

IRAQ ARBITRATION LAW

by

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1. Introduction

Since the fall of Saddam Hussain`s regime and the occupation of Iraq by the American and the British forces on 9th April 2003, Iraqi laws have been in constant changes. Many old laws have been repealed and replaced by new legislation, and other laws have been amended; first by the US Civil Administrator Paul Bremer, and later by the governments of Iraq.

Paul Bremer issued more than 100 laws and regulations within-one year changing and repealing long established civil and commercial laws. One of the most significant law issued by him was the Civil Administration Authority Order no. 17, according to which all foreign personnel are exempted from Iraqi jurisdiction and from Iraqi civil and penal laws. **This Order applies to all civil and military personnel of the Authority, Foreign Liaison Missions, as well as all non-Iraqi personnel of contractors and sub-contractors supplying goods or services to or on behalf of the Coalition Forces or the Authority.**

Section 20 of the revised Order 17 states that the Order remains applicable for the duration of the U.N. Mandate authorising the stay of the multi-national forces in Iraq. The Security Agreement concluded by the United States and Iraq came into effect on 01.01.2009, and has brought minor changes in the status of the US Forces in Iraq.

The aforesaid Order no. 17 raises a serious question as to whether exemptions from Iraqi laws and jurisdiction fall within the power of the occupying Authority. It is further

questionable whether such exemptions are consistent with the rules of international law. Under international law, the provisions of the related Geneva Conventions of

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The writer wishes to express his gratitude to Prof. Nael G. Bunni who kindly reviewed this article and made valuable comments.

1929, 1949, and 1985, such as Articles 64, 65, and 67 of the fourth Geneva Convention of 1949, the occupying Authority has no legal power to change or issue new laws, except for the purpose of maintaining orderly government and safeguarding public order in the occupied country. Many legislation issued by Paul Bremer have clearly gone beyond that.

The new legislation issued by the US Civil Administration Authority and those enacted by the government of Iraq have liberalised commercial rules, foreign investment and business environment. These changes are significant considering that prior to the occupation of Iraq, foreign entities, except Arabs, were not legally permitted to invest directly in Iraq, establish companies, and hold shares or equities.

The following are few examples of the new legislation:

- The Iraqi Company Law no. 21 of 1997 has been amended to grant foreign companies and persons the right to establish Iraqi companies and hold shares and equities.
- New Banking and Insurance laws have been enacted to permit foreign investment and participation in the Iraqi banking and insurance market.
- The new Investment Law no. 13 of 2006 is another major legislation, which aims to encourage foreign investment in Iraq. Under Article 10 of the said law, foreign entities and persons investing in Iraq enjoy the same right and privileges as those granted to Iraqi entities. They have the right to invest, own shares, and trade in the Iraqi market. The law also provides guarantees against confiscation, and it guarantees free movement of foreign capitals.

In accordance with the provisions of Articles 12-17 of the said Investment law, foreign and Iraqi entities and persons investing in projects in Iraq, enjoy a number of privileges and exemptions including 10 year tax exemption.

Machinery and Material imported for the purpose of a project under the law are exempted from custom duties and fees.

Furthermore, foreign investors may enjoy additional rights and privileges subject to any international and bilateral agreement as stated in Article 22 of the law.

Disputes between persons under the Investment law are subject to Iraqi law and jurisdiction according to Article 27. But, foreign parties are free to choose any other law and jurisdiction including international arbitration.

Notwithstanding the new legislation, the main Iraqi Civil Code no. 40 of 1951 and the Code of Civil Procedures no. 83 Of 1969, which constitute the backbone of the Iraqi legal system, have remained unchanged and in force. Arbitration law, which is the subject of this commentary, is governed by the Code of Civil Procedures hereinafter referred to as "CCP". Articles 251 to 276 of the said Code deal with the arbitration and arbitration procedures. This commentary is intended to outline certain aspects of arbitration under the present Iraqi law :

2. Arbitration Agreement

Article 251 of the CCP provides that an agreement on arbitration may be made in relation to a specific or existing dispute as well as in relation to future disputes which may arise from a contract. An agreement on arbitration may be made as a clause in the contract or as a separate contract, except in insurance policies where an arbitration agreement must be in a form of a separate contract. Article 985 of the Civil Code renders invalid an arbitration clause printed together with other conditions of the insurance policy.

