Kluwer Arbitration Blog

Recent Investor-State Arbitration Trends in the Middle East: #YoungITATalks in Dubai

Mayssa Khattar (DWF (Middle East) LLP) · Sunday, January 20th, 2019 · Young ITA

Young ITA has organised over fifteen successful events this year all over the world including in Sao Paolo, Buenos Aires, Guatemala City, Miami, Washington DC, New York City, London, and India. The first Dubai Young ITA talk took place on Wednesday 5 December 2018. The event hosted by Vinson & Elkins featured two panel discussions with leading arbitration practitioners from all over the Middle East offering their insights on the latest arbitration trends in the region.[1)] Amongst the topics discussed were the impact of the Qatari blockade and the uncertain legislative landscape of Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs) in the Middle East.

Impact of the Qatari Blockade on Investment Arbitration and Inter-State Arbitration in the Middle East

Qatar ratified the 1907 Convention for the pacific settlement of international disputes pursuant to which member states agreed to arbitrate or mediate their inter-state disputes. As such, the blockade against Qatar will inevitably have wide implications on the arbitration scene in the Middle East, in particular taking into account the projects related to the upcoming 2022 FIFA World Cup in Qatar. It is anticipated that commercial claims will arise from difficulties of performing contracts in Qatar, such as force majeure claims in relation to World Cup infrastructure projects. Investment claims are also expected to be filed by Qatari investors against states implementing the blockade. In fact, an international investment arbitration case has already been launched by Qatar's beIN sports network against the Kingdom of Saudi Arabia contending that it has been unlawfully driven out of the Saudi market. All these recent developments create an interesting landscape that will undoubtedly have an impact on investment arbitration and inter-State arbitration in the region.

Uncertain legislative landscape: BITs and MITs in the Middle East

Investor-State disputes in the Middle East have increased from 6% to 14% of ICSID's

current caseload. While there was a debate on whether the Arab Spring had a negative impact on investment arbitration in the Middle East, in practice, recent trends have shown to be positive. For instance, despite having been involved in a large number of ICSID claims, Egypt continues to enter into BITs, diluting any sign of backlash. A backlash would not be sensible as it would compromise the international standing of the relevant countries and affect their credibility before the World Bank.

That said, Middle Eastern countries currently face problems of clarity and precision in the terms of their BITs and MITs which threaten the certain and effective resolution of investment disputes in the Middle East.

By way of example, the dispute resolution clause in the BIT between the UAE and Russia is unclear as to which administrative body is competent to resolve investment disputes and as to which procedures are referred to in that clause. It is primordial that the legislative landscape of investment treaties be certain enough to avoid legal issues arising from the absence of terms and/or the interpretation of the terms of the investment treaties themselves.

With regards to the terms of MITs, there are two main MITs in the Middle Eastern region:

First, the 1980 Unified Agreement for the Investment of Arab Capital in the Arab States amended in 2013. In practice, this agreement is not often used as an investment claim instrument given (i) the uncertainty as to whether there is an agreement to arbitrate in the first place and (ii) the strict requirements of Arab capital for the agreement to be applicable.

Second and most importantly, the Organization of Islamic Cooperation (OIC) Agreement[2)] entered into force in 1988. Until recently, investors have only had theoretical access to the guarantees of investment protection set out in that agreement. In 2012, the Hesham Al-Warraq v. the Republic of Indonesia case established, for the first time, the possibility of using the OIC Agreement as an option for investors to bring investment claims. Jurisdiction was recognized under Article 17 of the OIC Agreement to allow investors to take host States to arbitration. The existence of the consent to arbitrate under the OIC Agreement was recently reconfirmed in the 2017 KCI v. Gabon case.

However, a recurring problem that creates a deadlock when arbitrating investment disputes under the OIC Agreement is the lack of fulfilment of the Secretary-General of the OIC of its role as appointing authority when parties fail to agree on the appointment of a tribunal, frustrating the claimants' attempts to resolve disputes by arbitration.[3)] This refusal to act and fulfil its role as appointing authority under the OIC Agreement threatens investors' protection rights under the OIC agreement. In this context, in March 2017, the Secretary-General of the Permanent Court of Arbitration (PCA) appointed an arbitrator on behalf of Libya in the D.S. Construction v. Libya case brought by a UAE-based company under the terms of the OIC Agreement. In its reasoning, the PCA imported the UNCITRAL Arbitration Rules[4)] through the Most Favoured Nation (MFN) clause to designate an appointing authority

in an arbitration conducted under different rules. By doing so, the PCA did not use the MFN clause to *create* an agreement to arbitrate but rather to *give effect* to the existing agreement to arbitrate contained in the OIC Agreement. Had the PCA rejected the Claimant's application, the Claimant would have been faced by a denial of justice. The PCA's creative decision is very welcomed and undoubtedly provides legal certainty to investors in the enforceability of investment-protection rights under the OIC Agreement, encouraging greater investment. It remains unknown whether the PCA's reasoning will lead Libya to eventually attempt to set aside the award once issued.

It should be noted in this context that, in the recent 2018 notice of arbitration filed by beIN Corporation against the Kingdom of Saudi Arabia under the OIC Agreement, beIN immediately relied on Articles 3(4)(a) and 6(1) of the UNCITRAL Rules to request the Secretary-General of the PCA to be the appointing authority for the arbitration. (para. 96) In other words, beIN did not even attempt to apply to the Secretary-General of the OIC to be the appointing authority prior to resorting to the PCA.

More recently, a UAE investor in a joint venture that operated Libya's largest oil refinery commenced arbitration against Libya under the OIC Agreement. It will be interesting to witness whether, in the absence of an agreement between the parties as to the appointment of a tribunal, the Claimant will once again resort to the Secretary-General of the PCA in the event the Secretary-General of the OIC fails to make a default appointment.

The event was sponsored by Vinson & Elkins. Further information on Young ITA can be found here.

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References

↑1 The first panel, chaired by Robert Landicho (Vinson & Elkins, Houston), and composed of Charlotte Bijlani (Watson Farley & Williams, Dubai), Sami Tannous (Freshfields, Dubai), Aseel Barghuti (Eversheds Sutherland, Amman) and Laila El Shentanawi (Al Tamimi & Co, Dubai), focused on recent developments in investment arbitration and inter-State arbitration in the Middle East. The second panel, chaired by Lara Hammoud (Senior Legal Counsel at Abu Dhabi National Oil Company), and composed of Emily Beirne (Vinson & Elkins, Dubai), Sana Belaid (Senior Legal Counsel at Cisco), Dilpreet Dhanoa (Squire Patton Boggs, Abu Dhabi) and Aditya Singh (White & Case, Singapore), focused on the findings of the 2018 QMUL survey in the context of arbitration in the Middle East. *While the content and subject-matter of this report stem from the discussions at the #YoungITATalks event, the views and analysis expressed herein are those of the author.*

↑2 The Organization of Islamic Cooperation (the "OIC", formerly the Organization of the Islamic Conference) is an intergovernmental organization with a membership of 57 states spread over four continents, describing itself as "the collective voice of the Muslim world". The OIC agreement has been ratified by 27 states, including Egypt, Saudi Arabia and the United Arab Emirates.

↑3 According to Article 17.2 b) of the OIC Agreement, if the parties do not agree on the appointment of a tribunal, "*either party may request the Secretary General to complete the composition of the Arbitral Tribunal*".

↑4 1976 UNCITRAL Rules, Art. 7.2(b); 2010 UNCITRAL Rules, Art. 6(4).

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