *GVC v Guinea and ARPT* sends a judicial signal[44] to arbitrators: if a party pleads corruption seriously, then arbitrators should take that pleading seriously. It is also a signal to parties: if a party has credible evidence of corruption or fraud, then the party should bring the evidence forward during the arbitration.

It is true that arbitrators and parties alike would err if they were to consider these French judgments as binding precedent. As judgments of a civil law court not operating under the principle of *stare decisis*, they are not binding in future cases as judgments of a common law court would be. Nevertheless, civil law courts operate under the doctrine of *jurisprudence constante* and treat a consistent line of decisions as persuasive,[45] and civil law judges are well-aware of the signalling potential of their judgments.[46] Moreover, the Paris *Cour d'appel* occupies an important place in the constellation of national jurisdictions in which award creditors seek recognition and enforcement, not least because of the many arbitrations conducted under the rules of the Paris-based ICC.

English courts are sending similar signals to those discernible in the French judgments. First, in *Alexander Brothers*, the High Court, in rejecting Alstom's request to refuse enforcement, noted that Alstom had had the chance to argue before the arbitrators that bribery impugned the contract, but it had not done so:

[41] See ibid paras 70–104. [42] eg ibid paras 87, 111, 126, 128, 129. [43] ibid para 104.

[44] Settings in which writers use the expression 'judicial signal' (which is used more in the United States than other countries) have included administrative agencies adapting to judicial decisions: KA Bamberger, 'Normative Canons in the Review of Administrative Policymaking' (2008) 119 YaleLJ 64, 101–2; private enterprises adapting to judgments or arbitral awards: S Baker and A Choi, 'Contract's Role in Relational Contract' (2015) 101 VaLRev 559, 575; the practising bar and clients responding to judges: RG Bone, 'Modeling Frivolous Suits' (1997) 145 UPaLRev 519, 591; and judges responding to other judges, whether on the same court or other courts: KE Whittington, 'Taking What They Give Us: Explaining the Court's Federalism Offensive' (2001) 51 DukeLJ 477, 480 fn 10, 482 fn 22.

[45] See V Fon and F Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26 IntlRevL&Econ 519, 520 fn 2, 524. [46] ibid 525.

> Alstom had in its mind, and had the materials for, a bribery case which therefore *prima facie* could and should have been brought before [the ICC] Tribunal. There is no explanation for why this was not done. The allegation which is sought to be made is a serious one which engages concerns about corruption, and perhaps more so now than would have been the case in the early years of this century; but it is still not an allegation of the most serious type within that umbrella or one where one can point to a consensus that such contracts should fail. Nor is it a case where the evidence now relied on is particularly strong; indeed the case advanced remains entirely unspecific and based on suspicions and inferences.[47]

It was important here that there was 'no explanation for why' the party alleging before the Court that corruption had vitiated the contract had not made this allegation before the arbitrators. As the High Court saw it, this case was not one in which the evidence of corruption had been withheld or concealed from the arbitrators for reasons beyond the party's control; Alstom simply had failed to introduce that evidence in the arbitral proceedings.

Indeed, the Court of Appeal in *Republic of Mozambique v Privinvest*, another case involving allegations of corruption, reminded litigants that such allegations are not beyond the ken of arbitrators.[48] In that case, Mozambique had established a series of special purpose vehicles (SPVs) which entered into supply contracts with Privinvest and other companies (the 'Privinvest companies') for the construction of ships and related infrastructure in support of policing and development of fisheries in Mozambique's Exclusive Economic Zone (EEZ). The supply contracts contained ICC and SCAI[49] arbitration clauses. The SPVs borrowed large sums from Credit Suisse and other financial institutions in connection with the fisheries project which were guaranteed by Mozambique.[50] The guarantees contained an exclusive jurisdiction clause in favour of the English courts.[51]

Mozambique brought proceedings in the English courts against, inter alia, the Privinvest companies, alleging that the guarantees were the fruit of bribery. The Privinvest companies, invoking Section 9 of the Arbitration Act 1996 (UK), sought to stay court proceedings in favour of arbitration.[52] Mr Justice

[47] *Alexander Brothers Ltd v Alstom Transport SA* [2020] EWHC 1584 (Comm) (Mrs Justice Cockerill) para 174.