An arbitration clause or contract must be in writing containing the elements of a valid agreement.¹ All disputes or differences arising from contracts are arbitrable. But only disputes or differences of a nature capable of a compromise may be referred to

¹ CCP, article 252.

arbitration.² Article 704 of the Iraqi Civil Code of 1951 describes matters which are capable of being compromised as those, which are capable of being disposed off for valuable consideration, and they must be defined or known. Matters related to public policy or criminal acts may not be subject to arbitration in case of a dispute. But, financial consequences or damages arising from criminal acts or from personal matters may be subject to arbitration.³

3. Independence of the Arbitration Clause

A question arises as to whether an arbitration clause remains valid and effective if the main contract is not valid or becomes invalidated. There is no provision in the Iraqi law on this matter. But, it can be assumed that the arbitration clause is independent from the main contract, and the invalidity of the main contract does not necessarily invalidate the arbitration clause.⁴ This assumption is based on article 139 of the Civil Code, which states that in case of an invalidity of a provision of a contract, such invalidity does not affect the rest of the contract, unless the invalid provision was the basis of the agreement.

4. Appointment of Arbitrators

There are no qualifications required for the arbitrators, but they must be impartial and must possess full legal capacity. Also, there is no provision excluding the appointment of non-Iraqi arbitrators, therefore it is possible to appoint foreign arbitrators and foreign experts in arbitration proceedings in Iraq. In fact, in a dispute arising from a contract between the Iraqi Construction Company and the dissolved Reconstruction Council of Iraq, the dispute was referred to a single foreign arbitrator chosen by the parties. The decision of the arbitrator was subject to an appeal on other grounds, and was approved by the Court of Cassation as correct and binding.⁵

² CCP, article 254

³ Article 704/2, Civil Code

⁴ See Dr. Fawzi M. Sami, International Commercial Arbitration, Baghdad 1992, page 214 (in Arabic)

⁵ See: A.R. Al-Allam, Commentary on the Code of Civil Procedures (in Arabic), Baghdad, 1990, volume 4, page 409

The number of the arbitrators and the method of their appointment are subject to the agreement of the parties, but the number of arbitrators must be an uneven number.⁶ If a party fails to appoint his arbitrator, the other party may refer the matter to the court to appoint one or more arbitrators.⁷

The decision of the court to appoint an arbitrator is final and not subject to appeal. But a party may challenge before the same court the appointment of an arbitrator⁸ on the grounds of certain disqualifying reasons and request the court to disqualify an arbitrator, which the court had appointed before. These disqualifying grounds are the same as those applicable to judges.

In this connection, article 93 of the CCP provides that an arbitrator can be disqualified by the court for reasons such as existence of an employment relationship, or if there is a friendship or enmity between the arbitrator/judge and the party concerned, or if the arbitrator/judge has already rendered an opinion on the case, or has accepted presents or payment.

It is also notable that article 91 of the CCP has laid down other reasons for disqualification of a judge or arbitrator, such as blood or marriage relationship. Also, the arbitrator must not have any interest in the dispute, and he should not be an agent of either party. The decision of the court to disqualify an arbitrator is subject to an appeal as stated in article 261 of the CCP. Furthermore, the presence of such reasons (of disqualification) can be held as a reason for repealing any arbitral decision taken by such disqualified arbitrator or arbitrators.⁹ According to article 260 of the CCP, an arbitrator may not resign, unless he has justified reasons, and cannot be dismissed unilaterally by one party..

5. Stay of Proceedings

An arbitration agreement, though binding on the parties, is not a part of the rules of "Public Order". Since the courts have general jurisdiction on all disputes, the parties

⁶ CCP, article 257

⁷ CCP, article 256

⁸ CCP, article 261

cannot avoid and set aside the jurisdiction of Iraqi courts completely. An arbitration is an exception to the jurisdiction of the court and the court does not by itself enforce an arbitration agreement, if one party to an arbitration agreement refers the dispute to the court, unless the other party challenges the jurisdiction of the court at the first hearing on the ground of an existing arbitration agreement. In such an event, the court must suspend the proceedings until an arbitration award is rendered.¹⁰ If the other party fails to challenge the jurisdiction of the court during the first session, the right of the party is deemed to have been waived and the arbitration agreement becomes null and void.¹¹ The court then would continue with the proceedings.

