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Abu Dhabi Oil & Gas Update

Perspectives on latest developments

Investment Protection

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The United Arab Emirates and the Emirate of Abu Dhabi do not have any domestic laws to protect foreign investors from nationalization or expropriation, but the UAE is a signatory on a number of bilateral investment treaties and international conventions. Investment protection and legal recourse are important factors to consider when reviewing any investment opportunity. Governing law and dispute resolution provisions in oil and gas sector agreements have developed over time.

Governing Law

The original Abu Dhabi oil exploration concessions of 1939 and 1953 were granted at a time when the Emirate of Abu Dhabi was a protectorate of Great Britain. At that time there was very little written law in Abu Dhabi that could be used to interpret or govern the concessions, and the documents were silent with regards to governing law. The concessions did contain a provision that prohibited the Ruler of Abu Dhabi from cancelling the concession by any legislation or administrative measures.

From the late 1960s through the early 1980s, new concessions and other agreements signed between Abu Dhabi and international oil companies typically contained a two-pronged provision regarding applicable law. First, the provision set out that the agreements independently carried the force of law (in Abu Dhabi). Second, the agreement was to be interpreted and applied in conformity with "general principles of law" as normally recognized by civilized states – an approach international oil companies may pursue when contracting for work in a developing state that does not have an established body of law. (There are often political sensitivities about using a "foreign" governing law in agreements for the development of sovereign natural resources.)

In recent years, agreements with Abu Dhabi sovereign institutions such as ADNOC been governed by the laws of the United Arab Emirates, often following with the line of "as they are applied and interpreted in the Emirate of Abu Dhabi." This is a reflection of the development of UAE law, such as the passing of the UAE Civil Transactions Law in 1985 and the Commercial Transactions Law in 1996 and an increase in confidence among international contractors in the fairness of the UAE legal environment. Of course, it also reflects the stronger negotiating position of Abu Dhabi.

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Even so, UAE courts do not recognize the doctrine of binding precedent for UAE court rulings, and consequently, there remains a lack of established rules on contract interpretation. Because Abu Dhabi's oil and gas institutions are unlikely to accept a foreign governing law in the core agreements regarding the Emirate's resources, any company seeking to do business in Abu Dhabi's oil and gas sector must likely accept local governing law. Even so, the uncertainty of UAE law is an issue to be discussed, and a risk to be evaluated, when planning business in Abu Dhabi's oil and gas sector. This uncertainty should be considered, as it will impact how an agreement is drafted and negotiated, and how certain terms are defined.

Dispute Resolution by Arbitration

In line with international norms, oil concessions and gas project contracts signed in Abu Dhabi have been subject to dispute resolution by arbitration. Historically, contracts have provided for dispute resolution by international arbitration in an overseas neutral city such as London or Paris. Most recently, some contracts with ADNOC have called for domestic arbitration in the Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC"), part of the Abu Dhabi Chamber of Commerce. ADCCAC is the preferred forum of arbitration for many Abu Dhabi institutions.

A foreign arbitration award will likely be enforceable in UAE courts because the UAE became a signatory state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") in 2006. Importantly, in recent cases, UAE courts have enforced international arbitration awards.

However, domestic arbitration awards have in the past faced challenges for enforcement in UAE courts due to arguably insignificant procedural errors, reflecting the local courts' view that domestic arbitration decisions that effectively carry the binding power of a court judgment should follow domestic civil procedural requirements. Although recent cases regarding the enforcement of international arbitration awards suggest that the UAE courts may be changing their approach to such matters, it remains prudent to ensure that domestic arbitrations that take place in the UAE follow local procedural rules to the maximum extent possible.

In this regard, consideration should also be given to whether an arbitration award can be enforced against assets of the other party outside of the UAE. As one example, the courts of the United States favor enforcement of arbitration awards in the absence of gross procedural errors or proven arbitrator bias.

Bilateral Investment Treaties

The UAE has concluded bilateral investment treaties (BITs) with a number of countries including the United Kingdom, France, Switzerland and certain other European countries, as well as with such countries as China, Malaysia, and Morocco. Most such agreements provide for investors to be able to initiate an international arbitration against a host government seeking monetary damages for harm caused by violation of the international obligations of the treaty. Those obligations typically involve commitments (i) to provide national treatment (i.e., non-discriminatory treatment) to investors, (ii) not to expropriate or nationalize investments without payment of appropriate compensation, and (iii) to accord "fair and equitable treatment" to investors.

A simple breach of contract by a sovereign entity generally does not constitute a violation of an investment treaty. However, when a breach is coupled with arbitrary treatment and lack of recourse, investors have sometimes been successful in convincing arbitration panels to award damages.

In some situations, the potential risk of investment treaty arbitration can help influence a government to enter into negotiations, or otherwise be more flexible than it would otherwise, without the need to initiate an arbitration procedure.

Many investment treaties provide for arbitrations to be administered under the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID"). The UAE became a member of the ICSID in 1982.

It is important to note that each bilateral investment treaty is different, and that the scope of issues subject to international arbitration, as well as the procedural requirements for initiation of an arbitration, can vary in critical ways.

Investors sometimes make a conscious decision to structure their investments through a corporate vehicle domiciled in a country that has an investment treaty with the host country, with the idea of enhancing their potential remedies in the event that a dispute arises. As with other types of litigation, investment arbitration is not a panacea and the availability of such arbitration certainly should not be treated as a key factor in making an investment. Nonetheless, especially for large and long-term investments, advance planning to ensure that investment arbitration is an option is a legitimate component of risk management.

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