[48] *Republic of Mozambique v Privinvest et al* [2021] EWCA Civ 329 (Carr LJ) (11 March 2021).

[49] Swiss Chambers' Arbitration Institution, as it then was. The SCAI on 1 June 2021 was refashioned the Swiss Arbitration Centre. See S Nessi, 'A Swiss "(R)Evolution": SCAI Becomes the Swiss Arbitration Centre and Enacts New Arbitration Rules' (*Kluwer Arbitration Blog*, 15 June 2021) <http://arbitrationblog.kluwerarbitration.com/2021/06/15/a-swiss-revolution-scai-becomes-the-swiss-arbitration-centre-and-enacts-new-arbitration-rules/>.

[50] *Republic of Mozambique v Privinvest et al* [2021] EWCA Civ 329, para 17.

[51] ibid para 18.

[52] Section 9 of the Arbitration Act 1996 reads, inter alia, as follows:

> Stay of legal proceedings.
>
> 1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be

Waksman, for the Commercial Court, declined to stay.[53] The judge reasoned that the allegations of bribery and other corrupt acts concerned the guarantees and not the supply contracts, and since it was only the latter that contained arbitration clauses, Mozambique's claims could be heard by the English courts, where Mozambique indeed had brought them.[54]

The Privinvest companies appealed, and, on appeal, it was determined that Mozambique's claims fell within the scope of the arbitration clauses.[55] Lady Justice Carr DBE, for the Court of Appeal, reasoned as follows:

> [I]t is to take too artificial an approach to isolate the Guarantees from the Supply Contracts which they supported. The substance of the dispute relates to a single fraudulent scheme involving all three transactions, namely the Supply Contracts, the Facility Agreements [ie the loan arrangements] and the Guarantees. The conspiracy claim is a matter sufficiently connected to the Arbitration Agreements to fall within [their] scope.[56]

Nobody in the proceedings seems to have suggested that any general consideration of public policy might prevent arbitrators from addressing allegations of fraud or corruption.[57] This comes as no surprise, for the High Court some years before had held that such allegations are, in principle, arbitrable.[58]

The Court of Appeal in applying Section 9 of the Arbitration Act 1996 in *Mozambique v Privinvest* suggests, even if *soto voce*, that arbitrators are not to ignore plausible allegations of fraud and corruption, including where such allegations affect closely-related transactions between the parties comprising a single matter: formal separation between an arbitral clause and the alleged fraud or corruption does not necessarily remove the matter from the scope of arbitral jurisdiction.

> referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> 4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

Statutory text available at <https://www.legislation.govuk/ukpga/1996/23/section/9>.

[53] *Republic of Mozambique v Privinvest et al* [2020] EWHC 2012 (Comm) (Waksman J).

[54] ibid paras 47, 93–118.

[55] *Republic of Mozambique v Privinvest et al* [2021] EWCA Civ 329 (Carr LJ) para 124. The question whether Mozambique was a party to the Arbitration Agreements, however, was expressly left open (para 121).

[56] *Republic of Mozambique v Privinvest et al* [2021] EWCA Civ 329, para 121.

[57] For reporting on the Mozambique ships case, see S Perry, 'Shipbuilder Wins Stay of Mozambique Bribery Suit' (*Global Arbitration Review*, 11 March 2021) <https://globalarbitrationreview.com/shipbuilder-wins-stay-of-mozambique-bribery-suit?utm_source=Congo%2Bthreatened%2Bwith%2BUS%252427%2Bbillion%2Bclaim%2Bover%2Brevoked%2Bmining%2Blicence&utm_medium=email&utm_campaign=GAR%2BAlerts>.

[58] *Interprods Ltd v De La Rue Int'l Ltd* [2014] EWHC 68 (Comm) (Teare J) paras 12–15.

