Iraq's Anti-Sanction Law: A Preliminary Review

by

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Confronted on every side by sanctions and blocking orders, Iraq has drawn a legislative "line in the sand" with an anti-sanction law enacted on September 16. The law is a direct response to the sanctions, and it reflects a hardening position toward companies, banks and others caught in the middle of the Gulf crisis. (One article of the law provides that all assets and property of governments, companies and banks that have issued arbitrary decisions against Iraq shall be frozen.)

On September 16, 1990, the Iraqi Revolutionary Command Council (RCC) issued Resolution No. 377, thereby enacting Law No. 57 (1990), the so-called Iraqi anti-sanction law. Law No. 57 was published one week later in the Iraqi legal gazette under the title: "The Law Protecting Iraqi Property, Interests and Rights Inside and Outside Iraq." Somewhat unusual for Iraqi legislation, the anti-sanction law was given retroactive effect, back to August 6, 1990.

While newspapers report that Western lawyers are puzzling over the scope of *force majeure* under Islamic law,[1] Iraq's enactment of the anti-sanction law has received little media attention. This is somewhat surprising, as the law clearly was enacted to confront the many sanctions and blocking orders issued against Iraq by the United Nations Security Council, as well as the United States, the United Kingdom and many other nations. The first United Nations sanctions were enacted on August 6, which almost certainly explains the retroactive date of the Iraqi law. However, the anti-sanction law was issued before the Security Council voted an air transport embargo on Iraq.

Some of the anti-sanction law's provisions also reflect the Iraqi government's hardening position toward companies, banks and other parties caught in the middle of the Gulf crisis. In one sense, the law might be seen as a legislative "line in the sand" that simply reflects the battle lines drawn in the political and military arenas.

The Iraqi law is explicitly based on the legislative power of the RCC, under Article 42(a) of the Iraqi Interim Constitution.[2] In a number of instances, however, the law's provisions directly conflict -- apparently intentionally -- with other existing Iraqi law.

Extraterritoriality

Given the tensions arising from the current crisis, Article 7 of the anti-sanction law probably could have been predicted: it provides that all assets and property of governments, companies and banks that have issued "arbitrary" decisions against Iraq shall be frozen.[3]

Somewhat surprisingly, however, some provisions of the law are intended to have extraterritorial effect (that is, outside Iraq's borders). For example, Article 1 states that any law or resolution of a foreign government concerning the freezing of Iraqi property will be ignored, and that those governments shall be responsible for safekeeping such property. Moreover, Article 3 provides that banks outside Iraq shall be responsible for safekeeping Iraqi property deposited with them.

The RCC presumably intended Article 2 to have both territorial and extraterritorial effects: it states, among other things, that foreign companies with contracts with the Iraqi government shall be responsible for safekeeping payments made to them, as well as equipment and goods in their possession but owned by Iraq.

As a practical matter -- and for the time being -- the anti-sanction law's only significant effects will probably be on those parties (or their employees and property) actually in Iraq or Kuwait.

Force Majeure, Unexpected Circumstances

Article 4 of the anti-sanction law illustrates the Iraqi government's hardening position toward foreign contractors performing work and services in Iraq at the time of the crisis. During the initial days of the crisis, the Iraqi government reportedly was willing in at least a few instances to issue written documents acknowledging either the *force majeure* or "unexpected circumstances" situation facing such foreign contractors. The contractors' difficulties in Iraq could have been attributed to relocation of workers from their original work site; bank accounts that were "frozen," apparently relatively early in the crisis in at least a few cases; or the inability to import needed materials because of various sanctions against Iraq.

Subsequently, the Iraqi government apparently became less willing to acknowledge such mitigating circumstances.[4] More recently, it has been sending notices to foreign contractors in Iraq, demanding their continued performance on government projects.[5] Article 4 of the anti-sanction law formalizes this position: Iraq shall not be responsible for delays by foreign companies carrying out "their contractual obligations to Iraq"

(presumably referring to Iraqi public sector companies, as well as the Iraqi government), and such foreign companies shall be responsible for damages Iraq suffers as a result of those delays. In addition, Article 5 states that neither the Iraqi government, banks, companies nor individuals shall be responsible for delay in financial settlements.

