Admissibility of New Evidence When Seeking Set-Aside

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Admissibility of New Evidence When Seeking Set-Aside

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INTRODUCTION

One of the main attractions of international arbitration is the presumed finality of arbitral awards. Once an award has been rendered, the decision of the arbitral tribunal is final and binding and may not be subject to appeal save for the limited statutory grounds for setting aside or annulment under the law of the seat.\(^2\)

Grounds for challenge are rarely concerned with review of the merits of the tribunal's decision, and most arbitration laws refuse to allow review of issues of fact.\(^3\) Thus, the introduction of new facts or evidence at the post-award stage is an extremely rare occurrence, especially since the natural trier of fact (i.e., the arbitral tribunal) is already *functus officio*, having fully exercised its authority to adjudicate the issues submitted to it by making an award with *res judicata* effect.\(^4\)

In exceptional circumstances, however, the parties may seek to rely on new facts and evidence after their award has been issued. This is usually the case when the parties wish to challenge the tribunal's findings with respect to its jurisdiction or when there is a strong case to be made that an award violates public policy, especially in cases of corruption, bribery, fraud, etc.\(^5\) In such cases, national courts have shown willingness to bend their rules on finality in the arbitral process in favour of the wider public interest in some measure of judicial control.

This chapter examines the admissibility of new facts and evidence in the context of (1) setting-aside or annulment proceedings and (2) the extraordinary remedy of revocation or revision, under the law of the seat of the arbitration, and in the context of (3) the institutional 'appellate' or revisions mechanisms under various international arbitration rules.

ADMITTING NEW EVIDENCE IN SETTING-ASIDE OR ANNULMENT PROCEEDINGS

Many sophisticated, arbitration-friendly jurisdictions remain divided as to the correct approach to introducing new facts and evidence during setting-aside proceedings, with approaches varying from the more liberal (such as France, Sweden, Germany and Denmark) to the more nuanced (such as Canada) or restrictive (such as the United Kingdom, Mauritius and Switzerland).

The much-discussed *Alstom* saga, and the resulting enforcement and annulment proceedings before the Swiss, French and English courts, presents an interesting case study that highlights the different approaches adopted by these jurisdictions, each of which is discussed below.

Alexander Brothers Limited (ABL) and the Alstom group entered into five consultancy agreements, pursuant to which ABL was to assist Alstom in obtaining government railway contracts in China. Alstom was successful in the tenders but made only partial payment to ABL under the consultancy agreements. In the meantime, the UK Serious Fraud Office and the US Department of Justice investigated the Alstom group with respect to corruption allegations pertaining to secret bribes paid to government officials in countries around the world. As a result, Alstom had to pay millions in fines. Although unrelated to its business in China, the Alstom group froze payments to ABL. ABL then commenced arbitration in Switzerland through the International Chamber of Commerce (ICC) to recover the remaining consultancy fees. Alstom argued, *inter alia*, that the onus was on ABL to prove that it had not acted corruptly (alleging serious indications of possible corrupt practices) and that Alstom...
was entitled to refuse payment, which, if made, would expose Alstom to criminal liability by virtue of ABL's corruption. The tribunal rejected Alstom's defence and ordered payment of the outstanding invoices, which Alstom refused to pay.

In annulment proceedings in Switzerland, the Federal Supreme Court of Switzerland (Swiss Supreme Court) limited itself to an analysis of the facts as found by the arbitral tribunal in the award, observing that, although corruption was indeed prohibited by Swiss public policy, the Supreme Court's role was neither to complete nor to question the facts as presented by the arbitral tribunal. In enforcement proceedings in London, the Commercial Court found that conclusive evidence of corruption must be adduced to establish such an allegation. Therefore, the Commercial Court did not consider that it was appropriate to probe matters of illegality itself and so could not review the facts of the case, including the possibility to introduce new evidence. By contrast, in enforcement proceedings in France, the Court of Appeal observed that its review of the facts was not limited to those established by the arbitral tribunal, and thus the Court could accept new evidence regarding allegations of corruption. The Court of Appeal found that there were serious, precise and consistent indications that payments made by Alstom had been used to bribe government officials, and on that basis refused to enforce the award.

