

Dubai Ruling On Immunity A Welcome Sign For Investors

By **Caroline Simson**

Law360, New York (September 8, 2017, 8:10 PM EDT) -- A recent decision by the Dubai International Financial Centre Courts enforcing \$2 billion in arbitral awards against Iraqi Kurdistan following a contract dispute with a consortium of energy companies sends an encouraging message to international investors on issues of sovereign immunity, experts say.

Late last month, the DIFC Court of First Instance shot down the immunity defense of Iraq's Kurdistan Regional Government as it tried to escape enforcement of the award. Justice Sir Jeremy Cooke concluded that the KRG had waived its sovereign immunity when it entered into the contract with the consortium.

The decision marks the first time the DIFC Courts have addressed this particular issue relating to sovereign immunity in the enforcement context. As a result, experts say, private parties contracting with sovereign entities in the Middle East can now rest assured that as long as their contract contains a clearly worded sovereign immunity waiver, states won't be able to skirt paying arbitration awards on immunity grounds.

Craig Shepherd, a partner in Herbert Smith Freehills' Dubai office who is also head of its Middle East disputes practice, said the importance of the decision is "not so much that it's amazingly novel, it's that it's refreshingly predictable and straightforward."

"It's exactly what you want to see if you're a company contracting with a government entity in the Middle East," he continued. "The decision isn't surprising from a common law perspective, but for the Middle East it's really rather good. Here, an awful lot traces back to government in some form, so questions of sovereign immunity are rather important."

The Aug. 20 decision came in a case brought by Pearl Petroleum Co. Ltd., Dana Gas PJSC and Crescent Petroleum Co. International Ltd., which had entered into a gas exploration and production contract with the KRG in 2007. The ruling enforces two partial awards issued by a London Court of International Arbitration tribunal ordering the KRG to pay the consortium more than \$2 billion following disputes over payment and other issues.

In the instant suit, the KRG had asked the DIFC court to overturn its earlier order enforcing the awards, claiming the court lacked jurisdiction because the government's sovereign immunity defense raised foreign affairs and public policy questions that could only be determined by the United Arab Emirates' federal legislature or the UAE Supreme Court.

But Justice Cooke rejected this argument, a decision that will likely come as a relief to foreign investors looking to enter into contracts with Middle Eastern governments, said Shepherd, who noted that arbitration clauses and contracts with government entities are common in the region.

Gordon Blanke, an international commercial arbitration partner with DWF LLP, shares that view.

"The issue, and more specifically the sensible limitation of sovereign immunity, is certainly of great importance to foreign investors in the Middle East in order to ensure that their investments are protected from rogue governmental action," he said.

There are also takeaways in the decision for states and government entities that are looking to benefit from state immunity as award debtors, Blanke said.

"If they wish to limit their waiver provisions, they will have to do so by reference to carefully chosen, express wording, taking account of relevant international instruments, such as the U.N. Convention (which may be called in interpretative aid by the competent court)," he said.

Raid Abu-Manneh, global co-head of the international arbitration group at Mayer Brown LLP, noted that the decision has significance outside of the UAE as well. DIFC court judgments can be enforced in the courts of signatories of the 1983 Riyadh Arab Agreement for Judicial Cooperation and also possibly in other Persian Gulf countries under the GCC Convention, he said.

So even if the award debtor has assets outside the UAE — perhaps in Jordan, Morocco or Somalia — the awardee can now have the award enforced in the courts of those countries, as long as they're among the 19 other signatories to the Riyadh Convention.

The enforcement landscape for foreign arbitral awards within the Middle East has traditionally been somewhat unpredictable, with one expert calling it "patchy" at an international arbitration conference held last year. One of the most infamous decisions came in 2004, when the UAE's highest civil court set aside an arbitration award issued to International Bechtel Co. in a dispute with Dubai's civil aviation authority because the witnesses in the arbitration had not been sworn.

Over the past few years, Dubai has taken steps to improve its status within the international arbitration community as a means of boosting foreign investment into and through the UAE. One of those steps was to launch the DIFC, an independent jurisdiction within the United Arab Emirates that operates under its own common-law-based legal system and regulatory framework.

Mark Beer, registrar general of the DIFC Courts, told Law360 that the court is part of that effort.

"The increasing trust and confidence and certainty that offering a familiar legal system and judicial system provides means that businesses from all around the world ... feel comfortable investing in, with and through Dubai as a gateway," he said.

The Pearl Petroleum decision was made by a first-instance court, meaning that if the KRG wanted to challenge the ruling it could do so. But any appeal is likely off the table now, since soon after the decision was issued the parties resolved their dispute through a \$2.2 billion settlement that amends and extends their energy production contract.

Nevertheless, Blanke said he feels that the decision would have withstood any challenge.

"Had this decision gone to appeal, I am certain that it would have been affirmed," he said. "No fault can be found with the literal interpretation of the contractual waiver provision by the DIFC Court of First Instance."

Pearl, Dana and Crescent are represented by Tom Montagu-Smith QC of XXIV Old Buildings and by Gibson Dunn & Crutcher LLP.

The KRG is represented by Michael Black QC of XXIV Old Buildings and by Addleshaw Goddard (Middle East) LLP.

The case is Pearl Petroleum Co. Ltd. & Others v. The Kurdistan Regional Government of Iraq, claim number ARB 003/2017, in the Dubai International Financial Centre Courts, Court of First Instance.

--Editing by Mark Lebetkin and Catherine Sum.