Article 4 is contrary to the Iraqi legal theories of *force majeure* and "unexpected circumstances," which are contained respectively in Articles 168 and 146 of the Iraqi Civil Law (Law No. 41 of 1951).[6] These two theories are well established not only in Iraqi jurisprudence, but also in Iraqi "standard" government contract clauses, such as the following one on *force majeure*:

> Neither party to the Contract shall be considered in default and be liable for any loss or damage of any nature whatsoever incurred or suffered by the other party due to omissions, delays or default in performance caused by circumstances beyond its control which could not have been reasonably foreseen and provided against by an experienced Contractor or Employer (as the case may be) in the exercise of due diligence.
>
> Provided always that such party shall continuously exert every reasonable effort to obviate or to minimize such failure. However and in all cases force majeure as aforesaid shall not be construed to include any act or circumstance which has been due or is any way attributable to the Contractor or his fault or negligence.
>
> Either party [a]ffected by force majeure shall notify the other party of the force majeure and its nature without delay and not later than fourteen (14) days from the occurrence of force majeure. Failure to notify the other party within the said (14) days shall constitute waiver of the rights under this Article.
>
> In case of delays in the fulfillment of obligations caused by force majeure, the respective party shall be entitled to claim an extension of time [therefor], and the Engineer shall determine the extension of time, if any, which shall be reasonable and proper.[7]

Force majeure in Iraqi law refers to an event occurring during the performance of a contract which was unforeseeable by the contractual parties, beyond their control, and which renders the contract impossible to perform. The Iraqi legal theory of "unexpected circumstances" is generally similar, except that the unforeseen event renders the contract onerous, but not impossible,

to perform. Under this latter theory, performance must continue, but the court may balance the rights and obligations of the parties. It is common in these cases for the court to appoint an expert to investigate and recommend the appropriate additional compensation and/or other equitable adjustment to the contract.

Although all the distinctions and details of these two civil law theories may not precisely exist in a Middle East country without a "Western" civil law (such as Saudi Arabia[8]), generally similar (and perhaps broader) equitable principles exist in Islamic law. For example, the Ottoman "Majalla," codifying certain Islamic legal principles, contains the following rules:

> Difficulty begets facility. . . .Difficulty is the cause of facility, and in time of hardship consideration must be shown. . . .Latitude should be afforded in the case of difficulty. . . .Upon the appearance of hardship in any particular matter, latitude and indulgence must be shown.[9]

Interestingly, the provision for "unexpected circumstances" in the Egyptian, Iraqi, and other Middle East civil codes can be attributed at least in part to the Islamic law concepts of "excuse" and equitable treatment of contractual parties.[10]

Litigation Rights

Article 6 of the Iraqi anti-sanction law contains two separate provisions that could affect a foreign party's litigation rights in Iraq.

First, Article 6 requires, in general, that Iraqi courts and arbitrators abstain from hearing any disputes against the Iraqi government contesting the provisions of the anti-sanction law.[11] For a non-Iraqi company obligated by contract to resolve disputes in an Iraqi forum, questions arise as to:

- the fairness of any Iraqi court or arbitral proceeding, and
- whether a U.S. or other non-Iraqi court might declare that any judgment obtained in an Iraqi forum is not enforceable.[12]

Second, Article 6 emphasizes that Iraq will not recognize any decision (contesting the anti-sanction law?) issued by a foreign court or arbitral panel. This provision potentially conflicts with a number of Iraqi treaties for the execution of foreign judgments, as well as with Iraqi Law No. 30 (1928), which allows for execution of foreign judicial and arbitral judgments based on reciprocity.