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As in the *Alstom* case, the proceedings in *Mozambique v Privinvest* took place against the backdrop of US enforcement proceedings.[59] Unlike in *Alstom*, the allegations of fraud and corruption in *Mozambique v Privinvest* concerned the conclusion of particular instruments between the parties, not the conduct of one party downstream.

Taken together with the recent French cases, a message emerges: parties with credible evidence that corruption has tainted a commercial relationship should present the evidence to the arbitrators; and the arbitrators should consider the evidence with due care. The Paris *Cour d'appel* in *GVC v Guinea and ARPT* suggests that arbitrators who produce a reliable, nuanced, and appropriately detailed record concerning serious allegations of corruption serve both the parties to the dispute and public policy at large. *Mozambique v Privinvest* recalls that there are no considerations of principle that prevent arbitrators from addressing credible allegations of corruption or fraud and suggests that English courts will be open to holistic interpretations of closely-connected legal instruments.

IV. AMPLIFYING THE SIGNAL TO ARBITRATORS

A few weeks after the *Cour d'appel* gave its judgment refusing annulment in *GVC v Guinea and ARPT*, the *Cour de Cassation* reversed the annulment that the *Cour d'appel* had granted in *Alexander Brothers v Alstom*.[60] An important element in the reasoning of the *Cour de Cassation* was that Alstom had not alleged that the consulting contracts with Alexander Brothers were obtained by corrupt means or that the contracts had an illicit purpose. On the evidence, the parties had not intended that the consultants commit acts of corruption or 'exercise some other form of undue influence on potential clients to obtain the contracts'.[61]

As had the *Cour d'appel* in *GVC v Guinea and ARPT*, the *Cour de Cassation* in *Alexander Brothers v Alstom* thought it of central importance that the arbitrators had given due care and attention to the allegations of corruption raised in the arbitral proceedings. The *Cour de Cassation* noted that Alstom had expressed its concern to the arbitrators that 'the Plaintiffs may have resorted to corrupt practices in the framework of the execution of the consultant contracts and that they may therefore be exposed to criminal proceedings' if they paid the consultants. The Court further noted that the arbitrators had addressed Alstom's argument that Chinese public officers would have interpreted Alstom's payment of the consulting fees as corrupt remuneration. The Court drew specific attention to the paragraphs of the arbitral award in which the arbitrators had addressed these matters (paras

[59] *Republic of Mozambique v Privinvest et al* [2021] EWCA Civ 329, para 20; *Alexander Brothers Ltd v Alstom Transport SA* [2020] EWHC 1584 (Comm) (Mrs Justice Cockerill) paras 12–14. [60] *Arrêt de la Cour de Cassation, du 29 Septembre 2021* (n 5). [61] ibid.

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261–263 of the award), and set out further passages of the award *in extenso* in which the tribunal had considered the evidence that Alstom had adduced. Notably, Alstom had *not* 'argued during [the] arbitration that the three consultant contracts had been obtained through corruption'.[62] The *Cour de Cassation* concluded that the *Cour d'appel* had erred by having conducted a new inquiry into the merits of a matter that the arbitrators already had properly addressed and, in doing so, had effectively revised the award, an operation that the courts are not empowered to perform.

The judgment of the *Cour de Cassation* would appear to clarify, to a degree, the scope of the definition of 'corruption' for purposes of international public policy in post-award proceedings in France. As noted above, in *Webcor v Gabon* the *Cour d'appel* might seem to have suggested that activities downstream from a contract, done by one party alone and without the other's direct involvement, might constitute fraud or corruption capable of leading to the voiding of an arbitral award.[63] The *Cour de Cassation* in *Alexander Brothers* did not go that far. Allegations that a party has been engaged in fraud or corruption did not vitiate the arbitral agreement or resultant award, where the alleged misconduct did not influence the formation of the contract and no fraud or corruption was envisaged under the terms of the contract.[64]

