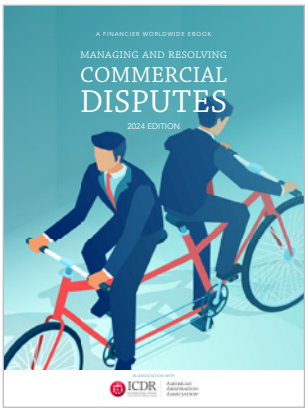

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Corruption as a basis to annul or refuse enforcement of international arbitral awards: a Franco-English comparison

BY SAADIA BHATTY AND JACK BOWNES

CORRUPTION AS A BASIS TO ANNUL OR REFUSE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS: A FRANCO-ENGLISH COMPARISON

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THE FIGHT AGAINST CORRUPTION REMAINS A key global concern. Since corruption remains prevalent in commercial transactions across the world, it is routinely used both as a shield and a sword to contest the recognition and enforcement of foreign awards before domestic courts.

In recent years, there has been a growing number of high-profile post-arbitral proceedings centred around allegations of corruption, in particular before the French courts as well as those of England & Wales.

Since 2020, at least 19 such matters relating to corruption have been brought before the French courts. The corresponding number, while smaller in the UK, is no less important in terms of impact, especially with the recent English High Court decision in *Nigeria v. P&ID*.

This chapter provides a comparative analysis of the most recent English and French cases dealing with post-arbitral corruption-related claims and offers insights on whether there is an alignment or divergence between the two jurisdictions on the issue.

CORRUPTION: A PUBLIC POLICY EXCEPTION UNDER BOTH FRENCH AND ENGLISH LAW

The UK and France are both signatories to international agreements that seek to prevent corruption, notably the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in Inter-

national Business Transactions (1997) and the United Nations Convention against Corruption (2003). These instruments have established legally binding obligations for signatory states to prevent and tackle corrupt activities. Both countries are also signatories to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), which provides that a foreign arbitral award may be refused recognition and enforcement in very limited cases, including where it would be contrary to the public policy of the country where the recognition and enforcement is sought.

This so-called public policy corruption exception has been codified under French and English law by virtue of the French code of civil procedure (CCP) and the UK Arbitration Act (1996) (AA) respectively. French law expressly refers to "international" public order, arguably a narrower concept than domestic public policy. While no such specification exists under the AA, there is consensus that the reference is also one to 'international public policy' under English law.

DIFFERING ADMISSIBILITY REQUIREMENTS?

The principal issue of admissibility of corruption-related claims

in post-arbitral proceedings concerns the determination of whether such claims had already been raised during the arbitral proceedings. Courts will generally assess whether to deal with such claims, and to what extent, in accordance with the legal doctrines of res judicata and issue estoppel.

Under both English and French law, a party may raise allegations of corruption for the first time at the post-arbitral stage but only if it had no knowledge of the misconduct during the arbitral proceedings.

Arguably, the English position seems more restrictive due to the added requirement for the party bringing such a claim to prove that it "could not with reasonable due diligence have discovered the grounds for objection".

In contrast, recent French cases have revealed a somewhat inconsistent position on the matter. In *Sorelec*, the French Supreme Court (Cour de Cassation) held that "respect for substantive international public policy cannot be conditioned by the attitude of a party before the arbitrator", thereby admitting allegations not previously raised, irrespective of the party's "disloyalty by not raising this complaint before the arbitrators". In ESISCO, the Paris Court of Appeal instead refused to admit a

corruption allegation on the basis that the party making the claim should have been aware of the alleged misconduct, the information in question being publicly available.

English and French courts also seem to diverge on how they deal with corruption allegations that were already put to the arbitral tribunal.

The French courts do not shy away from effectively engaging in a de novo review of those claims to "ensure that violation of international public policy is not characterised", according to *Securiport*; albeit noting that the review is not a de novo investigation per se, as the purpose of the review is to assess whether the award is contrary to public policy, even admitting in new evidence.

Conversely, the English courts are more hesitant to reopen corruption claims already put before an arbitral tribunal, stressing the importance of issue estoppel and the finality of the award. The courts will even refuse to review such allegations where the same set of facts were presented to the tribunal, but not specifically as an allegation of corruption, according to *Province of Balochistan v. Tethyan Copper Company*, and only admit allegations where new, decisive evidence comes to light after the

arbitral proceedings, as per W*estacre Investments v. Jugoimport*.

