

Managing Political Risk in Iraq: The Legal Framework

Ali Al Dabbagh - Senior Associate - Litigation
a.aldabbagh@tamimi.com - Baghdad

December 2016 – January 2017

A. Mitigating Political Risk

It is no secret that armed conflict, turbulent government policy and political unrest paints Iraq as an unlikely place to invest. However, there are ways to deal with such risks and Iraq has taken steps to address those concerns. By passing ratification laws No.64 of 2012 and No.29 of 2007, Iraq is now listed as a member of the International Center for the Settlement of Investment Disputes (ICSID) and the Multinational Investment Guarantee Agency (MIGA). Being able to use those two World Bank organizations in Iraq can make a significant difference in Iraq's investment climate and give measure of confidence to prospective investors.

Iraq had ratified the Convention Establishing the Multilateral Investment Guarantee Agency back in 2007 but was late in completing the necessary steps to commence insurance operations. Better late than never, MIGA membership means that investments in Iraq are now eligible for political risk insurance. According to the World Bank's website MIGA's outstanding gross exposure in Iraq stood at US\$8 million as of September 2016. The second, more recent and exciting development, is Iraq's accession to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 2012. ICSID provides private investors a unique enforcement mechanism for investment contracts and treaties through arbitration awards that cannot be appealed locally.

To understand the usefulness of ICSID and MIGA to investors eying Iraqi markets, it is important to explain what the two World Bank arms do not accomplish. Article 11 of the MIGA Convention covers risks such as imposition of currency transfer restrictions, expropriation by the host state, breach of contract where there is no effective remedy in a judicial or arbitral forum, and war or armed conflict. Because Iraqi markets are largely untapped, the commercial balance is favourable for Iraq leaving political risk as the main nuisance for investors. This is where MIGA comes in as it only underwrites to protect from non-commercial risks.

ICSID serves a similar function in addressing political risk. Although the Washington Convention of 1965, which created ICSID, does not have an article similar to Article 11 of the MIGA Convention, a number of factors have shaped the arbitration center to become a forum more suitable to address claims that state action is unfair to foreign parties as opposed to normal commercial claims. Such factors include the relatively higher cost of ICSID proceedings compared to commercial arbitration, the requirement to exhaust other local remedies before recourse to ICSID, and the frequent reliance on investment treaties to raise discrimination claims.

While ICSID is not without its flaws, ICSID provides less predictability than courts because its tribunals are ad hoc and lack a consistent supervising authority, through prohibiting recourse to diplomatic channels and transferring decision making power to international actors, ICSID remains a good solution to depoliticize investment disputes and move them to a judicial setting. This protects foreign investors from certain risks such as expropriation, and to some extent, over regulation by the host state.

Iraq's accession to ICSID may be surprising in light of the fact that Iraq is still not a member of the New

York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Unlike the New York Convention which allows courts to refuse enforcement of awards relying on a list of exclusive grounds that includes public policy, the Washington Convention considers ICSID awards to be final judgments from national courts. Further, unlike normal arbitration awards the only recourse against an ICSID award that is sought to be enforced with pressure from the World Bank is a request for annulment before another ICSID tribunal, which has rarely been successful throughout ICSID's history.

Accession to the New York Convention was presented before the Iraqi council of representatives in July 2007. At the time, most objections harked back to the days when Iraq was isolated because of economic sanctions and did not comply with arbitration awards. The only objection of legal substance was fear of retroactive application to allegedly large awards against Iraq. However, out of the 156 contracting states to the New York Convention, only six had the same concerns and opted to issue a reservation on temporal scope of application without any recorded diplomatic rebuke from the rest. However, unfortunately this did not prevent the proposal being blocked. In contrast, the Washington Convention was introduced with an empty political slate and was backed by the National Investment Commission (NIC) arguing that investment in Iraq was deteriorating sharply.

B. Iraq's International Investment Commitments

Neither ICSID nor MIGA determine investment treatment or provide substantive rights to investors, they work as an enforcement mechanism and an insurance provider respectively. As such it is necessary to look to contracts and investment treaties for an understanding of Iraq's commitments. Noting that contracts add another layer of rights on top of treaties, and because they are too varied to cover in this article, we will only address Iraq's International Investment Agreements (IIAs).

Iraq has signed and ratified five Bilateral Investment Treaties (BITs), titled investment promotion and protection treaties in the Arabic Iraqi gazette, with Japan, Kuwait, Jordan, Belarus, and Germany. All of Iraq's BITs came after the new investment law was passed, and it was the NIC who negotiated and signed them. Prior to the investment law, and in some cases even after it was passed, Iraq signed "Cooperation", "Partnership", and "Trade Exchange" agreements. Such treaties do not provide adequate protections because:

- They often contain language that is too broad to be useful or contain too many exceptions and loopholes;
- They often do not contain an investment treatment clause, i.e. Most Favoured Nation (MFN) or National Treatment;
- They often lack a definition for what is considered an investment; and
- Old treaties are typically of narrow scope, usually trade in specific goods, and are short term making them unlikely to have been renewed long enough to still be relevant today.

As things stand at the time of writing, Iraq does not have many noteworthy BITs other than the five recent ones mentioned above. This does not mean there is a complete vacuum in investment law, but rather that contracts, national law, and customary international law will be called upon to fill in the gap.

In conclusion, the Iraqi offering to foreign investors largely depends on the specific contract and applicable treaty(s) if any. However, through availability of ICSID arbitration clauses and MIGA insurance policies Iraq now at least offers a measure of protection from political risk.