Two situations remain in which corruption *could* undermine an award: *(i)* corruption integral to obtaining the contract (eg if an official had been bribed to obtain the official's assent to terms); and/or *(ii)* the contract engaged a party to carry out corrupt acts (eg if a company seeking government contracts paid a consultant to bribe an official). The parenthetical examples are not the only ones that might constitute corruption vitiating an award. Nor do the two general categories necessarily encompass all circumstances in which corruption might have such effect. These categories do, however, reflect the majority of circumstances which arbitrators might be called on to consider. Notwithstanding high profile differences in post-award judgments in recent years, a degree of convergence is visible here between French and English courts. Both judicial systems recognise that arbitrators are well-equipped to consider and decide allegations of fraud and corruption, and both seem now to signal that arbitrators, subject of course to the proper limits of their jurisdiction, should not hesitate to do so when a party brings forward credible evidence that such misconduct might have undermined a transaction.

[62] ibid, quoting arbitral award of 29 January 2016.

[63] The excursus on downstream activities in *Webcor*, if it had been in a judgment of a common law court, would have been *obiter dictum*: the point was unnecessary to the Court's reasoning.

[64] The *Cour d'appel* has since had occasion to consider other kinds of ancillary activities, where no allegation is made that the contract itself was impugned, including activities in breach of international human rights and humanitarian law. See *Arrêt de la Cour d'appel de Paris, du 5 Oct 2021*, n° 19/16601 (*DNO Yemen AS et al v Ministry of Oil and Minerals of the Republic of Yemen et al*) and especially para 41 where the Court declined a request to annul an ICC award.

V. OPEN QUESTIONS AND LESSONS LEARNED

The *Cour de Cassation* in *Alexander Brothers v Alstom* may be seen as having narrowed the range of situations in which an award debtor might credibly challenge an award on grounds of corruption: merely 'resort[ing] to corrupt practices in the framework of the execution' of a contract will not necessarily impugn the contract or an arbitral award. However, such downstream or ancillary activities by one contracting party might yet be relevant. For example, a court might consider such activities if they provide evidence of fraud or corruption which undermines the contract itself. Whilst illicit conduct at some remove from the contractual terms would not on its own vitiate the contract, it might provide evidence of other defects that do.

As the *Cour de Cassation* suggested in *Alexander Brothers*, evidence of corruption seldom consists of a proverbial smoking gun ('*caractère occulte des faits de corruption*'). When corruption does come to light, this more often is through indirect signs from which the decision-maker infers misconduct. Exorbitant consulting fees, for example, raised the arbitrators' suspicion in an ICSID claim against Uzbekistan under the Israel–Uzbekistan BIT; the tribunal held that the claimant's putative investment failed to meet the legality requirement under the BIT and, thus, the tribunal had no jurisdiction to consider the merits of the claim.[65]

A cautionary word, however, is in order. 'Whilst it can be relatively easy to allege corruption, it is less easy to prove it … Suspicion is not equivalent to proof.'[66] The process of inference must remain tethered to the facts. To arrive at a reliable finding of fact, arbitrators will consider the specific evidence placed before them in the setting from which the parties have gathered it.[67] Evidence concerning downstream conduct such as that in *Alexander Brothers*, which is even less direct than unexplained consulting fees, might be probative, but the fact-finder would need to exercise all due care before declaring a transaction invalid on the basis of such evidence.

[65] *Metal-Tech Ltd v Republic of Uzbekistan,* ICSID Case No ARB/10/3, Award (4 October 2013) (Kaufmann-Kohler, President; Townsend and von Wobeser, Arbitrators) paras 337–352. Compare other consulting fees at para 359 which the tribunal held were *not* indicative of corruption. Exorbitant consulting fees also seem to have served as evidence of corruption in *Spentex Netherlands, BV v Republic of Uzbekistan*, ICSID Case No ARB/13/26 (Reinisch, President; Stern and Alexandrov, Arbitrators) (unreported award dated 27 December 2016).

