

Client Alert: Yemen Three Years into the Civil War

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“Yemen, as a state, has all but ceased to exist”. This is the sober conclusion of the latest report from the Panel of Experts on 26 January 2018, operating on the basis of UN Security Council Resolution 2342 (2017). Three years after the outbreak of civil war, Yemen is fractured and polarized as never before in its recent history. The protracted hostilities and the breakdown of statehood have caused a horrific humanitarian crisis.

This client alert looks at some of the legal issues associated with the erosion of state power in Yemen. The recent developments also involve serious challenges for humanitarian and development organizations as well as for private companies active in Yemen.

The Origins of the Conflict in Yemen

The present conflict is directly rooted in the failed political transition after the uprising in 2011 that forced longtime Yemeni President Ali Saleh to hand over power to his deputy Abdrabbuh Mansur Hadi, who succeeded him as President. In late 2014, the Houthi Militia, a religious-political armed movement with ties to Iran, assisted by forces loyal to the former President Saleh, took control of the capital city of Sana’a and expelled Hadi. In response, in late March 2015 a coalition led by Saudi Arabia launched an intervention with the aim of restoring the power of the Hadi government. The Hadi government, now existing in exile in Riyadh, generally enjoys recognition by the international community.

Since late 2015, the Houthi forces control 8 governorates (comprising only 20% of the territory of Yemen but 70% of the population), located in the north and north west of the country. The remainder of the country is mostly controlled by forces loyal to the Hadi Government, backed notably by Saudi Arabia and the UAE, with three governorates that are contested between the two sides.

Recent Developments: from a Local Binary to a Regional Multipolar Conflict

In the southern part of the country, the former Governor of Aden, Major General Al-Zubaydi, announced the formation of the Southern Transitional Council (“STC”) in May 2017, with the declared goal of re-establishing the Republic of South Yemen as a separate state. The STC called a National Assembly for South Yemen, a kind of parliament, that convened for the first time in December 2017. In January 2018, the STC, backed by the UAE, seized control of Aden, notably its port, and called for the Hadi Government to resign.

December 2017 saw changes in the north, with the end of the marriage of convenience between the former President Saleh and the Houthi-forces. After two days of street fighting in Sana'a, Houthi militants killed Saleh, at the same time consolidating their grip on power in the northern part of Yemen.

The outcome has been that there continues to be a partition of the country between the areas controlled by Houthi forces and its supporters in the north and the areas controlled by its opponents in the south and north east. However, the conflict today is no longer a binary conflict, and the two nominal belligerent parties are experiencing their own internal divisions.

Challenges for Development Organizations and Private Companies

The erosion of government authority and the partition of the country also carries serious challenges for development organizations and private companies active in Yemen. Of course, the legal challenges that are discussed in this client alert are only one (and probably a minor) aspect of the difficulties facing anyone who is active in Yemen at the present point of time. Rebuilding Yemen and recovering from its current humanitarian crisis will not be possible without private sector initiative, though. Private sector initiative, in turn, is fostered by a stable and predictable legal framework.

State Failure and the Law – General Considerations

Can there be law without a functioning state? What law applies where government authority has eroded? The lawyer's answer to this philosophical question is simple and straightforward: a legal rule survives the authority which once created it. This means that when a state is imploding, or its internal organization is collapsing, this does not invalidate its laws and its legal system. The law persists. It is just no longer enforced.

From the perspective of international public law, this is supported by the principle of "continuity," saying basically that government authority persists until it has been replaced by a new functioning government. This implies that in a failing state the law continues to be in force, and the state continues to be bound by international treaties, until a new government authority has evolved, which then has the power to amend the existing legal system.

On the level of internal law, one can observe that a revolution, change in government or change in government organization normally leaves the legal system by and large intact. Business continues to be bound by legal rules, also when government authority is eroding.

Compliance

There is no rule of international law that would render business dealings in and with failing states illegal. However, dealing with Yemen raises a number of compliance issues which any company dealing with parties from the country should be aware of.

