

Contract Drafting Insights from Iraq

by Ali Al Dabbagh - a.aldabbagh@tamimi.com - Baghdad

May 2017

In this article, I aim to provide guidance on drafting contracts in general and specifically on drafting contracts performed wholly or partially in Iraq. I start by answering the two most frequently asked contract drafting questions, then cover legal culture quirks in Iraq, and finally go over some practical considerations for concluding contracts in Iraq.

This article does not aim to give specific legal advice or to advocate a specific position, and interested parties should always take specific legal advice. Instead, it aims to offer some guidance on what can be expected in Iraq.

Frequently Asked Contract Drafting Questions

By far the most frequently asked contract law questions are, firstly, whether a given choice of forum clause is enforceable, and secondly, whether the contract will be read in the light of the law chosen by the parties.

Choice of Forum

Choice of forum can be a little tricky in Iraq because courts do not look to party autonomy or choice when deciding jurisdiction. The default jurisdiction rules in Iraq are considered part of public policy, and they allow for suing a foreigner, if:

- he or she is present in Iraq;
- if the lawsuit involves real state property that is in Iraq territory;
- if it involves a contract that was signed or performed in Iraq; or
- if it involves an event, which took place in Iraq.

This leaves contracting parties very little room to affect the court's decisions on jurisdiction. The only way to give some certainty over jurisdiction is to structure properly the contract (and particularly the place of contractual performance).

Even in the case of an arbitration clause, and notwithstanding that party autonomy is a core tenant of arbitration, Iraqi courts add a twist to the usual position. Iraqi courts now respect arbitration clauses, but due to the current interpretation of Iraq's peculiar position and international commitments, a case brought before an Iraqi court is not dismissed on jurisdictional grounds if a defence raising arbitration is used, instead, proceedings are stayed.

In addition, further complications arise when the contract, or parts of it, engages mandatory rules in Iraqi law and sometimes rules dictating exclusive jurisdiction of Iraqi courts. A prominent example of such rules are labour contracts, which are subject to the exclusive jurisdiction of Iraqi courts.

Choice of Law

The answer to the second question on choice of law is at first simpler than choice of forum because under the Iraqi Civil Code, the law of the parties' common domicile or the law of the state within which the contract was concluded governs the contract unless an agreement otherwise exists (or

unless one of the default rules referred to above has effect). However, even with a simple rule that allows the parties to choose a governing law for their dispute resolution, practice teaches us otherwise. When deciding whether to respect a choice of law agreement, the Iraqi court is likely to start by asking how simple the chosen foreign law is. Litigation experience shows that if foreign law can be presented in a simple and straight-forward way, the courts are more receptive to enforcing its rules. If a party's arguments are based on an understanding of a complicated statute built on previous precedents from a common law jurisdiction that contains many exceptions and complex passages, it is akin to speaking in tongues to an Iraqi court.

In short, it is not impossible to have a foreign choice of law clause respected by the Iraqi courts, and we have certainly seen foreign laws applied by courts in Iraq, but prospective parties should consider the form and complexity of the legal regime for practical reasons.

Legal Culture and Contract Drafting

Like many other civil law jurisdictions, Iraq has codes that contain general rules and principles covering a very broad area of conduct. A few examples include the Civil Code, the Code of Commerce, the Code of Civil Procedures, and the Code of Criminal Procedures. These codes provide a legal framework of default rules, which often form the starting point of any given legal reasoning. Another aspect of Iraqi legal culture is that Iraqi courts accept evidence external to the contract document. In addition, all it takes to conclude an enforceable contract is the intent to form an agreement, a lawful object of the agreement, and a lawful purpose. With this in mind, Iraqi parties, including the government, draft short contracts and leave much detail to the broader legal framework. This is not seen as a problem because, given the general rules and principles that apply, it is rather difficult to argue that an agreement is not enforceable for lack of specificity.

Parties prefer to leave much unsaid in their contracts because the legal process views their agreement in light of their overall conduct, any facts admitted by a counter party or proven otherwise, and general legal theory. This may be alarming to parties unfamiliar with Iraqi law looking to do business in Iraq. Parties considering an agreement under Iraqi law should:

- Make their contracts simple. Simpler contracts are understandable by lawyers and non-lawyers alike making them more useful documents for their intended audiences and reducing transaction costs.
- Bear in mind that Iraqi law covers many situations that parties would normally make provision for in their agreements. People are bad prophets of the future and so trying to plan for every possible contingency is not a very wise approach.
- Remember that additional agreements such as collateral and side contracts can be added later on. A simple agreement is more flexible and keeps more options open allowing it to evolve with the parties' relationship.

To better illustrate the cultural expectations in Iraq and the preferences outlined so far, take the example of two construction subcontracts for work awarded by the Iraqi government. Iraqi law governed both contracts and they were of roughly the same value. One contract was between two Iraqi parties and it was a simple contract; the other was between an Iraqi and a foreign party and it was a more detailed contract. Unexpected events took place during the performance of the lengthy detailed contract. However, the added contract terms were of no aid to the parties under the new circumstances. The parties with the much simpler contract would have been in the same legal position had the same calamity befallen them.

Practical Considerations for Concluding Contracts in Iraq

Contract enforcement in any jurisdiction requires parties to follow certain formalities specific to that

jurisdiction. In Iraq, with only a few notable exceptions, most legal formalities ensure the parties ability to prove the existence of a contract not its validity. Therefore, it is always advisable to notarise contracts even if it is not a legal requirement. Notarised contracts can be authenticated through a public notary, providing strong evidence of the parties' agreement. Notarisation does not need to take place in Iraq, but it is much easier to use documents that have been notarised in Iraq because they do not have to be authenticated through as many government bodies as documents originating outside of the country. Finally, while notarization is mostly restricted to proving authenticity of a signature not the content of a document, it adds a unique benefit as documents notarised or stamped by a public official have a "definite date", the date of notarisation, which is very difficult to disprove barring an allegation of forgery.

Conclusion

In conclusion, drafting contracts is more of an art than an exact science, and so it is never possible to claim that one approach is better in all situations. Nevertheless, some observations can be made and understanding different approaches can be a great aid in drafting cross border contracts.

Al Tamimi & Company's Iraq team regularly advises on contract law. For further information, please contact Ali Al Dabbagh (A.AIDabbagh@tamimi.com)