werden. Allerdings wird nicht der Frage nachgegangen, welche Gründe dazu führen, dass steuerrechtliche Konflikte in Deutschland in den meisten Fällen vor den Finanzgerichten ausgefochten werden und außergerichtliche Erörterungstermine nicht in Anspruch genommen werden. Ein nicht zu unterschätzender Faktor ist, dass bei Erörterungsterminen nur beide sich im Steuerrechtsstreit befindenden Beteiligten, Steuerpflichtiger und Finanzbehörde, aufeinandertreffen, ohne von einem eigens zur Lösung von Konflikten ausgebildeten Dritten begleitet zu werden. Es ist nicht auszuschließen, dass der ausgleichende Einfluss von Mediatoren bei solchen Verhandlungsterminen nicht hinreichend berücksichtigt wird. Die oftmals angebrachten Bedenken hinsichtlich des Legalitätsprinzips und anderer der Mediation im Steuerverfahren Grenzen setzender Grundsätze sind unter den aufgezeigten Bedingungen unbegründet.

Für Mediationsverfahren sind schließlich von vornherein nur bestimmte Arten von Steuerstreitigkeiten geeignet: (i) Streitigkeiten, die schwerpunktmäßig die Sachverhaltsermittlung betreffen, sowie (ii) Streitigkeiten, die sich auf das steuerliche Erhebungsverfahren beziehen und den Behörden einen Ermessensspielraum eröffnen.[41]

Oftmals geschieht dies in Fällen, bei denen eine einvernehmliche Einigung Relevanz für die zukünftige Beziehung zwischen dem Steuerpflichtigen und der Behörde haben kann.

Die aktuell statistisch erhobenen Klagezahlen und die Anzahl der Verweisungen an Güterichter bei Finanzgerichten geben Aufschluss darüber, dass die Methode nur selten genutzt wird. Ob die geringen Zahlen der fehlenden Eignung der konkreten Streitigkeit oder der auch nach dem zehnjährigen Jubiläum des Mediationsgesetzes bestehende Skepsis gegenüber der Mediation in der steuerrechtlichen Materie geschuldet sind, lässt sich der Statistik nicht entnehmen. Allerdings lohnt insbesondere vor dem Hintergrund der Überlastung deutscher Finanzgerichte auch ein Blick auf andere Rechtsordnungen und die Innovationsimpulse aus Ländern wie Brasilien. Ein Ansatz könnte die Mediationsmethode der Gemeinde Porto Alegre sein, nach der geeignete Verfahren per Beschluss der zuständigen Behörde ausgewählt und zunächst einmal der Mediation zugeführt werden, um Konflikte, die ohnehin im Gerichtsverfahren durch Klagerücknahme oder Erledigung und somit nicht durch Gerichtsurteil beendet werden, auch in Deutschland auf einer früheren Stufe endgültig und interessengerecht zu lösen.

41 BFH Beschl. v. 20.9.2012 – VII R 42/11; *Offerhaus* DStR 2001, 2093 (2096); *Hölzer/Schnüttgen/Bornheim* DStR 2010, 2538 (2540).

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Fighting International Corruption in Domestic Courts – *Alstom, Sorelec* and the Review of Arbitral Awards

In the past years, notably in the *Alstom* and *Sorelec* decisions, the Paris Court of Appeal has taken on the fight against international corruption by sanctioning arbitral awards that allegedly gave effect to bribery. It thereby allowed for a substantive review on the merits, ordering the production of new evidence and taking recourse to circumstantial evidence or so-called "red flags". This approach marks a clear shift from the established principle, in France and elsewhere, of a prohibition of a *révision au fond*, a review on the merits. Given that courts in other jurisdictions are hesitant to follow the French lead, and the Paris court does not operate in a legal void, concerns as to the legality, the legitimacy, and the effectiveness of the new approach are appropriate. This article argues that, while the substantive review might be legal, the risk of misuse and abuse of the additional "joker card" in domestic court proceedings raises questions about its legitimacy, while unpredictability and possible avoidance mechanisms might render this tool in the fight against corruption ineffective.