The Iraqi government customarily has insisted on local dispute resolution in its contracts with foreign companies. For example, a standard Iraqi government contract contains the following clause:

> The Contract shall be and shall be deemed to be an Iraqi Contract and shall be governed by and construed according to the Laws in force in Iraq and Iraqi Courts shall have exclusive jurisdiction to hear and determine all actions and proceedings arising out of the Contract and the Contractor hereby submits himself to the jurisdiction of the Iraqi Courts for any such actions and proceedings.[13]

Nonetheless, in a number of instances foreign companies might be contractually entitled to resolve Iraqi disputes outside Iraq. For example, some foreign companies have been able to negotiate foreign arbitration clauses in agreements with Iraqi government customers. Moreover, the "customary" Iraqi forum clauses might not apply to the separate contractual undertakings contained in a pertinent bank guarantee/standby letter of credit.[14]

Article 6 of the anti-sanction law now raises additional questions as to the efficacy of such foreign judicial and arbitral dispute resolution, particularly where a resulting judgment conflicting with the anti-sanction resolution would need to be enforced in Iraq.

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ENDNOTES

1. Not to mention assisting the Saudi Arabian government in the procurement of gas masks. *See The Wall Street Journal*, October 3, 1990, p. B4.

2. RCC Decision No.792 (1970), promulgating the Iraqi Interim Constitution. Article 42 states:

> The Revolutionary Command Council exercises the following competences: (a) Issuing laws and decrees having the force of law. . . .

3. It is not unusual in the Middle East to encounter broadly and ambiguously drafted laws and regulations, which then enable government officials to apply their discretionary authority to the rules (or decide on exceptions) on a case-by-case basis.

4. *See Middle East Economic Digest*, August 24, 1990, p. 14.

5. Crusoe, "Cold comfort for contractors," *Middle East Economic Digest*, September 14, 1990, p. 8.

6. An English translation of these two articles was published in the Texts section of the October 1990 *Middle East Executive Reports*.

7. Iraqi Ministry of Planning, "General Conditions of Contract for Electrical, Mechanical and Process Works" (1980). This standardized contract was revised in 1986; the quoted text is intended simply for illustrative purposes.

8. *But see* Article 85 of the old Saudi tender regulations, Royal Decree No. M6 (1386 H):

> If the contractor or supplier objects to a fine imposed on it and submits documents which prove, to the satisfaction of the [government] authority who invited the tender, that the delay arose from *force majeure*, the head [of that authority] may, after the approval of the Ministry of Finance and National Economy, waive such fine, provided he gives a statement that the Government did not suffer damage or loss, either directly or indirectly, as a result of such delay. Such statement shall be attached to the payment vouchers.

However, the official position of the Saudi Ministry of Finance is that these old tender regulations were abolished by Royal Decree M/14 of 1397 H, the new Saudi Arabian Tender Regulations.

9. *See, e.g.*, Articles 17 through 31 of the Majalla, reproduced in 1 *Arab Law Quarterly*, pp. 374-75 (August 1986). Under the principles in the Majalla, such latitude is restricted to the extent of the circumstances. For example, if the hardship ceases to exist, the full contractual obligation may be restored. *See, e.g.*, Comment, "The Influence of Islamic Law on Contemporary Middle East Legal Systems: The Formation and Binding Force of Contracts," 9 *Columbia Journal of Transnational Law* 384, at 410 (1970) (P. Nicholas Kourides). The Iraqi civil law contains a number of provisions drawn from the Majalla. *Id.*, at 412.

10. *Id.*, at pp. 423-25; Saleh, "Some Aspects of Frustrated Performance of Contracts under Middle Eastern Law," 33 *International and Comparative Law Quarterly* 1046, 1049 (1984).

11. This provision could conflict with Article 60(b) of the Iraqi Interim Constitution, which provides that "[t]he right of litigation is ensured to all citizens."

12. *See* McDonnell Douglas Corporation v. Islamic Republic of Iran, 758 F.2d 341, 345 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 347, 88 L.Ed.2d 294:

> [E]ven if we assume for purposes of argument that [a standard contract] forum selection clause is mandatory, there is a "compelling and countervailing reason" why the forum clause should not be enforced. In *The Bremen*, the Court held that even a mandatory forum clause does not oust a non-forum court of jurisdiction if the party can "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." [citation omitted]

13. *See* footnote 7, *supra*.

14. *See, e.g.*, Rockwell v. Citibank, 719 F.2d 583 (2d Cir. 1983).