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“Between Iraq and a Hard Place”: The problem of non-ratification of the New York Convention in Baghdad

Noor Kadhim (Armstrong Teasdale) · Tuesday, March 18th, 2014

Setting the scene

Iraq currently ranks with Libya and Yemen amongst those recalcitrant Arab states that have thus far failed to ratify the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the **New York Convention** or **Convention**). This state of affairs and the inadequacy of the country’s domestic and international arbitration legal regime have been addressed numerous times by academics, politicians and lawyers over the last thirty years.

However, the subject of Iraq’s non-ratification of the Convention has recently achieved a heightened significance, for two reasons:

(1) This month, it is understood that on-site workshops to train senior members of Iraq’s judiciary in Baghdad, on arbitration and other matters have been organised by the Iraqi government. In the context of the creation of the new specialised “Commercial Courts”, delivering education on the effectiveness of international private methods of dispute settlement is understood to be one of the Iraqi government’s priority tasks.

(2) In late 2013, anecdotal evidence revealed that a law had been passed by the Iraqi Parliament permitting Iraq’s ratification of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 (**ICSID**). Although this could not be confirmed with the ICSID Secretariat, the unofficial understanding is that the news is correct.

The Convention is arguably more relevant and less controversial for Iraq, legally and politically, than signing up to ICSID. Against this backdrop, the absence of concrete progress on the ratification of the Convention becomes pertinent. Below, I will briefly consider:

- (A) the current regime under international law for foreign commercial arbitration awards in Iraq;
- (B) the Iraqi domestic law applicable to the enforcement of international awards; and
- (C) the reasons that have apparently been communicated for failing to ratify the Convention.

In seeking to address the concerns in (C), I will not address the position of investment arbitration, or foreign awards concerning Iraqi parties or state-owned entities where Iraq is the seat of arbitration.

A. The international regime for enforcement of foreign awards.

On the international level, Iraq has ratified one protocol and three treaties on the recognition and enforcement of foreign judgments and awards. These are:

- (i) The Arab Convention on the Enforcement of Foreign Judgments and Arbitral Awards of 1952 (**Arab League Convention**).
- (ii) The Riyadh Convention on Judicial Cooperation of 1983 (**Riyadh Convention**).
- (iii) The Arab (Amman) Convention on Commercial Arbitration of 1987 (**Amman Convention**).
- (iv) The Geneva Protocol on Arbitration Clauses of 1923 (**Geneva Protocol**).

The Arab League and Riyadh Conventions are regional treaties, relevant only within the Middle East context. The Riyadh Convention, which superseded that of the Arab League, prevents examination of the merits of arbitrated disputes whose awards are submitted for enforcement to the courts of signatory states. It was a progressive treaty for Arab states at the time, but given that a significant majority of Middle Eastern states have now acceded to the Convention, the Riyadh Convention is no longer as relevant.

According to my understanding, the Amman Convention has never been operative. To date, its signatories have failed to establish the Arbitration Centre in Rabat, Morocco as initially envisaged. To my knowledge, no arbitration case has been decided under its auspices since its entry into force.

Finally, under the Geneva Protocol, Iraq agreed merely to recognise the “validity of an arbitration agreement”, as opposed to guarantee the enforcement of an award made pursuant to it, under Article 1. Under Article 3, it undertakes to “ensure the execution” of awards made on its territory only “in accordance with the provisions of its national laws”. As I mentioned above, Iraq’s arbitration laws are far from satisfactory or clear. In any event, the Geneva Protocol and the Geneva Convention of 1927, to which Iraq is not a party, were overtaken by the regime under the Convention.

B. The national regime for enforcement of foreign awards.

Where one of the regional enforcement treaties or a bilateral enforcement treaty do not apply, enforcement of foreign arbitration awards must be carried out under Iraqi federal law. As a civil law jurisdiction, the majority of Iraq’s laws are codified. Those forming the backbone of the system are the Civil Code of 1951 (the **Civil Code**) and the Code of Civil Procedure of 1969 (the **CPC**). Although many laws were amended or repealed during Paul Bremer’s administration following the 2003 intervention, including the investment laws, the Civil Code and CPC were not amongst these.

Articles 251 to 276 of the CPC govern arbitration proceedings. The CPC makes no distinction between domestic and international arbitration. In the absence of provisions in relation to enforcement of foreign arbitral awards, and where the regional treaties do not apply, the Enforcement of Foreign Judgments Act, No. 30 of 1928 (the **EFJA**) has been adapted for the function. Indeed, the consensus amongst long-practising Iraqi lawyers is that the EFJA is the only avenue for enforcement of foreign awards. This means that the award must first be converted into a foreign judgment in the courts of the seat. An ICC award cannot, for example, directly be enforced in the Iraqi courts, even if it has been approved by the ICC Court in Paris as is required.

If the Iraqi courts continued to apply the EFJA to arbitral awards, the practice would be problematic in relation to foreign awards that do not come from a state that is accepted under the EFJA. Article 11 of the EFJA states that the act applies only to foreign judgments coming from countries that have a bilateral agreement with Iraq, which countries must specifically be named in regulations issued by the Iraqi government. Finally, the EFJA is subject to a condition of reciprocity.

