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Arbitration under the Lebanese Public Private Partnership Law

Michel Nassar · Saturday, June 23rd, 2018 · Young ICCA

On 9 September 2017, Lebanon passed Law No. 48 “Regulating Public Private Partnerships” (“PPP Law”) ahead of the CEDRE Conference (acronym in French for “Economic Conference for Development, through Reforms and with the Businesses”) held in Paris on 6 April 2018. This conference brought USD 11 billion of funding for Lebanon’s infrastructure which is in a critical state.

This most awaited law is based on a draft prepared in 2010 by the Lebanese High Council for Privatization and Public Private Partnership (“PPP”). The law was finally enacted just in time for the CEDRE Conference. As PPP is the preferred vehicle for foreign investments, the new law paves the way for a more prevalent choice for arbitration as dispute resolution mechanism.

1. The impact of the CEDRE Conference

Peter Mousley, a PPP specialist at the World Bank’s Beirut office, said in an interview: “Obviously [local banks] want to take informed risks.” Mousley continued: “Doing it in a PPP framework that takes proper account of the risks involved is liable to create a more enabling environment for infrastructure investment.”

The Secretary General of the High Council for Privatization and PPP, Ziad Hayek, explained in an interview that PPP is “a partnership in risks”. This means that the private company winning the PPP tender — depending on the terms of the agreement — might take on the risk of financing, constructing, and operating the project, while the government deals with revenue guarantees to the company, political risk, or environmental risk. “For each of these risks, then, [comes] a conversation about how you’re going to mitigate it,” Hayek says, adding that transparency is important in the tender process. Companies do not want to invest heavily in preparing for bids, i.e. designing the project and negotiating financing options with banks, which can be costly, if the evaluation methodology is not made public and the selection process is opaque.

Investors and fund managers such as those who were present at the CEDRE Conference have the option of investing in Lebanon or elsewhere. Invariably, they will look for jurisdictions that provide lucrative returns and low levels of risk.

2. Arbitration and public procurement projects before the PPP Law

Before the PPP Law was enacted, recourse to arbitration for local and foreign investors in procurement projects in Lebanon was limited mainly because it was subject to a lengthy

authorization process, which often had a political connotation to it.

The *Libancell* and *Cellis* case in the early 2000's serves as a prime example of how uncertain recourse to arbitration used to be. Those two mobile companies operated Lebanon's first-generation mobile network. Their contracts provided for arbitration clauses. When the government moved to terminate the contracts prematurely the companies filed for arbitration.

Consequently, the State Council, Lebanon's highest administrative court, issued an opinion according to which the arbitration clauses were null and void. Therefore, the state could not be party to the arbitration. Instead, the Council ruled that it had the competence of hearing cases against state-related entities. Despite this ruling, each investor ultimately won an award in CNUDCI proceedings under their respective country's BIT with Lebanon.

In response, improvement was made with Law No. 440 of 29 July 2002, that amended Article 762 of the Lebanese Code of Civil Procedure, allowing recourse to arbitration in a dispute with a state-entity:

[...]

The State and public legal entities may resort to arbitration regardless of the nature of the contract in dispute.

[...]

the arbitration clause or the arbitration submission agreement included in the administrative contracts will only become effective after being approved by virtue of a decree issued by the Council of Ministers following the proposal of the competent Minister with regards to the State, or the proposal of the supervising authority with regards to public legal entities.

However, effective recourse to arbitration remained uncertain — even if included in a public procurement agreement, the validity of an arbitration clause continued to be subject to the issuance of a decree by the executive power. Thus, in absence of political approval, recourse to arbitration would be paralyzed.

3. The new PPP Law

The CEDRE Conference organized by France was the final turning point because it required Lebanon to establish a certain legal framework as a condition for being granted funding. The envisaged changes were, for instance, the enactment of a new water law; the appointment of the members of regulatory authorities for the telecommunications, energy and aviation sectors; and an effective sharing of risks between state and investor.

