

## FRANCE

Jean-Christophe  
Honlet

Salans LLP, Paris  
jhonlet@salans.com

Gauthier  
Vannieuwenhuyse

Salans LLP, Paris  
gvannieuwenhuyse@  
salans.com

# International arbitration and French public entities: the INSERM decision of the Tribunal des Conflits

France has a dual jurisdictional system: civil courts handle disputes involving private parties, while administrative courts handle most disputes involving a public party or public act. To the extent that there are inevitably borderline situations, the Tribunal des Conflits is responsible for deciding which of the civil or administrative courts – having at their helm the Cour de cassation and Conseil d'État respectively – have jurisdiction over certain matters. On 17 May 2010, it rendered a much awaited decision regarding international arbitration and French public entities.<sup>1</sup> It decided that the civil courts in principle have jurisdiction over applications to set aside awards made in France in disputes between French public entities and foreign entities involving international trade, but that the administrative courts retain some residual jurisdiction over these applications. Implicitly, but decisively, it also expanded the arbitrability of French public law disputes.

## General framework: there are many exceptions to the general rule that public entities cannot enter into arbitration agreements

Article 2060 of the French Civil Code provides that public entities cannot enter into arbitration agreements.<sup>2</sup> There is, however, a series of exceptions to this rule.

First, Article 2060 provides that 'certain categories' of public institutions may be excluded by decree from that prohibition.

Secondly, specific laws and decrees providing for arbitration as a method of dispute resolution were made for specific public entities such as the French national railway company (SNCF) in 1982,<sup>3</sup> the French national institute for aeronautical studies and research (ONERA) in 1984,<sup>4</sup> the French postal and telecommunication services (La Poste and France Telecom)<sup>5</sup> – as they then were – and the French railway network (Réseau Ferré de France) in 1997.<sup>6</sup>

Thirdly, for certain types of disputes, such as disputes concerning contracts between foreign companies and public authorities regarding some specifically identified projects of importance,<sup>7</sup> or for public-private partnerships (PPPs),<sup>8</sup> the choice of arbitration was allowed.

Fourthly, for certain cross-border projects, such as the Mont Blanc Tunnel between France and Italy, the Channel Tunnel between France and the United Kingdom, and the construction of a high speed railway between France and Spain, bilateral agreements were entered into which also provided for arbitration.<sup>9</sup>

Finally, it should be noted that, until now, a divergence existed between the Cour de cassation and the Conseil d'État on the prohibition of arbitration for contracts entered into by public entities in international matters. While the Conseil d'État traditionally considered that there could be no choice of arbitration if the contract is of an administrative nature, irrespective of its international character,<sup>10</sup> the Cour de cassation has consistently held, since its 1966 *Galakis* decision, that this prohibition did not apply to international contracts entered into for the purposes of, and in accordance with, the usages of international trade.<sup>11</sup>

As a result, despite the general prohibition set forth in Article 2060, international arbitration with French public entities has in many instances been possible.

## The INSERM decision: the Tribunal des Conflits decides that, as a general rule, the civil courts have jurisdiction; but there are a number of exceptions to this rule

If an arbitral award is rendered in France in a dispute with a French public entity and the award is challenged, the question arises whether the challenge should be heard by a civil or an administrative court. This was

the jurisdictional question addressed by the Tribunal des Conflits in its decision of 17 May 2010. In this case, a French public institution for medical research (INSERM) and the Letten F Saugstad Foundation, a Norwegian foundation, entered into an agreement for the construction and funding of a building in France for research purposes. An arbitration clause was included in the agreement. A dispute arose between the parties. Arbitration proceedings were initiated and an award was rendered against INSERM, which applied to set it aside before both the Paris Court of Appeal and the Conseil d'État.<sup>12</sup>

Before the Paris Court of Appeal, INSERM argued that the arbitration agreement was null and void based on Article 2060 of the French Civil Code. Furthermore, INSERM requested a stay of proceedings pending the decision of the Conseil d'État. In a decision rendered on 13 November 2008,<sup>13</sup> the Paris Court of Appeal found that it had jurisdiction to hear the challenge against the award and refused to stay the proceedings. It reasoned that the French Code of Civil Procedure (Article 1505) provides that challenges against arbitral awards involving international trade are brought before a (civil) Court of Appeal. It decided, therefore, that the proceedings pending before the Conseil d'État had no bearing on the challenge pending before it. Concerning the issue of the alleged nullity of the arbitration agreement, the Court of Appeal held that the prohibition for public entities to enter into arbitration agreements is not part of international public policy and is therefore limited to domestic administrative contracts, as opposed to international ones. In this particular case, the Court of Appeal found that since the funding for the building came from the Norwegian foundation, there was a cross-border transfer of funds, and the agreement between the foundation and INSERM ought to be characterised as an international contract. Accordingly, the Court held that an arbitration clause can validly be inserted into that agreement, and it rejected INSERM's application to set the award aside.

Before the Conseil d'État, INSERM argued that, as the contract containing the arbitration clause was governed by French administrative law, the administrative courts should have sole jurisdiction to hear the challenge against the award. In a decision rendered on 31 July 2009,<sup>14</sup> the Conseil d'État decided to stay the case and refer it to the Tribunal des Conflits, as the question of whether civil or administrative French courts

had jurisdiction over such challenge raised in its view a serious jurisdictional issue.

