Kluwer Arbitration Blog

Highlights from the ICSID-ADGM Joint-Conference on Investment Arbitration in the Middle-East

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On 17 March 2022, Abu Dhabi witnessed an event which was five years in the making: a joint-conference by ICSID and the Abu Dhabi Global Market (ADGM) titled "Investment Arbitration in the Middle East". This post recaps some highlights from the event, as well as offering further views and commentary.

Event Kick-off and Its Interplay with Broader Developments

The event kicked-off with an opening address by **Linda Fitz-Alan** (Registrar and Chief Executive of the ADGM Courts) in which she announced the creation by the ADGM Arbitration Centre of a Panel of Investor-State Mediators. **Meg Kinnear** (Secretary General of ICSID) noted that the ADGM's initiative perfectly complements ICSID's own initiative in introducing Investor-State Mediation Rules, which have been approved by Member States along with the proposed amendments to the ICSID Rules, and which will enter into effect from 1 July 2022.

Later in the day, Ms. Kinnear announced the signature of a Cooperation Agreement between ICSID and the ADGM allowing for increased collaboration and knowledge-sharing between the institutions as well as for ICSID proceedings to be held at the ADGM's world-class facilities. Practitioners in the region will doubtless welcome this news and hope that this will mean that more MENA-focused investment arbitrations can be handled within the region.

The Past, Present and Future of Investment Arbitration

The first item on the agenda was a Ted-style talk by **Alain Farhad** (Mayer Brown) who focused on the "yesterday, today and tomorrow of investment arbitration". Mr. Farhad spoke of gunboat diplomacy, which was for a long time the prevailing approach for the settlement of investment disputes, and which included two key events in the Middle-East which significantly influenced the creation of ICSID to ensure a peaceful alternative: Iran's nationalization of the Anglo-Iranian Oil Company and the ensuing coup, and Abdel Nasser's nationalization of the Suez Canal Company.

Regarding the present, Mr. Farhad underlined the shifting dynamics in the investment arbitration

scene which had historically been branded as favouring the Global North and West to the detriment of the South and East: Masdar v. Spain, DP World v. Belgium, and Dayyani v. Korea were cited as examples of cases brought by MENA investors against developed states, demonstrating the viability of the system for the protection of investments irrespective of the home and host state.

Finally, contemplating the future and considering the increasing criticisms levied against investment arbitration, Mr. Farhad warned critics that the alternative could very well be a return to gunboat diplomacy, which would hardly be preferable.

The Notion of Investment: Definition, Legality, Corruption

The first panel of the day was moderated by **Yehia Shahine** (Alieldean Weshahi & Partners), who, in discussing the definition of an investment, highlighted the comprehensive one provided in the Egypt-Mauritius BIT: commitment of capital, expectation of gain, assumption of risk and contribution to development of the host state. This definition closely follows the one set-out in Salini v. Morocco, another major contribution by the MENA region to the investment arbitration landscape.

Floriane Lavaud (Debevoise & Plimpton) spoke of the time-sensitive nature of the legality defence: only an illegality which affected the investment at its outset can viably constitute a basis for a *ratione materiae* jurisdictional objection. Subsequent illegal acts during the life of the investment are more likely to be viewed under the lens of admissibility or in relation to the merits of the case (by way of contributory fault). Bank Melli v. Bahrain was cited as a notable MENA case which illustrated this point.

In addressing the issue of corruption, **Ziya Akinci** (Akinci Law) noted that it takes two to tango: corruption can (usually via the FET standard) form the basis of a claim by an investor, just as much as it can be used as a shield by the state in a legality defence. Al Warraq v. Indonesia, a case brought by a Saudi investor under the OIC Agreement, acknowledges the dual nature of this issue. Mr. Akinci underlined the contributions of other MENA cases to this issue: Dogan vs. Oman which found that the alleged corruption must be relevant to the investment, as well as the Wena Hotels and Union Fenosa cases against Egypt, which did not uphold a legality defence given the absence of payments to a decision-maker, and the absence of prosecution in Egypt.

Sabrina Aïnouz (Squire Patton Boggs), stressed that a State contemplating a corruption defence must present such defence as early as possible in the proceedings in order for it to be credible and viable and that consideration be given to the proportionality between the seriousness of the corruption and the gravity of the violation alleged by the investor.

Stated-Owned Entities in Investment Arbitration

The second panel explored a topic which is of particular relevance in the Middle East: the participation of SOEs, both as claimants and respondents, in investment arbitration including State corporations, Sovereign Wealth Funds (SWFs) and territorial subdivisions. **Jennifer Younan** (Shearman & Sterling), who moderated the discussion, made reference to the IMF's estimate that SOE assets totalled USD 45 trillion, or nearly 50% of global GDP. She anticipated that the number

of disputes involving SOEs would significantly rise in the coming years.

Andrea Menaker (White & Case) presented the issue from the angle of the Sovereign Investor, setting out the Broches test conceived by the namesake architect of the ICSID system: an SOE can resort to ICSID arbitration only in circumstances where it is acting in a similar manner to a private enterprise and not as a government entity. This question was central in two MENA-related cases: Beijing Construction v. Yemen and the aforementioned Masdar v. Spain. Ms. Menaker later noted that there are no known cases in which a tribunal declined jurisdiction on the basis of claimant being an SOE.

