PART K

IRAQ

Noor Kadhim and Leonardo Carpentieri

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(Translation of the Iraqi Code of Civil Procedures (Arbitration Section) by Hashim Kadhim)[***]

[1] INTRODUCTION

[1.1] Current Status of the Law and Arbitration in Iraq

[1.1.1] Overview

Over the last few years, the international community has been increasingly keen to explore potential investment opportunities in Iraq. During his tenure, Prime Minister Adil Abd Al-Mahdi committed to an economic plan that includes reforming Iraq's state-owned enterprises, reducing bureaucratic bottlenecks, investing in key infrastructure projects, fighting corruption, and stimulating the private sector.[1]

Foreign businesses have often voiced concerns about dispute resolution and the ability to obtain efficient, fair and final decisions in Iraq. Particularly in relation to disputes that arise out of or are connected with international agreements involving foreign counterparties, it would be logical to assume that arbitration as a form of dispute resolution would be welcomed as the only method to resolve such disputes.[2] In parallel with arbitration being

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[1] *See* 2019 Investment Climate Statement for Iraq, published by the U.S. Department of State: https://www.state.gov/reports/2019-investment-climate-statements/iraq/.

[2] At present, this does not yet appear to be the case, despite the fact that the country has emerged from authoritarian rule in 2003, just under two decades ago, after over three

internationally perceived to be the best and most efficient method to resolve disputes, Iraq is also taking steps to embrace the modern concept of arbitration more fully. A draft arbitration law (the contents of which are being debated) is currently under consideration, and when approved finally, is hoped to replace and update the current provisions that govern arbitration that are scant, and are contained in the Iraqi Code of Civil Procedure.

In order to understand how modern arbitration agreements function and how they are applied in or by the Iraqi courts or arbitration practitioners familiar with the territory, it is necessary to undertake a brief overview of the history of arbitration in the Arab region of the 'Near East', and subsequently to describe how this has influenced or included the origins of arbitration in Iraq.

Historical sources reveal that the concept of arbitration is rooted in the time of the Prophet Mohammed, who preferred to resolve disputes outside court. In fact, the Prophet was said to prize conciliation above all methods because it encouraged solidarity and the maintenance of peaceful relations amongst one's neighbours. This was felt to be in keeping with the Islamic Shari'a[3] and its emphasis on mutual respect.

Likewise, arbitration, or "tahkim", was a process of private dispute resolution that took place outside judicial processes, subject to the parties' free choice. In fact, the traditional concept of tahkim pre-dates the Islamic era. It was understood as a distinct process to conciliation and mediation. It involved a "neutral" third party adjudicator (a "hakam"), who intervened where prior amicable dispute negotiations between the parties dissolved. Depending on which Islamic school of thought one followed, arbitration could either be viewed as an extension of the obligation to conciliate (under the Hanafi school), or a distinct mechanism whereby decisions rendered

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decades of dictatorship under Saddam Hussein. Liberation should have enhanced political stability and opened up the country to more possibilities to increase foreign trade. It should have allowed the country to modernise its tightly controlled and interlinked economy. Iraq is, however, making progress on various fronts, by adhering to arbitration-related international instruments and by seeking to modernize domestic legislation aimed at promoting inward foreign investment and enhancing confidence in dispute resolution methods.

[3] The Shari'a is the body of Islamic law made up of the Qu'ranic commandments and the texts of external religious authorities, composed mostly of the teachings of the four Islamic schools of thought (Hanbali, Shafi, Malaki and Hanafi) whose 'opinions' sometimes conflict, and each of which are followed to varied extents in different Islamic states. Consequently, some of the content of "Shari'a law" is fluid and it is not universally accepted; it mutates as between different Muslim states and across time. As was also perhaps demonstrated in certain decisions (such as *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi (1951) 18 I.L.R. 144*, and the "Aramco" decision, *Saudi Arabia v. Arabian American Oil Co. (ARAMCO) ((1963) 27 I.L.R. 117)*, it contains lacunae.

by arbitrators could either be binding as between the parties (under the Shafi school). Or, at the other extreme still, arbitration might attain the same effect as a court judgment (Hanbali school[4]).

For its part, the Mejellah (an Islamic Code developed by the Ottoman Turks[5]) states: "should the parties have authorised the arbitrator[s] [hakam]...the agreement of the arbitrators is deemed to be a compromise which the parties must accept as though they had reached the compromise themselves."[6] Typically, the arbitrator, or "hakam", was a respected member of the community who had the power to deliver an internally binding decision in respect of the dispute, much like a "qadi" (or judge). The national courts were not obliged to uphold and enforce the hakam's decision. The award was only binding as between the parties. Second, arbitration was based on a closed system of trust. Only male members known to the community emanating from a family with proven experience in dispute settlement could act as arbitrators.

As to Iraq, and what was formerly Ancient Mesopotamia, it has been said that the Babylonians count amongst the Greeks and the Romans as the greatest merchants and explorers of all time. They were consequently well versed in out-of-court methods of dispute resolution. These built upon the traditional concepts of tahkim and its foundations of privacy and trust, established in the pre-Islamic era.

The influence of those concepts continued to permeate Iraq's laws,[7] dating back from King Hammurabi's era, in 1700 B.C. or before, when

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[4] *See* Mohammad Zahidul Islam, *Provision of Alternative Dispute Resolution Process in Islam*, 6(3) IOSR Journal of Business and Management 31-36 (Nov-Dec 2012). *See* also Torki A. Alshubaiki, *Developing the Legal Environment for Business in the Kingdom of Saudi Arabia: Comments and Suggestions*, 27 A.L.Q. (2013), who explains that these "*our Islamic Schools of Jurisprudence ..(i.e., the Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī [schools)]still had to be based on the original sources of the Qurʾān and the Sunnah, and, for this reason, other subsidiary sources of Shariʿah evolved, including ijmaʿ which means consensus,and qisā ṣ , which means analogy. As a result, the Islamic scholars had succeeded in building an expansive body of rules similar to the jurisconsults' contribution to ancient Roman law or the judges' role in the formative period of the common law*".

[5] Islamic scholars (such as Hamed Abu Taleb, in "*Al-Tandīm al-Qaḍī al-Islāmī: The Organization of Islamic Justice*", (Egypt: Al-Saadah Publishers, 1982), at 39) have noted that the Ottomans' understanding of religious tolerance included allowing consular courts to decide disputes arising between foreigners and third parties, whether or not Muslim, going as far as to permit even the application of foreign laws in lieu of Islamic laws.

[6] Para. 1844 of the Mejelleh; *see* Sami Zubaidah, *Law and Power in the Islamic World*, I.B. Tauris 16-17 (2003); AHARON LAYISH, LEGAL DOCUMENTS FROM THE JUDEAN DESERT: THE IMPACT OF THE SHAR'IA ON BEDOUIN CUSTOMARY LAW 44 & 94 (Brill, 2011).

[7] *See* Torki A. Alshubaiki, *op.cit*., 372.

Iraq's legal system was conceived, until today.[8] Aside from and beneath the Iraqi Constitution of 2005, which constitutes the primary source of rights and obligations in Iraq, the most important rules of substance and procedure are contained in the Iraqi Civil Code No. 40 of 1951 (the Civil Code) and the Iraqi Code of Civil Procedure No. 83 of 1969 (the CCP).

Taken together, these two codes form the backbone of Iraq's legal system. Abdul Razzak Al-Sanhouri, the Egyptian scholar, played a significant role in drafting Iraq's laws. Al-Sanhouri was the author of the Egyptian Civil Code, which was itself inspired by the French Civil Code, and both these codes influenced the Iraqi Civil Code. Despite amendments to the substantive law of Iraq made during the period of the British mandate in Iraq in the 1930's, Iraqi civil procedure continued to be founded on civil law concepts. Like the national procedural codes of other Arab civil law jurisdictions that have not adopted the UNCITRAL Model Law of 1985 as amended in 2006 (the Model Law) as a stand-alone arbitration law, the current CCP devotes a section to arbitration. This comprises Articles 251 to 276.[9]

Although they were and remain in the greatest need of reform, it is notable that both the CCP and the Civil Code were untouched amongst the raft of legislation that was amended, introduced or repealed by General Bremer's temporary administration in 2003 (the U.S. Civil Administration Authority).[10] Although the CCP was expected to be amended following enactment of the Legal System Reform Act No. 35 of 1977 (the Legal Reform Act), that project was abandoned.[11]

Crucially, a draft arbitration law based on the Model Law is currently being discussed, following various reviews carried out by the Iraqi State

[8] Thomas, L.D., … International Journal for Court Administration 1(2), 19-25.

[9] Until 1956, and before the introduction of the CCP, arbitration in Iraq was subject to the Mejellah that was introduced by the Ottomans (*see supra*, 2).

[10] Over 100 laws were amended or repealed. *See* further, Eric Stover, *Bremer's Gordian Knot: Transitional Justice and the US Occupation of Iraq*, Berkeley Law Scholarship Repository, 2005 (regarding human rights).

[11] This proposal, which was published in the (Iraqi) Official Gazette, issue 2576 of 14 March 1977, set out an ambitious 5-year plan for reform of the Iraqi legal system from top to bottom. *See* Mahir Jalili, *International Arbitration in Iraq*, 4(3) Journal of International Arbitration 109 (1987). The Legal System Reform Act incorporated a Working Paper on the reform of the legal system in Iraq, including the CCP, having the aim, inter alia, *"to promote and expand the principles of arbitration and conciliation"* and *"to establish a special procedure for the settlement of disputes...not by bound the rules of procedure in ordinary courts"*.

Council.[12] At the time of publication, various drafts of the law are in circulation, awaiting executive approval.

[1.1.2] The Judicial System in Iraq

Iraq has a federal judiciary structure which is composed of the Higher Judicial Council, the Supreme Court, the Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated by law, such as the Central Criminal Court and the Supreme Iraqi Criminal Tribunal.

The Higher Judicial Council is the supreme administrative body of the ordinary judiciary system, and is based in Baghdad. It deals with the administration of the ordinary judiciary system and consists of 20 judges. It nominates the Chief Justice and members of the Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Commission. It is also in charge of drafting the budget of the judiciary.

At the apex of the court system in Iraq is the Federal Supreme Court (or FSC), an independent judicial body tasked with the interpretation of the Constitution. It is also responsible for determining whether laws and regulations are constitutional. Among other tasks, it acts as a final court of appeal, it settles disputes among or between the federal government and the regions and governorates, municipalities, and local administrations. However, after the occupation, a temporary FSC was established with extremely limited powers which has been problematic.

The transitional Federal Supreme Court is a Constitutional Court originally established under Article 44 of the Transitional Administrative Law (TAL) and Law No. 30 of 2005, an order of the Transitional Government made under the TAL. The TAL, which had been signed on 8 March 2004 by the Iraqi Governing Council, came into effect on 28 June 2004 and remained in place until the 2005 Constitution came into effect. Currently the Federal Supreme Court is composed of 9 members. Rules of procedure were promulgated in 2005 which were published in the Official Gazette issue 3997 of 2 May 2005.[13]

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[12] The Iraqi Council of State is a constitutional institution of a judicial and advisory nature whose functions are guaranteed by constitutional and legal rules.

[13] Art. 93 of the Constitution sets out the jurisdiction of the Federal Supreme Court as follows: "***First**: Overseeing the constitutionality of laws and regulations in effect. **Second**: Interpreting the provisions of the Constitution. **Third**: Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the Court to the Council of Ministers, those concerned individuals, and others. **Fourth**: Settling disputes that arise between the federal government and the governments of the regions*

However, the permanent Federal Supreme Court (an entity of the same name but different status) was established under Articles 92 to 94 of the 2005 Constitution. Article 92 (Second) of the 2005 Constitution states that:

> *"The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the **method** of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives." (emphasis added)*

The rules governing the permanent FSC's court's functioning and composition are therefore not part of the constitution[14] and the Iraqi Parliament has so far been unable to promulgate the necessary implementing legislation.[15] In its judgments, the Federal Supreme Court has opted to stay out of most controversial issues. This includes a recent case whereby the FSC has declined to give an opinion on the interpretation of the Constitution in a dispute brought by the Iraqi Ministry of Oil against the Minister of Resources of the KRG, preferring instead to suspend its decision (presumably for fear of challenge of being ultra vires).[16]

In the interim, the temporary FSC remains a provisional but unsatisfactory solution in relation to the regulation of disputes between Iraqi law and the Constitution and other aspects in respect of which a choate FSC would be empowered to rule.

The Court of Cassation, also based in Baghdad, is considered the highest judicial body in the ordinary judiciary system. It consists of a president and 26 judges specializing in the review of decisions issued by all criminal and civil courts, as well as by family courts.

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*and governorates, municipalities, and local administrations. **Fifth**: Settling disputes that arise between the governments of the regions and governments of the governorates. **Sixth**: Settling accusations directed against the President, the Prime Minister and the Ministers, and this shall be regulated by law. **Seventh**: Ratifying the final results of the general elections for membership in the Council of Representatives. **Eight A**. Settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region. **Eight B**. Settling competency disputes between judicial institutions of the regions or governorates that are not organized in a region."*

[14] Art. 19.

[15] CHOUDHRY, S., & BLASS, K. , CONSTITUTIONAL COURTS AFTER THE ARAB SPRING: APPOINTMENT MECHANISMS AND RELATIVE JUDICIAL INDEPENDENCE (Stockholm: International IDEA, 2014).

[16] Decision no. 59 of the FSC.

The Public Prosecution Department, in Baghdad, is presided upon by the head of the public prosecution and is composed by public prosecutors present in all courts in Iraq (the task of public prosecution is to monitor the decisions that are issued by judges and to represent the Iraqi society). The head of the Public Prosecution Department is a member of the Supreme Judicial Council.

