

# Paris Court Sets Aside Arbitration Awards Based on Corruption Red Flags

December 14, 2020

On November 17, 2020, the Paris Court of Appeal (the “Court”) set aside two ICC awards in a €450 million dispute between a French construction company, Sorelec, and the State of Libya on the grounds that they resulted from a settlement agreement that was tainted by corruption.<sup>1</sup> By using a “red flags” test to assess circumstantial evidence of illegality that had not been presented to the arbitral tribunal, the Court confirmed its heightened scrutiny of arbitration awards on international public policy grounds, consistent with prior decisions of the French courts in recent years.

**The *Sorelec v. Libya* Case at a Glance.** In 1979, Sorelec and Libya concluded a contract for the construction of schools and housing units. Disagreements arose between the parties regarding the enforcement of the contract. In 2013, Sorelec commenced arbitration proceedings against Libya under the France-Libya bilateral investment treaty (the “BIT”) and the ICC Rules, seated in Paris.

Following the 2011 revolution in Libya and the ensuing struggle for political power, two rival governments were formed. In 2016, Sorelec reached a settlement agreement with one of these governments, based in Tobruk (the “Settlement Agreement”). When Sorelec asked the arbitral tribunal to validate the Settlement Agreement, Libya objected that it should have been concluded with the other government, based in Tripoli. In a partial award of December 20, 2017, the tribunal declared that the Settlement Agreement was valid and, in accordance with that agreement, ordered Libya to pay €230 million to Sorelec within 45 days. When Libya did not comply, the tribunal rendered a final award on April 10, 2018 ordering Libya to pay Sorelec €452 million in damages in accordance with the Settlement Agreement.

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<sup>1</sup> Paris Court of Appeal (Chamber 1-1), November 17, 2020, Nos. 18.07347 and 18.02568. As Libya first sought annulment of a partial award in January 2018, the proceedings were brought before the former Court chamber for arbitration matters (Chamber 1-1) and not before the new International Chamber of the Court (Chamber 5-16), which is competent for proceedings referred to the Court of Appeal from March 1, 2018. Proceedings before the International Chamber may be conducted in English and judges may take live testimony of witnesses and experts and give counsel the opportunity to cross-examine them (see our previous updates [here](#) and [here](#)).

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Libya sought to set aside both awards before the Court on several grounds. In particular, Libya argued that both awards should be set aside as contrary to international public policy because the Settlement Agreement had been procured through corruption. Sorelec denied any wrongdoing, argued that Libya's corruption argument was inadmissible as it had not argued any alleged corruption before the arbitral tribunal and did not present any new factual elements before the Court, and noted that the partial award had recognized the power of the Tobruk-based Minister of Justice to settle on behalf of the Libyan State.

**Heightened Scrutiny of Alleged Corruption.** The Court confirmed that the prohibition against corruption falls under the French conception of international public policy, which is one of the limited grounds for setting aside awards under French law. Conducting a *de novo* review of the evidence adduced by the parties, the Court found that the Settlement Agreement was tainted by corruption. It set aside both the partial award and, in a second decision, the final award as contrary to international public policy. The *Sorelec* decision is one of several cases involving consent awards with Libya allegedly tainted by corruption, which have led to differing outcomes.<sup>2</sup>

The main takeaways of the Court's decision are as follows:

- **Public Policy Arguments Are Admissible Even if Not Raised Before the Tribunal.** The Court held that the fact that Libya had not raised the corruption issue during the arbitration did not bar it from raising this argument on set-aside. According to the Court, the French conception of international public policy implies that the Court can assess an argument based on violation of international public policy even when it was not raised before the arbitral tribunal.
- **Court Investigation of "Serious, Specific and Consistent Indicia" of Corruption.** Confirming its prior decisions on the standard of review for alleged corruption,<sup>3</sup> the Court held that "it is up to the Court ... to investigate all the legal and factual elements necessary to rule on the alleged illegality of this agreement and to assess whether the recognition or enforcement of the award is manifestly, effectively and concretely contrary to the French conception of international public policy." The Court held that the awards should be set aside if there were sufficiently "serious,

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<sup>2</sup> See, e.g., *Slim Ben Mokhtar Ghenia v. Libya*, UNCITRAL Case (confidential); *Odebrecht v. Libya*, ICC Case No. 20839/MCP/DDA; Swiss Federal Tribunal, November 2, 2020, No. 4A\_461/2019.

