EUROPE

France

Two Supreme Courts – One Single Approach to the Review of Arbitral Awards

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In the last judgement of the Fosmax saga issued in July 2021, the French Administrative Supreme Court ('Conseil d'Etat') upheld the award and clarified its limited scope of review of public policy grounds and ruled that the dismissal of an application to annul an award is deemed an enforcement order, thereby confirming its alignment with the French Code of Civil Procedure and Civil Supreme Court ('Cour de Cassation') case law.

1. Factual background

In a long-running dispute over the construction of a Liquid Natural Gas terminal (LNG terminal) that started in 2012, the French Administrative Supreme Court ('*Conseil d'Etat*') upheld a €32 million ICC award in favour of Fosmax in the annulment proceedings initiated by Tecnimont and TCM.[1]

Back in 2004, Gaz de France – at that time a public entity – entered a contract with a construction consortium (STS) to build the LNG Terminal in the port of Fos-sur-Mer. The consortium was, at the time of the conclusion of the contract, composed by Sofregaz (now TCM), SN Technigaz and Saipem. By an amendment dated 17 June 2005, Gaz de France — which then became a private company — retroactively transferred the contract to its subsidiary Fosmax, a private company. Similarly, Technigaz assigned its rights to Saipem, and Tecnimont, an Italian company, joined the construction consortium. On 11 July 2011, the parties inserted an arbitration clause providing that any dispute arising out of or in relation to the contract shall be definitively settled pursuant to the ICC Rules.

Following several major defects during the construction of the terminal, Fosmax substituted STS with other contractors to remedy these defects. In 2012, Fosmax initiated arbitration proceedings to obtain compensation for the delays, the cost overruns, and the defects in the delivery of the LNG terminal. The dispute turned around the ability for the client to have resort to the French concept of '*mise en régie*', i.e. to proceed to a forced substitution of the contractor at its own costs.

On 13 February 2015, the arbitral tribunal rendered an award ordering (i) STS to pay nearly €69 million to Fosmax and (ii) Fosmax to pay €128 million to STS; and (iii) dismissing Fosmax's claim on the substitution costs.

Fosmax applied to the *Conseil d'Etat*, the French administrative Supreme Court, to seek annulment of the award on the ground that the arbitral tribunal erred in concluding that the contract was subject to private law and, accordingly, failed to apply a mandatory rule of French public law (the '*mise en régie*' regime). Fosmax claimed that, as a result, STS should reimburse the works performed by other contractors due to the default of STS.

Following this application, the *Conseil d'Etat* referred the matter to the *Tribunal des Conflits* – the court to resolve the conflict of jurisdiction between the administrative and the civil courts. There was indeed doubts as to the competent jurisdiction since the litigious contract, which was initially concluded by a public entity, was later transferred to a private company. In this matter, the Tribunal des Conflits held that the annulment recourse against the award at issue fell within the jurisdiction of the *Conseil d'Etat*.[2] In a follow-up decision issued by its plenary assembly, the *Conseil d'Etat* partially annulled the award which dismissed Fosmax's claim related to the reimbursement for the remedial works performed by third companies,

1 *Société Tecnimont SpA and Société TCM FR SA*, Conseil d'Etat, 20 July 2021, Case No. 443342.

2 *Société Fosmax LNG*, Tribunal des conflits, 11 April 2016, No. 4043; J. Billemont, 'D'Inserm à Fosmax: la cession rétroactive d'un marché public à une personne privée n'affecte pas la compétence du juge administratif pour connaître du recours contre la sentence arbitrale', *Rev. arb.*, 2016.1153; D. Bensaude, 'Arbitrage administratif, exequatur et excès de pouvoir', *Gaz. Pal.* 7 nov. 2017, nº 306e9, p. 27.

holding that the arbitral tribunal disregarded a mandatory rule of French administrative law ('*mise en régie*').[3]

On 24 June 2020, in a new award, the arbitral tribunal ruled that the construction consortium STS shall reimburse Fosmax for the remedial works performed by other companies due to STS failure. While STS challenged that the non-performance was not due to its fault, the arbitral tribunal held that the substitution was lawful under the mandatory rules of public law. STS was therefore ordered to pay nearly €32 million to Fosmax. The construction consortium members, Tecnimont and TCM, applied to the *Conseil d'Etat* to annul the award.