After 2003, the Iraqi judiciary has also included the Judiciary Oversight Commission, which is the body responsible for monitoring the conduct of judges and staff in all Iraqi courts (except for the Constitutional Court and the courts of the Kurdistan region).

As far as the appellate level goes, there is one court of appeal in each of the 15 provinces except in the province of Baghdad, which has two separate courts of appeal. Iraqi courts of appeal deal with civil claims and criminal claims for which penalties are less than five years. They are composed of three judges for the civil cases and of three judges for the criminal cases.

At the trial court level, there are courts of first instance specialized in civil cases (selling, buying, renting, civil commitments, commercial contracts). These courts are headed by one judge. There are many courts of this kind in different cities across Iraq. Decisions rendered by courts of first instance are reviewed by competent courts of appeal and, ultimately, by the Court of cassation.

Following the legislative reform post-2003, the Iraqi executive also implemented laws to bring into creation Iraq's first "*commercial courts*". These were designed to address commercial issues, including with foreign investors, and were part of the attempt to create a more predictable and efficient legal environment for businesses operating in Iraq. It is notable that no less than 40% of decisions taken by the commercial courts have ruled against the Iraqi government and in favour of foreign companies, thereby defeating fears of automatic bias.

Crucially, pursuant to the Higher Judicial Council procedure, any Iraqi court would be required to transfer a case to the commercial court if it fell within its remit. According to the HJC's [2011] statistics the Baghdad Commercial Court has adjudicated 1,146 cases out of a total of 1,252 cases filed since its inception. The average trial length for these cases is 60 days, according to the HJC, with many cases finally decided in as few as 30 days.

However, since Iraq is a civil law country, comprehensive legislative and regulatory reforms to Iraq's investment and arbitration systems, among others, will need to be enacted by the legislature and the executive. Absent a codified set of modern laws and regulations, the Iraqi courts will be

limited to ad hoc and arbitrary measures to address the lacunae, which will be subject to inconsistent and possibly narrow interpretative decisions. Unlike in common law jurisdictions, there is no system of judicial precedent.

Furthermore, in order to achieve its two primary goals, efficiency and specialization, the judiciary limited the new commercial courts' jurisdiction to commercial disputes involving at least one foreign party. The restrictions did not stop there; disputes of a "commercial nature" had to fall strictly within one of the 16 defined categories in the Iraqi Commercial Code (Law No. 30 of 1984). These archaic definitions and restrictions are in need of re-assessment and overhaul through a modern Code; until then, it is understandable why foreign parties continue to wish to utilise the flexible process of arbitration, rather than resorting to domestic litigation.

[1.1.3] Distinction between commercial and investment arbitration in Iraq

The legal regime that governs Iraqi investment disputes is, *prima facie*, distinct from that which concerns private commercial disputes. It is a distinction that became more acute after the 2003 intervention and occupation. Prior to Saddam Hussein's overthrow, non-Arab foreigners were not permitted to invest directly in Iraq, through shareholding or direct control of Iraqi-incorporated companies. This situation changed when foreign direct investment was permitted after the occupation, primarily to serve foreign interests.[17]

Following the upheaval of the political regime in Iraq in 2003, the laws that were updated and amended by the Bremer administration included the investment laws.[18] The aim was to align these laws with Iraq's commitment to make necessary reforms to ameliorate its business climate, making it more attractive to foreign investors. As part of these ongoing reforms, Iraqi Investment Law No. 13 of 2006 (the Investment Law)[19] came into force on January 2007. All Iraq's fifteen governorates (provinces) within the federal government established their provincial investment

[17] The Iraqi Companies Law No. 21 1997 of was amended to grant foreign natural and legal persons the right to establish Iraqi companies and invest in their shares, and banking and insurance laws were also overhauled in order to enable foreign investment in the Iraqi insurance and banking markets.

[18] *See* the USAID Tijara Investor Guide of Baghdad available on www.iraq-business.com.

[19] *See* Law No. 13 of 2006 (Appendices for Iraq at https://arbitrationlaw.com/books/arbitration-mena).

commissions. It bears noting, however, that the Investment Law excludes from its scope of application investment in oil and gas extraction and production sectors, and investments in the telecommunications, banking and insurance sectors.[20]

Kurdistan, a semi-autonomous region within Iraq, separately created its own Investment Board in Erbil with two branch offices in its two other provinces, Dahuk and Sulaimaniah. The Kurdistan Investment Board was established according to Investment Law No. 4 of 2004[21] issued by the Kurdistan Regional Government (KRG), which covers investments in the Kurdistan Region only. This becomes relevant when one considers the constitutionality of the oil and gas legislation and the contracts passed by the KRG, and any actions taken in respect of such activity at the central level, in Baghdad.[22]

A full analysis of the investment regime in Iraq is beyond the scope of this chapter. However, given the importance of foreign direct investment for Iraq as for many other developing countries in the Near East, it is incumbent on the authors here to explain the background and structure of the investment law at least at the basic level. As such, some of the operative provisions of the Investment Law are described below:

Article 1 of the Investment Law defines an "*investment*" as "*the investment of capital in any economic or service activity or project that results in a legitimate benefit for the country*."[23]

Article 10 of the Investment Law bestows the same rights and privileges to foreign investors as it does to Iraqi nationals. Importantly, however, the Investment Law does not apply to the petroleum sector, from which, at the time of writing, over 80% of Iraq's revenues derive.

The Investment Law indirectly permits arbitration to be used as a method to settle international investment disputes because in its specific reference to the Iraqi law, it implies acceptance of the CCP.

Article 27 of the Investment Law further states: "*Disputes arising between parties who are subject to the provisions of this law shall be subject to the Iraqi law unless otherwise agreed.*"[24] Therefore, absent any mandatory provisions of Iraqi law, the parties may agree on a law of their

[20] *See* Law No. 13 of 2006 (Appendices for Iraq at https://arbitrationlaw.com/books/arbitration-mena).

[21] *See* Law No. 4 of 2006 (Appendices for Iraq at https://arbitrationlaw.com/books/arbitration-mena).

[22] For Kurdistan Investment Law incentives, please *see* www.kurdistaninvestment.org.

[23] Article, Recital N, the Investment Law (Appendices for Iraq at https://arbitrationlaw.com/books/arbitration-mena).

[24] *See* Appendices for Iraq at https://arbitrationlaw.com/books/arbitration-mena.

choice to apply to the proceedings. Otherwise, Iraqi law will by default apply. With regard to investment treaty arbitration, however, there have been developments.

[2] INVESTMENT ARBITRATION IN IRAQ

[2.1] Procedural and substantive legal protections for inbound investments

[2.1.1] Overview

Following the 2003 U.S. occupation and the restoration of Iraqi sovereignty shortly after, the encouragement and development of Iraq's private sector became a constitutional obligation for the state in 2005.[25]

It soon became primordial in the view of policymakers to adopt concrete measures to make Iraq more appealing internationally to global business and seek to attract international investment. Just like scenarios, Iraq decided to start negotiating or re-negotiating investment treaties. While since the early 1980s Iraq had already become a party to a certain number of regional multilateral investment treaties, it now began to enter into strategic investment treaties with selected countries, on a bilateral basis.

We will discuss below key protections available to foreign investors under both bilateral and multilateral investment treaties to which Iraq is a party.

[2.1.2] Bilateral Investment Treaties

Iraq has entered into bilateral investment treaties (**BITs**) with Armenia, France, Germany, Iran, Japan, Kuwait, Morocco, Syria, Saudi Arabia and Jordan aimed at promoting, fostering and protecting reciprocal investments made by nationals or corporates of one country into the territory of the other country.

Out of these BITs, only the ones with Kuwait, Armenia, Japan and France are currently in force. The German BIT has been ratified by Iraq but is, at the time of writing, awaiting approval on the German side by the European Commission before it can be ratified by Germany and enter into

[25] *See*, generally, N J. Calamita & A. Al-Sarraf, *The Development of Investment Arbitration in Iraq: Domestic Law, the ICSID Convention and Iraq's Investment Treaties*, 3(2) BCDR International Arbitration Review 343–360 (2016).

force.[26] On 17 April 2019, Iraq concluded its most recent BIT, with Saudi Arabia, which is however yet to come into force. Conversely, it is worth noting that the oldest BIT that Iraq signed was with Kuwait in 1964. This BIT was also one of the oldest BITs in history.[27] That treaty was terminated in 2015 and replaced by a newer generation treaty.[28] Apart from the Japan treaty, which is much more detailed, Iraq's newly ratified BITs are short agreements which in average comprise fourteen to sixteen articles, most of which focus on investment protection.

All BITs in which Iraq has entered into provide for international arbitration as a neutral forum for the resolution of disputes which foreign investors may bring against the Republic of Iraq, following the parties' initial attempt to resolve their disputes amicably. While the treaties provide for arbitration under the ICSID Convention and under the UNCITRAL Arbitration Rules, they also offer investors the choice of bringing a dispute before the courts of the host state.

In all BITs signed by Iraq, whether or not in force, the choice of forum lies with the claimant. Importantly, in those with France and Jordan, the state may bring claims in addition to the investor. The provisions of these two treaties have not yet been tested and it will be interesting to see how the provisions in the French and Jordanian BITs might apply where the investor and the state both bring claims but choose different venues. Neither treaty indeed provides for a mechanism for dealing with parallel proceedings under the same treaty or resolving jurisdictional issues which may arise out of parallel proceedings.[29]

The Iraqi treaties currently in force require qualifying juridical persons (that is foreign companies) investing in Iraq to be constituted under Iraqi law. More generally, most treaties refer, at some level, to the investor's compliance with local laws and regulations as far as the investment as such is concerned.

It is pertinent to note that treaties with Armenia, France and Japan contain a very broad definition of investment. Article 1(1) of the Iraq-

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[26] At the time of writing, the first ICSID case to rely on this German BIT (inter alia) against the Republic of Iraq has been brought on 26 June 2020 by German investor AHG Industry GmbH & Co. KG in ICSID Case ArB 20/21.

[27] For a discussion of Iraqi investment treaties before the 2003 U.S. occupation, *see supra*, 350-353.

[28] *See Agility Public Warehousing Company KSC v. Republic of Iraq* (ICSID Case No. ARB/17/7) for discussions on the applicability of the old and the new Kuwait BIT. *See*, *also,* N. Kadhim, *Iraq May Have Energy, But Can It Meet Agility with Resilience*, Kluwer Arbitration Blog (12 April 2017).

[29] *Supra*, n. 25, 355.

Japan BIT, for example, refers to an "investment" as "*any kind of asset owner of controlled, directly or indirectly, by an investor, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain of profit, or the assumption of risk*". The treaty goes on to list what may constitute an investment, including shares, stocks, bonds, debentures, loans, rights under contracts, claims to money, intellectual property rights. In practical terms, Japanese investors are very much encouraged to consider investing in Iraq.

As far as substantive protections go, all Iraqi BITs reviewed include protection against unlawful expropriation. Generally, expropriation is permitted if carried out in the public interest and in return for compensation. The Armenia, France and Japan treaties further require that the expropriation be non-discriminatory, while also requiring that it be in accordance with due process of law.

The level of compensation for expropriation available under a relevant treaty is a key consideration for any potential investors entering the Iraqi market and varies from treaty to treaty. For one, the Japan BIT provides for "*prompt, adequate and effective compensation*" equivalent to the fair market value of the investment. The Kuwait BIT includes slightly different language and refers to "*just and immediate compensation*, equal to the value of the investment. Finally, the Armenia and France BITs refer to "*prompt and adequate compensation*" equivalent to the "real" or "actual" value of the investment. Importantly, the Japan BIT specifically provides that investors may challenge both the expropriation itself and the amount of compensation allocated by the State before the Iraq courts. Crucially, most Iraqi BITs do not exclude expropriation from the scope of their dispute resolution provisions. As such, foreign investors in Iraq may challenge any alleged expropriatory measure by having recourse to investor-state international arbitration.

Given Iraqi political and social situation, potential investors will also closely look at any legal guarantee provided under relevant treaties with respect to protection of assets and personnel in times of war, civil unrest and similar emergencies. The Armenia, Kuwait, France and Japan BITs all include full protection and security guarantees imposing an obligation on the State to adopt protection measures in wartime or civil unrest scenarios. Importantly, the Armenia, France and Japan BITs also include so-called war clauses, requiring Iraq to afford investors treatment no less favourable than what it accords to its own investors or investors of a third state in relation to loss or damage related to investments caused by armed conflict or similar events.

The effectiveness of these protections very much depends on the ability of the Government actually to protect investors during critical times. As such, and given Iraq's recent political turmoil, investors may wish to look at additional guarantees when considering investments.

[2.1.3] Multilateral Investment Treaties

Iraq is also a party to a certain number of multilateral investment treaties which include investment provisions and protections. Foreign investors would normally consider the content of such treaties in addition to protections available under BITs and local legislation, before firming up any investment plan.

There are three multilateral investment agreements currently in force which contain specific provisions relevant to international investors wishing to enter the Iraqi market:

- The "*Agreement on Investment and Free Movement of Arab Capital Among Arab Countries*", which was signed on 29 August 1970 and entered into force on 29 August 1970;
- The "*Unified Agreement for the Investment of Arab Capital in the Arab States*", which was signed on 26 November 1980 and entered into force on 7 September 1981 (the "Unified Agreement"); and
- The "*Agreement on Promotion, Protection and Guarantee of Investments among member states of the Organization of the Islamic Conference [OIC]*", which was signed on 5 June 1981 and entered into force in February 1988 (the "APPGI").

