

Arbitration Between the State and Private Entities in Lebanon (The New Law 440 on Arbitration)

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1. On the 17th of July 2001, the “*Conseil d’Etat*”, being the highest administrative court in the Republic of Lebanon, rendered two final decisions in the highly publicized arbitration disputes between the State and the two cellular mobile phone operators (FTML and LibanCell), declaring the arbitration clauses stipulated in the concerned BOT contracts null and void.
2. The said decisions were based, mainly, on Article 77 of the Lebanese New Code of Civil Procedure (NCCP), which gives Lebanese courts exclusive jurisdiction to rule over disputes related to *Concessions de Service Public* (Concession contracts), and on a principle according to which, administrative contracts may not be subject to arbitration.
3. This latest development was considered by the Government as a major impediment to its efforts to encourage international investment in the country, a matter that led to the enactment of Law No. 440 dated 29 July 2002, bringing amendments to the New Code of Civil Procedure and expressly establishing the validity of arbitration clauses in administrative contracts, however, under certain conditions.
4. Unfortunately, the said amendment, though being of a major importance, did not bring an end to all problems, as shall be further detailed hereunder.
5. For the purposes of providing a fairly comprehensive understanding of the current situation, a general overview of the relevant legal background shall be necessary **(I)**. A brief analysis of the *Conseil d’Etat* decisions **(II)** shall then prove to be fundamental, specially when examining the new amendment and its inherent limits **(III)**.

I. General Overview of Arbitration Law in Lebanon.

6. The Lebanese Legislation on arbitration has been enacted 19 years ago. In 1983, while redrafting the whole Code of Civil Procedure, the Lebanese legislator decided that it was appropriate to adopt modern provisions regulating various aspects of domestic and international arbitration.
7. Indeed, the New Code of Civil Procedure (NCCP), which comprises two chapters on arbitration (Domestic and International), was enacted in 1983. Three years earlier, the French legislator was redrafting the French Code of Civil Procedure when a Decree dated 14 May 1980 was enacted. The said Decree (50 Articles) dealt with matters related only to domestic arbitration. However, Decree dated 12 May 1981 was enacted in order to regulate some aspects of international arbitration.
8. The French experience turned out to be the perfect example of the modern legislation that can easily serve as a source of inspiration. Indeed, the Lebanese legislator adopted most of the French provisions.

9. In the Lebanese New Code of Civil Procedure, the chapter on arbitration is divided into two sections, the first (Articles 762 to 808) deals with domestic arbitration, while the second (Articles 809 to 821) is related to international arbitration.
10. The distinction between domestic and international arbitration is based on economic criteria. In fact, Article 809 § 1 NCCP considers arbitration as international when it involves "the interests of international trade", such definition being understood in a broad manner so as to include every operation which concerns economically more than one country¹.
11. According to Article 809 § 2 of the NCCP, "the State and all public legal entities may have recourse to international arbitration".
12. The Section of the NCCP on domestic arbitration contains also a provision which, though not enacted in general terms as Article 809, is nevertheless unequivocal when admitting that arbitration is valid when it relates to administrative contracts² of the State.
13. Indeed, Article 795 § 2 NCCP, which comes in the section dealing with domestic arbitration, reads as follows:

"If the dispute which is the object of the arbitration falls within the jurisdiction of the administrative courts, the order of exequatur shall be issued by the president of the Conseil d'Etat. If an order refusing exequatur is issued, an appeal may be brought before the majlis al-qadaya [the litigation council]."

14. This provision, which is also applicable to international arbitration (by reference from Article 815 NCCP), further confirms that the State and public entities can have recourse to arbitration, whether domestic or international, and whether the dispute is related to an administrative contract or not.