[66] *Unión Fenosa Gas, SA v Arab Republic of Egypt,* ICSID Case No ARB/14/4, Award (31 August 2018) (Veeder, President; Rowley and Clodfelter, Arbitrators) para 7.113, citing *Metal-Tech* op cit. For an example of a national court making much the same point, see *Hydro Fuels Inc v Wilder* [1990] BCWLD 702 (British Columbia SCt, Leggatt J) para 18. Suggesting the forensic challenge, in *Unión Fenosa*, Arbitrator Clodfelter dissented principally 'concern[ing] the overriding issue of whether the [relevant contract] was procured through corrupt means'. (Dissenting Opinion Clodfelter at para 2).

[67] As to burden of proof in respect of allegations of fraud or corruption, see the interesting colloquy between the parties in *Metal-Tech*, summarised in the ICSID Award at paras 229–235, but which the tribunal concluded was unnecessary in the circumstances (para 239).

Another open question is the degree to which, if at all, arbitrators should consider the observance (or non-observance) of internal compliance operations as evidence of the validity (or invalidity) of a contract. As noted above, Alstom pleaded that Alexander Brothers had not observed Alstom's compliance rules and asked that this be taken as evidence of a corrupt purpose vitiating the consulting contracts. In other cases, too, including *Mozambique v Privinvest*, allegations of fraud arise against the backdrop of national enforcement actions which have led companies to create elaborate compliance machinery. FCPA actions in the United States, in particular, have resulted in very large financial penalties for companies,[68] and those companies, in turn, have expended considerable sums on internal compliance.[69] Yet it might be asked on what parties, and in what circumstances, are internal compliance procedures to have legal effects.[70]

Policymakers who have promoted international rules against corruption, such as those found in the OECD and UN Conventions, wish private businesses to institute internal compliance mechanisms in order to ensure both that their employees refrain from bribery and other corrupt acts and that those with whom they transact refrain from such acts as well. However, commercial actors are neither legally empowered nor functionally equipped to police a partner, co-venturer, or consultant in its downstream activities, at least past a point. Future cases might well test how far, precisely, the legal duties of the commercial actor extend in this regard and to what extent the observance of a company's internal compliance procedures by another party may serve as evidence if that party is called to answer an allegation of corruption. The English High Court in *Alexander Brothers*, for one, was not convinced that 'mere non-compliance with contractual rules aimed at preventing corruption would by itself give rise to a public policy ground to refuse enforcement'.[71] Perhaps this, too, is a signal (though if it be one, only rather muted) that courts will not necessarily treat compliance regimes created by particular

[68] Financial penalties under the FCPA have drawn remark for some time. See eg the notes in the January 2013 and July 2011 US Contemporary Practice section of AJIL: (2013) 107 AJIL 227; (2011) 105 AJIL 582 (JR Crook, ed).

[69] See RH Folsom, 'A Commentary on the Globalization of Foreign Corrupt Practices Law' in *International Business Transactions* (2021–22 edn, Thomson West 2021) vol 1, section 17:59.

[70] In the very different setting of the media industry, it has been suggested that *sociological* or *political* effects sometimes arise from non-compliance with 'institutional structures'—and that non-compliance might lead to curtailment of legal rights as well: see G Greenwald, 'Kyle Rittenhouse, Project Veritas, and the Inability to Think in Terms of Principles' (*Glenn Greenwald*, 16 November 2021) <https://greenwald.substack.com/p/kyle-rittenhouse-project-veritas>. Across a range of industries, private organisations have set up internal compliance machinery in recent years in response to regulatory risk, market risk, or combinations of different kinds of risk. The second-order effects of the phenomenon—eg on other organisations and on individuals—are a matter of increasing interest and concern.

[71] *Alexander Brothers Ltd v Alstom Transport SA* [2020] EWHC 1584 (Comm) (Mrs Justice Cockerill) para 54.

enterprises to address their particular regulatory risks as having legal effects more generally, ie on other parties and in other processes.