FRANCE

French courts have adopted a profoundly expansive approach with respect to the admissibility of new evidence in setting-aside proceedings, specifically in the context of (1) the review of arbitral jurisdiction and (2) the award's compatibility with public policy.

Turning first to the review of arbitral jurisdiction, it has long been accepted that the French annulment judge is empowered to review the decision of the arbitral tribunal on its jurisdiction under Article 1520(1) of the French Civil Code of Procedure (F CCP) by looking at all the legal and factual elements that allow the scope of the arbitration agreement to be assessed. The French Court of Cassation took this position a step further, overturning a decision by the Paris Court of Appeal that had dismissed an application to set aside an arbitral award issued under the International Centre for Settlement of Investment Disputes (ICSID) Additional Facility in the case of Schooner v. Poland. In the setting-aside proceedings before the Paris Court of Appeal, the plaintiffs argued that the tribunal wrongly denied its jurisdiction with respect to some of the claims raised by the investors and, in doing so, they raised new arguments, which had not been put forward during the arbitration proceedings. The Paris Court of Appeal refused to set aside the award. However, the Court of Cassation disagreed, holding that when the tribunal has addressed its jurisdiction, the parties are then entitled, in the context of annulment proceedings, to challenge the award by raising new arguments and producing additional evidence.

French courts have likewise solidified their ‘maximalist’ approach to challenges regarding violations of public policy under Article 1520(5) of the FCCP, at least with respect to allegations of corruption and money laundering. This approach was cemented in the seminal Alstom case, in which the Paris Court of Appeal rejected a motion to enforce the award. After analysing all the facts of the case on an ex officio basis and noting that it could accept new evidence regarding allegations of corruption, the Court rejected the motion on the basis that enforcement of the award would give effect to an act of corruption in violation of international public policy.
In the *Belokon v. Kyrgyzstan* case,[19] the French Court of Cassation upheld the 2017 decision of the Paris Court of Appeal[20] setting aside a US$15 billion award rendered by the United Nations Commission on International Trade Law (UNCITRAL) in favour of a Latvian investor in a dispute against Kyrgyzstan. It highlighted that French judges have full authority to review the implications that enforcing the award would have on the French legal order, including full fact-finding powers going beyond the assessments or qualifications of the original tribunal with respect to evidence.[21] This left the door open to the introduction of new facts and evidence.

The *Gabon v. Santullo Sericom* case in 2022 followed suit.[22] Here, the Paris Court of Appeal set aside an ICC award rendered in favour of a public works company owned by an Italian businessperson on the ground that upholding the award would allow the company to benefit from the corruption of Gabonese public officials, in violation of French international public policy. In reaching this conclusion, the Court reviewed the corruption allegations de novo, including its own evaluation of the probative value of the evidence before the tribunal and new evidence that was not before the tribunal.[23]

**SWEDEN**

The position adopted by Swedish annulment judges is even more ‘invasive’ than the approach espoused by France. Under Swedish law, setting-aside and enforcement proceedings are subject to standard rules of civil procedure, which provide that the parties can submit and invoke new facts and evidence, beyond what was submitted in the arbitration, under the principle of ‘free assessment of evidence’. [24]

The Swedish Supreme Court has also held that it could raise and assess, on its own motion, circumstances that have been disclosed in the matter before the court that may lead to a violation of public policy, [25] thus not limiting itself to facts and evidence contemplated by the tribunal. [26] However, the Court noted that a court’s obligation does not go beyond a duty to raise and assess such circumstances, and indicated that it is not the function of the court to attempt to find or research circumstances independently. [27]

**GERMANY**

In determining the existence of grounds for setting aside under Section 1059 of the German Code of Civil Procedure (ZPO), German courts are not bound by the arbitral tribunal’s determination of facts. [28] Based on the parties’ submissions, courts may deviate from or supplement the facts determined by the arbitral tribunal, when necessary, [29] including potentially admitting new evidence. [30]

