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The INSERM decision of the Tribunal des Conflits: a storm in a teacup?

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The arbitrability of a dispute is not generally limited to private law. In many countries, including Germany and Switzerland, it is admitted that arbitration can also bear on claims derived from public law, and in particular on rights conferred upon by contracts subject to administrative law. Arbitrability of such disputes may however be more problematic in countries, like France, where the administrative jurisdiction plays an important role in the judicial system alongside with civil courts.

In that respect, French law has traditionally been said to be restrictive in permitting arbitration for administrative law disputes.

In France, under Article 2060 of the Civil Code, domestic disputes involving the State, as well as public entities (such as municipalities) and public establishments may not be referred to arbitration. Article 2060 provides, to that effect, that "there can be no arbitration […] in disputes concerning public collectives and public entities". However, this provision has since long been excluded by the *Cour de cassation* (highest French jurisdiction in civil matters) as far as international disputes are concerned (*Cour de cassation*, 1re civil chamber, 2 May 1966, *Galakis*). The Court held on that occasion that "the State is not prohibited from concluding arbitration agreement in international matters".

In 1975, a new provision was added to Article 2060 of the Civil Code, whereby "certain categories of public entities of an industrial and commercial character can be authorised to arbitrate by decree". However, pursuant to an opinion given by the *Conseil d'Etat* (highest French jurisdiction in administrative matters), this provision is applied in a very restrictive manner and only authorises such entities to enter into an arbitration agreement after the dispute has arisen (*compromis d'arbitrage*).

The question then arose of the capacity of the French State and public entities to validly enter into an arbitration agreement with the American company Walt Disney in the contracts related to the construction of the Eurodisney Park.

In its *Walt Disney* opinion of 6 March 1986, the *Conseil d'Etat* pointed out that legal entities of public law could not circumvent the rules determining the jurisdiction of the French administrative courts if the dispute touches upon rules of French administrative law that are considered as being of public policy. It came to the conclusion that the contract envisaged with Walt Disney "resorts to

the French domestic legal order" and can therefore not contain a valid arbitration clause, which would be null and void as a matter of public policy.

It therefore appeared that the *Walt Disney* opinion tended to restrict, in spite of the Cour de Cassation's ruling in Galakis, the arbitrability of international disputes touching upon administrative law. In fact, the Walt Disney contract was certainly to be considered as international pursuant to Article 1492 of the French Code of Civil proceedings, as it involved the interests of international trade.

Since then, there has been considerable debate on how to open arbitration in France to public law disputes. On 7 April 2006, the Ministry of Justice commissioned a working group to consider the future of arbitration in the context of administrative law. The working Group issued its report (called the *Labetoulle* report, by the name of its author) on 13 March 2007 (Rev. arb., 2007, Vol. 3: p. 651, on which *see* J.-L. Delvolvé, Une véritable révolution inaboutie, remarques sur le projet de réforme de l'arbitrage en matière administrative ; and S. Lemaire, Rapport du groupe de travail, ib.).

The *Labetoulle* report proposed to abolish the prohibition preventing public bodies from agreeing to arbitrate, as set out in article 2060 of the Civil Code. As a result, a draft law was prepared in order to "broaden the possibility for recourse to arbitration for public bodies and to clarify the procedural regime of arbitrations involving public law" (Rapport du groupe de travail sur l'arbitrage en matière administrative, 13 mars 2007 in Rev. arb., 2007, Vol. 3, p. 651). This report was nonetheless criticized in the arbitration community for it set a special regime for the arbitration in administrative cases, distinct from that prevailing under the Code of Civil Procedure for other arbitrations. As a consequence, difficult issues of characterisation would arise, in particular in the context of an international arbitration, to define what would and what would not be an "administrative arbitration". The *Labetoulle* report, however, has not so far been converted into law.

A particular and sensitive aspect of that debate is the allocation of jurisdiction between administrative and civil courts to hear challenges.

As it stands, challenges against international awards are brought before the Court of Appeal of the place of the arbitration, pursuant to Article 1505 of the Code of Civil Procedure, which court applies the rules provided for challenges by the French Court of Civil proceedings.

However, the question whether administrative courts should have jurisdiction in cases involving mandatory administrative laws has never been clearly settled.

This issue was however raised in the recent *Inserm* case.