DIFFERING SCOPE OF THE PUBLIC POLICY CORRUPTION EXCEPTION?

While the two jurisdictions seem aligned on the principle that the misconduct in question must relate to the formation or performance of the underlying contract between the parties in dispute (to the extent that the conduct is so closely connected to the result of the arbitration that it would be unconscionable for the state to recognise or enforce it), they slightly differ in their respective applications of what misconduct falls within the scope of the public policy corruption exception.

In *Webcor*, the Paris Court of Appeal extended the public policy corruption exception to contracts which "would have the effect of financing or remunerating a corrupt activity"; that is, instances in which the corrupt activities are causally linked to the underlying contract as well as the obtention of the arbitral award.

Conversely, the English courts have resisted such widening of the scope. By way of example, a mere attempt at fraud was not considered as misconduct sufficiently corrupt as to out-

weigh the "public interest in the finality of arbitration awards" (*RBRG v. Sinocore*). Furthermore, English courts have stressed that it is only where the award itself is obtained by means of corruption that the balance is tipped in favour of respecting the public policy corruption exception over the finality of an arbitral award (*Nigeria v. P&ID*).

This divergence in approaches may be explained by the difference in wording under the respective laws: whereas both article 1520, 5° of the CCP and section 68 of the AA do refer to situations contrary to public order, the English text seems to add a more stringent requirement, that is, for such infringement to constitute "a serious irregularity… which the court considers has caused or will cause substantial injustice to the applicant".

CONVERGING EVIDENTIARY REQUIREMENTS FOR THE PUBLIC POLICY CORRUPTION EXCEPTION?

The burden of proof in both jurisdictions rests on the party alleging corruption in support of its claim or defence. In some instances, however, the French courts have shifted the burden of proof on the award creditor on the basis that only the latter was "in a position to justify the reality and seriousness of the nego-

tiations" (*Sorelec*). To our knowledge, this shift has not occurred in the English courts to date.

With respect to the standards of proof, while somewhat differing in wording, they seem to be homogenous in substance: the English courts apply the common law standard of 'balance of probabilities' to ascertain whether "there has been conduct which infringes public policy" (as per *Alexander Brothers v. Alstom*). The French courts instead will look for "serious, precise and corroborating evidence" (*Seécuriport, Sorelec*), which reflects the emergence of an intermediate standard of proof, between that of 'balance of probabilities' and the more stringent 'beyond all reasonable doubt'.

Finally, in analysing the evidence put before them, the French courts will review and assess a collection of red flags as established in *Alexander Brothers v. Alstom* which may indicate the presence of corruption to ascertain whether they add up to "serious, precise and corroborating evidence" are linked to the facts of the dispute and provide a causal link between corruption and the underlying contract. The terms of the contract, the way it was concluded and the general level of corruption in the state at the time of negotiation and execution of the contract

are frequently considered as potential indicia of corruption by the French courts. In a few exceptional cases, red flags can be so serious that they can constitute a direct indication of corruption without the need for the French court to look at corroborating indicia in detail, such as the payment for the honeymoon of a public official implicated in the construction project object of the dispute, evidenced in an official letter which was produced before the judge (*Webcor*).

While the means of assessing evidence of corruption has been extensively developed by French jurisprudence, the English courts do not seem to have identified a direct equivalent, instead simply looking for "convincing evidence" that would tip the balance of probabilities (*Nigeria v. P&ID*).

The above snapshot of recent cases on both sides of the Channel reveals that the French courts seemingly approach corruption allegations in post-arbitral proceedings with much more flexibility than the English courts. The latter tend to tip the balance in favour of the finality of awards and the doctrine of issue estoppel, thereby limiting the setting aside, non-recognition or non-enforcement of foreign awards to only exceptional circumstances.

This differing approach has been confirmed by recent data: since 2020, two awards have been set aside and two partially annulled by the French courts on the basis of corruption allegations, compared to only one in the UK, the infamous *Nigeria v. P&ID* matter, a particularly anomalous case given the unusual and extreme facts.

Will these differing approaches encourage those making such claims to choose French courts over English courts to resist recognition or enforcement of awards? This remains to be seen, especially given the ever-evolving practice of both courts in this area.

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