2. A review of public policy grounds limited in scope

In the judgment issued on 20 July 2021 ('*Fosmax (2)*'), the *Conseil d'Etat* first took the opportunity to recall the grounds under which the administrative courts may review an international arbitral award. Those grounds, set forth in the Fosmax's judgment dated 9 November 2016 ('*Fosmax (1)*'), are in line with those provided in the CPC for the review of an arbitral award by civil courts.

The *Conseil d'Etat* held:

> When it is seized of a recourse against an arbitral award rendered in France in a dispute arising out of a the performance or the termination of a contract concluded by a French public entity and a foreign legal entity performed in France, the *Conseil d'Etat* shall ensure, even *ex officio*, that the arbitration agreement was validly concluded. In addition, can only be usefully challenged before it the arguments relating to, on one side, the fact that the award was issued in irregular circumstances, and, on the other side, that it is contrary to public policy. [...]
>
> Regarding the substance of the award, an arbitral award is contrary to public policy when it enforces a contract which is illegal or tainted of a particularly serious flaw, in particular regarding the conditions under which the parties consented to the contract, and when it disregards the rules which cannot be waived by public entities.[4]

According to *Conseil d'Etat*, a party may therefore only seek the annulment of an award before the administrative courts upon the six following grounds:

1. the arbitral tribunal wrongly upheld or declined jurisdiction;
2. the arbitral tribunal was not properly constituted;
3. the arbitral tribunal ruled without complying with the mandate conferred upon it;
4. due process was violated;
5. the award fails to state the reasons upon which it is based; and
6. the award is contrary to public policy.

The *Conseil d'Etat* then underlined the narrow scope of its review, especially regarding the public policy ground. In *Fosmax (1)*, the *Conseil d'Etat* only overruled part of the award that violated mandatory rules of French public law. Under those rules, a public entity is entitled to substitute a defective contractor with another contractor to remedy the defects at the expense of the former, even though the contract does not refer to such rule. In this decision, the *Conseil d'Etat* indeed underlined the mandatory status of the '*mise en régie*'.

However, the *Conseil d'Etat* left to the arbitral tribunal to determine whether the conditions for applying such regime were satisfied in the present matter. By holding such reasoning, the *Conseil d'Etat* implied that the administrative courts would not review the reasoning of the arbitrators as annulment proceedings are not an appeal. Such ruling is in line with the position of the civil courts.

3 *Société Fosmax LNG*, Conseil d'Etat, Plenary Session, 9 Nov. 2016, Case No. 388806; R. Dupeyré, 'French Council of State reviews arbitration award', *Lexis Notes*, 1 Dec. 2016; M. Laazouzi, S. Lemaire, 'Arrêts Fosmax, Un guide incomplet du contrôle par les sentences administratives des sentences internationales', *CAPJIA*, No 4, 2017, p. 722; J.-M. Pastor, 'Le contrôle du Conseil d'État sur une sentence arbitrale', *Dalloz*, 14 Nov. 2016.

4 Free translation. In French: 'Lorsqu'il est saisi d'un recours dirigé contre une sentence arbitrale rendue en France dans un litige né de l'exécution ou de la rupture d'un contrat conclu entre une personne morale de droit public française et une personne de droit étranger, exécuté sur le territoire français mais mettant en jeu les intérêts du commerce international, il appartient au Conseil d'Etat de s'assurer, le cas échéant d'office, de la licéité de la convention d'arbitrage. Ne peuvent en outre être utilement soulevés devant lui que des moyens tirés, d'une part, de ce que la sentence a été rendue dans des conditions irrégulières et, d'autre part, de ce qu'elle est contraire à l'ordre public .. S'agissant du contrôle sur le fond, une sentence arbitrale est contraire à l'ordre public lorsqu'elle fait application d'un contrat dont l'objet est illicite ou entaché d'un vice d'une particulière gravité relatif notamment aux conditions dans lesquelles les parties ont donné leur consentement, lorsqu'elle méconnaît des règles auxquelles les personnes publiques ne peuvent déroger, telles que notamment l'interdiction de consentir des libéralités, d'aliéner le domaine public ou de renoncer aux prérogatives dont ces personnes disposent dans l'intérêt général au cours de l'exécution du contrat, ou lorsqu'elle méconnaît les règles d'ordre public du droit de l'Union européenne.'