II. The Decisions of the *Conseil d'Etat*.

15. In June 1994, two contracts for *Build, Operate and Transfer (BOT) Undertaking for Implementing Cellular GSM Services in Lebanon* were signed between the State of

¹ The definition is purely economic: "Any transaction involving a movement of goods, services or funds across national boundaries, or concerning the economies or currencies of at least two countries, necessarily involves the interests of international trade. The same is true of any dispute to which that transaction may give rise" Fouchard, Gaillard, Goldman, on International Commercial Arbitration, 1999, paragraph 115; See also Paris Court of Appeal, 14 March 1989, *Revue de l'Arbitrage* 1991, page 355; Paris Court of Appeal, 1 July 1997, *Revue de l'Arbitrage* 1998, page 131.

² Under Lebanese Law, which is a civil law system, contracts between the State or public entities and private persons are divided into two categories: private and administrative, whereby administrative contracts are (i) all such agreements where the contracting private persons are directly participating to the implementation of a Public Service, or (ii) all such agreements containing stipulations which cannot be inserted in an ordinary private contract (*clauses exorbitantes du droit commun*), all other contracts being considered as private. The administrative nature of a contract entails the application of a separate body of law, the administrative law, and all disputes arising therefrom fall, in principle, within the jurisdiction of administrative courts.

Lebanon and two international GSM mobile phone operators: France Telecom Mobiles International (FTMI) and Telecom Finland (TFI).

16. The BOT contracts were then assigned to the newly created Lebanese subsidiaries of FTMI and TFI, respectively FTML and LibanCell.
17. A dispute emerged between both operators and the State of Lebanon pertaining to the interpretation and implementation of the BOT contracts, upon which FTML and LibanCell filed two separate requests for arbitration before the International Chamber of Commerce³. The said requests were based on Article 30 of the BOT contracts, which provided that settlement of disputes arising in connection therewith shall be settled through arbitration of the International Chamber of Commerce, the place of arbitration being Lebanon.
18. Three months later, the State of Lebanon petitioned the *Conseil d'Etat* requesting that the arbitration clauses contained in both BOT contracts be declared as null and void.
19. On the 17th of July 2001, the *Conseil d'Etat* rendered two decisions in the above cases. Both decisions declared the concerned ICC arbitration clauses as null and void.
20. In essence, the *Conseil d'Etat* based its decisions on the grounds that the contracts are "*Concessions de Service Public*"⁴, and that Article 77 NCCP required any dispute pertaining to such contracts be brought before the Lebanese courts. The decisions were also based on a general principle of administrative law according to which, administrative contracts may not be the subject matter of arbitration⁵.
21. By adopting this position, the *Conseil d'Etat* has obviously misinterpreted Lebanese law **(i)**, while founding a precedent that is in complete contradiction with international arbitration principles and practice **(ii)**.

(i) The *Conseil d'Etat* misinterpreted Lebanese law.

22. Article 77 NCCP states the following:

"It is mandatory for actions concerning the validity or violation of a "Concession de Service Public" granted or recognized by the Lebanese State to be brought before the Lebanese courts."

23. This Article appears under a section of the NCCP entitled "International Jurisdiction". International jurisdiction, however, concerns only the assignment of jurisdiction between the State courts of Lebanon and foreign countries. Article 77 is, therefore, totally irrelevant to the question of the arbitrability of a dispute.

³ Said requests were then registered as cases No., respectively, 11031/ACS and 11019/ACS; both cases are still pending.

⁴ Under Lebanese law "*Concession de Service Public*" is defined as the agreement by which a (generally) private person undertakes to manage a Public Service and/or to perform a work for the benefit of a public entity, in consideration for a remuneration which may take various forms. Concession contracts are, by nature, administrative contracts.

⁵ In fact, this principle was already established by Lebanese jurisprudence. In this sense, see *Conseil d'Etat*, 7 December 1948, *Hatem*, Vol. 71, page 23; 1 February 1988 (*the State v. Medreco*), *Administrative Judiciary Review*, fifth edition, page 37).