While all of these treaties provide for both procedural and substantive protections for investors, the Unified Agreement and the APPGI were only invoked for the first time about two decades after they entered into force.[30]

While most cases brought under these treaties have derived from events following the Arab Spring events of 2011, which did not include Iraq, the developing case law may well be relevant to any future dispute involving foreign investors in Iraq, or Iraqi investors abroad.

[30] The authors have not located any case law in connection with the Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, which was signed and entered into force on the same date, 29 August 1970.

Both the Unified Agreement and the APPGI contain similar provisions defining investors and investments which qualify for protection. If compared to more traditional BITs, the definitions contained in the multilateral treaties to which Iraq is a party are somewhat more detailed, and thus more restrictive. The main reason for such restrictive approach seems to be that Arab capital is the underlying criterion allowing investors to afford substantial protection.

As to substantive protections, while the APPGI provides for guarantees against direct or indirect expropriation, the treaty does not seem to offer other standard protections for investors, such as fair and equitable treatment or guarantees that foreign investors will be treated no less favourably than domestic investors, except where "*compensation of damages […] befalls the physical assets of investment due to hostilities of international nature… or due to civil disturbances or violent acts of general nature*".[31]

As to the Unified Agreement, one of its key features is the inclusion of proactive obligations which the treaty places on the investor. Article 14, for example, requires foreign investors to abide by the host state's domestic laws and regulations. Investors are also required to comply with the host state's development plans when managing and developing investment projects. Failure to observe such requirements may result in liability by the investors before the dispute resolution mechanism set up under the treaty.[32] The Unified Agreement also sets out important standards relating to the transfer of capital, compensation for expropriation, admission of investments, free movement of investors, and non-discrimination.[33]

Both the APPGI and the Unified Agreement provide for arbitration for the resolution of investment disputes. While the APPGI contains an automatic right to arbitration applicable to both investor-state and inter-state disputes, the Unified Agreement provides that disputes involving investors must be settled through conciliation or arbitration or by recourse to the Arab Investment Court (**AIC**). Crucially, the Unified Agreement makes it clear that dispute resolution through arbitration requires the agreement of the parties. Resorting to the AIC is only permissible if the parties have failed to agree to submit their dispute to arbitration, if the arbitrators have failed to make a ruling or an award was not executed within three months of being rendered. Importantly, the AIC makes final

[31] *See* APPGI, Art. 14.

[32] *See* M. N. Al-Rashid & L. Carpentieri, *The Revival of Islamic and Middle East Regional Investment Treaties: A New Way Forward?*, 12(2) TDM 9 (March 2015).

[33] *See*, generally, M. N. Alrashid & L. Carpentieri, *op. cit*.; and N. Jansen Calamita & Adam Al-Sarraf, *op. cit*., 3(2) BCDR International Arbitration Review (2016).

and binding decisions enforceable in any of the contracting state parties as if they were local judgments.[34]

On 11 July 2005, Iraq and the United States signed the Trade and Investment Framework Agreement (**TIFA**). The TIFA entered into force on 18 December 2013 and the inaugural TIFA Council meeting took place in March 2014. The second TIFA Council took place on 14 June 2019, during which Iraq and the United States discussed trade and bilateral investment issues with the aim of further promoting mutual trade relations and market access.[35]

Iraq has also been seeking to develop trade relations with the member states of the European Union, by signing a Partnership and Cooperation Agreement with the EU in 2012.[36] While this treaty has not yet entered into force, it is worth noting that the objectives of the signatory parties include the promotion of "*trade and investment and harmonious economic relations between the Parties*", the fostering of the "*their sustainable economic development*", and the provision of "*a basis for legislative, economic, social, financial and cultural cooperation*".[37] In addition to including most protections available under traditional investment BITs and MITs, this treaty sets forth a detailed dispute settlement mechanism providing for the establishment of an arbitration panel in case consultations between the parties have failed.[38]

Iraq is also a signatory to investor protection agreements or memoranda of understanding with 35 bilateral partners and nine multilateral groups. The agreements include arrangements within the Arab League, as well as arrangements with Afghanistan, Armenia, Bangladesh, France, Germany, India, Iran, Japan, Jordan, Kuwait, Mauritania, the

[34] *See* Unified Agreement, Art. 34.3.

[35] *See* Joint Statement on the U.S.-Iraq Trade and Investment Framework Agreement Council Meeting by the Office of the United States Trade Representative, dated 14 June 2019 (https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/june/joint-statement-us-iraq-trade-and).

[36] *See* Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, signed on 11 May 2012.

[37] *See* Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, signed on 11 May 2012, 8.

[38] *See* Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, signed on 11 May 2012, at Arts 66-74.

Republic of Korea, Sri Lanka, Syria, Tunisia, Turkey, the United Kingdom, Vietnam, and Yemen.[39]

Finally, more particularly in relation to the energy sector, Iraq has signed the International Energy Charter, which is often seen as the first step towards acceding to the Energy Charter Treaty.[40]

[2.1.4] Iraqi national legislation on investment

In addition to the limited network of investment protection treaties designed to protect inward investments, there are three important pieces of legislation which foreign investors should consider when seeking to invest in Iraq.

In addition to the Kurdistan Regional Investment Law (Law No. 4 of 2004) and the Iraqi Investment Law (Law No. 13 of 2006), investment protection legislation in Iraq can be found in the Iraqi Constitution of 2005. It should be recalled here that the Investment Law does not apply to the oil and gas, banking and insurance sectors.[41] As the Iraqi Ministry of Oil continues to control and supervise the oil and gas exploration process in Iraq, the framework for oil transactions in in the country is indeed defined by the Ministry's Technical Service Contracts (**TSC**),[42] which refer to ICC arbitration for dispute settlement purposes.

While the Iraqi Constitution and the Investment Law both contain protections against unlawful expropriation or nationalisation, neither piece of legislation provides for direct access to international arbitration or any other neutral forum for the resolution of investment disputes, thus significantly limiting the reach of the substantive protections they contain in favour of foreign investors.[43] For this reason, most cases are brought

[39] *See* 2019 Investment Climate Statement for Iraq, published by the U.S. Department of State (https://www.state.gov/reports/2019-investment-climate-statements/iraq/).

[40] Iraq signed the International Energy Charter on 25 November 2016. The Energy Charter Treaty provides a unique international law multilateral framework for energy cooperation. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998. Currently there are fifty-three Signatories and contracting parties to the Treaty.

[41] *See* Art. 29, Law No. 13 of 2006.

[42] Technical Service Contracts or TSC are generally used for producing fields while production service contracts for development and producing fields under which the contractor is not entitled to any share of production but can elect to have the service fee paid in kind in oil.

[43] Article 27(4) also provides that "*if one of the parties to a dispute is subject to the provisions of this law, they may, at the time of signing the agreement, agree on a*

before the Iraqi courts. On 26 June 2020, AHG Industry GmbH & Co KG brought a third ICSID case against Iraq, relying on multiple BITs and multilateral investment treaties, as well as domestic laws. The case is currently (at the time of writing) at the Request stage.

As to the Kurdistan Regional Investment Law, while it affords no specific protection against unlawful expropriation, it does provide for national treatment standard vis-à-vis foreign investors and, most crucially, for international arbitration as a forum for the resolution of investment disputes.

[2.2] Investment treaty cases involving Iraq as Respondent State

On 18 November 2015, Iraq took the bold and historic move to ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the "ICSID Convention"). In accordance with Article 68(2), the ICSID Convention entered into force for Iraq on 17 December 2015. Notably, this development was to be in tandem with the other major development in Iraq in October 2015, which was the amendment to the Investment Law. Shortly thereafter, on 18 November 2015, two investment treaty claims, both registered at ICSID, were brought against Iraq.[44]

The first claim was made by a Kuwaiti investor under the 1964 Kuwait-Iraq BIT.[45] The second claim, registered shortly after, was filed pursuant to the Japan-Iraq BIT as well as the OIC Investment Agreement of 1981.[46]

Both cases are summarised in turn below.

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mechanism to resolve disputes including arbitration pursuant to the Iraqi law or any other internationally recognized entity". More generally, Article 27 of the Investment Law provides for investment disputes to be brought before the Iraq courts.

[44] N. Kadhim, *The Curious Incident of Iraq and the ICSID Convention*, Kluwer Arbitration Blog (23 November 2015). *See*, also, N. Kadhim, *Is Iraq Fully Open for Business? Not Yet, But Very Soon | Iraq Energy Conference 2018*, Kluwer Arbitration Blog (7 April 2018).

[45] *Agility Public Warehousing Company KSC v. Republic of Iraq* (ICSID Case No. ARB/17/7). On 11 July 2019, the tribunal decided that it had jurisdiction over claims arising since the Kuwait-Iraq BIT entered into force.

[46] *Itisaluna Iraq LLC and others v. Republic of Iraq* (ICSID Case No. ARB/17/10). On 3 April 2020, the Tribunal rendered its award in favor of the investor declining jurisdiction.

[2.2.1] Agility Public Warehousing Company K.S.C. v. Republic of Iraq (ICSID Case No. ARB/17/7)

In February 2017, Iraq faced its first investment treaty claim at ICSID by a Kuwaiti investor under the 1964 Kuwait-Iraq BIT.[47] A Kuwaiti logistics group (Agility) filed a request for arbitration to the Republic of Iraq on 9 February 2017, making allegations under the Kuwait-Iraq BIT.

In March 2011 Agility and France Telecom, now called Orange, said they would acquire a 44 percent stake in Iraqi mobile telecoms operator Korek Telecom. The two groups would form a joint venture, 54 percent owned by Agility, to control the stake.

Agility was to contribute convertible debt and inject an additional $50 million for its 24 percent indirect stake, with France Telecom paying $245 million for its 20 percent indirect stake while extending a $185 million, four-year loan to the Iraqi firm. Agility claimed that Iraq had indirectly confiscated its investment (Korek Telecom, a Kurdistan-based mobile phone operator), which was worth over $380 million, and violated treaty provisions contained in the treaties.

On 11 July 2019, an arbitration tribunal constituted under ICSID decided that it had jurisdiction over claims arising since the entry into force of the Kuwait-Iraq BIT. The proceedings are currently proceedings to the merits stage. As of May 2020, the tribunal issued a Procedural Order in relation to the confidentiality of documents. The chair of the tribunal is Singaporean national Cavinder Bull. While Agility appointed British national John Beechey, Iraq appointed American national Sean Murphy. Iraq is represented *inter alia* by Iraq's Minister of Justice.

[2.2.2] Itisaluna Iraq and others v. Iraq (ICSID Case No. ARB/17/10)

On 3 April 2020, a majority consisting of tribunal chair Daniel Bethlehem QC and Brigitte Stern declined jurisdiction over the claims

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[47] *See Agility Public Warehousing Company KSC v. Republic of Iraq* (ICSID Case No. ARB/17/7). *See*, https://arabpressreleases.com/international-arbitration-tribunal-rules-it-has-jurisdiction-to-hear-agilitys-dispute-with-iraq/; https://www.arabianbusiness.com/kuwait-s-agility-files-380m-telecoms-arbitration-case-against-iraq-662781.html; http://arbitrationblog.kluwerarbitration.com/2017/04/12/booked-iraq-energy-forum-2017/; https://www.iareporter.com/arbitration-cases/agility-public-warehousing-company-k-s-c-v-iraq/; https://www.iareporter.com/articles/agility-public-warehousing-companys-arbitration-against-iraq-continues-as-icsid-tribunal-issues-jurisdictional-decision/. *See*, *also,* N. Kadhim, *Iraq May Have Energy, But Can It Meet Agility with Resilience*, Kluwer Arbitration Blog (12 April 2017).

brought by Itisaluna Iraq and other Jordanian and Emirati entities pursuant to the Japan-Iraq BIT as well as the OIC Investment Agreement of 1981.[48]

The ICSID tribunal decided by majority that it did not have jurisdiction to hear claims against Iraq under the Agreement on Promotion and Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (OIC Agreement).

The claimants were investors in Iraq's telecoms sector. Itisaluna, which provides wireless fixed voice and data technology in Iraq, is a subsidiary of VTEL Holdings, in which Munir Sukhtian holds a stake. VTEL Holdings is in turn managed by VTEL Middle East and Africa, which was also a claimant.[49]

In 2006, a joint venture including Munir Sukhtian obtained a licence for Itisaluna, agreeing to pay 33.4% of its gross revenues to the Iraqi government in exchange for Itisaluna operating wireless networks in the country. The group paid $20 million to obtain the licence, following which the investors said they spent "hundreds of millions of dollars" to launch its commercial operations in Iraq, setting up wireless networks in Baghdad and Basra in 2008 before expanding to the country's southern provinces.

The investors said the licence allowed them to operate their own "international gateways" to transmit telecoms traffic, but that the Iraqi government barred them from doing so – thus depriving them of the benefit of an essential element of their investment without compensation. The investors filed a claim at ICSID in 2017.

The majority found that the investors could not use a most-favoured-nation (MFN) clause in the OIC treaty to import an ICSID arbitration clause in the Iraq-Japan bilateral investment treaty because the ICSID Convention requires that contracting parties provide express consent to arbitrate at ICSID in writing. It did find that the OIC treaty contains a "general consent" to arbitration – but only where the parties have first exhausted conciliation proceedings.

In his dissenting opinion, the arbitrator appointed by the Claimants indicated that he found the investors' case on the MFN clause "compelling" and would have upheld jurisdiction.

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[48] *Itisaluna Iraq LLC and others v. Republic of Iraq* (ICSID Case No. ARB/17/10). On 3 April 2020, the Tribunal rendered its award in favor of the investor declining jurisdiction.

