

Conflict of Laws: an Iraqi Perspective

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In a previous article published in the Law Update (May 2017) titled “Contract Drafting Insights from Iraq”, we alluded to choice of law briefly and concluded that it is possible to allow for autonomy of the parties to deviate from the choice of Iraqi law. However, before making such a choice it is important that the parties should carefully consider the form and complexity of the chosen legal regime for practical reasons. In this Article, we will discuss the implications of such a choice of law. We will start by summarising the Iraqi conflict of law rules, then cover legal and practical considerations affecting Iraqi courts’ decisions, and finally address specific sources of law relevant to international transactions.

Iraqi Conflict of Law Rules

Iraqi conflict of law rules are formal in nature. That is to say, they require courts to decide the applicable law by applying a simple formal test without going into the policy behind said law, its nature, or the intended effects of its application. Those rules can be summarised as follows:

- Iraqi law is the law used to characterise any given legal relationship;
- Real state matters are governed by the law of the state where such real state is located and this includes characterization as real state;
- Formal requirements for contract conclusion are governed by the law of the place of contract conclusion;
- Capacity is governed by the law of the state which the person is a national except that in pecuniary transactions concluded or performed in Iraq and there is a lack of capacity that is not apparent and cannot easily be detected by the other party capacity will be assumed;
- Regulation of juristic persons – companies, societies, or otherwise – is governed by the law of the state within which lies their actual head office, except that if such juristic persons have commenced their main commercial activity in Iraq, Iraqi law will apply;
- Iraqi law applies to marriage and personal status matters where one parties is an Iraqi and otherwise the law of the husband applies;
- Alimony is subject to the law of the debtor;
- Matters concerning selected guardianship, and other arrangements laid down for the protection of persons having no legal capacity or are of diminished capacity and those absent are governed by the law of the country to which such persons belong;
- Inheritance is governed by the law of the state which the deceased is a national;
- Contracts are governed by the law of the parties’ common domicile or the law of the state within which the contract was concluded unless an agreement otherwise exists or where it is revealed from the circumstances that another law was intended to be applied;
- Non contractual obligations are governed by the place of events giving rise to such obligations but this does not apply to tort liability for acts outside Iraq that are legal under Iraqi law even if they are illegal under the law of the place where they were committed;
- Law of the place where a lawsuit is filed governs jurisdiction.

Legal and Practical Consideration Affecting Iraqi Courts’ application of non-Iraqi Law

The first consideration affecting application of non-Iraqi law is that Iraqi courts cannot refuse to rule or dismiss a claim because the applicable legal regime provides no rule on the dispute or because the applicable law is ambiguous. The concept of denial of justice is interpreted in a way that prevents courts from dismissing non-Iraqi law simply because it is difficult to prove or ascertain. In other words, private parties do not have to prove non-Iraqi law as a fact, and in case of dispute over the existence and content of foreign law, courts will use diplomatic channels through Iraqi consulates to ascertain the applicable law. However, Iraqi courts have discretion in interpreting and applying a given legal text or concept. For example, courts may choose to elect legal experts to explain non-Iraqi law or proceed without requiring an expert report. When looking for experts to appoint, Iraqi courts can delignate this to the parties if they can reach an agreement or seek help from academic institutions and research centres inside or outside Iraq if needed. As indicated earlier, form and complexity of a given law affect the court's receptiveness to its application for practical rather than legal reasons. For example, statutory law is easier to prove using an authenticated text obtained via diplomatic channels while common law is more difficult to prove using this method, and courts can apply simple law directly after it is translated while complex law necessitates involvement of experts and makes matters more difficult for courts.