<sup>3</sup> See, e.g., Paris Court of Appeal (Chamber 1-1), September 27, 2016, No. 15.12614 (*Indrago*); Paris Court of Appeal (Chamber 1-1), February 21, 2017, No. 15.01650 (*Belokon*); Paris Court of Appeal (Chamber 1-1), May 16, 2017, No. 15.17442 (*CTC v. Democratic Republic of the Congo*); Paris Court of Appeal (Chamber 1-1), January 16, 2018, No. 15.21703 (*MK Group v. Onix*); Paris Court of Appeal (Chamber 1-1), June 30, 2020, No. 17.22515 (*Gulf Leaders*).

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specific and consistent indicia” (“*faisceau d’indices graves, précis et concordants*”) that the awards concealed corruption.

- **Red Flags-Based Approach.** In this case, the Court found that there was sufficient circumstantial evidence to conclude that the Settlement Agreement had concealed illegal dealings between Sorelec and the Tobruk-based Minister of Justice who approved the settlement. Noting that it could take into account all relevant facts and not only those raised by the parties, the Court observed that the Settlement Agreement had been concluded in uncertain times that were conducive to corruption of public officials. It relied, among other things, on the general context of corruption in Libya; a report by the “Libyan Audit Bureau,” according to which some local and foreign entities had taken advantage of the political divisions and rival governments to engage in corruption; the fact that the Libyan officials in question had not followed appropriate procedures for the approval and execution of the Settlement Agreement; that there was no evidence of genuine settlement negotiations before the Settlement Agreement was signed; and that the Settlement Agreement essentially capitulated to Sorelec’s claims and offered no financial or political benefit to the State of Libya.

**Redrawing the Contours of Tribunal Deference?** The *Sorelec* decision signals the French courts’ heightened scrutiny of alleged illegality affecting arbitral proceedings. In recent years, French courts have repeatedly confirmed that their assessment of alleged illegality is not limited by the arguments or evidence that may or may not have been presented to the tribunal or indeed the tribunal’s own assessment of them.<sup>4</sup> French courts will look not only for tangible proof of corruption—which is seldom available since corruption is, by its nature, concealed—but will also take into account all red flags surrounding the case.

The Court’s holding that the illegality argument was admissible even though it had not been raised before the tribunal is also consistent with the French courts’ *de novo* review of the jurisdiction of arbitral tribunals. A few days after the *Sorelec* decision, the French Court of Cassation reversed and remanded a decision of the same Paris Court of Appeal that had found inadmissible, on set-aside, jurisdictional arguments that had not been

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<sup>4</sup> See, e.g., Paris Court of Appeal (Chamber 1-1), February 21, 2017, No. 15.01650 (*Belokon*) (disagreeing with the tribunal’s evidentiary analysis, holding that the Court “was not limited to the evidence produced in front of the arbitrators, nor limited by the findings, assessments and qualifications made by them,” and finding that there were “serious, specific and consistent indicia” of money laundering); Paris Court of Appeal (Chamber 1-1), September 27, 2016, No. 15.12614 (*Indrago*) (applying “serious, specific and consistent indicia” test); Paris Court of Appeal (Chamber 1-1), May 16, 2017, No. 15.17442 (*CTC v. Democratic Republic of the Congo*) (same).

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raised before the tribunal, holding that at the set-aside stage parties are allowed to raise new arguments and adduce new evidence with respect to jurisdiction.<sup>5</sup>

Moreover, the *Sorelec* decision is one of a series of recent French court decisions in matters involving sanctions, corruption, and other white collar issues. In September 2020, the Paris Court of Appeal held that, in disputes governed by French law, the arbitral tribunal may refer to corruption red flags under the U.S. FCPA to assess potentially corrupt practices.<sup>6</sup> In June 2020, as we reported [here](#), the Court found that some EU and UN economic sanctions were a matter of international public policy but that corresponding U.S. sanctions were not.<sup>7</sup>

These developments occur in a context in which allegations of illegality in arbitration more generally have proliferated, and the European Commission's public retreat from investment treaty arbitration signals a distrust of the system as a whole. It remains to be seen how French courts will balance their historic legacy of deference to arbitral tribunals with their *de novo* review of jurisdictional issues and heightened evidentiary scrutiny of illegality arguments.

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<sup>5</sup> Court of Cassation, December 2, 2020, No. 19.15396 (*Schooner v. Poland*).

<sup>6</sup> Paris Court of Appeal (Chamber 5-16), September 15, 2020, No. 19.09058 (*Airbus Helicopters*).

<sup>7</sup> Paris Court of Appeal (Chamber 5-16), June 3, 2020, No. 19.07261 (*Sofregaz*).

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