[49] *See* T. Jones, Iraq defeats ICSID claim under Islamic treaty, 8 April 2020, Global Arbitration Review; https://jusmundi.com/en/document/decision/fr-itisaluna-iraq-llc-munir-sukhtian-international-investment-llc-vtel-holdings-ltd-vtel-middle-east-and-africa-limited-v-republic-of-iraq-pas-encore-disponible-thursday-13th-april-2017; https://www.lexology.com/library/detail.aspx?g=87aca22f-7c97-4fda-bad2-6f4c4defb066.

[3] COMMERCIAL ARBITRATION IN IRAQ

[3.1] Overview of Commercial Arbitration Practice in Iraq

[3.1.1] Frequency of arbitration as opposed to litigation

After the occupation that preceded the withdrawal of the US forces in 2003 led by the American diplomat Paul Bremer, the American administration made changes (the constitutional correctness of which are questionable) to Iraqi laws including the Investment Law of 2006. However, these purported updates did not affect two principal legislative instruments, being the Iraqi Civil Code no. 40 of 1951 and the Code of Civil Procedures no. 83 of 1969 (**CCP**). These codes have been said to constitute the backbone of the Iraqi legal system, have remained unchanged and continue in force. Arbitration is governed by the CCP and is contained within articles 251 to 276 CCP.

As to the frequency of arbitration versus litigation, there are no verifiable statistics that can give an accurate picture of which forum is preferable. At present, there remains a mistrust of the arbitration method and the majority of disputes – including those with foreign counterparties – eventually find their way into the courts. It is notable that a significant proportion of Iraq or Iraqi counterparties currently fall within the energy or infrastructure sectors. In relation to oil disputes, which compromise a majority of these, the forum is either ICC arbitration as mandated by the standard contracts that govern these business relationships, or (especially in the case of subcontractor disputes with Iraqi based counterparties) sent to the commercial courts (such as the Basra commercial courts, where many of the lucrative oilfields are located).

However, it is hoped that as Iraq's economy grows and attracts more international businesses, the role of arbitration in the country will become more important. At this juncture, it will become relevant to update the arbitration law (currently passing between the State Council and international commentators in draft form). The world's foremost global arbitration institution (the ICC) has recently confirmed the uptick in Iraqi-centric arbitration requests remitted to it, notably with a rise in Iraq or Iraqi parties as claimant, after 2005. Indeed, between 2005 and 2018, there were 58 ICC arbitrations involving Iraqi parties, with 2005 representing a spike in the number (13) in which all Iraqi parties were Respondent. Since 2009, Iraqi parties have tended to have at least an equal balance between being Claimants and Respondents. In the same period, no ICC arbitration was seated in Iraq. As to the nationality of

arbitrators, nine were Iraqi in the period between 2005 and 2018.[50] Two current cases known from Iraqi sources to be administered by the ICC are the long-standing Iraq-Turkey pipeline dispute in which Iraq is claiming more than US$250 million in damages, against Turkey and its state-owned pipeline operator, BOTAS, because, among other things, BOTAS purchased oil directly from the KRG, allegedly without consent from the Iraqi ministry. The second is a case brought by BGR Energy Systems (India) against the Iraqi Ministry of Electricity pursuant to a $250M contract signed in 2013.

No public information is available, to the current authors' knowledge, that evidences the statistics for participation and enforcement of Iraq related awards under the Riyadh Convention, or any other multilateral conventions to which Iraq is a party.

As explained above, Iraq's new commercial courts are said to have seen some measure of success. Since its inception, the authors Adam Al Sarraf and N Jansen Calamita reported that the Baghdad commercial court had by then received over 500 cases and adjudicated over 350, sometimes taking less than a month per case to do so.[51] Commercial courts were set up in Basra and Najaf as well. In deciding cases, the commercial courts have surprisingly treated foreign companies in an even-handed way, often finding in their favour, and those judgments have been affirmed by Iraq's appellate courts. An example is the case of *Westinghouse v The Iraqi Ministry of Industry and Minerals* (Trademark office), in the Baghdad Commercial Court,[52] in which the Trademark Office was ordered to register the trademark of the multinational company Westinghouse and cancel the registration of a locally-based, infringing competitor. Similar decisions have been issued in favour of other well-known multinational companies. The independent judicial fairness of such decisions is likely to give impetus to foreign companies to do business in Iraq.

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[50] Information correct as of of 1 June 2020. Specific information is as follows: 2004: 0 (arbitrations); 2005: 13 (all Respondents); 2006: 0; 2007: 3 (1 Claimant and 2 Respondents); 2008: 0; 2009: 1 (Claimant); 2010: 6 (all Claimants); 2011: 2 (both Claimants). No statistics are available for 2011-2018. In terms of the nationality of the arbitrators, of the 7 who emanated from Iraq in the last 10 years, these comprised:1 co-arbitrator in 2006; a sole arbitrator in 2007; 1 sole arbitrator in 2009; 3 arbitrators in 2011, and 1 co-arbitrator in 2013. No statistics are available for 2011-2018.

[51] N. J. Calamita & A. Al-Sarraf, *International Commercial Arbitration in Iraq: Commercial Law Reform in the Face of Violence*, 32(1) J. Int. Arb. 43 (2015).

[52] Mahkamat al Tamiez, Decision No. 52/B of 2012, Al-Nashra al Qadaiah (Iraq). Iraq's Court of Cassation affirmed the decision of the Baghdad commercial court in *Westinghouse v. Ministry of Industry and Mineral.*

[3.1.2] The domestic and international commercial arbitration frameworks in Iraq

The framework that governs commercial arbitration is contained within the CCP as explained above. However, the CCP is geared towards regulating domestic arbitration, for which there are many detailed provisions. There is no formal distinction between international and domestic arbitration. Indeed, the courts consider that any arbitration taking place in Iraq, whether or not involving foreign counterparties, is a domestic arbitration.

"International" is used here in the sense that either the dispute touches upon matters that concerns international trade interests, or the arbitration proceedings were conducted and/or the award is rendered in a third-party state.

Whilst there is no express provision in the law that forbids non-Iraqi seated arbitrations, the courts have historically declined to enforce such "foreign" arbitration agreements including under foreign seated awards, because they have viewed it as a breach of their sovereignty over such disputes, and Iraq's public policy. This hostile and mistrustful approach towards arbitration has been problematic and will continue to present hurdles for foreign investors wishing to do business in the country.

Pending the arbitration reform, the CCP will continue to represent a disjointed and inconsistent approach to arbitration. This is a view that has been confirmed by Iraq's own highest court, the Court of Cassation, in the decision by the Baghdad Commercial Court in the *Fincantieri* case. At worst, it implies a misunderstanding of the conceptual raison d'être of arbitration. It is hoped that eventually Iraq will adopt a uniformly respected and applied law such as the UNCITRAL Model Law on Arbitration, such as some of its Arab neighbours have done. This will go some way in ensuring consistency of approach and application.

[3.1.3] Arbitration institutions

Iraq has one national arbitration centre which can allegedly accept international and domestic arbitration disputes: the International Commercial Arbitration Centre Najaf.[53] It has no pending cases at the time of writing this chapter. Furthermore, it does not appear to have any arbitral rules in force (at least, none that are published on its website). The website merely

[53] *See* http://najafchamber.net/en/centers/icacn/the-international-commercial-arbitration-center-najaf.html

states that it *"observes the rules of most arbitration centres in the region,"* which is unhelpful and means that the centre is not operational.

Generally, although it is recommended to do so, parties in Iraq are not bound to rely on any arbitration centre to assist with the arbitral process. Further, there are no restrictions on which centre can be used, so parties can choose international centres (ICC, LCIA) or regional ones (DIFC-LCIA, BCDR-AAA, CRCICA), depending on their specific requirements.

[3.2] Jurisdiction of the Arbitral Tribunal

[3.2.1] The Agreement to arbitrate

An agreement to arbitrate is recognised under Iraqi law. The relevant article is Article 251 CCP, which provides that: "*it is permissible to agree on resolving a certain dispute through arbitration...[and agree to use it] as a dispute resolution mechanism for all disputes that may arise from the implementation of a certain contract*."[54] Therefore, the contracting parties may oust the jurisdiction of the Iraqi national courts by opting for arbitration in place of litigation in relation either to an existing dispute or disputes, or to future disputes arising out of the performance of a defined contractual relationship. It is said the second part of this clause covers submission agreements (i.e. where specific disputes are later subject to arbitration by agreement) and the first part relates to compromissory clauses (where the agreement to arbitrate is included within the contract from the outset).

[3.2.2] Form and content of the arbitration agreement

In Iraq, arbitration agreements must relate to specific defined contractual relationships. Under Article 252 CCP, arbitration agreements must also be in writing: "*The agreement to arbitration is not established except in writing and it is permissible to agree upon it during a trial [which is already underway]. If the court proves that there is an arbitration agreement, or if the parties agreed to it during the trial, the case will be regarded as postponed until [an arbitration] award is issued*."

It is therefore clear that just because an arbitration agreement has not been concluded before the outset of a dispute, this does not mean that the parties cannot later agree to it, even if they are in the middle of a court hearing. In practice this situation is going to be unlikely to arise, but it

[54] CCP, Article 251 (unofficial translation) (*See* Appendices for Iraq at https://arbitrationlaw.com/books/arbitration-mena).

does at least demonstrate Iraqi law's willingness to defer to the will of the parties.

Further, it is significant that two of the Iraqi government standard conditions of contract, the General Conditions for Contracts of Civil Engineering Works, and the General Conditions for Contracts for Electrical and Mechanical Process, specifically provide for domestic arbitration subject to the provisions of the CCP. Incorporation by reference of an arbitration clause is thought to be permitted as long as it can unequivocally be established in writing.[55]

Article 253 goes on to state that:

> 1. *If the litigants agree to arbitrate a dispute, it is not permissible to file a case with it before the judiciary until after the arbitration process has been exhausted.*
> 2. *However, if one of the parties resorted to filing the case without consideration of the arbitration condition, and the other party did not object in the first session, the case may be considered, and the arbitration clause is considered null.*
> 3. *But if the opponent opposes, the court will consider the case postponed pending the decision of the arbitration.*

On the face of it, Article 253 accords primacy to the will of the parties to arbitrate a dispute instead of mandating recourse to the courts, and any court actions started in defiance of the arbitration clause are invalid whilst the arbitration process is ongoing. In subsection 2, a party may displace this by failing to object to a court action started by an obstructive party in disregard of the parties' agreement to arbitrate. Although the method of "objection" is not defined, nor time limits imposed upon it, one practitioner has opined that (as in other jurisdictions) the objection should be raised at the first "substantive" opportunity to do so in the court action.[56] This appears to be similar to the practice in many jurisdictions: If a party does not object to an arbitration clause at the first available opportunity to make a substantive submission in the matter, they are deemed to have submitted to the arbitration and are prevented from challenging the validity of the clause.

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[55] *See* Abdul Hamid El Ahdab & Jalal Al Ahdab, *Arbitration with the Arab Countries*, Kluwer Law International, 2011 IQ-028, 231.

[56] Saleh Majid, *Iraq Arbitration Law*, *available online at:* http://www.iraqilaw consultant.com/, para. 5, 2.

The authors are aware of one decision where the Iraqi courts have enforced a provision to arbitrate and stayed the court action where a party has raised it, but would not go as far as to say (as one commentator has opined) that this reflects a general attitude by the Iraqi courts to respect arbitration agreements.[57] Further, the concerning part about this provision is the second part: it is not clear whether this means that the arbitration process is not final, if it leaves the door open for a party to commence a lawsuit "*after the arbitration process has been exhausted*". So, even an objection validly made and within time does not fully put the court action to rest. This is because, under this provision, the court may in any event decide only to "*postpone the action until an arbitration award is rendered*". Such a position is unsatisfactory, because it presumes that the court has jurisdiction to re-commence the suspended court case after the award is rendered. This creates the possibility of conflicting decisions and casts doubt on the finality of the award for enforcement purposes.

That being said, it is reassuring to note that there are examples when the commercial courts in Iraq have adopted a pragmatic, or purposive, approach towards the interpretation of the CCP. In the 2011 case of *Iraqi Ministry of Finance v. Fincantieri-Cantieri Navali Italia S.p.A, Baghdad Commercial Court,*[58] the Baghdad Commercial Court (**BCC**) ultimately interceded. By way of background, FCNI (the Claimant) commenced Italian court proceedings against the Ministry of Finance (**MoF**) in Iraq over the Kuwait sanctions and the subsequent impossibility of fulfilling performance under a warship delivery contract they had with the MoF. A judgment was rendered by the Genoa Court of Appeal some years later in favour of FCNI.[59] The MoF, during the court proceedings, filed a notice of arbitration at the ICC, under the contract, claiming damages, and FCNI challenged the validity of the arbitration clause. The Paris Court of First Instance upheld FCNI's application to enforce the Genoa decision on the basis that it was a prior decision (under European law). The ICC at first refused to register the MoF's arbitration due to sanctions, but later accepted to register it. Following the commencement of the ICC arbitration (and the arbitrators' seizure of jurisdiction), the Paris Court of Appeal

[57] *See* Decision of the Baghdad Court of First Instance in Case No. 976/1134 of 1978. *See* Jalili, *supra*, n. 12 at 115.

[58] Decision of the Baghdad Commercial Court No. 228/B of 2011, Al-Nashra al Qadaiah (Iraq).

[59] *See Fincantieri–Cantieri Navali Italiani S.p.A. & Oto Melara S.p.A. v. Ministry of Armament, Supply, Directorate of Iraq and Republic of Iraq*, Corte di Appello, Genoa, May 7, 1994, XXI Yearbook 594 (1996).

ruled in 2006 that the First Instance Court of Paris had erred in deferring to the decision of the Genoa Court of Appeal and, as a result, the arbitration in France could go ahead.[60] However, to the MoF's chagrin, the ICC tribunal rendered an award against it.