Lara Hammoud (ADNOC) laid out statistics regarding BIT treatment of SOEs: 84% made no mention of them whatsoever, while less than a handful expressly excluded them from bringing claims. Reference to SOEs, and particularly SWFs, are however notably common in BITs concluded by Kuwait, Qatar, Saudi Arabia and the UAE, with the Saudi-Czech BIT even making reference to the Saudi public financial institutions, funds and monetary agency as potential investors.

Ms. Younan then sparked a debate by positing whether the involvement of SOEs as claimants was not repoliticising disputes and thereby straying away from the original intention behind the creation of the ICSID system. **Sami Tannous** (Freshfields Bruckhaus Deringer) advocated the pragmatic view that SOEs are a large part of the world economy and there should therefore be no reason to exclude them from this system: if the UK Government decided to expropriate Newcastle United, would the Saudi PIF not have as legitimate an investment claim as any other club owner in similar circumstances? This later drew an intervention from Alain Farhad who considered Qatar's ownership of Paris Saint-Germain in light of the Broches test: if a State makes an investment with no realistic aim to turn a profit, possibly with the purpose of serving political aims, is it actually acting as a private enterprise or in its governmental capacity?

The conversation then shifted to the respondent-side of things: **Hussein Haeri** (Withers) explored the question of whether and when a state can be held liable for actions of SOEs. Mr. Haeri noted that, contrary to the Broches test which appears to do little to filter out claims brought by SOEs, the attribution test has produced varying results when determining whether a respondent State should be liable for an SOE's actions. Mr. Haeri pointed to the Ampal v. Egypt and Union Fenosa v. Egypt cases, which although involving the same SOE reached different conclusions as to attribution.

The question of designation of SOEs to ICSID under Article 25(1) of the ICSID Convention was then explored by Sami Tannous: does an ICSID arbitration clause entered into by an SOE constitute a valid basis for arbitration in the absence of the designation by the host State of that SOE to ICSID? Aaron Broches' view that designation should have no bearing on jurisdiction appears to have been rejected by some tribunals in favour of Christoph Schreuer's view that there must have been some communication to the Centre by the host state. The other approach has been to distinguish designation, by which a host state endorses an SOE's signature of an ICSID arbitration clause, from notification, which brings such endorsement to ICSID's attention: the State's approval should be sufficient, regardless of ICSID's awareness of it.

Advocacy Insights

The final panel, moderated by **Mohamed Abdel Wahab** (Zulficar & Partners) provided insights into the investor-state arbitration process from various perspectives: **Nada Sader** (Derains & Gharavi) presented the investor perspective, **Fatma Khalifa** (Egyptian Lawsuits Authority) spoke from the state viewpoint, **Reza Mohtashami QC** (Three Crowns) provided the arbitrator's angle and Meg Kinnear rounded it out with the view from within ICSID.

On the question of the tribunal selection, Ms. Sader and Ms. Khalifa both agreed that the selection of the right tribunal was primordial. Mr. Mohtashami and Ms. Kinnear stressed the importance of a collegial atmosphere within the tribunal as a whole. Mr. Mohtashami advised that it may be counterproductive for state to appoint arbitrators with staunchly pro-state records whose dogmatic and academic views may alienate their co-arbitrators. Ms. Khalifa however underlined the importance of the arbitrators having some exposure to and appreciation of public law, to which Ms. Kinnear added Public International Law experience and political and cultural sensitivity as key considerations in the appointment process.

With regard to the presentation of the investor's case, Mr. Mohtashami advised claimants to do their due diligence before filing an RFA and get all facts right as arbitrators will appreciate a good narrative which withstands scrutiny. Mr. Abdel Wahab proceeded to inquire whether Ms. Sader would opt for an upfront strategy, fully revealing her cards before the identity of opposing counsel is known. Ms. Sader responded that she would, considering the stakes and dynamics of an investment arbitration, although she might take a different approach in a commercial dispute.

Regarding respondents' preparedness for investment arbitrations, Ms. Kinnear advised that States regularly conduct procurements and have law firms on standby should the need arise as ICSID cannot pause the proceedings to allow a state the time to go through such a process. Ms. Khalifa added that prior experience in state representation is important in retaining counsel as is sector expertise, and that state representatives from different countries should exchange feedback on counsel performance.

Finally, an interesting disagreement arose with regard to the question of bifurcation: Mr. Mohtashami suggested that when unsure whether or not bifurcation is necessary, it is better not to bifurcate, Ms. Khalifa took the opposite view, stressing the importance of limiting any unnecessary expenditure of public funds.

Concluding Remarks

The event concluded with an intervention by **John Gaffney** (Al Tamimi & Co.) who spoke about the importance of ESG (environment, society and governance) considerations, and their growing relevance in the evaluation by corporations of their investments, a topic which is quickly gaining traction as has been discussed in similar arbitration events recently held in Washington D.C. and Shanghai.

This conference set the stage for what appears to be a promising year for dispute resolution in the MENA region: 2022 will not only be the year in which new ICSID Arbitration Rules enter into force, but also new DIAC and QICCA rules. Developments are also awaited regarding a potential ruling from the French Court of Cassation on the validity of PCA nominations of arbitrators in OIC Treaty arbitrations, an increasingly popular instrument for investment arbitrations in the Middle-

East, after the Paris Court of Appeal dealt investors a blow in its March 2021 ruling.

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