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CASE NOTE: FRANCE TRIBUNAL DES CONFLITS 17 MAI 2010

ALEXANDRE MEYNIEL

In this case, the *Tribunal des conflits* was asked to decide which of the Judiciary order or the Administrative order had jurisdiction over the action for annulment of an international arbitral award brought by a French administrative agency on the grounds of an arbitration clause contained in a contract between itself and a foreign investor.

The *Tribunal des conflits* reconciles subject-matter related disputes between the *Conseil d'Etat* (highest administrative court) and the *Cour de cassation* (Supreme court for Judiciary Matters). Traditionally, the Administrative order have jurisdiction over cases where agencies or contracts that operate the furtherance of the public service through means of government authority are involved.

L'Institut national de la santé et de la recherché médicale (hereafter "INSERM") is a French administrative agency. It contracted with the Norwegian foundation Letten F. Saugstad (hereafter "Letten") for the construction of a new research institute in France. The parties had agreed to resort to arbitration if a dispute arose out of their contract. Such a dispute arose when Letten notified INSERM of the termination of their contractual relationship. INSERM initially brought an action in front of a French high court. However, the court found that jurisdiction could not be asserted because of the existence of an arbitration clause. The dispute was thus submitted to arbitration and the arbitrator rendered an award in favor of Letten. INSERM then filed an action for annulment of the arbitral award to the Paris court of appeals — it was denied. It additionally sought annulment of the award in front of the Administrative court of appeals that referred the issue to the *Conseil d'Etat* who decided this was a matter for the *Tribunal des conflits*.

It held that the Judiciary order shall have jurisdiction over the action seeking the annulment of an arbitral award arising out of an arbitration agreement between a foreign party and a French administrative agency where international trade is involved. However, the *Tribunal des conflits* further added that the Administrative order shall retain jurisdiction if bringing such an action equated to an examination of the French mandatory rules of public law pertaining to the occupancy of French public property, and that of public contracts such as public procurement contracts, public-private partnership agreements and contracts delegating the performance of public service. It thus creates an

exception to the principle that the Judiciary order has exclusive jurisdiction to hear the annulment actions against international arbitral awards under Article 1505 of the French Code of Civil Procedure. Indeed, from now on, the Administrative order shall have jurisdiction to rule over the action for annulment of an international arbitral award if the arbitration agreement is incorporated in an administrative contract that is subject to the French mandatory rules of public law.

Not only does this decision separate the judicial orders where litigation for annulment will be brought, it also affects the nature of the review in cases where the French mandatory rules of public law are involved. Indeed, the *Conseil d'Etat* reviews the merits of the case because of the nature of the interests that are at stake: the general public.

However, predicating such a system on the concept of French mandatory rules of public law and giving such a short list of public contracts where the Administrative order has jurisdiction is sure to cast a shadow of uncertainty. Indeed, not only is a concept like the French mandatory rules of public law overly broad itself, the enumerated public contracts are unlikely to be strictly limited. Consequently, the parties cannot know before hand, with sufficient certainty, which judicial order they should bring their action to or if their contract is one of the public contracts that falls within the scope of the French mandatory rules of public law.

Additionally, bringing the action in the wrong order will not only delay the final settlement of the dispute but it may also strongly affect the outcome of the dispute since both orders do not exercise the same type of review over the award. It thus brings about a fair amount of uncertainty in a sector that held none and whose purpose is to have none. Indeed, one of the parties' goals when submitting their dispute to arbitration is to avoid national courts and some of the uncertainty that may arise out of domestic litigation, like time issues for instance. Even though the parties must still file to the national courts to seek recognition, enforcement or even the annulment of the award, in a country as favorable to arbitration as France, the standard for review is usually light and the courts exercise very little scrutiny over the award, unless it is contrary to the French conception of International Public Policy.