In response, the MoF sought to challenge the award in the French courts and simultaneously litigated a parallel claim against FCNI in the BCC.[61] However, rejecting the MoF's argument that Article 253 CCP did not apply to international arbitration proceedings, BCC determined that the domestic action had to be stayed pending the outcome of the annulment proceedings in the French courts.[62] It confirmed that Article 253 required the court to hold the litigation in abeyance until the arbitral tribunal issued its final award and that the CPC made no distinction between foreign and domestic arbitrations and therefore applied to both.[63] The BCC also gave short shrift to the MoF's argument that the arbitration clause in the FCNI contract was unenforceable because the CCP did not cover international arbitration. The BCC disagreed and, using an accepted and inherent jurisprudential power bestowed upon it by Iraqi jurisprudence, looked beyond the Iraqi laws when it was clear there was a gap in such laws. Instead it applied the principles of the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention of 1958[64] (even though Iraq had not formally ratified either) as providing the correct and contemporary approach. Though the BCC's rulings in this regard, and its decision to put the proceedings in abeyance out of respect for the concurrent French proceedings based on Article 253, were overturned on appeal to the Rasafa Court of Appeal, its findings were eventually reconfirmed on final appeal to the Iraqi Court of Cassation, Iraq's highest court.[65] The decision, which the authors Al-Sarraf and Calamita discuss in more

[60] *See Legal Department of the Ministry of Justice of the Republic of Iraq v. Fincantieri–Cantieri Navali Italiani*, et al., Cour d'Appel, Paris (France), June 15, 2006, XXXI Y.B.C.A. 635 (2006).

[61] *Ibid*.

[62] Commercial Court Decision No. 228/B.

[63] *Ibid*. *See also* Calamita, N. Jansen & Al-Sarraf, Adam, *International Commercial Arbitration in Iraq: Commercial Law Reform in the Face of Violence*, Journal of International Arbitration 32, no. 1 (2015): 37–64 at 47-48.

[64] UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) and United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

[65] The judgment of the Rasafa Court of Appeal is summarized in the decision of the Iraqi Court of Cassation (Tamiez): Mahkamat al Tamiez, Decision No. 52/B of 2012.

detail in their article,[66] confirms and supports the views that the CCP may be interpreted by reference to the more progressive provisions of the New York Convention and the UNCITRAL Model Law, and that the CCP applies equally to domestic as to international arbitration, in the absence of provisions in the CCP that specifically govern international proceedings. Notably, pursuant to Article 215(2) of the Civil Procedure Code, the status of the special panel that assisted the Court in coming to its decision in this specific case meant that, crucially, the decision would be binding on lower courts in future cases.[67]

[3.2.3] Law applicable to the interpretation of the arbitration agreement

On the face of it, there is nothing in the CCP that prescribes which law is to be applied to the interpretation of the agreement to arbitrate, itself. However, in the absence of a clear contrary agreement by the parties as to applicable law, there is a risk that the 'catch-all' situation provided for in Article 265 will apply[68] and that the arbitrators will be asked to apply "*the conditions and procedures stipulated in the law of litigation*"[69] (*i.e.* presumably the Iraqi Civil Code, and the remainder of the CCP where the eventuality is catered for) to fill the gap.

This means that, in the absence of agreement, the Iraqi Civil Code is likely to apply to international arbitrations.

Article 1(2) of the Civil Code provides that:

> *"In the absence of any applicable legislative provisions in the law the court shall adjudicate according to custom and usage; in the absence of custom and usage in accordance with the principles of the Islamic Shari'a which are most consistent with the provisions of this Law but without being bound by any specific school of thought; and otherwise in accordance with the laws of equity".*

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[66] *Supra*, n.63.

[67] Commercial Court Decision No. 228/B. Unusually, far more reasoning was employed in this judgment than in the normal course of civil system decision-making, which supports the conclusion that this is an important decision that will permeate and influence the direction of the Iraqi legal system with regard to the interpretation of the CCP, in future, one hopes.

[68] *Infra*, discussion of Art. 265 at 25.

[69] Art. 265, CCP.

Under Article 1(3), there is further confusion introduced by the conflicts of law provision:

> "*The court shall in all the foregoing be guided by the adjudication determined by the judiciary and jurisprudence in Iraq and then of the other countries the laws of which are proximate to the laws of Iraq"* [the other countries may include Egypt, being in turn influenced by Sanhouri, and underlying this, the French Civil Code].

Given that no legislative provisions apply to what law is applicable to an arbitration agreement, it is likely that this vague provision – which gives the arbitrators considerable discretion given that they can apply both equitable and customary rules, and Iraqi law – will apply, which will lead to an unsatisfactory result when what is really required is a definitive national governing law, with prescriptive rules, that would govern this situation.

[3.2.4] Governing law of the agreement in the absence of choice

This situation also potentially applies when there is no stipulated governing law for a contract. In that case, in a contract between two Iraqi parties, or in a contract subject to the Standard General Conditions, Iraqi law will apply. As to whether it is possible to apply a foreign law to an arbitration which takes place in Iraq, Article 25 of the Civil Code is instructive. This states that:

> *"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 this, it is understood that in a contract, where at least one party is foreign domiciled, the parties may choose a law other than Iraqi law, as long as, and to the extent, that law does not run contrary to public policy or morals.

[3.2.5] Separability of the arbitration agreement, and competence-competence

Fundamentally, the CCP does not recognise the concept of separability of the arbitration agreement, and its corollary, competence-competence. That being said, Article 139 of the Civil Code provides that in the case of invalidity of a contractual provision, the invalidity shall not taint the remainder of the contract unless the invalid provision was the basis of the agreement.

However, this does not fully address the issue in relation to arbitration, if the question at issue is the invalidity, not just of one provision but of the entire contract. This would normally be a matter for the arbitral tribunal to determine at first instance and then referred to the Court, if necessary, on challenge of the award. In such circumstances, it is difficult to create a presumption that Article 139 will stretch to protection of the arbitration provision alone.[70]

Under Article 268, where an issue "*falls outside the arbitrator's authority*", or if a party alleges that the contract in which the arbitration agreement is included is tainted by fraud or other criminal activity (for example, corruption), the arbitration tribunal may not assume jurisdiction in relation to the dispute. It must, instead, refer the matter to a "*competent court*". There is no rule that directs either the court or the tribunal to preserve the integrity of the agreement to arbitrate. This contrasts with the position in other more progressive Arab jurisdictions; for example, the core concepts of separability and competence-competence are recognised in the arbitral rules of some Arab arbitration institutions such as the Rules of the Dubai International Arbitration Centre.[71]

[3.2.6] Seat of arbitration

There are no specific provisions dealing with the determination of the seat of arbitration in the CCP. That said, according to article 265 CCP, an Iraq-seated arbitration by default will be governed by the rules of procedure laid down in the CCP, unless otherwise agreed by the parties. This may include the Civil Evidence Law.[72] Therefore, the parties are free to choose other procedural law of procedural rules, such as those of the ICC, LCIA, UNCITRAL, or other. The parties may also agree to exclude the procedural rules of CCP, which are not of a compulsory nature, and

[70] *Supra*, n.55, 231.
[71] *Cf.* Art. 6, DIAC Rules.
[72] *See* paragraph 3.4.

apply other rules as long as such rules are not contrary to public policy and morals.

[3.2.7] Arbitrability

The admissibility of certain disputes must be ascertained not only by reference to the CCP, but also by reference to the Civil Code. Under Article 704 of the Civil Code, only matters that may be compromised are arbitrable. These include matters that are capable of being disposed of for valuable consideration, and they must be defined and certain. It is therefore conceivable that arbitration may not be permitted in relation to disputes over certain types of financial transactions depending on whether certain "mandatory" requirements of the law can be adequately defined and held to apply. Further, only persons having capacity may conclude an arbitration agreement. An Iraqi party's capacity is determined under Iraqi law, thought to be governed in this respect by the Hanafi School of Shari'a.[73]

Article 254 CCP provides that "*arbitration is only valid in matters in which conciliation*[74] *is permissible for those who have the capacity to dispose of their rights. Arbitration may take place between spouses under the Personal Status Law and the provisions of Islamic Sharia*." It is interesting to note that arbitration is possible between spouses as usually family law matters are precluded from adjudication outside the courts. The arbitration, however, is prescriptive: the arbitrators are bound to apply the provisions of the Islamic Shari'a and the Personal Status Law of Iraq when adjudicating such disputes.

Indeed, the extent to which so-called mandatory norms of the Shari'a law, as applied in Iraq, may have a bearing on arbitration is worth

[73] *See* El Ahdab & El Ahdab, *op. cit.*, *infra*, n. 38: "*on the basis of these provisions, scholars consider that no capacity can exist for persons of unsound mind, minors, non rehabilited bankrupts and persons deprived of their civil right*s"...[further] "*guardians, legal representatives and receivers in bankruptcy canno, and to accept arbitration on behalf of the persons they represent because they can only dispose of their properties upon authorisation by the cour*t", at page 235. Notably, the Iraqi Law of Personal Status 1959 (ILPS), in terms of capacity of individuals, applies (according to its Article 2) to all Iraqis except those specifically exempted by law (i.e. including Christian and Jewish minorities). The ILPS provides that, in the absence of legislation to the contrary, judgments should be passed on the basis of the principles of the Islamic Shari'a in conformity with the ILPS (Article 1 of the Civil Code also identifies Islamic law as a formal source of law). As a corollary, the Courts of Personal Status hear all cases involving Muslims (whether Iraqi or not).

[74] The reference to 'conciliation' means that for any matter to be arbitrable, a precondition is that it be a dispute in relation to which the parties can reach a "compromise".

addressing. Article 254 appears here to make a distinction between family law and other matters. In matrimonial disputes, "*arbitration [may] be implemented...according to the civil status law and the provisions of the Islamic Shari'a*". In other matters, Article 254 merely provides that "*arbitration is permitted*", without alluding to Shari'a law. The implication of Article 254 must be that Shari'a law is intended to be of greater relevance to matrimonial disputes, at least in Iraq. The assumption is that this allows parties to agree on more objectively ascertainable laws, or possibly rules of law (such as lex mercatoria), in relation to other disputes.

Criminal matters are not arbitrable in Iraq, as in most jurisdictions. However, the financial consequences of such matters may be. Various other matters may not be arbitrable, ranging from certain types of corporate and personal status disputes. One author, Jalal Al Ahdab, writing in 2011, said that the prevailing academic opinion was that "*disputes relating to bankruptcy, patents and trademarks are arbitrable, unless they give rise to a crime...disputes between partners of the same company are not arbitrable because they involve rights of third parties, contrary to disputes over a commercial agency which may be subject to arbitration unless matters [sic] that must be referred to the Minister of Economy.*"[75]

[3.2.8] Public policy and public morals in Iraq

Additionally, the arbitration must not be contrary to "*public policy or good morals*", pursuant to Article 34 of the Iraqi Civil Code. There is little guidance as to how to define or apply public policy under Iraqi law, and whether or not there is a distinction to be made between domestic matters of public policy and international policy. Therefore, we must assume that it is as fluid and unpredictable as in any other country. Unlike in jurisdictions such as France, there is no palpable distinction to be made in Iraq between 'international' and 'national' concepts of public policy (*i.e.* what is acceptable for domestic contracts, which may diverge from what is appropriate in the case of foreign contracts).

It can be observed here that "non-arbitrability" in Iraq at least may be considered merely an extension or a part of "public policy". Hence the distinction between the two terms may in practice be irrelevant, especially when one adds the extra requirement of compliance with "good morals". This is subjective and arguably leaves more room for vacation of an award under domestic notions of public order as opposed to manifest

[75] *Ibid*, n. 73, 237.

breaches of the "international public policy" that is gradually evolving and embraced to the greatest extent by the French and the Swiss courts.[76]

[3.3] The Arbitral Tribunal

[3.3.1] Composition of the Arbitral Tribunal

The articles dealing with the composition of the arbitral tribunal are not many. They are Articles 255 to 261, with a provision dealing with arbitrators' wages in Article 276. Any person is permitted to serve as arbitrator except, pursuant to Article 255, unauthorised judges, minors, detainees and bankrupts. Article 255 provides: "*The arbitrator may not be a member of the judiciary except with the permission of the Judicial Council and he may not be a minor, detained, stripped of their civil rights, or bankrupt (not normalised yet).*" The reference is to a male arbitrator but there is nothing to prevent a female arbitrator being nominated, under the Civil Code. The requirement that an arbitrator may not be a judge may not sit well with the common law systems such as England and Wales, where frequently barristers are appointed as arbitrators and those barristers also serve as part time judges. The reference to "Judicial Council" is presumably intended to refer to the Iraqi Judicial Council; this supports the view that the CCP governs purely domestic arbitrations and does not apply to foreign arbitrations seated in or having some link to Iraq.

As to formal requirements, it is stipulated in Article 259 that "*[t]he arbitrator's acceptance of the arbitration must be in writing unless he is appointed by the court. Acceptance may be supported by the arbitrator's signature of the arbitration agreement and the arbitration does not end with the death of one of the disputants*." Accordingly, the mandate must be accepted in writing. Again, the court's intervention here – as in many instances in the CCP where it appears to transcend a mere supervisory role – is prominent. It clearly not only allows for an arbitrator to be appointed by the court (sometimes in undesirable circumstances under Articles 256 and 261), but it removes the requirement that the arbitrator accept in writing and thereby potentially any safeguards that would assure the arbitrator's independence and impartiality which is normally confirmed in writing.