According to some authorities, [31] this is limited to cases of defects in the fact-finding process or to infringement of public policy. [32] In the opinion of the majority, however, this applies to all grounds of annulment under Section 1059(2) of the ZPO. [33]

**DENMARK**

Denmark’s annulment judge will likewise revisit all aspects of a tribunal’s jurisdictional decision. The parties can submit new evidence that is relevant to the court’s decision regarding the tribunal’s competence. [34]

**CANADA**

Canada, in particular, has recently witnessed significant jurisprudential developments in this respect. In *The Russia Federation v. Luxtona Limited*, Russia filed an application with the
Ontario Superior Court of Justice challenging under Articles 16(3) and 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) the tribunal’s findings that it had jurisdiction over a dispute between Russia and Luxtona Limited. The dispute arose when Luxtona Limited, a Cyprus-incorporated entity and former shareholder of Yukos Oil Company, alleged that Russia violated certain provisions of the Energy Charter Treaty relating to the protection of investments, including Luxtona Limited’s investment in Yukos. \[35\]

The Ontario Superior Court of Justice initially held that a party to a challenge of an arbitral tribunal’s jurisdiction may not file fresh evidence as of right, but must apply for leave to do so by providing a reasonable explanation for why new evidence is necessary, including why that evidence was not, or could not have been, put before the tribunal in the first place. \[36\]

On appeal, the Divisional Court reversed this ruling, drawing a fine distinction between jurisdictional challenges under Article 16 of the Model Law, where the court has to ‘decide the matter’ itself, and a setting-aside application on jurisdictional grounds under Article 34 of the Model Law, where the reviewing court has to determine whether the tribunal was correct. \[37\] With respect to the former, the Divisional Court decided that it should proceed as a hearing *de novo*, allowing the parties to adduce new evidence, including expert evidence, as of right so long as the evidence is relevant to the jurisdictional issue. \[38\] By contrast, the Court highlighted that a setting-aside application on jurisdictional grounds under Article 34 of the Model Law is a ‘review’, expressly circumscribed by the terms thereof, to which a standard of correctness applies. \[39\]

**UNITED KINGDOM**

It is often said that one of the fundamental purposes of the UK Arbitration Act 1996 (AA 1996) is to reduce court intervention in the arbitral process. In the seminal *Westacre* decision, \[40\] the main question before the English courts was whether the facts should be reopened to consider new evidence to support the allegation that the contract in question violated English public policy. The Court of Appeal refused to do so, holding that the public policy of sustaining international arbitration awards on the facts of this case outweighs public policy in discouraging international commercial corruption. \[41\]

In *NIOC v. Crescent*, \[42\] a case concerning a long-term gas supply contract governed by Iranian law, the High Court of England and Wales took a more nuanced approach. It refused to overturn an award, rejecting a defence based on allegations of bribery, but underlined the fact that the tribunal’s factual assessment could be reopened in ‘very exceptional circumstances’ or in the presence of fresh evidence, which was not found to exist in this case. \[43\]

This position was reiterated in *Alexander Brothers v. Alstom*. \[44\] Alstom resisted the enforcement of the award issued by a Switzerland-seated arbitral tribunal, on the basis that its enforcement would violate public policy, since the underlying consultancy agreements were tainted by illegality. \[45\] The High Court of England and Wales concluded that it could not hear new evidence pertaining to allegations of illegality, because Alstom could have presented the evidence and defence before the arbitral tribunal, but had not done so. \[46\]