3.1. The PPP Law allows recourse to arbitration

Article 10 of the recent PPP Law explicitly authorizes recourse to arbitration in the Partnership Agreement (as defined in Article I of the law) to be concluded between the state-party and the investor:

[...]

The Partnership Agreement shall include the following:

[...]

15- The dispute resolution mechanism, which can include mediation and domestic and international arbitration.

Ziad Hayek highlighted at the Lebanon Investment in Infrastructure Conference held in Beirut on 6 March 2018, that the new PPP Law:

[...] has facilitated the participation of the private sector – in the full spirit of partnership. It did that by recognizing the need to share risks and mitigate them; by providing for local and international arbitration; by exempting project companies from regulations requiring Lebanese control, ownership and management; and by allowing project companies to benefit from the provisions of the existing laws of investment promotion and asset securitization.

Article 10 of the new PPP Law will allow investors to benefit more easily from a dispute resolution clause providing for arbitration in the Partnership Agreement, since the state-party won't need a specific authorization to be able to resolve the dispute in arbitration.

Arbitration is now accepted by the Lebanese government as the impartial forum allowing for effective risk sharing between the state and the investor, assuring foreign investors.

However, the arbitration clause won't be automatically included in the draft Partnership Agreement proposed by the project committee. Consequently, the investor will have to negotiate such a clause and its terms on a case by case basis.

3.2. The PPP Law secures investment law

As noted by Ziad Hayek, operating through a PPP vehicle should not prevent local and foreign investors to benefit from the protection granted under Law No. 360 of 16 August 2001 ("Investment Law").

In that sense, Article 16 of the PPP Law provides that:

The provisions of this law shall not prevent the Private Partner and the Project Company from benefiting from the provisions of Law No. 360 dated August 16, 2001 and relating to the development of investments in Lebanon and from the provisions of Law No. 705 dated December 9, 2005 and relating to the securitization of assets.

The Investment Law provides investors with administrative and financial exemptions and facilities. Article 18 of the Investment Law also allows recourse to arbitration, although only after a lengthy authorization process.

This legal framework for investment protection granted by the new PPP Law and the Investment Law comes in addition to existing international agreements entered into by Lebanon.

4. Existing BITs and trade agreements

Lebanon's substantial investment protection is finally fully efficient since an authorization by the executive power is no longer required to allow conducting an arbitration involving a state-party.

In addition, the country has signed so far fifty-four Bilateral Investment Treaties ("BIT"). The BITs provide primarily for fair and equitable treatment on a non-discriminatory basis, and for full protection and security of foreign investments in both countries.

Lebanon has also a long tradition of openness towards the international community having ratified several trade agreements with major trade partners, such as the Euro-Mediterranean Partnership Agreement (EMP), the Free Trade Agreement with the European Free Trade Association (EFTA), the Greater Arab Free Trade Area (GAFTA), the Unified Agreement for the Investment of Arab Capital in the Arab States, the Lebanon-US Trade and Investment Framework Agreement (TIFA), and the Lebanon-Turkey Association Agreement.

5. Conclusion

Even if the new PPP Law and the investment protection framework provide for protection for investors in Lebanon, it remains nonetheless subject to the condition that an appropriate and efficient jurisdiction can hear their claims should a dispute arise. Therefore, arbitration will be the preferred method of dispute settlement over litigation before the Lebanese courts.

Consequently, foreign investors that will operate in Lebanon should negotiate robust dispute resolution clauses in order to efficiently protect their investments. To this end, Article 10 of the PPP Law allows an escalation clause, which includes arbitration as ultimate recourse.

Throughout these projects, legal practitioners should advise their clients also taking into account sector specific regulations (e.g. energy, oil & gas and telecommunications) in order to offer the most suitable dispute resolution mechanism.

With the new PPP Law, Lebanon makes yet another step towards a more arbitration-friendly environment. However, further efforts are still needed in order to make recourse to arbitration a natural choice of dispute resolution. Investors should therefore pay special attention to dispute resolution clauses when negotiating a Partnership Agreement.

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