Der Pariser *Cour d'Appel* hat sich der Bekämpfung der internationalen Korruption angenommen, indem er mehrere Schiedssprüche sanktioniert hat, denen vermeintlich korrupte Praktiken international tätiger Unternehmen zugrunde lagen. Insbesondere in den Entscheidungen *Alstom* und *Sorelec* hat er dabei eine materielle Überprüfung in der Sache (*révision au fond*) zugelassen, die Vorlage neuer Beweise angeordnet sowie auf Indizien oder sogenannte *„red flags"* zurückgegriffen. Dieser Ansatz stellt eine klare Abkehr von dem in Frankreich und anderswo geltenden Grundsatz des Verbots einer *révision au fond* dar. Da Gerichte in anderen Ländern zögern, dem französischen Beispiel zu folgen, und das Pariser Gericht nicht im rechtsfreien Raum agiert, sind Bedenken hinsichtlich der Rechtmäßigkeit, der Legitimität und der Wirksamkeit des neuen Ansatzes angebracht. Dieser Artikel argumentiert, dass die materielle Überprüfung zwar rechtmäßig sein mag, das Risiko des Missbrauchs des zusätzlichen „Jokers" in innerstaatlichen Gerichtsverfahren jedoch Fragen der Legitimität aufwirft, während Unvorhersehbarkeit und mögliche Umgehungsmechanismen dieses Instrument im Kampf gegen Korruption wirkungslos machen könnten.

I. Introduction

Over the past three decades, the fight against corruption has become a global aim. International instruments, such as the Council of Europe Civil and Criminal Law Conventions on Corruption 1999, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 2003, or the UN Convention Against Corruption 2003, bear witness of an emerging (one could say, today, emerged) understanding that corruption is a negative phenomenon, the combatting of which necessitates international coordination and harmonized sanctioning.[1]

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1 This has not always been the understanding. For a long time, "gifts" or an additional "service fee" have been considered as either necessary or at least common business practice to facilitate transactions in foreign countries. Reference to this *"ancient concept"* at *Gaillard* Revue de l'Arbitrage 2018, 582 (585). A first sign of an emerging change can be seen in the US Foreign Corruption Practices Act 1977; on this law as the *"archetype of supranational anti-bribery regulation"* see *Arnone/Borlini*, Corruption: Economic Analysis and International Law, 2014, 209 *et seqq.*

It is nowadays the common understanding that corruption has more disadvantages than it has – if at all – advantages. One could name here, for example, economic (distort competition, efficiency loss, unproductive investments), political (bypassing ordinary channels that are democratically legitimated), and sociological (decreasing trust in institutions) reasons.[2] In the context of international investments, the possible gain of obtaining an investment is, for both investor and host State, outweighed by negative "feedback" impeding the quality of local governance, with negative long-time effects, e. g., on education or political stability.

If corrupt practices still occur in international business relations, arbitral tribunals are confronted with the question of how to assess allegations and sanction those practices. And while arbitral tribunals show more and more awareness on the issue of corruption, it may be possible that an arbitral award gives effect to an act that is linked to bribery.[3] Here, domestic courts have a crucial role: if they admit the award to have an effect, although there is a possibility that the transaction was linked to corruption, courts risk validating corruption (abroad) *ex post*. The international obligations to fight corruption would, therefore, indicate that set aside and enforcement courts should act under highest precaution.

This finding is, however, contrary to a common practice of set aside and enforcement courts: their limited standard of review. Domestic courts, confronted with setting aside or enforcement of an arbitral award traditionally avoid a review on the merits, i. e., rejudging the affaire. The reason lies in the very purpose of international arbitration, notably the desire for a neutral forum, combined with the objective of efficient procedure to avoid long and expansive litigation.[4] The absence of a substantive review on the merits is a cornerstone of the international arbitral process.

Recent decisions issued by French courts show a changing view. In the *Alstom* decision, the Paris Court of Appeal ordered the parties to produce new evidence *sua sponte* during the enforcement proceedings and reviewed it.[5] In *Sorelec*, the same court, this time confronted with a set aside request, annulled the award on the basis of corruption, going into an in-depth analysis of indicators of corruption (one could say, "red flags"), without one party having invoked the allegation of bribery before the arbitrators.[6] In order to justify its initiative, the court referred to the OECD and UN conventions against corruption, respectively. Also, and perhaps not coincidently, the Paris Court of Appeal deemed the "circumstantial evidence" sufficient to prove the alleged corrupt acts in both the *Alstom* and the *Sorelec* cases, without direct evidence of the bribery.

