French Conseil d'État Clarifies Standard of Review in Arbitral Awards Annulment Proceedings

On 9 November 2016, the French Conseil d'État (the ***Conseil d'État***), the French Administrative Supreme Court, ruled on the standard of review to be applied by French administrative courts in actions to set aside international arbitral awards.

Under French law, an action to set aside an arbitral award should, in principle, be brought before a civil court (*i.e.* the Court of Appeal of the place where the award is made). However, French administrative courts have jurisdiction to hear actions to set aside arbitral awards relating to administrative contracts.

The case at hand helps clarify the uncertainty concerning the standard of review to be applied by these administrative courts.

The dispute arose between *Fosmax LND SAS* (***Fosmax***) and a consortium of three engineering contractors. The consortium had initially entered into a contract with *Gaz de France* (then

a public company) for the construction of a gas terminal in France. However, *Gaz de France* latter became a privately-owned company, and assigned the contract to Fosmax in 2005.

Alleging defects and delays in the project, Fosmax initiated arbitral proceedings pursuant to an arbitration agreement inserted in 2011, by way of amendment to the contract. The arbitral tribunal, however, rejected most of Fosmax's claims and Fosmax consequently initiated proceedings before administrative courts to set aside the award.

Embracing its newly acquired jurisdiction, the Conseil d'État took this case as an opportunity to clarify the standard of review to be applied by French administrative courts in actions to set aside international arbitral awards in disputes relating to administrative contracts.

Firstly, the Conseil d'État clarified that it must *ex officio* examine the legality of the arbitration agreement.

Secondly, the Conseil d'État ruled that its review of arbitral awards was limited to examining; (i) whether the arbitral proceedings had been conducted in an appropriate manner (*i.e*. whether basic due process requirements had been fulfilled and whether the arbitral tribunal was indeed competent to rule on the matter); and (ii) whether the award complied with public policy.

With regard to the public policy requirement, the Conseil d'État seems to have adopted a quite novel approach. Indeed, while French civil courts usually make a distinction between domestic public policy and international public policy, the Conseil d'État seems to have departed from this traditional dichotomy, as it only enumerated the factors that need to be assess to find a violation of "public policy" without specifying whether it referred to the domestic or international context. According to the Conseil d'État, those factors include: (i) whether the purpose of the contract is

illegal or the contract is void; (ii) whether the contract suffers a major defect such as a lack of mutual consent; (iii) non-compliance with mandatory public policy rules from which public bodies are not allowed to derogate; or (iv) the European Union's public policy.

The fact that the Conseil d'État did not specify whether it referred to domestic or international public policy is quite interesting. Should one consider that the Conseil d'État departed from the traditional dichotomy and has now adopted one common, generic view of the concept of public policy? This might be a bridge too far… Another line of case law may be necessary to clarify this issue.