[76] *See* Art. 1514, French Decree No. 48 of 2011 Reforming the Law on Arbitration; and Art. 190(2)(e), Swiss Public International Law Act of 1987.

As to number and qualification of the arbitral tribunal, there are no mandatory requirements under the CCP except, pursuant to Article 257, pursuant to which if there are multiple arbitrators, the number of arbitrators shall be odd, except for the case of arbitration between spouses. This is unhelpful because it means that family law matters might be decided by an even number of arbitrators, which may lead to split decisions. This exception for spousal dispute is unclear, but it is unlikely to concern most readers of this Chapter as most disputes with which we are concerned are commercial (non family) disputes.

[3.3.2] Remuneration of the Arbitral Tribunal

In relation to costs, Article 276 provides that:

> *"the wages of the arbitrators are determined by the parties agreed upon in the arbitration agreement or in a subsequent agreement. Otherwise, they will be decided by the specialised court in its ruling or in a separate ruling that can be appealed against (cassation) as per article 153 and 216 of this law."*

There is nothing controversial or that poses an obstacle in this if the parties agree (for example through incorporation by reference into the clause of the LCIA or ICC Rules, which stipulate detailed rules for the remuneration of the tribunal). However, this clause will be important for ad hoc arbitrations in which the parties have not decided on the payment mechanism(s). In order to circumvent the provisions of the CCP, the parties would need to exclude its application directly in the clause, for Iraq seated arbitrations.

[3.3.3] Appointment of the Arbitral Tribunal

In relation to the appointment of the arbitral tribunal, there is no prescribed formula for the mechanism to apply if the parties have not agreed the process. This is unhelpful. Article 256 CCP indeed merely provides:

1. *If the dispute occurred and the disputants did not agree on the arbitrators, or one or more of the agreed arbitrators refrained from work, retired from it, dismissed it, or were prevented from initiating it, and there was no agreement in this regard concerning the issue. Each disputant will have the right to write to the specialised court to appoint the*

arbitrator(s) following the notification of the rest of the opponents and hearing their statements.

2. *The decision of the court to appoint the arbitrator(s) is final and cannot be overturned, whereas its decision to refuse the request to appoint the arbitrators could be appealed as per the procedures explained in Article (216) of this law."*

This leads to the undesirable situation of uncertainty if the arbitral tribunal becomes truncated or the sole arbitrator resigns (by dint of any reason, including death).

At any stage in the proceedings, Article 260 permits the resignation of an arbitrator who has an "*acceptable excuse*". Article 260 provides: "*[a]fter accepting the arbitration, the arbitrator may not step down without an acceptable excuse and he may not be dismissed except by the agreement of the disputants*".

No conditions are set out as to what is considered "acceptable", and by whom such judgment may be made, and, further, whether it is by reference to an objective or subjective standard. There is no reference, in particular, to conflicts of interest, the continuing duties of disclosure, independence and impartiality, or associated ethical requirements now prevalent in modern arbitration laws and rules. The provision's vagueness also leaves room for uncertainty and the potential for an unforeseeable disruption in proceedings, especially where no rules have been agreed for the replacement of a resigning arbitrator. In that case, under Article 256 above, as in the case of disagreement or absence of agreement between the parties as to the appointment of (an) arbitrator(s), only the court has the power to appoint the arbitrator(s) upon application by a party. Its decision is final and, except in cases of refusal to appoint an arbitrator, it is not subject to further appeal.[77]

It is also significant that where an arbitrator resigns or is dismissed without another being appointed in his or her place, or where the statutory time limits for rendering an award (six months, where the parties have not agreed otherwise) are exceeded, the arbitration proceedings end. This may leave the parties without adequate remedy, if the circumstances of the termination were outside their control.[78]

Regarding the powers of the arbitral tribunal, the CCP, pursuant to Article 258, permits the tribunal to act as conciliators if the parties so agree. It is interesting that this may lead to conflict of interest situations

[77] Arts 256 and 261(2), CCP.
[78] Art. 262, CCP.

if the arbitrator depends on the arbitration instruction for remuneration purposes (for example, when is the conciliation to start and end and does this pause the arbitration?)

[3.3.4] Challenge of arbitrators

Once the arbitral tribunal has been constituted and the proceedings are under way, the law permits the Iraqi courts yet more incursions into the proceedings. However, there are no clear guidelines as to when an arbitrator may be challenged (for example, in the ICC Rules, this may be for a lack of independence or impartiality), and at what time. It is understood, though not clearly provided in the CCP, that impartiality is a requirement for arbitrators, and it is thought that on this basis, as under the rules of most if not all arbitral institutions, the can be challenged.

Article 261, which regulates the issue, says:

> 1. *The arbitrator may be rejected [for] the same reasons as the courts, and this is only for reasons that arise after the appointment of the arbitrator.*
> 2. *[Amended]-Rejection request shall be submitted to the court originally specialised by hearing the dispute and its decision regarding this matter shall be subject to appeal as per the rules explained in article 216 of this law.*

Under Article 261, therefore, arbitrators may be challenged "*in the same way as for judges*". However, the law (concerning arbitration at least, in relation to which there should be minimal judicial intervention and where the presence of an arbitral institution may complicate matters) fails to define what that "way" is. It is also unpalatable that once again, the standard of reference is domestic, assimilated to Iraqi and not international standards, by reference to the Iraqi judicial system.

For international arbitration, in a field where a level playing field combining common global approaches has been sought to be applied to some aspects of the adjudicatory role (such as through the efforts of the International Bar Association, for example[79]), this is unacceptable and undesirable for foreign disputants.

[79] For example, the IBA Guidelines on Conflicts of Interest in International Arbitration (2014), and on the Taking of Evidence in International Arbitration (2010), to name two important examples.

From a substantive position, Article 93 CCP does provide some guidance as to the grounds on which a judge (and presumably also an arbitrator) can be challenged. It 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 where the judge has already rendered an opinion on the case, or has accepted bribes or gifts (no value stipulated).

Under Article 91 CCP, other reasons for disqualification of a judge or arbitrator can exist, such as a blood or marriage relationship. The arbitrator must also have no interest in the dispute, and he should not be an agent of either party.

Second, under Article 261, it is unclear what is meant by "*for reasons that arise after the appointment of the arbitrator".* It appears, *prima facie*, that facts that came to the knowledge of the parties after the appointment, but which arose prior to the appointment, cannot be challenged. Surely this was not the intention of the drafters, however it begs the question.

The above procedure is a conflation of the method for litigation and arbitration proceedings, which confuses issues, as the processes should be distinct. It also fails to take into account the different interests at stake; judges are essentially servants of the state, and have a duty to the state, whereas arbitrators derive their authority primarily from the parties, by whom they are appointed.[80]

Article 94 of the Iraqi Constitution (as amended in 2005) states only that "*Judges may not be removed except in cases specified by law; such law will determine the particular provisions related to them and shall regulate their disciplinary measures*". This cannot be applied to arbitration, where different laws can apply and where the foundation for the arbitrators' mandate is either in the contract, the rules of the institution (where applicable) and the parties' agreement.

Moreover, the tribunal is not empowered to rule on the matter, as the proceedings must be remitted to court. As for other provisions, it is unclear whether this is a mandatory provision of the CCP or may be overridden by the parties' contrary agreement.

[3.4] Evidence

Subject to the general provisions set out below relating to witness and expert evidence, which are only indirectly covered in the arbitration sections of the CCP, Article 266 suggests that arbitrators should decide

[80] *See*, *also*, EL AHDAB & AL AHDAB, *supra*, n. 55, 243.

the dispute submitted to them exclusively on the basis of documentary evidence presented to them.

Indeed, Article 266 CCP describes the adjudicatory role of arbitrators as follows:

> *The arbitrators shall resolve the dispute according to the arbitration agreement or clause, the documents and what the parties submit thereto. The arbitrators shall specify the timeframes for the parties to submit their pleadings and documents. However, they may resolve the dispute based on the claims and documents provided by one party if the other party failed to submit his pleas within the set timeframe.*

Notably, arbitrators must focus on "*the documents and what the parties submit thereto*".

This provision, on the face of it, appears to be in line with global arbitral practice, as it directs the arbitrators to set out a procedural timetable for the parties' pleadings and evidence, which is assumed to cover both factual exhibits and legal authorities. However, in practice, the law is not prescriptive in this regard and is indeed rudimentary in many respects. In the absence of choice, given the content of Article 265, the basic provisions of the Civil Evidence Law 107 of Year 1979 (Civil Evidence Law) will apply. Disputants are advised to make alternative arrangements by agreement, such as incorporation of the IBA Rules on the Taking of Evidence in International Arbitration or similar, which are comprehensive and clearer by comparison.

Consistent with other civil law jurisdictions, Iraqi law allows arbitrators to make a ruling *in absentia* should a party fail to submit its position within the timeframe decided by the Tribunal.

As to the assessment of the evidence presented to the arbitral tribunal, Article 267 CCP refers to "*investigation procedures*" to be undertaken by the arbitrators,[81] in line with the Iraqi civil law inquisitorial approach, granting more significant powers to the court – and arguably arbitral tribunals – to direct and manage the proceedings.

[81] Art. 267, CCP provides that: "*The arbitrators collectively undertake the investigation procedures, and each of them shall sign the minutes unless they have assigned one of them to certain procedures and this authorisation should be recorded.*"

[3.4.1] Witnesses

The provisions of the CCP dealing with arbitration matters address the potential intervention of factual witnesses during arbitral proceedings only very briefly.

Indeed, the only reference to witnesses is to be found at Article 269 CCP, providing that:

> *Arbitrators should go back to the competent court originally assigned for the dispute to issue its decision for judicial delegations that may be necessary in settling the dispute, or if needed taking legal action as a result of witness abstention or refusal to respond (testify).*

It would therefore appear that the CCP only envisages the scenario in which a witness does not show at the hearing or refuses to testify but fails to provide a wider framework for witness testimony. In these circumstances, arbitrators are encouraged to refer the issue back to the competent court, which would take action to deal with a recalcitrant or absent witness. The wording of the law is, however, unclear as to whether arbitrators should directly apply to the court or request the parties to apply in order to obtain a specific order or action against a witness. Some commentators consider that arbitrators should request the parties to do so,[82] although Article 269 CCP seems to impose a duty on the arbitrators themselves.

The very existence of Article 269 CCP implies that reliance on witness testimony in arbitration proceedings governed by Iraqi law is widely accepted in practice, despite the absence of a clear procedural framework. One would assume that the general rules applicable to witness testimony in traditional civil proceedings are also applicable to arbitration matters, as is the case in other Civil Law jurisdictions, and subject to any additional or other rules or guidelines provided under applicable arbitration rules.[83]

The rules applicable to witness testimony are contained at Articles 116 to 123 CCP. Notably, these provisions only deal with oral testimony and indicate that "*written notes may not be used without the permission of the court if such was necessitated by the nature of the case.*"[84] This restriction may become problematic in an arbitral context where parties' witnesses

[82] *Supra*, n. 61.

[83] The authors have interpreted key provisions of the CCP in relation to witness evidence in light of other Civil Law jurisdictions, with comparatively similar legal background to Iraq, and also by taking into account international arbitration standards and practice.

[84] Art. 120, CCP.

are normally expected to produce written testimony during the initial stages of the dispute, before being cross-examined during an evidentiary hearing. Given the restriction imposed by Article 120 CCP, it may be wise for the arbitral tribunal to seek the parties' agreement at the outset of the arbitration in order to also allow written testimony in the proceedings.

Article 121 CCP describes the way in which verbal witness testimony is to be delivered before a court, including direct and cross-examination by the parties' respective counsel and questions by the court. While the role of the court is very much inspired by the civil law legal tradition (at its roots, inspired by the French Civil Code) – the court may directly address the witness with questions at any time, but it can also prohibit certain questions if it deems them "*irrelevant to the subject-matter of the suit*"[85]– the parties' ability to direct, cross and re-direct witnesses creates the right balance of inquisitorial and accusatorial approaches which is to be expected in arbitral proceedings.[86]

[3.4.2] Experts

Similar to factual witnesses, expert witnesses are not discussed in any degree of detail in the arbitration-specific provisions of the CCP. However, general rules applicable to expert testimony are contained at Articles 125-135 CCP.

Iraqi law provides that should the subject matter necessitate consulting an expert, then "*the court shall appoint an expert or more from the experts' roll / list or otherwise, unless the same were selected by the agreement of the litigants.*"[87]

It would seem that the default position is in favour of court-appointed experts, unless the parties have agreed on the identity of one or more experts. Further provisions indicate that the role of the expert is exclusively that of informing the court on a particular technical issue to allow the judge to make a ruling. Article 131 CCP even provides that the "*expert shall conduct his task even in the absence of the litigants*".

Such departure from standard arbitral practice where experts may be appointed by the arbitral tribunal, but also by the parties, should be pondered by counsel and, as in the case of witnesses, it may be helpful to agree on specific procedural rules at the outset of the arbitration allowing

[85] Art. 121(4), CCP.

[86] It should also be noted that while Arts 116-135, CCP contain the core body provisions applicable to both witness and expert testimony, there are other provisions of the CCP dealing with witnesses, namely Arts 100-101, 109, 146, 231 and 286.

[87] Art. 125, CCP.

for a specific sequence of expert testimony, detailing rules for their appointment and how their testimony must be delivered.

Contrary to witness testimony which is only envisaged "*verbally*"[88], experts are required to draft a report "*showing the result of [their] work which shall be signed by the expert*". Article 132 CCP goes on to indicate that "*[t]he report shall address all the issues in which the expert's detailed opinion was sought, and the results which the expert has embarked on, or what the subject matter of the expert's advice may lead to*."