First, there are UN, EU and also US sanctions against certain Yemeni individuals and organizations. The sanctions are based on the United Nation's Resolutions 2140 (2014) and 2216 (2015) and comprise the freezing of assets, a travel ban, a targeted arms embargo, as well as the obligation to inspect all cargo to Yemen. Notably, the sanctions do not interdict trade with Yemen or Yemeni parties per se. However, they ban the export of certain goods and services – basically everything related to defense – to, or for the

benefit of certain designated individuals and entities and those acting on their behalf in Yemen. Hitherto, five individuals are included in the sanctions lists, including the deceased former President Ali Saleh and three of the Houthi movement's leaders. Furthermore, the ISIL (Da'esh) and Al-Qaida Sanctions Committee pursuant to Resolutions 1267 (1999) 1989 (2011) and 2253 (2015) listed further Yemeni individuals and entities alleged to be affiliated with terrorist Islamic organizations such as Al Qaeda or AQAP. This makes a thorough business due diligence imperative before engaging with any new business partner in Yemen.

Second, according to international principles of good governance, private business is prevented from taking sides in an armed (internal) conflict. This follows from the general obligation to "*abstain from any improper involvement in local political activities*" (as the OECD Guidelines for Multinational Enterprises formulate). This principle prohibits an international company from actively supporting one of the parties in the conflict. It can also raise intricate questions as to whether a private company may engage with a contested government that is considered predominantly illegitimate by the international community, as is the case with the de facto Houthi government in Sana'a. Provided there are no specific restrictions (e.g. based on sanctions) that apply, there is no general rule of international law that would prohibit a private company from dealing with a non-recognized government that de facto exercises power in certain parts of a country. This means, e.g., that in principle an international company may pay taxes, registration fees, customs duties and port fees to the de facto Houthi government, as prescribed by the law, although the de facto Houthi government as such is not recognized by the international community. There however is a fine line between "discharging existing obligations" and "supporting a party in an armed conflict" that must be carefully observed.

Third, there is an increasing awareness that private companies can be bound by principles of human rights law and that they may be held liable for violations they have committed, or they have permitted their subsidiaries and business partners to commit. Although, from a legal perspective, many aspects are still in the making, and to a large extent depend on the forum and applicable law, the associated risks should be taken very seriously – from a legal and a reputational perspective.

Commercial Contracts

Beyond the export of oil and gas, the Yemeni economy is predominantly import-oriented, and many raw materials and manufactured goods are imported. For many international companies, it was a market, albeit small, with a high potential. At the same time, the ongoing conflict has not only changed the map of Yemen, but also the traditional business community, over decades dominated by a handful of trading families. A new merchant class is emerging which benefits from its ties to one or other of the two conflicting parties. In addition, the present situation provides opportunities for small size trading companies that step into the shoes of the traditional trading houses which are no longer able to operate freely. The disruptive change in the business community also has implications on the legal level.

Like many Arab country civil codes, contract termination rights in Yemen are limited and Article 219 of the Yemeni Civil Law (Law 14/2002) requires "good cause" for premature termination. Changing political circumstances are unlikely to reach the "good cause"

standard. With very rare exceptions, the political affiliation of a contracting party will not go to the essence of the contract, so that a mere change in the political landscape will not permit termination.

Moreover, to the extent distribution agreements are concerned, a Yemeni distributor or agent has certain means to contest a termination. In general terms, the Yemeni law on commercial agency is fairly liberal, with only a moderate level of protection for an agent. In practice however, where an agency has been registered, the former agent can contest deregistration until the dispute with the principal has been finally resolved in court or amicably. This follows from Article 19 of Law 23/1997 Regulating Foreign Companies' Agencies and Branches. In practice, the former agent often would only consent to the deregistration if compensation is paid. Moreover the deregistration's proceedings are slow due to the limited functionality of the Commercial Agency Registrar, held by Ministry for Trade and Industry in Sana'a,.

Forex

Among the main challenges for any business active in Yemen are the restrictions on financial transactions.

Financial transactions with Yemeni counterparties are difficult because Yemeni commercial banks are not able to transfer money out of the country. Upon the outbreak of the conflict most American and European banks closed the accounts of Yemeni commercial banks (and many Yemeni individuals living abroad). The key motivation are compliance concerns regarding money laundering standards and costs related thereto. The Yemeni banking sector and business community is to a large extent cut off from the international banking sector. Often, *hawala* remittances will be the only way to transfer funds in and out of the country. While *hawala* offices in principle are required to obtain a license from the Central Bank, many would be operating without such a license. International development organizations and companies at times use *hawala* transactions as means of last resort, however each transaction should be scrutinized on a case-by-case basis.