It is pertinent to note that Iraq is a signatory party to a number of Arab League Conventions on judicial cooperation, and to the Geneva Protocol on Arbitration Clauses of 1923. The said Protocol incorporates provisions similar to the article 253 of CCP, which provide for the stay of proceedings under similar conditions as explained above.

6. Applicable Law

A) Procedural Law:

According to article 265 of the CCP, arbitration, which takes place in Iraq, should apply the rules of procedure laid down in the CCP, unless otherwise agreed by the parties. In other words, the parties to an arbitration agreement are free to choose other sets of procedural rules, such as the UNCITRAL Arbitration Rules. The parties may also agree to exclude the procedural rules of CCP, which are not of a compulsory nature, and apply other rules as long as such rules are not contrary to Public Order and morals.¹²

B) Substantive Law:

As to the substantive law, the arbitrator must apply the applicable law to the contract in question. In an Iraqi contract between two Iraqi parties, or in a contract subject to

⁹ CCP, article 92

¹⁰ CCP, article 253

¹¹ Supra: Al-Allam, page 426, Volume 4, Decision of the Court of Cassation no. 300/First Chamber 1973/dated 22.12.1973

the Government Standard General Conditions of Contract, the Iraqi law will apply to the dispute. But, the question arises as to whether it is possible to apply a foreign law to an arbitration which takes place in Iraq. The answer to this question can be derived from the provisions of article 25 of the Civil Code, which states that:

"1) The contractual obligations shall be governed by the law of the state wherein lies the domicile of the contracting parties if they have a common domicile; where they have different domiciles the law of the state within which the contract was concluded will be applied unless the contracting parties have agreed otherwise or where it would be revealed from the circumstances that another law was intended to be applied."

From the above, it is understood that in a contract, where the domicile of one party at least is outside Iraq, the parties may choose a law other than Iraqi law, provided, however, that the application of such a foreign law is not contrary to Public Order or morals.¹³ A foreign law would be applicable only to the extent that it is not contrary to Public Order and morals.

7. Award

The arbitration tribunal must render its decision within a period, if such period is specified in the arbitration agreement. In the absence of a stipulated period, the arbitrators must issue the award within 6 months from the date of their acceptance to act as arbitrators.¹⁴

Arbitrators have no power to order interim measures,¹⁵ and have no jurisdiction in matters of criminal nature such as forgery and other offences, nor have they jurisdiction to order an action against witnesses who fail to appear before them. In matters falling outside the jurisdiction of the arbitrators, including the aforesaid matters, arbitration proceeding is suspended, and the arbitrators should request the

¹² Ibid: Al-Allam, pages 463-466, Volume 4

¹³ Civil Code, article 32

¹⁴ CCP, article 262

parties to apply to the competent court to order a specific action, or an interim measure, or render a decision.¹⁶

The arbitral award must be by either majority or unanimous vote in case of more than one arbitrator. It must be in writing and in the form of a court judgement including a reference to the arbitration agreement, statement of the parties, documentary evidence, the place and date of the award together with the reasons and basis of the arbitral award.¹⁷

8. Enforcement of the Award

After the arbitrators have rendered the award, the parties may voluntarily enforce the award, and thus bring an end to the dispute. But, often one party is not satisfied with the award or wishes to gain time. The arbitral award is not *res judicata* and cannot be enforced without a decision of the competent Iraqi court, according to article 272 of the CCP. The court would normally subject the award to thorough and detailed examination from the point of view of form and law.

For the purpose of enforcement, one party must apply to the competent court to confirm the award. Once the award is confirmed by the court, it becomes final and enforceable “*res judicata*” judicial decision, provided that no further appeal is made by the parties.