Further, "*[i]n case there was more than one expert and there was an opinion disagreement among them then the opinion of each of them shall be mentioned in the report along with its grounds*."

In addition to producing a written report, experts may also be called to attend a hearing to clarify certain points or complete certain sections of their report. During the hearing, the court may ask questions on specific disputed issues. Should it find the expert's conclusions and further clarifications insufficient, the court may require the expert to correct the shortcomings of his/her report by supplying another report, but it may also decide to exclude inadequate expert testimony and appoint another expert instead.[89]

Parties to arbitral proceedings should take the rules set out in the CCP into consideration when agreeing on additional procedural rules applicable to their dispute and allowing a more detailed procedure and framework for expert testimony. To the extent that the prescriptions set forth in the CCP are not contradicted, it would appear that parties to arbitral proceedings are at liberty to negotiate and agree specific procedures applicable to expert evidence, including a set number of rounds of written reports, the possibility for each party to appoint its own expert or experts (subject to the possibility for the arbitral tribunal to also appoint an expert), how expert evidence is to be tested during hearings, and the ability for experts to adopt specific methods such as expert hot-tubbing during hearings.

[3.5] Inherent powers of the Arbitral Tribunal

In the CCP, once again unsurprisingly, it appears the arbitrators' powers are to be determined by reference to the laws of domestic litigation where no contrary provision applies. There are no clear rules. This is unsatisfactory, in the absence of a modified arbitration law which sets out independent and distinct rules and standards for arbitration as opposed to litigation.

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[88] Art. 120, CCP.

[89] *See* Art. 133, CCP.

In this regard, Article 265 (which also provides instruction as to the applicable procedural rules ("seat") of arbitration) provides:

> 1. *The arbitrators shall follow the conditions and procedures stipulated in the law of litigation, unless the arbitration agreement or any subsequent agreement expressly frees the arbitrators from them or lay down specific procedures to be followed by the arbitrators.*
> 2. *If the arbitrators are authorized to reconcile, they are exempt from compliance with the procedures of pleadings and the rules of law, save those related to public order.*

However, drafters of arbitration clauses that will implicate Iraq as a jurisdiction or Iraqi counterparties would do well to mind the 'escape route' contained in the second part of Article 265(1): by inserting other rules (for example, the rules of an arbitral institution) they can sidestep the application of the Iraqi litigation law (i.e. laws of Civil Procedure, or the remainder of the provisions of the CCP) as applicable to the arbitrators' powers. As already mentioned, arbitrators in Iraq are specifically permitted to act as conciliators, and the second part of this provision focuses on this.

However, given the vagueness of Article 265, the parties' rights to determine the procedure, including the selection of the arbitral tribunal in accordance with their agreement, are not adequately catered for and this in turn will also affect whether and how (and on which clear basis) an arbitrator can be challenged for straying from his/her mandate[90]. In addition, challenge is unavailable for awards that have not yet become final and binding on the parties.

[3.6] Interim measures and judicial intervention

Iraqi legislation dealing with arbitration, including the CCP, does not include any specific power granted to arbitral tribunals to make interim measures. Importantly, however, such power is not explicitly excluded either and as such it can be argued that arbitral tribunals may be requested by either party to issue conservatory, injunctive or any other type of interim measures.

[90] *See*, Challenge of Arbitrators, *infra*, Section 3.3.4.

[3.6.1] Scope of intervention

The scope and variety of the measures that a party may request from a tribunal are therefore to be found in the set of arbitration rules applicable to the dispute. The ICC Arbitration Rules, for example, provide that "*as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate*".[91]

The ICC Arbitration Rules further specify that under certain circumstances, even after the file has been transmitted to the arbitral tribunal, the parties may apply to a competent judicial authority for interim or conservatory measures.[92]

The absence of any prescriptive procedural framework for the adoption of interim measures in support of arbitration proceedings may therefore afford parties a wide margin of manoeuvre as to the types of measures they can request from either the arbitral tribunal or Iraqi courts.

[3.6.2] Security for costs

In arbitration, the parties' ability to apply for security for costs when faced with an alleged unmeritorious claim is an important consideration at the outset of any dispute. While Iraqi law does not specifically provide for this type of relief, it does not preclude a party applying for it from the arbitral tribunal. In an LCIA arbitration under Iraqi law, for example, a party may successfully rely on Article 25.2 of the LCIA Arbitration Rules granting tribunals the power to order a "*party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances*".[93]

It does not appear that the arbitrators' powers to grant security for costs under applicable arbitration rules clashes with any mandatory or public order provisions under Iraqi Law and as such tribunals have full discretion to order this type if relief as necessary.

[3.6.3] Respect for party autonomy

Finally, it is worth noting that the Iraqi arbitration law is flexible enough that parties can choose any arbitral institution they wish. This

[91] *See* Art. 28(1), ICC Arbitration Rules.
[92] *See* Art. 28(2), ICC Arbitration Rules.
[93] *See* Art. 25.2, LCIA Arbitration Rules.

would be relevant to the negotiating stages of contracts subject to Iraqi law, whether between private parties or with an Iraqi governmental body or entity. Given the specific industry considered or the nature of the contracting parties, legal advice must be sought as to the choice of the arbitration institution offering the most appropriate set of arbitration rules and selection of interim relief available.

As mentioned above, Iraqi courts generally respect arbitral agreements. Iraqi judges have the power to assist the arbitral process if necessary, which may include the appointment of an arbitrator where the parties may have difficulty in agreeing or where one party fails to do so, or granting more time for the issuing of an award.

[3.6.4] Examples of judicial intervention

We set out below a few examples in which local courts may come in aid of arbitrators or parties to a dispute, namely the process to resolve issues of absence or unavailability of arbitrators; the court's role in the recusal process of arbitrators; the parties' ability to request an extension of time to allow the arbitral tribunal to render their awards, or ask the court to adjudicate the dispute instead of the arbitral tribunal in place, or, finally, appoint alternative arbitrators as necessary.

[3.6.5] Judicial assistance for the appointment of unavailable or missing arbitrators

The CCP provides that any party may apply to the competent courts to request the appointment of a missing arbitrator in a set number of circumstances, including in cases where one or more arbitrators declined to act, were unable to assume their role, resigned, or were discharged from their position.

Article 256 CCP addresses the issue as follows:

1. *If when the dispute arises the litigants have not yet agreed on the arbitrators, or if one of the arbitrators declined or was unable to assume his position, quit, or was discharged, and such a situation was not addressed in the parties agreement, then any of the parties may resort to the competent court and request the same to appoint the missing arbitrator(s) (after notifying and hearing the other parties\litigants).*
2. *The court's decision to appoint the missing arbitrators shall be final and unchallengeable. However, its decision to reject*

the request of such an appointment shall be challengeable by cassation according to the provisions of Article (216) of this law.

[3.6.6] The courts' role in the process of recusal of arbitrators

The CCP encourages judicial assistance at other crucial stages of the arbitral process as well. For example, Article 261 CCP seeks to address the issue of the recusal of arbitrators and does so in the following terms:

1. *The arbitrator may be recused for the same grounds of recusing judges. The recusal of arbitrators shall be only for reasons that become apparent after the appointment of arbitration.*
2. *The recusal request shall be submitted to the court that is originally competent to hear the dispute. The court's decision on this matter shall be challengeable by cassation according to the provisions of Article (216) of this law.*

Given the right to appeal against the court's decision enshrined in Article 261(2) CCP, while it may be useful that the recusal process is dealt separately from the arbitral process and directly by the competent courts, this may slow the proceedings pending the outcome of any appeal.

[3.6.7] Time limits for making an award

It should be recalled that under Article 262 CCP arbitral tribunals must render their decision within a specified period of time, if such period is specified in the arbitration agreement. In the absence of a stipulated period, the arbitrators must issue the award within six months from the date of their acceptance to act as arbitrators (unless one of them dies[94]). This is definitely something to bear in mind for would-be disputants: as the time limit is a short one in most complex contracts and the arbitration clause should be altered accordingly where the parties do not wish to run the risk of an invalid award as it has been rendered outside the time limit.

Article 262 provides:

1. *If the arbitration is limited by time, it will cease when passed unless the parties agree to extend the period.*

[94] *See* Article 262(3), CCP.

2. *If the arbitrators are not required to issue a decision within a specified period, they must issue it within six months of the date of their acceptance of the arbitration.*

3. *In the event of the death of one of the litigants, the removal of the arbitrator, or the filing of a request for rejection, the deadline for the issuance of the arbitration decision shall be extended to the extent that this barrier shall be removed.*

Courts may authorize an extension of time in circumstances where the arbitrators were unable to resolve the dispute within the agreed or default period of time, or if they were unable to "*submit their report due to a force majeure*".[95]

Article 263 CCP provides as follows:

> *If the arbitrators failed to resolve the dispute within the agreed upon period or the one stipulated in the law, or if they were unable to submit their report due to a* ***force majeure,*** *then each litigant may invoke the competent court to apply for an extension, or to request the court to adjudicate the dispute or to appoint an alternative/another arbitrators for that purpose, as the case may be.*

[3.6.8] Procedural impasses

Assessing this further, crucially, Article 263 CCP (which gives a wide escape route for arbitrators to excuse themselves from decision-making in cases of "force majeure", which is unhelpfully not defined) also allows a party to request the domestic court either to "*adjudicate the dispute*" or "*appoint an alternative/another arbitrator for that purpose*".

Both measures above would appear to be in aid of the arbitral process as they certainly would enable the parties to overcome a procedural impasse or the arbitrators' inability to agree on a unanimous solution within a stipulated period of time. However, it does not facilitate support of the concept that the parties intended to circumvent the courts to begin with in putting an arbitration clause into their contract. It defies the very *raison d'être* of arbitration. In fact, Article 263 where it is used to rely upon the court's assistance would result in "judicializing" the arbitral process by sending the arbitrators' remit back to the courts, which is what the parties arguably sought to avoid. In practice, this would not seem the

[95] Art. 263, CCP.

ideal solution. Further, transferring the case to a court would also delay the proceedings and inevitably increase legal costs.

As such, the third option offered by Article 263 CCP allowing a party to request that the court appoint alternative arbitrators to deal with the dispute and render a timely decision would seem more appropriate and in line with the parties' overall intention to submit their dispute to arbitration.[96] The problem is that it co-exists with the unpalatable alternative of judicial intervention.

[3.7] Enforcement of domestic and foreign awards

[3.7.1] Enforcement of domestic awards

One recalls that Articles 251 to 276 CPC governing arbitration proceedings make no distinction between domestic and international arbitration. However, the discussion of Article 253 above hopefully sheds light on the Iraq courts' position with regard to the CCP's application to international arbitration, in the absence of a clear section dealing with this (*i.e.*, affirmative). The precedent-setting case by FCNI, whereby the Court of Cassation special committee affirmed that the CCP was applicable to foreign as well as domestic arbitrations, should therefore help support this position.

The CCP also contains certain peculiar anomalies. Article 270, for example, provides that an award be accompanied by the main documentary evidence relied on by the parties. This adds to the minimum requirements existing under the New York Convention and most modern arbitration laws. For example, the award must be produced, accompanied by a translation and a copy of the arbitration agreement. It must also be reasoned, and state the place and date of the award. These are also requirements in the CCP. The reasons for this requirement are unclear, although the more suspiciously minded might point out the convenience of this for the enforcing court where it permits itself to re-consider the case on its merits.

[96] We note that Art. 264, CCP contains further clarifications as to the appointment of alternative arbitrators to resolve the dispute, in the following terms: "*the request submitted to the competent court to appoint arbitrators does not, as it stands, include ratifying their decision, or issuing a judgment of its purport, unless such was expressly indicated in the request. In such a case the court shall appoint the arbitrators and decide to postpone the suit until the issuance of the arbitral award.*"

Another irregularity is that once an arbitral award is made, Article 271 requires that it be lodged with the court within three days of issuance. The provision states:

> *After the arbitrators issue their decisions as explained above, a copy of it must be given to each of the parties, and the decision must be submitted with the original arbitration agreement to the specialised court within the three days after its issuance, with a signature signed by the clerk of the court.*

This imposes an excessive burden on those involved, in particular if the tribunal members signing the award are based in different locations. No conditions are stipulated as to how a domestic award may validly be made, for example whether (as in some Arab States[97]) it should physically be rendered by all of the arbitrators in the territory in which it is made. The condition introduced by Article 271 may also be problematic given the security concerns in Iraq and the excessive bureaucratic delays generally incurred during the administrative process.

Article 272 (1) CCP, further, contains an important provision relevant to the enforcement of domestic arbitration awards. It provides as follows:

1. *According to the request of either party, and after the payment of specified fees, the arbitrators' award shall not be implemented by the executive departments whether the arbitrators who issued it were appointed by court or by way of mutual agreement, unless the competent court of approves it." (Emphasis added)*
2. *The arbitrators' decision shall be enforced only with respect to the opponents who chose them, and in the matters for which the arbitration was conducted.*

As a result, a domestic Iraqi award cannot be enforced unless the supervising court approves it. To this end, a party must make an application to the competent court to confirm the award. It is only when

[97] The UAE Civil Procedure Code, for example, requires that the award be signed on its territory by all the arbitrators. *See also* Reza Mohtashami, Antonia Birt & Lee Rovinescu, INTERNATIONAL BAR ASSOCIATION: ARBITRATION GUIDE TO THE UAE (February 2013), 3. There is no such formalism in the Dubai International Financial Centre (DIFC).

the award is confirmed that it becomes final and enforceable, unless a further appeal is lodged.

It is understood that the second part, Article 272(2), confirms that the arbitral award is only enforceable against the parties to the arbitration and not any third parties that did not accept to be bound by the arbitration. There are no provisions in the rudimentary CCP that govern the position as to the addition of third parties to an arbitration clause they did not sign or submit to.