The English courts’ position with respect to the introduction of new evidence in the context of jurisdictional challenges is rather more clear-cut. A challenge under Section 67 of the AA 1996 on the ground of lack of substantive jurisdiction takes the form of a rehearing rather than a review. In *Dallah v. Pakistan*, \[47\] the Supreme Court
of the United Kingdom held that ‘a party who has not submitted to the arbitrator’s jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court’ and that the ‘tribunal’s own view of its jurisdiction has no legal or evidential value’. In other words, the court may have regard to but is not bound by the reasoning and findings of the tribunal. As such, the losing party may seek to obtain new evidence and present additional material not put before the tribunal for the hearing before the court.\footnote{48} Section 67 of the AA 1996 is invoked in only a tiny percentage of arbitrations,\footnote{49} and the court usually exercises close control to discourage speculative applications and to limit the introduction of new evidence.\footnote{50} Indeed, the court may selectively refuse to allow a claimant to produce new documents to avoid causing irreparable prejudice to the respondent, or where evidence is not presented in a fair manner.\footnote{51} This position is under review by the Law Commission as part of its consultation on reform of the AA 1996, and may be subject to change.\footnote{52}

MAURITIUS

The Judicial Committee of the Privy Council (the highest court of appeal for Mauritius, consisting of members of the Supreme Court of the United Kingdom) has adopted a similarly restrictive approach.

In \textit{Betamax v. STC},\footnote{53} the Privy Council pondered the need for balance between the finality of awards and upholding public policy, including by introducing new evidence. The Supreme Court had initially found that the contract of affreightment in question was in breach of Mauritius’ Public Procurement Act 2008 and, therefore, flagrantly illegal.\footnote{54} The Privy Council disagreed, holding that a national court should never second-guess an arbitral tribunal’s decision as to whether there had been illegality, ‘in the absence of a fraud, a breach of natural justice or any other vitiating factor’ – thus firmly closing the door to the possibility of introducing new facts or evidence during setting-aside proceedings in the absence of such exceptional circumstances.\footnote{55}

SWITZERLAND

The Swiss annulment judge’s stance is equally conservative. The Swiss Supreme Court generally limits itself to analysis of the facts as found by the arbitral tribunal in the award.\footnote{56} Indeed, the facts established by the arbitral tribunal bind the Supreme Court.\footnote{57}

The Swiss Supreme Court reiterated this long-held position in the annulment proceedings pertaining to the \textit{Alexander Brothers v. Alstom} arbitration.\footnote{58} Alstom tried to set aside the award in Switzerland, raising corruption allegations and arguing that the award was incompatible with international public policy.\footnote{59} The Court upheld the award, holding that the decision was based on the facts established by the arbitral tribunal and that the annulment court could neither correct nor supplement the arbitrators’ findings even if the facts had been established in a manner that was manifestly incorrect or contrary to the law. The Court added that allowing the parties to make factual allegations other than those established in the award would not (other than in exceptional cases) comply with the court’s role to examine whether objections against an award are well founded, even if the new factual allegations were established by evidence that had been submitted in the arbitration.\footnote{60} Therefore, a party challenging an award before the Swiss Supreme Court may generally not present new facts or evidence,\footnote{61} nor may it, as a rule, submit a request for the taking of evidence.\footnote{62}

Only exceptionally will the Swiss Supreme Court bend this rule. First, the judge may, on their own motion, consider it necessary to take new evidence or consider new facts pursuant
to Article 55 of the Federal Supreme Court Act. However, this hardly ever happens in practice.

Second, the judge may reopen the record if the facts established by the arbitral tribunal are found to be in violation of one of the grounds under Article 190(2) of the Swiss Private International Law Act (PILA). Such would be the case if a party is not allowed to introduce facts or evidence in arbitration proceedings in violation of the party’s right to participate in the taking of evidence.

KOREA

In the context of a Korean court action seeking enforcement of an award in an ICC arbitration seated in Hong Kong, the defendant argued that the award was obtained by fraudulent means and thus resisted enforcement on public policy grounds under Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The court of first instance rejected this argument, but the appellate court took an independent review of the facts based on evidence collected during the enforcement court action and, on this basis, ruled in favour of the defendant.

The Supreme Court of Korea, however, remanded the case back to the appellate court. It acknowledged that obtaining an award by fraud could, in principle, constitute grounds for refusing recognition on public policy grounds, but took a very narrow view of the specific circumstances in which such a refusal could be allowed, ruling that the circumstances in that specific case did not satisfy that narrow view.