The 17 May 2010 decision of the Tribunal des Conflits clarifies that, in principle, an application to set aside an award made in France in a dispute arising out of a contract between a French public entity and a foreign entity involving international trade and performed on French territory should be heard by civil courts, irrespective of the administrative nature of the contract. Accordingly, it found that the Paris Court of Appeal had validly retained jurisdiction over the matter. The decision of the Tribunal des Conflits only seems to concern international, as opposed to domestic, administrative contracts. In order to identify a contract involving international trade, an expression also used by Article 1492 of the French Code of Civil Procedure, it is necessary and sufficient to demonstrate that the overall underlying economic transaction is not confined to the territory of France.<sup>15</sup> Even though the decision of the Tribunal des Conflits deals exclusively with contracts performed in France, there is reason to believe that the rule should apply *a fortiori* to contracts involving international trade which are performed outside of France.<sup>16</sup>

The Tribunal des Conflits, however, sets out an exhaustive list of exceptions to the general rule. Administrative courts will have jurisdiction over challenges to awards relating to agreements governed by mandatory administrative rules concerning the occupancy of publicly-owned land or public expenditure in procurement contracts, public-private partnerships and contracts of delegation of public services. The rationale given by the Tribunal is that since these four types of agreements are governed by mandatory public law rules,<sup>17</sup> administrative courts should retain exclusive jurisdiction over challenges against arbitral awards arising out of these kinds of agreements.

While this solution was not favoured by most arbitration specialists,<sup>18</sup> these four types of contracts are well defined in French administrative case law<sup>19</sup> and, accordingly, the administrative courts should have jurisdiction over only a small fraction of awards made in France in international matters. The great majority of challenges against awards involving international trade made in France, even those involving French public entities such as INSERM in the case at hand, will continue to be heard by civil courts which, over the years, have developed a strong body

of experience in relation to international arbitration and a distinct *favor arbitrandum*.

In addition, the Tribunal des Conflits implicitly recognised the arbitrability of disputes arising out of administrative contracts involving international trade. The traditional and restrictive position of the Conseil d'État that public entities could not enter into arbitration agreements if the contract is of an administrative nature, irrespective of its international character, as illustrated by the position in the 1986 *Eurodisney* opinion referred to above, should therefore no longer apply. This in itself is a very positive development.

#### Notes

- 1 Tribunal des Conflits, Judgment No 3754, dated 17 May 2010, *INSERM v Fondation Letten F Saugstad*.
- 2 Article 2060 of the French Civil Code provides that: 'One may not enter into arbitration agreements in matters of status and capacity of natural persons, in those relating to divorce and judicial separation or in controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned. However, certain categories of public institutions having an industrial and commercial character may be authorised by decree to enter into arbitration agreements.'
- 3 Law No 82-1153, dated 30 December 1982.
- 4 Decree No 84-31, dated 11 January 1984.
- 5 Law No 90-568, dated 2 July 1990.
- 6 Law No 97-135, dated 13 February 1997.
- 7 Law No 86-972, dated 19 August 1986. (In this specific case, the Eurodisney park was concerned).
- 8 Ordinance No 2004-559, dated 17 June 2004.
- 9 Treaty between France and Italy concerning the construction and operation of the Mont Blanc Tunnel, dated 14 March 1953; Treaty between France and the United Kingdom concerning a Channel fixed link, dated 12 February 1986; Treaty between France and Spain concerning the construction and operation of the international section of a high speed railway, dated 10 October 1995.
- 10 Conseil d'État, Opinion No 339-710, dated 6 March 1986, *Eurodisney*.
- 11 Cour de cassation, 1st civil chamber, Judgment dated 2 May 1966, *Trésor Public v Galakis*.
- 12 INSERM's request was first filed before the Marseille Administrative Court of Appeal, which the Court remanded to the Conseil d'État.
- 13 Paris Court of Appeal, Judgment dated 13 November 2008, *INSERM v Letten*.
- 14 Conseil d'État, Judgment dated 31 July 2009, *INSERM v Letten*.
- 15 For example, Paris Court of Appeal, Judgment dated 14 June 2001, *André v Tradigrain*.
- 16 See M Audit, 'Le nouveau régime de l'arbitrage des contrats administratifs internationaux (à la suite de l'arrêt rendu par le Tribunal des conflits dans l'affaire *INSERM*', *Rev Arb* (2010), p 262.
- 17 *Régime administratif d'ordre public* in the original French text.
- 18 For various reasons, civil courts may have been granted jurisdiction over the challenge of all arbitral awards involving a French public entity and international trade, which would have had the authors' and most arbitration specialists' preference. First, the administrative nature of the contract may be seen as irrelevant since setting aside proceedings do not allow the review of the merits of a dispute but are only limited to the narrow grounds set out in Article 1502 of the Code of Civil Procedure. Secondly, civil courts could also have applied the mandatory rules of administrative law. Finally, civil courts already have jurisdiction over challenges of awards involving administrative contracts entered into by foreign public entities. See, eg, Paris Court of Appeal, Judgment dated 17 December 1991, *Gatoik*; Paris Court of Appeal, Judgment dated 13 June 1996, *Sté KFTC*; Paris Court of Appeal, Judgment dated 24 February 1994 *Sté Bec Frères*.
- 19 See M Audit, note 16 above, at 271.