The second consideration affecting application of non-Iraqi law is that Iraqi courts will not apply such law if it is inconsistent with the public policy and morals of Iraq. As a result, there is always the difficult task of determining what is public policy and morals and whether a given legal rule infringes it or not. One way to solve this problem is to consider all Iraqi mandatory rules to be part of public policy; this would cover all instances where courts would disregard non-Iraqi law. Examples of such mandatory rules include time limitations of action, rules of jurisdiction, labour law, commercial agency registration requirements, caps on interest, and the prohibition on agreements to exempt from tort liability. However, this test of public policy, while being relatively easy to apply, representative of Iraqi courts' reasoning, and of practical use, is not always accurate. In some cases, a successful argument can be made that mandatory rules are not part of public policy and therefore can be disregarded if another legal system is applicable. For example, such an argument can be made for Iraqi mandatory rules such as the requirement to send notice before filing a claim of damages or the disregard for agreed on liability caps in case of claims of fraud or gross error.

The third consideration affecting application of non-Iraqi law is that Iraqi courts only apply substantive rules and not procedural rules. Iraqi law does not offer a clear-cut definition of what is procedural or substantive. However, this rule aims to free courts from having to follow procedures different from the ones followed in regular adjudication to avoid inconsistency or irregularity and because procedural rules are not seen as affecting the outcome of a case. For example, Iraqi evidence law will always apply regardless of the applicable legal regime.

Sources of Law Relevant to International Transactions

There are three main sources of potentially applicable legal rules beside Iraqi law, which play a role in cross border transactions. Those sources are foreign state laws, contractual instruments, and International treaties. It should be noted that, foreign state laws and international treaties may be applicable because of, or despite, party autonomy while contractual instruments such as the UCP for documentary credits, the incoterms for price-delivery terms, and FIDIC for contracts need to be agreed on to have effect. This grouping is useful for another reason because each results in different analysis if they conflict with national Iraqi law. Unlike the public policy analysis mentioned above, contractual instruments cannot change mandatory rules even if such rules are not part of public policy because they are restricted to filling in gaps and changing default rules. Another noteworthy caveat specific to the use of contractual instruments in government contracts is that the tendering regulations used by the Iraqi government contain many mandatory rules that can override, alter, or supersede said contractual instruments. The law applicable to government contracts also directs to specific contractual instruments that are an assumed part of contracts, even when they are not expressly chosen, because of mandatory language in government contracting regulations requiring government-contracting parties to choose said instruments.

International treaties can present unique challenges in Iraq. Iraqi treaty law has changed in 2015 to require ratification for all treaties to come into force unlike previous law before 2015. The new law did not address old treaties that Iraq acceded to (signed and deposited an instrument with the treaty depository) but did not ratify (pass a ratification law by the legislature) as the latter was not a condition then. Treaties in this legal status were already problematic to enforce under the old treaty law and this situation did not change. Fortunately, this only affects few treaties such as the United Nations Convention on Contracts for the International Sale of Goods.

Parties seeking to enforce an international treaty in Iraq will face another challenge if the treaty contradicts domestic Iraqi law. Here, we must note that the Iraqi constitution and treaty law is silent on the hierarchy of treaties and domestic law. The resulting analysis is slightly different from what would be expected if an express rule existed. First, courts may check if there are special rules stipulating that a given treaty or law override and supersedes any contradicting legal language. Examples of such rules can be found in the labour law, unless more rights are given in a treaty, and in some investment treaties. If no such rule can be found, statutory interpretation rules may be used to resolve the conflict because a treaty will be treated as national law by virtue of its ratification law. Examples of interpretation rules include canons such as “more specific rules override general ones” and “later law repeals or amends earlier law”.

Conclusion

The choice of law applicable to cross-border legal relations in Iraqi courts is subject to many legal and practical considerations. Such considerations include party choice (if any), the source of law being litigated (state law, contractual instruments, or international treaties), the legal rule itself (if it's procedural or substantive), the form and complexity of the legal argument, the presence of mandatory rules in Iraqi domestic law, and whether such mandatory rules are part of public policy or not. Drafting a good and effective choice of law clause must take into account all of these considerations as well as the nature of the transaction and intersections with the domains of certain Iraqi laws.

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