A dispute arose between the French National Institute for Health and Medical Research (Inserm), a French public entity, and a Norwegian foundation, with respect to an international cooperation agreement. The agreement provided for *inter alia* the construction in France of a building dedicated to research in neurobiology. It included an arbitration agreement.

A dispute arose, and the French party seized a French court, which declined to hear the case because of the existence of an arbitration agreement between the parties. Subsequently, the *Inserm* requested the Paris First Instance Tribunal to appoint an arbitrator.

The arbitrator was appointed and rendered an award in favour of the Norwegian company. A challenge against the award was brought before the Paris Court of Appeal. The Paris Court of Appeal decided (*Inserm* v. *Association Fondation Letten F. Saugstad*, Paris Court of Appeal, 13 November 2008, Rev. arb., 2009, Vol. 2, p. 389) that it had jurisdiction to hear the challenge, but rejected it on two grounds. Firstly, it found that the prohibition for States and State entities to arbitrate was limited to domestic contracts, and secondly that, pursuant to the principle of validity of arbitration clauses admitted in French law, the prohibition to arbitrate was not part of international public policy.

However, an action was also brought in parallel by the French party before the French administrative courts, which were requested to annul the award on the basis that the arbitration agreement was null and void.

The case was directly called to the French highest administrative jurisdiction, the *Conseil d'Etat.*

The question was therefore to determine which of the two judicial bodies, civil or administrative, had jurisdiction to hear the matter in the last resort.

The *Conseil d'Etat* decided that there were reasonable doubts with respect to the allocation of jurisdiction between civil and administrative courts, and it therefore decided to raise the case to the *Tribunal des conflits*, which is the French jurisdiction empowered to settle a conflict of jurisdiction between civil and administrative courts.

The *Tribunal des conflits* rendered its judgement on 17 May 2010. That decision has given rise to a certain level of criticism in the French arbitration community (See Th. Clay, *Les contorsions byzantines du Tribunal des conflits en matière d'arbitrage*, JCP G, n° 21, 2010, p. 1045, and E. Gaillard, *Le Tribunal des conflits torpille le droit français de l'arbitrage*, ib., p. 1096).

The Tribunal des Conflits decided that "a challenge against an arbitral award rendered in France on the basis of an arbitration agreement contained in a contract concluded between an entity of French public law and a foreign company, which contract has been performed on the French territory and which concerns the interests of international trade, is to be brought before the court of appeal where the award is rendered pursuant to article 1505 of the Code of Civil Procedure even if the contract is to be characterized as administrative according to French domestic law".

The Tribunal however added that "the situation is different where a recourse brought under the same circumstances implies that the award be reviewed according to French mandatory rules of public law on the occupation of the public domain or according to the rules governing public expenditure that are applicable to public procurement, to public partnerships or to the delegation of public services, as such agreements are subject to a mandatory administrative regime that is of public policy. A recourse with respect to those contracts is subject to the jurisdiction of the administrative court".

In other words, a challenge against an international award concerning an international administrative contract which involves the application of the mandatory rules of French administrative law is to be brought before the administrative court rather than before the civil court as it is normally the case. With respect to that particular dispute, the Tribunal found that the civil courts have jurisdiction, but the door is left open to the administrative jurisdiction if French administrative law's mandatory rules are at stake.

It would certainly have been preferable if the *Tribunal des conflits* had clearly established that all international awards, even if they relate to administrative mandatory laws, are subject to the rules for vacatur provided by the Code of Civil proceedings and to the jurisdiction of the civil courts of the place of the arbitration. After all, such is the case when mandatory rules of another nature are at stake (such, for example, as European mandatory rules), and there is no real logic to treat administrative mandatory law differently. From that perspective, the decision is certainly a missed opportunity. It is, in addition, likely to increase the procedural difficulties in challenges against contracts concluded with the French State or with French State entities and that are performed in France. Ultimately, it is likely that parties will tend to place the seat of the arbitration in those contracts out of France in order to avoid these difficulties.

It should be noted, however, that the decision does not do much more than clarifying the situation as it resulted after the Walt Disney episode. Since *Walt Disney*, very little difficulties arose with respect to the jurisdiction of the French civil courts to hear challenges against international awards involving French public entities, and it is to be hoped that no more will arise after the decision of the *Tribunal des conflit*s. If this is the case, hopefully, the *Labetoulle* report and the Inserm case will remain a storm in a teacup.

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