Another question still to be answered is how to tell the difference between situations in which a party could have brought forward evidence of corruption but failed to do so, and situations in which such evidence was concealed. An important consideration in *Alexander Brothers* was that the arbitrators had heard and considered the evidence of corruption and, in *Webcor v Gabon*, it was equally important that evidence of corruption 'which the arbitral tribunal [had not been] aware of at the time of the award' only later came to light.[72] Situations where it is shown that a party concealed evidence arguably involve a fraud against the arbitral process. This means that a party challenging an award in such situations might consider running an international public policy argument with reference to that defect, distinct from any argument that corruption vitiated a contract directly.[73] Courts, including those of England and Wales, have interpreted national arbitration statutes to include perjury or fraud in the arbitral proceedings as a possible grounds for invoking the public policy exception.[74] The former situation—ie where the party *could* have brought the evidence forward but failed to do so—is less promising for the party challenging an award, given the expectation that arbitral proceedings are final.

A lesson from *Alexander Brothers* and the other recent cases considered in this article is that a strategy that aims during arbitration to prevent an adversary from airing plausible claims about corruption might backfire. Both the *Cour de Cassation* and the *Cour d'appel* in cases in which a party has pleaded that corruption has vitiated an award have placed considerable weight on the care and attention that the arbitrators gave to the corruption claims. Where awards were annulled, relevant evidence of corruption had not been properly ventilated during the course of the arbitration. This is not necessarily to suggest that the arbitrators were at fault: the national courts continue to have a backstop function concerning serious violations of international public

[72] *Arrêt de la Cour d'appel de Paris, du 25 Mai 2021* (n 17) para 67.

[73] Through a long course of litigation in numerous jurisdictions, Kazakhstan near the end of 2021 appears to have succeeded in challenging an award by having done just that—producing evidence that came to light only after the award and arguing that the claimants, having fabricated or concealed evidence, had engaged in a fraud on the arbitral process. See *Republique du Kazakhstan c Stati et al, Cour d'appel de Bruxelles,* 2020/AR/252 (16 November 2021) especially at 22 concluding that the false evidence affected both the arbitrators' determination of State responsibility and their assessment of quantum; and *Republique X v la société de droit moldave A) Group, et al*, *Cour de Cassation* (Luxembourg), No CAS-2020-00040 (11 February 2021). For an overview of the matter, see L Auge, 'An Unprecedented Turn of events: Kazakhstan Welcomes New Arbitration Claim' (*eureporter*, 1 September 2021) <https://www.eureporter.co/kazakhstan-2/2021/09/01/an-unprecedented-turn-of-events-kazakhstan-welcomes-new-arbitration-claim/>. *Note*: the present author served as legal expert for Kazakhstan in an earlier phase of the post-award proceedings in the Svea Court of Appeal (Sweden).

[74] See the *dictum* at *Alexander Brothers Ltd v Alstom Transport SA* [2020] EWHC 1584 (Comm) para 74.

policy and that function may include the review of evidence that did not come to light during the arbitral proceedings. English judges, at least as a matter of principle, are much in accord with their French counterparts in this regard:

> Perhaps the majority of cases brought under … section [103 of the Arbitration Act 1996(UK)] concern allegations that the award has been obtained by fraud, or perjury. In such cases it is well established that the Court will not refuse enforcement unless … [t]he evidence was not available or reasonably obtainable, either: (i) at the time of the hearing of the arbitration; or (ii) at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the tribunal's award if such procedure were available.[75]

The presumption remains, however, that awards are to be enforced.[76] These cases offer further guidance to parties in post-award proceedings: if they are to challenge an award in court successfully, not only do they need to show that they did not have the chance to raise pleas of fraud or corruption during the arbitral process; they also need to show that 'the award has been obtained' on the basis of the alleged misconduct.

Finally, these cases suggest that, where there are plausible claims that corruption or fraud has invalidated a transaction, parties should take care to choose arbitrators who will take their fact-finding function in relation to those claims seriously. The recent French decisions might suggest that the national courts are backing away from considering claims of corruption by parties attempting to prevent recognition and enforcement of awards. The better view, however, is that the French courts are not resiling, but are, instead, taking a close look at how arbitrators handle such claims. Where arbitrators have produced a careful, well-reasoned, and thorough record, properly mindful of the indicators of corruption, the courts have found no basis to annul the award.

[75] ibid. For the text of Section 103, see (n 4).

[76] ibid para 68.

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