24. The fact that Article 77 is irrelevant to the subject matter is further confirmed when examining the rationale behind such provision. In fact, the granting of exclusive jurisdiction to Lebanese courts to rule over disputes arising in connection with Concession contracts was meant only to protect national sovereignty⁶. Indeed, national sovereignty may suffer if the courts of a foreign State are allowed to rule over such disputes, specially that Concession contracts generally relate to the exploitation of national natural resources.
25. The same is not true for arbitration. Indeed, arbitrators are not State organs, and all powers vested in them are derived essentially from the parties' will. It is therefore difficult to understand how national sovereignty can suffer from arbitration⁷.
26. As mentioned above, the *Conseil d'Etat* also based its decisions on a general principle of administrative law according to which, administrative contracts may not be the subject matter of arbitration.
27. In fact, the *Conseil d'Etat* heavily relied on an opinion⁸ rendered in 1986 by the French *Conseil d'Etat*, wherein the French highest administrative court held that, according to general principles of administrative law, arbitration is prohibited whenever it relates to administrative contracts. The said opinion drew, however, fierce reactions from eminent French scholars⁹.
28. In all cases, such principle is certainly in contradiction with Article 809 § 2 NCCP, which provides that "the State and all public legal entities may have recourse to international arbitration".
29. In order to avoid implementing Article 809, the *Conseil d'Etat* held that administrative contracts (including Concession contracts) may never be considered as "involving the interests of International trade" (that is under Lebanese law the definition of international arbitration), and that, therefore, arbitration pertaining to administrative contracts is necessarily domestic. Article 809 is, accordingly, inapplicable.
30. As such, the *Conseil d'Etat* adopted a rather restrictive interpretation of "International Trade" and international arbitration. Indeed, and as mentioned earlier, the distinction between domestic and international arbitration in Lebanese law is based on an economic criteria: in order to be qualified as international, the arbitration need only be related to an operation which affects the economy of more than one country, the nature of the contract and the parties thereto being absolutely irrelevant¹⁰.
31. Even if (which is denied), administrative contracts are to be qualified as domestic by nature, arbitration in connection thereof would still be valid, since Article 795 § 2

⁶ See Nasri Diab, *Le tribunal internationalement compétent en droits libanais et français*, page 212.

⁷ See ICC case No. 2321 of 1974, Collection of ICC Arbitral Awards 1974/1985, page 246, 248.

⁸ French *Conseil d'Etat*, Opinion Euro Disney Land dated 6 March 1986, *les Grands Avis du Conseil d'Etat*, page 219.

⁹ Matthieu de Boissésou, "Interrogations et doutes sur une évolution législative, l'article 9 de la loi du 19 août 1986", *Revue de l'Arbitrage* 1987, page 3; Yves Gaudemet, *Revue de l'Arbitrage* 1992, page 241; G. Teboul "Arbitrage International et personnes morales de droit public", *AJDA* 1997, page 25.

¹⁰ See Paris Court of Appeal, 13 June 1996, *Revue de l'Arbitrage* 1997, page 251.

NCCP pertaining to domestic arbitration can only be interpreted as confirming the arbitrability of administrative contracts.

(i) The *Conseil d'Etat* decisions are in contradiction with international arbitration practice.

32. Most importantly, the position taken by the *Conseil d'Etat* sets a precedent which is in full contradiction with international arbitration practice.

33. In fact, there is a widely accepted principle in international arbitration that bans States or public entities from invoking an alleged lack of empowerment in order to withdraw from an arbitration agreement. The said principle is frequently considered as one of international public policy.

34. In ICC case No.1939 of 1971¹¹, an arbitral tribunal held that:

"(...) international public policy would be strongly opposed to the idea that a public entity, when dealing with a foreign party, could openly, knowingly and willingly enter into an arbitration agreement, on which its co-contractor would rely, only to claim subsequently, whether during arbitral proceedings or on enforcement of the award, that its own undertaking was void".

35. The same principle is also established in comparative case law¹², legislation¹³ and international conventions¹⁴.

36. Therefore, and not surprisingly, the decisions of the *Conseil d'Etat* raised severe criticism from Lebanese commentators. The Government saw in it a serious threat to international investment in Lebanon, and the only practical solution that was left consisted in the enactment of a new law.