To my knowledge, there is neither a definitive recent statement from the courts on the issue, nor adequate clarification in the Iraqi law, as to the EFJA's application. To add an extra layer of ambiguity, the EFJA's potential interaction with the CPC and the Civil Code is unclear. Therefore, parties cannot be certain that the provisions of Iraq's domestic arbitration laws shall **not** be applied to the enforcement of a foreign arbitral award in addition to the EFJA.

In any event, even if the Iraqis were to ratify the Convention, this may not solve the potential scenario of misunderstanding of a judge who incorrectly applies domestic law provisions to the foreign enforcement process. Taking a recent example, a decision from Qatar's Court of Cassation, in September 2013, betrayed the judge's misunderstanding of the limited nature of the grounds for refusal of an award under Article V of the Convention. The court denied validity of a foreign-seated award approved by the ICC Court, because the arbitrators who signed the award had failed to declare that it was being rendered "in the name of the Emir of Qatar". This procedural condition would have been required for domestic Qatari awards, but not under the Convention (see Minas Katchadourian's post in Kluwer Blog, entry of 23 September 2013: "[Controversial Ruling of the Qatari Court of Cassation Regarding Arbitral Awards](#)"). Other decisions in the Gulf region, including in the Dubai courts, have disappointingly gone the same way, nullifying foreign awards for procedural deficiencies that should have been applicable only for domestic-seated awards.

Overall, the Iraqi courts retain significant power in relation to the international enforcement process. Enforcement is ultimately subject to the national court's discretion, which may approve or refuse an award either in whole or in part, send it back to the arbitration tribunal for a recast decision or even take it upon itself to decide the case on its merits. This creates problems of legal certainty and affects the tribunal's decision, which should have binding effect.

Furthermore, an Iraqi court decision that purports to ratify an international arbitration award is itself subject to appeal, under Article 275. In other words, an award does not even achieve finality when it passes the first hurdle at the judicial recognition stage.

C. Iraq's concerns about ratifying the New York Convention.

I am aware of three main areas underlying the Iraqi government's concerns about ratifying the Convention. These are as follows:

- (i) The Convention would retroactively apply to causes of action arising prior to its ratification.
- (ii) Iraq suffers from a lack of experience arbitrators and judges.
- (iii) There is a perceived bias in "Western" international arbitration against Arab states.

These issues are addressed below.

(i) Retroactivity

The fear is that the Convention will open the floodgates to allow claims under arbitration agreements signed before the date of accession. The permissibility of a non-retroactivity reservation is not settled. However, it has not prevented other states from applying it, perhaps relying on Article 20(2) of the Vienna Convention on the Law of Treaties of 1969 for justification. For example, the Democratic Republic of the Congo used the “retroactivity” condition when it acceded in 2013.

(ii) Lack of “specialist arbitration” judges and practitioners in Iraq

The concern is that Iraq’s judges are likely to be required to assess the validity of an award from the perspective of a foreign legal system with which they may be unfamiliar. That is true. But so what? Iraq’s judiciary and legal profession should be in no more difficult a predicament here than, for example, judges and lawyers in foreign systems faced with the interpretation of specific aspects of an obscure religious or secular law, or even another unfamiliar foreign law. The practice of arbitration is international, and specialists from whom an expert opinion may be sought may be based anywhere in the world.

Second, that few arbitration specialists exist in Iraq makes it vital that the Convention be ratified. The CPC, as highlighted above, does not distinguish between domestic and foreign arbitral awards. Moreover, it is uncertain, and contains gaps for judges or lawyers who attempt to apply or rely on it. The EFJA is archaic, and is unsuitable for international arbitration awards. In this respect, the need for ratification of the Convention is, in my view, self-explanatory.

(iii) Perceived bias

This concern may go back to some of the unfavourable decisions rendered in relation to oil concession disputes, in the Gulf region. An often-cited case is that of *Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi*,¹⁾ where English law was applied to a dispute, apparently in violation of the parties’ agreement to apply the Sharia law. However, the regressive attitude towards arbitration is changing in the Arab states, as they are gradually adapting to the needs of international trade. Since the *Sheikh of Abu Dhabi* decision, and the famous *Aramco* case,²⁾ there has been a rise in arms-length commercial exchange of goods and services between Western and Eastern-based parties. Decisions of the Iraqi executive should not be affected by a handful of decisions many years ago that seemed to go the wrong way.

Conclusion

In setting the scene for ratification of the Convention, Iraq’s government is edging towards the application of accepted international standards and norms in the arbitration field. A new arbitration law that is apparently based on the UNCITRAL Model Law of 1985 is currently under discussion at the Iraqi executive level. Creating valid and credible institutions will also assist in addressing concerns in relation to bias and the lack of expertise. In Kurdistan, for example, a project is currently in process to establish the semi-autonomous region’s first ‘Kurdish Arbitration Centre’. As for Iraq as a whole, the ratification of the Convention simultaneously represents both the *sine qua non* and the final step in the gradual process towards an arbitration-friendly climate.


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References

?1 International Law Reports, I.L.R. (18) 149 (1953).

?2 *Saudi Arabia v Arabian American Oil Company (Aramco)* ARAMCO-Award, I.L.R. (17) 117 (1963).

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