



## An Arab Spring of treaty arbitration?

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The Arab Spring is just one of several factors that have contributed to the increased participation in investment treaty arbitration of Middle Eastern and North African companies and states, argued speakers at GAR Live Dubai. Kyriaki Karadelis and Alison Ross report.



Reporter interviews protestors in Tahrir Square, Cairo, during the Egyptian revolution of 2011

Traditionally, the Middle East and North Africa have tended to generate more commercial arbitrations rather than investment treaty ones, perhaps because much investment in the region has been in sectors of the economy where the state has a presence, such as energy, construction and telecoms. This enables aggrieved investors to sue under contracts rather than taking the treaty path.

Statistics from ICSID show that states from the region have appeared in only 11 per cent of ICSID cases since the centre opened 30 years ago, fewer than states from sub-Saharan Africa, Eastern Europe and central Asia.

However, the 2014 ICSID fiscal year (running from 1 July 2013 to 30 June 2014) appeared to bring a change in direction. In that period, states from the region were involved in approximately 15 per cent of new cases registered at the centre, reported French-Lebanese arbitration specialist **Roland Ziadé** of Linklaters, moderating one of GAR Live Dubai's afternoon panels.

This is more than were generated by the traditional "hot spot" of investment treaty arbitration, Latin America, which accounted for just 7 per cent of new cases registered.

States that were on the receiving end of new claims in that period included Egypt, Jordan and Tunisia. Other states to have faced claims in the centre's history include Lebanon, Oman, Saudi Arabia, the United Arab Emirates and Yemen.

Similarly, the past few years have seen a rise in claimants from the region.

The rise in cases began about a year after the Arab Spring, the wave of demonstrations and protest that began in Tunisia in late 2010 and swept through North Africa, the Middle East and the Gulf until mid-2012.

But while this may cause one to leap to conclusions of a link, GAR Live speakers argued that one should also look for other reasons.

#### The growth in Arab claimants

According to **Anne K Hoffmann**, a German and English-qualified special counsel at Al Tamimi & Company in Dubai, the growth in Arab claimants in recent years can be explained partly by changes in the flow of foreign direct investment.

Inflow of investment to the region has been surpassed by outflow, she explained. The Gulf states of Kuwait and Qatar especially have invested “incredible amounts” in other parts of the world either directly or through state entities or investment funds, and this trend is only likely to increase.

Indeed, **Veijo Heiskanen**, a partner at Lalive in Geneva who conducts much work related to the region despite his Finnish origins, suggested that Arab governments are now in a similar position as Western governments that signed up to bilateral investment treaties in the 1960s and 1970s because of their strong capital-importing role in Asia.

The growth in Arab claimants may also be linked to rising awareness of the possibility of treaty arbitration where investments have gone awry.

**Hamid Gharavi**, the French-Iranian founder of Paris disputes boutique Derains & Gharavi, was in a good position to offer his views as counsel to the Omani investor in the first ever Arab–Arab treaty arbitration, the ICSID case of *Desert Line Projects v Yemen*.

In his experience, awareness of the protections available under investment treaties and other instruments still varies hugely in the Arab business community, as in Europe, but is getting stronger with time.

Until recently, he explained, there has been a notable lack of reporting of the treaty coverage in the region. Some instruments to which states are signatories have not been publicised at all; others are reported as signed, but turn out on investigation not to have been ratified.

He mentioned his delight and amazement on discovering recently that both Tunisia and Gabon had signed and ratified the little-known investment agreement of the Organisation of the Islamic Cooperation (a union of 57 Muslim states founded in 1969 as the Organisation of Islamic Conference), enabling his Tunisian client to file an ad hoc arbitration claim under that instrument.

#### Treaty coverage

Treaty coverage in the Middle East and North Africa is actually quite dense, according to Heiskanen.

Egypt has concluded the most bilateral investment treaties, he reported – 112, of which 73 are in force – and also has the most number of cases filed against it, 25 at ICSID alone.

Kuwait has 81 BITs, 44 of which are in force; and Iran has 64, with 48 in force. Qatar has 51 but only 18 in force, and Saudi Arabia has 24, 17 of which are in

force.

Other countries with more than 100 BITs in the region include Oman and Turkey; while Morocco has 80 treaties (although only 57 are in force). Iraq is the Middle Eastern state with the least number of BITs, with just nine signed and only one in force.

Since the Arab Spring, the treaty coverage has increased further, Heiskanen said, with Iraq, Kuwait and the UAE all actively signing BITs. Egypt, however, has resisted the trend: Cairo-based arbitrator [Karim Hafez](#) joked that to press for the signing of treaties in the new Egypt would be considered “prima facie treasonous” in light of the number of claims the state is already facing.

There are also several regional instruments under which Arab investors can bring ad hoc arbitration claims against states in the region.

The 1980 Unified Agreement for the Investment of Arab Capital in Arab Countries (UAIAC), for example, has been signed and ratified by all member states of the Arab League, save Algeria and Comoros, and came into force a year after it was signed.

The agreement says that inter-Arab investment disputes can be resolved by ad hoc arbitration or conciliation, or by the Arab Investment Court, a judicial body established by the agreement and based at the permanent headquarters of the Arab League in Cairo. Several bilateral investment treaties entered by Arab states have also named the court among their dispute resolution bodies.

The 1981 Organization of Islamic Cooperation agreement that Gharavi referenced is another option. It has been signed by 33 Islamic states that are members of the body, 27 of which have ratified it.

The agreement has recently been the basis for several ad hoc arbitration claims, at least one of which, brought by Saudi businessman Hesham al-Warraq against Indonesia, has proceeded to the merits phase (a tribunal chaired by [Bernardo Cremades](#) accepted jurisdiction over the case in 2012).