This case suggests that Korean courts, in theory, may consider new facts uncovered after the award, but in practice would be very reluctant to do so and would consider the facts only if there is clear, persuasive and objective evidence, which makes it obvious that the party seeking enforcement committed a criminally liable fraudulent act during the arbitral proceedings and that the party resisting enforcement (1) was not aware of these facts and (2) was not able to defend itself from the fraudulent act.

ADMITTING NEW EVIDENCE WHEN REVOKING OR REVISING ARBITRAL AWARDS

A few jurisdictions, including Switzerland, the Netherlands, France and Spain, expressly permit the introduction of new material facts or conclusive evidence via the remedy of revocation or revision of arbitral awards.

Quite distinct from the remedy of setting aside or annulment, revision and revocation are statutory mechanisms that, either at the request of a party or following a judicial order, allow for the resubmission of an award to the arbitrators upon (among other things) the discovery of fresh evidence. In contrast to the annulment of an award by national courts, revision or revocation is an extraordinary means of recourse, which allows the tribunal itself to revoke or revisit an award.

The few jurisdictions that do provide for the revocation or revision of arbitral awards based on the discovery of new facts or evidence usually take a similar approach to their assessment of the gravity of new facts or evidence, and thus their potential to affect the integrity of an arbitral award. In general, only previously unknown facts, which could not have been discovered during the arbitral proceedings and which may affect the outcome of the arbitration, can provide grounds for revision.
Switzerland is one of the few jurisdictions incorporating the revision mechanism directly into its arbitration law. Article 190a of Chapter 12 of PILA (as amended with effect from January 2021) codifies the long-standing practice of the Swiss Supreme Court that it has jurisdiction over requests for the revision of international arbitral awards. Among other reasons in an exhaustive list of grounds for revision, Article 190a(1)(a) of PILA provides that a party may file a request for revision with the Swiss Supreme Court following the discovery of material facts or conclusive evidence that the party was unable to invoke during the arbitration proceedings, despite having exercised due diligence.

Article 190a(1)(a) of PILA explicitly excludes facts and evidence postdating the award. As such, the facts or evidence must have occurred before the award was rendered (i.e., improper nova). In contradistinction, the discovery of the facts and evidence should be new (i.e., having taken place after the issuance of the award). In addition, revision is only justified if the facts are material and the evidence is conclusive. In other words, the new facts and evidence must be such that, had the arbitral tribunal been aware of them, it would have, in all probability, rendered a different decision.

If the court upholds such a request for revision, the Swiss Supreme Court will annul the award and remand the matter to the arbitral tribunal for a new decision. Revision is available against all partial and final awards, as well as preliminary and interim awards and may also be sought against decisions of the Swiss Supreme Court on requests to set aside an arbitral award. Interestingly, the Swiss Supreme Court has ruled that a setting-aside application takes precedence over a request for revision when the two applications are submitted simultaneously.

As per Article 190a(2) of PILA, the request for revision must be filed within 90 days of the discovery of the material facts or conclusive evidence, but no later than 10 years from the date on which the award came into force. Finally, under Swiss law, the remedy of revision may be waived in advance for all grounds for revision, including notably with respect to new material facts and conclusive evidence, save where the ground invoked is that the award is tainted by criminal conduct under Article 190a(1)(b) of PILA.

Spain has also adopted the remedy of revision. Under Article 43 of the Spanish Arbitration Law, one may seek to revise an arbitral award on the limited grounds set forth under Article 510 of the Spanish Civil Procedure Act (SCPA). Article 510(1) of the SCPA provides that the revision of an award can be sought when decisive documents, which were not available owing to either force majeure circumstances or the actions of the party in whose favour the award was rendered, are obtained after the award is issued. According to Article 516 of the SCPA, revision applications can only be heard by domestic courts, which have the power to revoke the award if the requirements are fulfilled.