Upon presentation of an award, the court has grounds available to it to set aside the award (where it is seated in Iraq) or refuse to enforce, in other instances. This becomes important (*see below*) in the absence of Iraq's ratification of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Awards. Under Iraqi law, the court may decide to annul an award on the basis of the grounds provided for under Article 273 CCP:

1. *If it was issued for the purpose of being a written evidence or based on an invalid agreement or if the decision deviated from the agreement's boundaries [i.e. was ultra vires the arbitrators' mandate].*
2. *If the decision violates one of the rules of public order or morals or any of the arbitration rules specified in this law.*
3. *If a ground exists which makes a retrial a possibility.*
4. *If there is a material error in the decision or in the procedures that affect the validity of the decision.*

Article 273 sets out the grounds on the basis of which a party may seek to challenge an award. No time limit is set for an application. The grounds may either be invoked by the parties or applied by the court of its own volition. In the same vein as Articles V(1)(a) and V(2)(a) and (b) of the New York Convention, an award may be set aside if the court deems that the award is contrary to the parties' agreement, or if there was no agreement to arbitrate,[98] is subject to serious procedural irregularity,[99] went outside the scope of the arbitrators' authority,[100] or otherwise contravenes Iraq's public policy or morals.[101]

[98] Art. 273(1), CCP.
[99] Presumably this is Art. 273(4), CCP.
[100] Art. 273(1), CCP.
[101] Art. 273(2), CCP.

Article 273 (i) is self-explanatory save for the requirement that the award be "*issued for the purpose of being a written evidence*". This requirement is unclear, but it appears to be seeking to address the instances in which a "fake" arbitration award is issued in order to support a party's claim in another action or other proceedings, improperly. This provision can be restated in much clearer terms and leaves room for interpretation.

Under Article 273(ii), an arbitration award may fail for technical invalidity where it violates the rules or regulations of "*public order or morals*" or "*any of the arbitration rules specified in [the CCP]*". The public policy exemption is usual. Indeed, there is now a growing trend for public policy to be construed narrowly, although some states continue to use it with a broad brush (notably, Saudi Arabia, where considerations of the Islamic Shari'a are expressly allowed to "piggy back" off the public policy provision in its 2012 arbitration law). Public policy in international commerce should pertain to patent breaches of universally accepted standards of procedural fairness and notions of justice, as opposed to being contrary to the "domestic" public order requirements that may be relevant to a specific national system.

However, it is the second limb of Article 273 (ii) that is perturbing. As explained above, without the benefit of guidance that comes close to "judicial precedent" to indicate otherwise, the risk is that a valid award would be refused in Iraq at a party's request or on the court's own motion for a technical failing under the CCP. Such circumstances may not have been envisaged by the tribunal or by the courts at the seat of the arbitration.

Third, under Article 273(iii), the Iraqi courts may refuse an award if "*[i]f a ground exists which makes a retrial a possibility".* However, this misses the point of the process. In agreeing to arbitrate, parties opt for a full and final method of dispute resolution to the exclusion of national courts. Further, who is to determine whether grounds for a retrial exist, and on what basis? Denying "arbitral effect" having equivalence to res judicata to domestic and foreign arbitral awards is a crucial failing of the Iraqi system. Despite the divergence in legal systems, the principle of finality is embedded in every system that gives legitimacy to the arbitral process.

Under Article 273(4), another opaque ground for challenge exists where "*material error in the decision or in the procedures that affect the validity of the decision*". Neither "material error", nor the content or the extent of its potential influence on the decision are defined. For instance, "material error" may encompass both procedural and substantive matters. This creates wide room for mischief for a losing party. Combined with

Article 273(ii) and 273(iii), it affords a party scope to throw the kitchen sink into an application to challenge.

On the other hand, the equivalent of some important grounds of challenge under the New York Convention do not find express enunciation in the CCP. These include, first, violation of the parties' right to be notified of the proceedings and to present their case (the American "due process" or European "fair trial" equivalent). However, established commentators have held that certain fundamental requirements such as due process and arbitrator impartiality must nevertheless be observed.[102]

Moving to Article 274, this once again gives considerable power to the Court. It provides that the court may either approve the arbitral award or reject it in whole or in part. Should the court reject the award, the judge may decide to refer the dispute back to the arbitrator or the arbitral tribunal in order to correct the part of the award that was rejected or issue a whole new decision. Article 274 finally provides that the "*court may also settle the dispute on its own if the case was valid for settlement*". The above analysis demonstrates that the Iraqi courts wield a considerable and residual power in respect of both domestic and international enforcement processes. Enforcement is ultimately subject to the national court's discretion.[103] It should nevertheless be noted that when deciding whether to approve or annul an award it is not the practice of Iraqi courts to revisit substantive issues. Any decision made by the court can be appealed even though this is an action that a party does not ideally wish to undertake, for time and costs reasons. Any judicial decision to confirm or reject the award is subject to appeal to a higher degree court in accordance with the CCP rules of appeal.

Yet another gateway into the potential refusal of the award is Article 275, which permits a party to appeal the court judgment that itself ratifies the award, "*by other methods of appeal stipulated in the law*". In full, it provides:

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[102] *See* EL AHDAB & EL AHDAB, *op.cit*., 244.

[103] As Prof. Jan Paulsson has stated, "*It no doubt takes maturity on the part of a national judge to uphold an award rendered against one of his fellow citizens by foreign arbitrators in a manner which he believes to be entirely wrong, perhaps even in what seems to him to be a mistaken application of his own law. But unless judges realise that the higher long-term interests of cross-border justice and understanding requires them to accept the decision flowing from the arbitral mechanism which the parties had agreed upon, even when they do not like the particular decision in a given case, the international arbitral system will break down*." J. Paulsson, " Euro-Arab Congress Session III", Kluwer International (Prof. Fathi Kemicha ed., 1991), 111.

"The ruling issued by the specialised court in accordance with the previous article is not subject to objection, but rather can be appealed against through other methods prescribed by law."

This begs the question, when does an award attain finality, such that it becomes binding upon the parties? More pertinently, were Iraq to ratify the New York Convention, such provisions would likely fall foul of Article III of that treaty, if it were not to be made specific to domestic arbitrations, which obliges contracting states to "*recognise [foreign] arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*".

In practice, the discretion accorded to judges under Articles 273 to 275 raises an issue of considerable concern. It is that the Iraqi courts currently lack crucial expertise in conducting the supervisory function in relation to arbitration proceedings. This is not a problem that is specific to Iraq. Indeed, Michael Hwang, an experienced arbitration practitioner, academic and arbitrator in Singapore, and former Chief Justice of the DIFC courts, has explained in the case of Chinese and the Indian courts, that: "*the task of educating judges is a slow one...In 2000 a judicial colloquium was organised in India for Indian judges in conjunction with the ICCA Conference in New Delhi, and a further judicial colloquium was organised in China in 2004 for Chinese judges in conjunction with the ICCA Conference in Beijing. However, much more needs to be done on a continuing basis in the other Asian countries if more dramatic progress in judicial attitudes is to be made*."[104]

[3.7.2] Enforcement of foreign awards

The problem of judicial attitudes in Iraq becomes acute in the absence of clear, applicable rules, such as under the New York Convention, or a clear legislative framework, like the Model Law and this is particularly worrisome for counterparties wishing to enforce non domestic awards on the territory of Iraq. By way of background, although Iraq has not yet acceded to the New York Convention, the Iraqi Cabinet voted on 6 February 2018 in favour of accession to this important multi-lateral treaty.[105] The

[104] M. HWANG QC, SELECTED ESSAYS ON INTERNATIONAL ARBITRATION (2014), 30, *available online at* http://www.mhwang.com/Selected_Essays_on_International_Arbitration_(2013).pdf.

[105] *See* N. Kadhim, *Finally, Iraq Says Yes to the New York Convention* (Kluwer Arbitration Blog, 13 March 2018), *available online at* http://arbitrationblog.

next steps would be the approval by the Iraqi Parliament and ratification by the President. However, as is the case for the implementation of the new arbitration law, this step remains unfulfilled and the CCP provisions remain the operating provisions.

Foreign judgments that are not covered by an Arab regional judicial cooperation treaty may only be enforced under the Enforcement of Foreign Judgments Act of 1928 (the *"EFJA"*). Although the EFJA does not state such expressly, it is the view of some commentators that the statute will probably also be used to enforce foreign arbitral awards. The practice in other Arab States has also been to channel the enforcement of foreign arbitral awards through the same enforcement routes as foreign judgments.[106] On a literal reading of the EFJA, however, this should not be the case. The EFJA, in both its Arabic original text and its English translation, refers to "judgments" emanating from "foreign courts" and not, for example, arbitration awards masquerading as judgments. Presumably, the courts' decisions will relate to the merits of the case, which would have been considered by those courts. This does not apply in the case of arbitral awards, where the courts would merely be approving the arbitral tribunal's decision. This is of particular relevance when one remembers that there is a reciprocity requirement in the EFJA, implying that mutual trust in the decisions of contracting states' courts exists. The logical basis of the EFJA (mutual trust and reciprocity) is lost when it is applied to arbitration awards, which could have been issued by arbitrators unconnected with the laws of the issuing court. So in the absence of a clarifying provision in the CCP, the EFJA should not apply to arbitral awards.

A fortiori, the provisions of the CCP should, in the absence of Iraq's implementation of the New York Convention, be applicable to foreign awards. It is also unclear on which basis the EFJA is to apply to foreign awards, if Article 270 of the Arbitration Law itself stipulates that an award must be *"in the form of a court judgment."*[61] Aside from the fact that this approach conflicts with modern practice, and the New York Convention, which abolished the double exequator requirement, Article 270 appears to contemplate and accommodate foreign arbitral awards as well as domestic awards, given the absence of a distinction in the CCP between international and domestic arbitration.

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kluwerarbitration.com/2018/03/13/scheduled-15-march-better-late-never-iraq-embraces-new-york-convention/?doing_wp_cron=1591353624.5429420471191406250000.

[106] According to S. Fawzi,"*regarding the enforcement of foreign arbitral awards, the Arab legislations stipulate the application of the same procedure as for a foreign judgment*." *See* International Arbitration in Arab Legislation", in Euro-Arab Arbitration III, *supra*, 103, 58.

Any number of incoherent and inconsistent decisions may arise, depending on the enforcement judge who presides upon the matter at any given time. In any event, even if the Iraqis were to ratify the Convention, this may not solve the perfectly foreseeable scenario 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 New York Convention.[107]

[3.7.3] Enforcement treaties to which Iraq is a party

As the situation currently stands, Iraq has in any event ratified only two effective treaties in relation to the enforcement of foreign judgments and awards. These are:

- The Arab Convention on the Enforcement of Foreign Judgments and Arbitral Awards of 1952 (Arab League Convention); and
- The Riyadh Convention on Judicial Cooperation of 1983 (Riyadh Convention).

The Amman Arab Convention, of which Iraq is a founding member, has not been included in this list as it has never been operative, having failed to date to establish the Arbitration Centre in Rabat, Morocco, that it envisaged, and having never decided an arbitration case since its inception.

The above are therefore regional treaties, relevant only within the Middle East context, the Riyadh Convention superseding the Arab League Convention. The Riyadh Convention 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 those Arab States that had not acceded to the New York Convention.

However, with the large number of Middle Eastern States that have now acceded to the latter, the Riyadh Convention is no longer as relevant

[107] *See* Minas Katchadourian, *Controversial Ruling of the Qatari Court of Cassation Regarding Arbitral Awards* (Kluwer Arbitration Blog, 23 September 2013), *available online at* http://kluwerarbitrationblog.com/?s=emir+of+qatar.

as it once was. Of its 12 signatories, only Iraq, Libya and Yemen have failed to accede to the New York Convention.[108] The view of one experienced London barrister specialising in the energy sector in Iraq,[109] is that "*in [her] experience, Iraqi contracts are usually governed by English law and, in some cases, Iraqi law, but usually with recourse to arbitration, usually in London or Paris*".

[3.7.4] Form of the award and deposition

Iraqi law sets out some formal requirements for the validity of arbitral awards. First and foremost, awards must be made by either majority or unanimous vote in case of more than one arbitrator. They must be in writing and in the form of a court judgement including a reference to the original 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.

Once the arbitrators have issued their award, the CCP provides that they must give a copy to each of the parties, as well as hand over to the competent court the award together with the original arbitration agreement. They must do so within three days of the issuing of the award and must obtain a receipt signed by the court's clerk.[110]

APPENDICES

Please find the Appendices at **www.arbitrationlaw.com/books/arbitration-mena**.

- Iraqi Civil Code No. 40 of 1951 (the Civil Code):
- https://www.refworld.org/docid/55002ec24.html
- Iraqi Code of Civil Procedure No. 83 of 1969 (the CCP):
- http://gjpi.org/library/primary/statutes/
- [Civil Evidence Law No. 107 of Year 1979:]
- http://gjpi.org/library/primary/statutes/

[108] Since no published and accessible decisions exist in relation to the enforcement of arbitral awards in the Iraqi courts, to the knowledge of this author, the application of the Riyadh Convention cannot be tested.

[109] Ms Janan Al Asady, at 1 Essex Court, London.

[110] *See* Art. 271(1), CCP.

- Law No 13 of 2006 (The Investment Law of Iraq): http://www.iraqitic.com/maga_ten/ten_64_63_62_61.pdf
- Law No. 4 of 2006 (Kurdistan Regional Investment Law):

  https://investpromo.gov.iq/wp-content/uploads/2013/06/kurdistant-regional-investment-law-no-4-of-2006-En.pdf

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