Fosmax (2) strengthens this view. In fact, Tecnimont and TCM raised in their annulment briefs a substantive issue regarding the application of the rules of public policy of the French public law. The *Conseil d'Etat* dismissed that ground holding for the first time that it was not for the *Conseil d'Etat* to rule on the wrongful application of the mandatory rules.

Echoing *Fosmax (1)*, the *Conseil d'Etat* declined to review the reasoning of the arbitral tribunal, limiting its review to the effect the award may produce. The Court emphasised that its review over an arbitral award is limited in scope and that reviewing substantive application of the mandatory rules under French public law did not fall within its scope of review.

As a result, by declining to review the reasoning of an arbitral tribunal on a mandatory rule of public law, the *Conseil d'Etat* stepped into the path of the French Court de Cassation – confining its review to the conformity of the award to the public policy.[5]

3. A dismissal of an annulment application deemed an enforcement order

While the *Conseil d'Etat* laid down the scope of its review in *Fosmax (1)*, in its judgment *Fosmax (2)*, the Court underlined the impact of a dismissal of an application to annul an award before administrative courts. The *Conseil d'Etat* also affirmed that the dismissal of an annulment application was equivalent to an enforcement order under Article 1498 of the French Civil Procedure Code ('CPC'), which provides that:

> A decision denying an appeal or an application to annul an award shall be deemed an enforcement order of the arbitral award or the parts thereof that were not overturned by the court.

The *Conseil d'Etat* held that:

> By exception to the provisions of article L311-1 of the Code of Administrative Courts, the dismissal by the *Conseil d'Etat* of a recourse against an award rendered in France in a dispute arising out of the performance of the termination of a contract performed in France but involving the interest of international commerce amounts to an exequatur of the arbitral award.[6]

As annulment proceedings are not an appeal, deficiencies in the arbitral tribunal reasoning cannot be challenged. Such dismissal has the same impact as in civil annulment proceedings.

4. Conclusion

By stepping into the path paved by the *Cour de cassation* case law and the French CPC — despite the French dualist arbitration regime (civil/administrative) — the *Conseil d'Etat* took a constructive approach in the review of arbitral awards. The grounds to annul an award before both jurisdictions are not only similar in nature but also in scope. For instance, the *Fosmax (2)* points out that the *Conseil d'Etat* will not review the reasoning of the arbitral tribunal in case of an alleged violation of public policy, confining its review to the conformity or the effect of the award to the public policy. Accordingly, the position of the *Conseil d'Etat* concurs with the view of the *Cour de cassation* on the purpose of their review.

Similarly, by ruling that a dismissal of an application to annul an award shall be deemed an order to enforce that award, the *Conseil d'Etat* is aware of the economic stakes in the arbitration field, and favours a quick and efficient enforcement of an arbitral award.

The *Conseil d'Etat*'s position in *Fosmax (2)* points out a convergence of the civil and administrative courts with respect to the law regime of review of arbitral awards. This also shows the efficiency and the arbitration-friendly regime in France despite its dualism.

5 *Société SNF SAS v. Société Cytec Industries BV*, Cour de cassation, Civ. 1, No. 06-15.320.

6 Free translation. In French: 'Par dérogation aux dispositions de l'article L. 311-1 du code de justice administrative, le rejet par le Conseil d'Etat d'une demande d'annulation d'une sentence arbitrale rendue en France dans un litige né de l'exécution ou de la rupture d'un contrat exécuté sur le territoire français mais mettant en jeu les intérêts du commerce international confère l'exequatur à cette sentence.'