Pursuant to Article 1068 of the Dutch Code of Civil Procedure (DCCP), a party may apply for revocation when (1) the award is entirely or partially based on fraud that is discovered after the award was made and that was committed during the arbitral proceedings by or with the knowledge of the other party, (2) the award was entirely or partially based on documents that, after the award was made, are discovered to have been forged, or (3) after the award was made, a party obtains documents that would have had an influence on the decision of the arbitral tribunal and that were withheld as a result of the acts of the other party.

While distinct from the setting-aside proceedings under Article 1065 of the DCCP, the revocation of an award under Dutch arbitration law also results in the whole or partial annulment of the arbitral award, as provided for under Article 1068(3) of the DCCP.
Following the revocation of the award (in whole or in part) by the Court of Appeal, the case will be resubmitted to the original or a new tribunal that will determine the issue anew.\[83\]

Both actions are available in parallel under Dutch arbitration law and, as highlighted by the decision of the Supreme Court of the Netherlands in the *Yukos* case, the limitations to one action must, in principle, not infringe on the admissibility of the other.\[84\] In this respect, Article 1068(2) of the DCCP provides that a party may file a revocation action within three months of the moment when the existence of one of the above-mentioned grounds was discovered. This is more flexible than the deadline for an annulment action under Dutch law.\[85\]

In a similar vein, under Section 1502 in conjunction with Section 595(2) of the FCCP, French legislation provides that parties may file an application for review should decisive documents that had been withheld by another party be recovered after the issuance of the award. Only parties to the arbitration may file a request for review and the time limit to do so is two months, running from the day on which the party becomes aware of the ground for review it is invoking. Unlike Spain and the Netherlands, Article 1502 of the FCCP provides that revision proceedings should be conducted before the original tribunal and only refer the matter to the courts if the original tribunal cannot be reconstituted.

Reportedly, requests for revision or revocation are granted sparingly. This is not surprising, given that reopening final awards can compromise legal certainty and predictability, and as such may only be warranted where justice and equity demand a revocation or revision owing to the fundamentally flawed factual premise of the award.

**NEW EVIDENCE IN APPELLATE REVIEW AND REVISION IN INSTITUTIONAL ARBITRATION**

In addition to revision or revocation provisions under national laws, certain institutional arbitration rules include provisions regarding internal, non-statutory appeals of arbitral awards. These rules constitute a departure from the general principles of finality, and while one may argue that they compromise efficiency, they nonetheless reflect the parties’ autonomy to adopt procedures tailored to their particular needs.

As illustrated below, these institutional appeal mechanisms (which may apply either by default or by opt-in) often include provisions that address the introduction of new evidence after the award has been rendered but before the initiation of setting-aside, revocation or revision proceedings. Irrespective of the validity of these mechanisms under national law, the fact remains that they contain a standard of review that is often more expansive than allowed by existing provisions for vacating or setting aside an arbitral award under the governing law of the seat.

Section (d) of the Optional Arbitration Appeal Procedure of the Judicial Arbitration and Mediation Services (JAMS) provides that an *ad hoc* appeal panel may reopen the record to review evidence improperly excluded by the arbitral tribunal or evidence that has become necessary in light of the appeal panel’s interpretation of the relevant substantive law.\[86\]

Similarly, the Grain and Feed Trade Association (GAFTA) arbitration rules, incorporated in all GAFTA standard forms of contracts, provide for a two-stage arbitration system that includes an internal appeal mechanism. A party may appeal to a standing board of appeal, which will examine the parties’ submissions and documentary evidence, including – as expressly stated in Article 12(3) of the GAFTA Arbitration Rules No. 125 – new evidence not previously presented to the initial tribunal.\[87\]
In sports-related matters, the Appellate Division of the Court of Arbitration for Sport (CAS) serves as an appellate body for CAS awards, pursuant to Rule 47 of the Code of Sport-Related Arbitration (the CAS Code), if the appeal is expressly allowed by the rules of the federation or sports body concerned. The appeal panel has full power to perform a de novo review of the facts, under Rule 57(1) of the CAS Code. In other words, the panel is not bound by the facts or evidence of the previous instance but may consider new evidence; however, it generally considers its power of review to be limited by the object of the dispute in the first instance.