The court, in accordance with the provisions of article 274 of the CCP, may either approve the arbitration award or reject it in whole or in part. In the latter case, the court may refer the matter back to the arbitrator to rectify the rejected part of the award or issue a new decision. The court may also decide to adjudicate the case itself. The aforementioned decision of the court confirming or rejecting the arbitration award is subject to appeal to a higher court in accordance with the CCP rules of appeal. Obviously, this would delay the settlement of the dispute even longer, and

¹⁵ Dr. Akram Yamulki, page 109, Year Book of Commercial Arbitration, 1979

¹⁶ CCP, article 268 and article 269, Supra: Al-Allam, Volume 4, pages 473-474

¹⁷ CCP, article 270

this itself frustrates the intended purpose of arbitration as fast process for dispute resolution.

9. Reasons for Annulment

There is no time limit during which the parties may apply to the court for approval or annulment of an arbitral award.

Article 273 of the CCP has laid down a number of grounds upon which the parties may request the court for annulment or according to which the court may by itself set aside the award:

The reasons for annulment are extensive, and are summarised as follows:

- a) Invalidity of the arbitration agreement.
- b) The arbitrators have acted beyond the scope of their jurisdiction.
- c) Lack of certain documentary evidence.
- d) The award is contrary to Public Order or public morality. There is no comprehensive definition of Public Order, but article 130.2 of the Iraqi Civil Code refers to certain matters by way of example as matters of public orders. Also, Iraqi Law does not distinguish between national and international public order.
- e) If there is an essential error in the award or in the proceedings which effects the validity of the award.
- f) If the arbitrators did not observe certain compulsory rules of CCP procedures.
- g) If there is any reason to justify re-hearing of the case, such as the presence of forged evidence, and
- h) if there is a reason for one of the parties to challenge the competence of the arbitrators such as lack of impartiality, as stated before.

10. Evaluation

As noted above, the competent court has an extensive power to intervene in the arbitration procedures. The arbitration is not final unless approved by the court. There are extensive reasons for the court to set aside the arbitration award and even to adjudicate itself the case and enter the merit of the dispute.

The decision of the court to approve or reject the arbitration award is subject to appeal. Thus, the purpose of arbitration as efficient and relatively fast process for dispute settlement is hereby not achieved.

11. International Arbitration

Any arbitration which takes place inside Iraq, even if between two foreign parties, is considered as a domestic arbitration subject to the provisions of the CCP.

There is no specific legislation concerning international arbitration, nor is there any law in Iraq prohibiting international arbitration. But, the official attitude in Iraq during 1970 to 1980 was to resist acceptance of international arbitration clauses in contracts for government projects and supplies on the ground that it is a violation of the general domain and jurisdiction of Iraqi courts, and contrary to the principle of sovereignty.¹⁸

In spite of this negative attitude, the economic development in Iraq during 1970-1980 and thereafter, which accompanied the increase of oil prices, led to the acceptance of international arbitration clauses in many contracts concluded between foreign companies and Iraqi government entities.

In this respect, it is pertinent to note that both Iraqi government standard conditions of contracts, namely the General Conditions for Contracts of Civil Engineering Works and the General Conditions of Contracts for Electrical and Mechanical Process have laid down special provisions for dispute resolution, according to which disputes between the parties are referred to national arbitration subject to the provisions of the CCP.

Iraq is not a party to the New York Convention of 1958, but is has ratified the Arab League Riyadh Convention for judicial co-operation, which includes recognition and enforcement of arbitral awards issued in member states.

¹⁸ See: Supra, Dr. Fawzi M. Sami, pages 462-464
Also see F. Al-Alwani, Arbitration Formula in Bills of Lading and Charter Party, Baghdad, 1992, pages 75-76, (in Arabic)

Enforcement of foreign arbitral awards and judgements is subject to the law no. 30 of 1928.¹⁹

Finally, a new arbitration law covering international arbitration and enforcement of foreign awards is required in Iraq. Meanwhile, as mentioned before, foreign investors are entitled by the new Investment Law no. 13 of 2006, to choose international arbitration or any foreign jurisdiction for the settlement of disputes.

¹⁹ see Saleh Majid, Enforcement of Foreign Judicial and Arbitral Awards in Iraq, International Trade Law Quarterly May 1998, pages 173-177