In addition, by virtue of Presidential Decree 119 of 2016 issued on 18 September 2016, President Hadi ordered the move of the Central Bank, which until then had been located in Sana'a, to Aden. The effect was that a truncated central bank was left behind in Sana'a and a non-functional new central bank was established in Aden, a situation which renders any meaningful monetary policy, banking supervision or communication with international financial institutions difficult. The lack of any effective banking supervision, in particular, will make it difficult to restore the trust of the international financial community in the Yemeni market. The absence of any monetary policy, as well as attempts to attract foreign deposits and issuing new bank notes, has further fueled a decline of the national currency.

Oil and Gas

In 2011 Yemen was the world's 32nd biggest oil exporter and 16th biggest seller of liquefied natural gas (LNG). The main crude oil and LNG production facilities are located in the governorates of Mareb (Northeast), Hadarmout (East), and Shabwa (Southeast), which are not under the control of the Houthi forces.

At present, the oil and gas sector is effectively paralyzed, but there is hope that the Yemeni energy sector will revive in the course of 2018 by resuming crude oil exports from south Yemen. Crude oil shipments from the Masila oil field (block 14) in Hadramout, Yemen's premier producing property, already resumed on a smaller scale in late 2016, after the forces loyal to Hadi's government and backed by the United Arab Emirates successfully forced Al-Qaeda fighters to withdraw from the coastal city of Mukalla, capital city of Hadhramaut governorate, and the oil exporting terminal of Al-Shihr, 40 miles to the east. A European oil trading firm reportedly has already offloaded two million barrels every two months since January 2017. The basis for this is an agreement that was entered into with the exiled Hadi government in July 2016. At present, there are plans to further expand exports, also from the fields in Mareb, in northeast Yemen, presently controlled to large extent by the Hadi government.

Any oil and gas transaction with an unstable government – be it a de facto government or a government in exile – must be treated with caution. As a general rule, natural resources are owned by the state and the state is represented by the government. This general principle of international law, that also is reflected in the Yemeni constitution (Article 8), but which is difficult to apply where there is no clear government authority.

Dispute Resolution

The ongoing civil war has also impacted the general functioning of the judiciary and the administration.

While courts in the Houthi-controlled territories have continued to at least partially function, there has been no functioning judiciary in the remainder of the country. Since August 2017 efforts have been made by the Supreme Council of the Judiciary in Aden to reactivate the judiciary in the territories controlled by the Hadi Government. The irregular payout of public sector wages further contributes to the paralysis of state institutions.

For an international development organization or company that needs to resolve disputes in Yemen, this leaves basically two options.

First, the parties can resort to international arbitration and resolve disputes offshore. While this is, of course, an attractive option from a legal perspective, it has some serious practical shortcomings. Yemen is not a party to the New York Convention (1958), but it is a signatory to the Riyadh Arab Agreement for Judicial Cooperation (1983), which unlocks potential avenues of dispute resolution in other signatory states, including the forums available in the Emirate of Dubai in the United Arab Emirates. Even so, enforcing a foreign judgment or arbitral award in Yemen is impossible without a functioning judiciary. In addition, arbitral proceedings tend to depend on certain “local support services” such as service of legal documents etc. that also can be affected by the civil war.

Second, the parties can rely on traditional methods of conciliation and dispute settlement outside the official court system. Yemen has long tradition of community-based dispute resolution, particularly tribal dispute resolution. The ongoing conflict has weakened the long-standing alternative dispute resolution mechanisms in Yemen, hence the shift in political and social power challenged the authority of the traditional nonstate power brokers. A decision will in any case hardly ever be formally recognized in court.

Future Developments

Whether Yemen will survive as a nation state is uncertain and breakup would raise intricate legal issues. From the perspective of international law, the territorial disintegration of states is treated as a question of “state succession.” The rules on state succession set out in the body of international law are complex and it is difficult to predict how they will apply to a future case. In the present context, suffice it to say that there is no principle of universal succession in relation to disintegrating states under which all assets and liabilities would pass to the successor state and each international treaty and public contract must be reviewed individually. Parties cannot assume how international agreements would apply in any successor states that form from today’s Republic of Yemen.

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