Article 51 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) introduces a non-statutory revision system, which constitutes an exception to Article 53 of the Convention’s rule regarding the finality and non-appealability of arbitral awards in the context of the system used by the International Centre for Settlement of Investment Disputes. Revision is dependent on the discovery of new facts, including new documents, about which neither the tribunal nor the party seeking the revision of the award were aware at the time the initial award was issued. The new facts can relate to either jurisdiction or the merits and must be capable of decisively affecting the award.

In other words, the new facts or documents must be of such a nature as to have led to a different decision had it been known to the tribunal – thus excluding new evidence that would not have affected the outcome of the dispute. In addition, the interested party must show that their ignorance of the fact during the issuance of the first award was not because of negligence. A request for revision must be submitted within 90 days of discovery of the pertinent fact and no more than three years after the date of the award. The ICSID Convention provides that the revision request must be submitted to the tribunal that rendered the award. Only if reconstituting the tribunal is not possible may the case be ‘reopened’ by a new tribunal.

**FINAL COMMENTS**

The various approaches discussed in this chapter highlight the importance placed on the discovery of new facts or evidence that have the potential to change the entire complexion of a case, after a final award has already been issued. Although the de novo review approach protects consent to arbitration and safeguards important public policy concerns, there are many pragmatic (e.g., efficiency and economy) as well theoretical (e.g., Kompetenz-Kompetenz and finality) reasons in favour of constraining the judge’s powers to second-guess tribunals’ decisions.

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**Endnotes**

1. Joel E Richardson and Sue Hyun Lim are partners at Kim & Chang. The authors would like to thank Eugenia Stavropoulou, an associate at Kim & Chang, for her assistance in preparing this chapter.  
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4 Born, op. cit. note 2, Section 24.02. ↩ Back to section

5 See Pierre Mayer and Audley Sheppard, ‘Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ [2003] 19(2) *Arbitration International* 306. It is notable that the majority of the International Law Association Committee on International Commercial Arbitration concluded that national courts should be entitled to review the underlying evidence presented to the tribunal and, in exceptional cases, any new evidence, when enforcement is resisted (and, we can safely assume, when set-aside is requested) on grounds of *lois de police* or public policy rules. The International Law Committee further noted that the court should undertake a reassessment of the facts only when there is a strong *prima facie* argument of violation of international public policy. ↩ Back to section

6 A. & B. v. Z., Federal Supreme Court of Switzerland (Swiss Supreme Court), 3 November 2016, 4A_136/2016. ↩ Back to section

7 *Alexander Brothers Limited (Hong Kong S.A.R) v. (1) Alstom Transport SA (2) Alstom Network UK Limited* [2020] EWHC 1584. ↩ Back to section

8 *Alstom Transport SA v. Alexander Brothers Ltd*, Paris Court of Appeal, 28 May 2018, Case No. 16/11182. ↩ Back to section

9 See also First Civil Chamber, 29 September 2021, Case No. 19-19.769. The Court of Cassation reversed and remanded the decision, finding that the Paris Court of Appeal had misunderstood a witness transcript, thereby wrongly refusing to enforce the award. It appears that the Court of Cassation took exception with the appreciation of evidence by the Paris Court of Appeal but not with the approach regarding the scope and standard of review in relation to international public policy. ↩ Back to section


11 First Civil Chamber, 2 December 2020, Case No. 19-15.396. ↩ Back to section

12 Paris Court of Appeal, 2 April 2019, Case No. RG 16/24358. ↩ Back to section

13 *Vincent J Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015. ↩ Back to section