It might come as a surprise that this potential shift originates from French courts, given that the French legal system understands itself as arbitration-friendly, guaranteeing the autonomy and efficiency of international arbitration.[7] Only the combination of a more substantive review on the merits, on the one hand, and the acceptance of circumstantial evidence, on the other, has allowed the Paris Court of Appeal to sanction the arbitral awards. However, these are two distinct but deliberate choices: breaking with the established principle of a prohibition of a *révision au fond*, and lowering the standard of proof.

Given that the Paris Court of Appeal does not operate in a legal void, concerns might arise as to the legality, legitimacy and effectiveness of the new approach. Therefore, this article will, after presenting the underlying facts and the decisions in the *Alstom* and *Sorelec* case (II.), show how the new French approach deviates from the legal framework of set aside and enforcement proceedings and the practice of domestic courts (III.). It proceeds by showing that the shift operated is generally not followed by courts in other jurisdictions (IV.) and assesses the *Alstom* and *Sorelec* decisions critically as to their legality, legitimacy and effectiveness (V.).

II. The *Alstom* and *Sorelec* Decisions

In two cases that came before the Paris Court of Appeal 2018/19 and 2020, the court sanctioned arbitral awards that were deemed to be linked to corrupt activities abroad. In both cases, the Paris court referred to the international consensus to fight corruption, witnessed by the 1997 OECD Convention and the 2003 UN Convention. The interesting issue lies in the way the Paris Court of Appeal addressed the question of whether corruption had taken place: it did not limit its control to the facts established by the arbitral tribunal but requested new evidence and deemed circumstantial evidence sufficient to satisfy the standard of proof.

1. The *Alstom* case

The first case concerned the enforcement of an arbitral award against the (partly) French company *Alstom Transport S.A.*[8] The train manufacturer had concluded several consultancy contracts with the Hong Kong administered firm *Alexander Brothers Ltd.* (*ABL*) in order to obtain assistance in public offers related to the Chinese infrastructure market. Being sued for the non-payment of the "service-fees" by *ABL*, *Alstom* claimed that the payment would be against its code of conduct which formed part of the contract, because *ABL* allegedly used the money, in essence, to bribe Chinese officials. The arbitral tribunal nonetheless condemned *Alstom* to pay a considerable part of the sums,[9] and a Swiss court refused to set aside the award.[10]

The Paris Court of Appeal, in a first decision,[11] listed the evidence and conclusions of the arbitral tribunal, before highlighting that it is itself, as enforcement judge, called to research in law and in fact whether corruption had taken place.[12] Therefore, it was not bound by the examination, nor by the appreciation of the tribunal. *Alstom* invoked before the court evidence to prove corruption, including facts that it had not brought before the arbitral tribunal. The Paris Court of Appeal reopened the debate and ordered *Alstom* to produce additional evidence.[13] This is a major shift in its jurisprudence since for the first time, the court explicitly invited the parties to make additional submissions on the

2 *Arnone/Borlini*, Corruption: Economic Analysis and International Law, 2014, 2-6.
3 *Haugeneder*, Dealing with Corruption, in Lim (ed.), The Cambridge Companion to International Arbitration, 2021, 410 (411 *et seq.*).
4 *Born*, International Commercial Arbitration, 3rd ed. 2021, 3652.
5 Paris Court of Appeal Order of 10.4.2018, Revue de l'Arbitrage 2018, 574; Decision of 28.5.2019 – n°16/11182.
6 Paris Court of Appeal 17.11.2020 – n°18/02568. This approach has since been applied by Paris Court of Appeal 25.5.2021 – n°18/27648 – *Cengiz* and Paris Court of Appeal 7.9.2021 – n°19/17531 – *Global Voice*.
7 *Racine*, Droit du commerce international, 3rd ed. 2018, 468.
8 The award was also rendered against its English counterpart, *Alstom Network UK Ltd.*
9 *ABL v. Alstom*, Award, 29.1.2016, not publicly available. Summary of the facts according to Paris Court of Appeal 10.4.2018, Revue de l'Arbitrage 2018, 574 (575 *et seq.*).
10 Swiss Federal Tribunal 3.11.2016 – 4A_136/2016.
11 Paris Court of Appeal 10.4.2018, Revue de l'Arbitrage 2018, 574.
12 Paris Court of Appeal 10.4.2018, Revue de l'Arbitrage 2018, 574 (580).
13 Paris Court of Appeal 10.4.2018, Revue de l'Arbitrage 2018, 574 (581).