¹¹ ICC case No. 1939 of 1971 (*Italian company v. African State-owned entity*), cited by Yves Derains, *Revue de l'Arbitrage* 1973, page 122, 145; See also ICC case No. 2521 of 1975, *Journal du Droit International* 1976, page 997, 998; ICC case No. 4381 of 1986, Collection of ICC Arbitral Awards 1986/1990, page 263; ICC case No. 3896 of 1982 (*Framatome v. Atomic Energy Organization of Iran*), *Journal du Droit International* 1984, page 58, 72; Award rendered in the case of *Elf Aquitaine Iran v. NIOC*, dated 14 January 1982, *Revue de l'Arbitrage* 1984, page 401, 418.

¹² See French Court of Appeal, 17 December 1991 (*Gatoil*), *Revue de l'Arbitrage* 1993, page 281; 24 February 1998 (*Bec frères*), *Revue de l'Arbitrage* 1995, page 275; 13 June 1996 (*KFTCIC v. Icori Estero*), *Revue de l'Arbitrage* 1997, page 251. See also Court of Appeal of Cairo, 19 March 1997 and the Italian *Corte di Cassazione* (*SAEPA & SIAPE v. Gemanco srl*), XXII Yearbook 737 (1997).

¹³ Article 177 (2) of the Swiss Private International Law Act provides that: "If a party to the arbitration agreement is a State or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement".

¹⁴ See the European Convention on International Commercial Arbitration, Article II. See also the "*Acte uniforme relatif au droit de l'arbitrage*" adopted on 11 March 1999 by the Council of Ministers of the "*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*" (Article 2 (2)).

III. The New Law 440 and its Limits.

37. On the 29th of July 2002, the Lebanese parliament adopted law No. 440 providing for "the amendment of certain provisions of the Code of Civil Procedure pertaining to arbitration".
38. The new law expressly establishes the validity of arbitration agreements in all contracts of the State and/or public entities, including administrative contracts. Indeed, Article 762 § 2 NCCP as amended reads as follows:

"(...) The State and public legal entities may have recourse to arbitration, irrespective of the nature of the contract subject matter of the dispute."

39. Article 762 appears under the chapter relative to domestic arbitration. Accordingly, arbitration agreements in domestic administrative contracts (and, *a fortiori*, in "international" administrative contracts) are, from now on, perfectly valid.
40. However, arbitration agreements in administrative contracts shall not be effective unless approved by virtue of a Decree issued by the Council of Ministers. In this sense, the new Article 762 § 3 NCCP provides:

"As of the entry into force of this amending law, the arbitration clause or submission in administrative contracts shall not be effective until approved by virtue of a Decree of the Council of Ministers issued upon the proposal of the competent Minister (with respect to the State) or the supervising authority (with respect to public legal entities)."

41. The said requirement applies only to domestic arbitration agreements, whereby international arbitration agreements need not be approved. Indeed, Article 809 NCCP relative to international arbitration requires no such approval.
42. For the avoidance of all doubts, law 440 provided also for the amendment of Article 77 NCCP, which reads now as follows:

"Subject to the terms of Article 762 § 3 as amended and Article 809 § 2, it is mandatory for actions concerning the validity or violation of a "Concession de service Public" granted or recognized by the Lebanese State to be brought before the Lebanese Courts."

43. The new Article 762 § 3, as well as Article 809 §2, provide for the validity of arbitration agreements in administrative contracts. Therefore, the new Article 77 can only be read as expressly establishing the arbitrability of Concession contracts.
44. Most important, however, is the fact that this new law applies only to contracts and agreements which are concluded after the date of its enactment *i.e.*, after 29 July 2002. All preceding contracts remain subject to the previous legal condition.
45. This means that the precedent set by the decisions of the *Conseil d'Etat* shall continue to regulate arbitration agreements concluded before the 29th of July 2002, which agreements shall be considered as null and void, unless the *Conseil d'Etat* changes its conviction.