14 Paris Court of Appeal, 2 April 2019, No. RG 16/24358. ↩ Back to section

15 First Civil Chamber, 2 December 2020, No. 19-15.396. ↩ Back to section

17 id. ~ Back to section

18 Paris Court of Appeal, 28 May 2018, Case No. 16/11182. ~ Back to section

19 First Civil Chamber, 23 March 2022, No. 17-17.981. ~ Back to section

20 Paris Court of Appeal, 21 February 2017, No. RG 15/01650. ~ Back to section

21 Arvmyren and Heydarian, op. cit. note 16, 232. ~ Back to section

22 Paris Court of Appeal, 5 April 2022, No. 20/03242. ~ Back to section

23 id. ~ Back to section


25 Sweden Court of Appeal, 22 April 2021, No. T 603-1. ~ Back to section

26 Arvmyren and Heydarian, op. cit. note 16, p. 241. ~ Back to section

27 id. ~ Back to section


29 id. ~ Back to section

30 Higher Regional Court of Düsseldorf, 21 July 2004, No.VI–Sch (Kart) 1/02. ~ Back to section

31 Kröll and Kraft, op. cit. note 28, 401. ~ Back to section

32 Johannes Koepp and Agnieszka Ason, ‘An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings’ [2018], 35(2) *Journal of International Arbitration*, 162, in which the authors state outright that German courts are not bound by the facts determined by the arbitral tribunal. ~ Back to section

33 Kröll and Kraft, op. cit. note 28, 401. ~ Back to section


36 **The Russia Federation v. Luxtona Limited**, 2019 ONSC 7558. ~ Back to section


38 id. ~ Back to section

39 id. ~ Back to section


41 id. ~ Back to section

42 **National Iranian Oil Company (NIOC) v. Crescent Petroleum Company International Ltd** [2016] EWHC 510 (Comm). ~ Back to section

43 id. ~ Back to section

44 **Alexander Brothers Limited (Hong Kong S.A.R) v. (1) Alstom Transport SA (2) Alstom Network UK Limited** [2020] EWHC 1584. ~ Back to section

45 id. ~ Back to section

46 id. ~ Back to section


48 **Electrosteel and A Ltd v. B Ltd** [2015] EWHC 137 (Comm). ~ Back to section


50 **GDF GP Sarl v. Republic of Poland** [2018] EWHC 409 (Comm). ~ Back to section

51 **Central Trading & Exports Ltd v. Fioralba Shipping Company** [2014] EWHC 2397 (Comm); **Jiangsu Shagang Group Co Ltd v. Loki Owning Co Ltd** [2018] EWHC 330 (Comm). ~ Back to section
52 Stavros Brekoulakis, et al., op. cit. note 49, 497 et seq.  Back to section


54 id.  Back to section

55 id.  Back to section

56 See, e.g., Swiss Supreme Court, 27 March 2012, 4A_558/2011.  Back to section


58 Swiss Supreme Court, 3 November 2016, 4A_136/2016.  Back to section

59 id.  Back to section

60 id.  Back to section

61 Kunz, op. cit. note 57, 64.  Back to section

62 ibid., 307.  Back to section


64 ibid., fn. 387.  Back to section

65 Kunz, op. cit. note 57, 307.  Back to section

66 See Swiss Supreme Court, 10 September 2001, BGE 127 III 576; Swiss Supreme Court, 19 January 1995, BGE 121 III.  Back to section


69 id.  Back to section

70 id.  Back to section

71 Born, op. cit. note 2, Section 24.07.  Back to section
id.  


Catherine Anne Kunz, ‘Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera? A Review of Decisions Rendered by the Swiss Supreme Court on Revision Requests over the Period 2009-2019’ [2020], 38(1) ASA Bulletin, 16.  

id.  


If it is not possible to reconstitute the original arbitral tribunal, a new tribunal will be constituted. See Kunz, op. cit. note 74, 14.  

Swiss Supreme Court, 1 November 1996, Decision No. 122 III 492.  

Kunz, op. cit. note 74, 9.  

Swiss Supreme Court, 31 January 2022, Decision No. 4A_464/2021.  

Kunz, op. cit. note 74, 9.  


Dutch Supreme Court, 5 November 2021, Decision No. 20/01595 [ECLI:N:HR:2021:1645].  

Marsman, op. cit. note 83, 449 et seq.  


91 id.  
92 id.