Kluwer Arbitration Blog

Finally, Iraq Says Yes to the New York Convention

Noor Kadhim (Armstrong Teasdale) · Tuesday, March 13th, 2018

It has been on the cards for many years. But on 6 February 2018, days before the Kuwait reconstruction conference, the Iraqi cabinet officially agreed to endorse the ratification of New York Convention of 1958 and table it with Parliament. The decision finally to accede to the treaty coincides with the eradication of Da-esh (ISIL) terrorist cells from the last of their strongholds in the north, and the perception that the country has consequently become 'safer to invest in'. The World Bank has also significantly contributed to the efforts in this turnaround, in the last few months.

Although Iraq has in principle accepted for a long time, at least in theory, that the New York Convention is necessary (see my blog post) the timeline for its accession has only recently been given attention. As such, accession will be subject to the non-retroactivity exception: it will apply only to contracts arising post-ratification of the Convention.

As explained above, it is no coincidence that the decision to ratify the treaty precedes the International Conference for Reconstruction of Iraq which was organized by the World Bank and co-chaired by the European Union, and convened in Kuwait on 12 -14 February 2018. The

objectives of the reconstruction programme are set out in a framework paper issued in the same month **(Framework).** The conference garnered commitments from international investors to provide Iraq with a sizeable (over £30 billion) reconstruction package. The commitments emanated from different regions globally, including the United States and Europe. They were also linked to and supported by the World Bank and IMF commitments to Iraq.

Amongst the largest 'donations' agreed by international investors were loans. The biggest donors included the United Arab Emirates ($5.5 million in guarantees for investments), the Islamic Development Bank, the European Union,Britain (considerable export credits) and the Kingdom of Saudi Arabia. The United States agreed to provide over $3 billion in loans and financing to American firms wishing to invest in Iraq. The financing is complicated and the figures reported in the press do not give an accurate picture, but consensus is that the package represents a major commitment from those involved. The five recovery 'pillars' include strengthening economic development. As part of this pillar, at chapter 3 of the Framework, Iraq's reform priorities include "improving the business and investment environment". Pillar 1, governance, also places emphasis on the need to promote accountability, equity and fairness.

It is clear, therefore, that the Kuwait conference is a crucial backdrop to the New York Convention decision. In fact, it is understood from internal sources that one of the World Bank's conditions was that Iraq approve ratification of the New York Convention, prior to agreement of the reconstruction package. This is because one of the first things that investors would have been asking is: what if everything goes pear-shaped in Iraq again? What if the billions of dollars invested in the country fall into the wrong hands, the business environment rapidly alters, or the Iraqi counterparties (whether they are State-affiliated, or private companies) breach their contracts?

Some of the deals being negotiated are complex and cross-jurisdictional, and include multi-faceted financing arrangements. For instance, Iraq aims to enter into significant export credit agency financing agreements whose counterparties will include the Ministry of Finance, major banks (JP Morgan and Deutsche Bank), and export credit agencies. The financing components will be governed by English law – but will also need reliable jurisdictional (forum selection) clauses. The funding arrangements should also not lose sight of another crucial feature of the reconstruction agenda: boosting the private sector. One of Iraq's main goals is to increase its non-oil revenue (currently less than 10%). The issue is that capacity building will take time. As a result, many of the contracts to be negotiated off the back of these financing deals will be fraught with obstacles and with unknowns.

Therefore, given the value and significance of the Iraqi projects and their connected international financial commitments, donors and investors need assurance that if any disputes arise, they will be resolved in a neutral forum (arbitration) and that the resulting award will be enforceable in the local courts, and subject to avoidance only on limited and objective criteria. The New York Convention, if observed correctly, should guarantee the second and most vital step of this process: enforcement. Accordingly, a condition of the investments and loans was that Iraq provide legal comfort to businesses through its accession to the New York Convention.

One recalls that Iraq signed and acceded to the ICSID Convention of 1965 last year (see my second blog post). Currently, there are two ICSID cases proceeding against Iraq: Ittisaluna Iraq LLC and Others, and Agility Public Warehousing Company K.S.C. (both telecommunications cases). These cases are discussed by reference to the investment law context in Iraq, in this third blog post.

ICSID provides legal assurance to qualifying investors with qualifying investments in Iraq, where disputes arise over those investments. The restrictions, of course, are that not every investor will be a qualifying one (they need to be nationals of a state that has also signed up to ICSID). Also, not every investment will qualify (one-off sales contracts will not normally meet the requirements for an 'investment', for example). In addition, the investor needs to have contracted with Iraq directly or an entity whose actions are directly attributable to the State. If there is no direct contract that mentions ICSID, a treaty would need to be utilised. Currently, there are only three bilateral treaties in force between Iraq and third states: Japan, Kuwait and Jordan. As such, the investment would need to have been structured to take advantage of these treaties, but in sufficient time before the dispute arises, to avoid any allegations of last-minute 'treaty-shopping'.

Given these limitations, and the increased costs of pursuing a claim using the ICSID forum, it makes abundant sense that investors should be cautious about the ICSID route being an accessible one for disputes that may arise under their investments or the new and substantial contracts with Iraq in its major country reconstruction. Notably, for commercial disputes, an international arbitration award backed by the existence of the New York Convention and its limited grounds for annulment and non-recognition is the standard option when dealing with a State whose national justice system will not afford an internationally recognised and neutral forum for dispute resolution.

To an extent, Iraq will seek to protect itself at the State level by requiring government entities to obtain collective approval from a special committee at the Secretariat of the Council of Ministers wishing to enter into an arbitration that could possibly bind the State. Otherwise, the validity of contracts between private parties will depend on the usual laws applying to capacity to enter into arbitration. As a consequence of this important step, negotiations between foreign investors and State-owned, as well as between commercial parties transacting at arm's length, will hopefully find greater comfort in the legal regime underpinning their transactions. These developments should, with a lot of effort and a bit of luck, help steer a crippled country onto the path to recovery.

(Image: courtesy: nuaire).

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