

# Client Update

## French *Conseil d'Etat* Annuls ICC Award for Failure to Apply Domestic Administrative Law Rule

### NEW YORK

Ina C. Popova  
ipopova@debevoise.com

Floriane Lavaud  
flavaud@debevoise.com

### LONDON

Tony Dymond  
tdymond@debevoise.com

### PARIS

Antoine F. Kirry  
akirry@debevoise.com

Alice Rault  
arault@debevoise.com

The French *Conseil d'Etat*, France's highest administrative court, has set aside an international arbitral award for the first time, setting out a new scope for its control over awards involving State entities.<sup>1</sup> Under the *Fosmax* decision, arbitral awards involving mandatory rules of public law fall under the jurisdiction of the administrative (not civil) courts, and they may be annulled for failure to apply a mandatory rule of French public law.

### BACKGROUND

In 2004, Gaz de France, then a State-owned entity, entered into a contract with a consortium of private companies (the "Consortium") for the construction of a liquefied natural gas terminal in the South of France. Gaz de France was subsequently privatized, and it transferred the contract with retroactive effect to one of its subsidiaries, Fosmax LNG ("Fosmax"). An Italian company later joined the Consortium, and the parties amended the contract to provide for arbitration under the rules of the International Chamber of Commerce (the "ICC").

A dispute arose about delay and defects in the delivery of the terminal. In 2015, an ICC tribunal awarded approximately €69 million to Fosmax and €128 million to the Consortium. Fosmax sought to set aside the award before the *Conseil d'Etat*, arguing among other things that the tribunal had failed to apply a mandatory rule of French public law by denying reimbursement of costs that Fosmax had incurred in retaining third-party contractors to perform works that the Consortium had failed to perform.

---

<sup>1</sup> *Conseil d'Etat, Société Fosmax LNG v. Groupement d'entreprises STS*, n°388806, November 9, 2016.

## ADMINISTRATIVE COURTS HAVE JURISDICTION OVER ARBITRAL AWARDS INVOLVING MANDATORY RULES OF PUBLIC LAW

Because the contract had been transferred from a public to a private entity with retroactive effect, the question arose whether the administrative or civil courts were competent to review the award.<sup>2</sup> The *Tribunal des Conflits*, the court in charge of resolving conflicts of jurisdiction between civil and administrative courts, had held that the civil courts have jurisdiction over awards arising out of administrative contracts between public entities and foreign companies which concern international trade.<sup>3</sup>

Contrasting its earlier decision, in *Fosmax*, the *Tribunal des Conflits* held that international awards involving mandatory rules of public law, such as those relating to the occupation of the public domain or public procurement, fall under the jurisdiction of the administrative courts.<sup>4</sup> The *Tribunal des Conflits* concluded that the *Conseil d'Etat* had jurisdiction over the parties' dispute because it involved issues of public procurement.

## AWARD ANNULLED FOR FAILURE TO APPLY A MANDATORY RULE OF FRENCH ADMINISTRATIVE LAW

The *Conseil d'Etat* held that its review of international arbitral awards is limited to the validity of the arbitration agreement and the arbitral process, and the compatibility with public policy (including mandatory rules of domestic public law and European law).<sup>5</sup> Civil courts, in contrast, cannot annul an international award based on an error of law unless it rises to the level of a violation of international public policy.<sup>6</sup>

---

<sup>2</sup> *Conseil d'Etat, Société Fosmax LNG v. Groupement d'entreprises STS*, n°388806, December 3, 2015, para. 5.

<sup>3</sup> *Tribunal des Conflits, INSERM v. Fondation Letten F. Sausgstad*, n°C3754, May 17, 2010.

<sup>4</sup> *Tribunal des Conflits, Société Fosmax LNG v. Groupement d'entreprises STS*, n° 4043, April 11, 2016.

<sup>5</sup> *Conseil d'Etat, Société Fosmax LNG v. Groupement d'entreprises STS*, n°388806, November 9, 2016, para. 5.

<sup>6</sup> See French Code of Civil Procedure, Article 1520 ("An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.").

This distinction was key in *Fosmax*, because the main issue before the *Conseil d'Etat* was whether the arbitral tribunal erred in failing to apply a mandatory rule of domestic administrative law. The *Conseil d'Etat* recalled that a mere error of law does not automatically lead to annulment unless it “led the arbitrators to violate or ignore a mandatory rule applicable to administrative contracts.”<sup>7</sup> The ICC tribunal, however, had disregarded such a mandatory rule when it denied Fosmax’s claim for reimbursement of its costs in retaining a third-party contractor to perform the works that the Consortium had failed to perform. Accordingly, the *Conseil d'Etat* partially annulled the award to the extent it denied Fosmax’s claim. It declined, however, to review other findings of the arbitral tribunal on the grounds that the principles applied were not mandatory in nature and were therefore beyond the scope of the *Conseil d'Etat*’s review.<sup>8</sup>

Foreign companies wishing to enter into procurement contracts with French public entities should therefore be mindful of mandatory rules of French public law, for disregarding such rules may lead to the annulment of any favorable awards they may secure against these entities.

\* \* \*

Please do not hesitate to contact us with any questions.

---

<sup>7</sup> *Conseil d'Etat, Société Fosmax LNG v. Groupement d'entreprises STS*, n°388806, November 9, 2016, para. 11.

<sup>8</sup> *Id.* at 14.