However, in the past decade – as Hoffmann noted – an unusually high proportion of North African or Middle Eastern investors have structured their investments through jurisdictions outside the region and brought claims under their treaties rather than relying on home grown instruments.

Often, they have relied on dual nationality to do so, with varying success.

For example, the ICSID case of *Siag v Egypt* was successfully brought by Egyptian-born investors naturalised in Italy under the Italy–Egypt BIT; while in *Soufraki v UAE*, a claimant of Libyan descent sought to bring a claim under the Italy–UAE BIT (but the court held that he had relinquished his Italian nationality to become a Canadian and had not taken the necessary steps to remain an Italian).

Another ICSID case, *Champion Trading v Egypt*, was brought by three dual US-Egyptian nationals: the tribunal found it had no jurisdiction over them back in the mid-2000s.

Other examples of Middle Eastern investors routing claims through other jurisdictions include the Abu Dhabi Investment Fund bringing an Energy Charter Treaty claim against Spain through its Dutch subsidiary, Masdar Solar, in 2014. As the UAE is not a signatory to the ECT, reliance on that instrument would otherwise have been impossible.

Gharavi's clients, meanwhile, have included Franck Charles Arif, a French-Lebanese dual national who sued Moldova under its bilateral investment treaty with France, and Devincci Hourani, a Lebanon-based businessman who is relying on his US nationality to sue Kazakhstan under the US–Kazakhstan BIT.

#### Regional instruments

Nassib Ziadé, the Chilean-Lebanese CEO of the Bahrain Chamber for Dispute Resolution (BCDR-AAA) and a former acting secretary general of ICSID, spoke about the track record of the Unified Agreement for the Investment of Arab Capital in Arab Countries.

He noted that while the agreement seems to put in place a good regime for the resolution of investor-state disputes, the Arab Investment Court it created was dormant for a long time and did not actually issue its first judgment until nearly 20 years after the agreement was signed – in a case concerning a Saudi company with investments in Tunisia in 2004 (Tanimiah for Management and Marketing Consultancy v Tunisia).

The court ruled in favour of Tunisia and since then, the few further judgments it has issued have always been in favour of the Arab host state, creating a problem of perception, Ziadé said.

In contrast, the first case to go to ad hoc arbitration under the 1980 Unified Agreement resulted in an unusually high award against the host state (Libya) in favour of Kuwaiti investors – including substantial moral damages.

Though the award was well-reasoned and skilfully drafted, Ziadé noted that “had such high moral damages been awarded in an international context, it would most likely have received critical disapproval”.

A new inter-Arab agreement has recently been signed to replace the 1980 one with a supposedly enhanced investment protection regime. However, in light of the past decisions of the Arab Investment Court and UAIAC tribunals – and the lack of legal certainty they provide – it is perhaps unsurprising that investors have sought other instruments under which to file claims, even if it means relying on dual nationality.

The prospect of arbitrating under the OIC agreement also seemed to cause concern to GAR Live delegates. It was pointed out that the treaty only ever envisaged arbitration as a temporary way of resolving investment disputes pending the creation of an Islamic International Court of Justice in Kuwait, which is still to be built.

Hafez noted that those who have applied to the secretary general of the OIC to appoint arbitrators where the parties have been unable to agree a tribunal, in

fulfilment of its role as appointing authority, have met with little success. He has been made aware of at least four cases where lawyers are still waiting for a reply.

If anyone has updated contact information for the secretary general, they should get in touch, he joked.

In light of all this, Nassib Ziadé's advice to Arab investors seeking redress from a state in the region was to opt for administered rather than ad hoc arbitration proceedings overseen by a well-known institution that would ensure "a public perception of legitimacy".

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) is named as a possible administrator of investment arbitration proceedings in a number of treaties (for example, Egypt's treaties with Chad, Cyprus, Switzerland and Zambia), he said. It has also administered at least one case under the Libya–Morocco bilateral investment treaty.

His advice for the institutions of the region, meanwhile, was to focus on "good governance".

#### **The Arab Spring factor**

According to Heiskanen, the recent growth in Middle East and North Africa-related claims at ICSID owes more to the rise in Arab foreign investment, treaty coverage and treaty awareness discussed so far than to the Arab Spring, which he sees as responsible for only "a handful" of cases.

While revolutionary movements inevitably cause damage to investments thanks to civil strife and interruption to contracts, many BITs exclude from their scope claims for compensation related to "extraordinary" events, he pointed out. Furthermore, the Arab Spring did not involve large-scale expropriations of property or nationalisations, such as occurred after the Iranian Revolution of 1979.

Where possible, he thought claimants have continued to prefer to initiate commercial arbitrations against state entities rather than sue governments because there is a lower risk of souring the relationship with the host state. This is particularly the case where new regimes are in place and there is much to gain through staying in favour.

Hafez further explained that the claims that have arisen as a result of the Arab Spring have not been of the type you would imagine. Most of the claims against Egypt, for example, have materialised not from state agents exercising their executive and regulatory powers to the disadvantage of a particular investor or category of investments, but from "executive paralysis".

"After the events of 2011 and the changes of regime since, just about every official in government has made the perfectly sensible choice of not making any decisions lest it land them out of favour or behind bars," he said.

Other cases relate to real estate investments or privatisations approved before the succession of recent regime changes, which subsequent officials held to be invalid or illegal because of corruption or other reasons, Hafez said. Often, the

arbitration is preceded by domestic court proceedings in Egypt to consider the allegation, which can themselves give rise to denial of justice claims.

A speaker in another session of the event, **Mohamed Abdel Wahab** of Zulficar & Partners in Cairo, mentioned one of Egypt's responses to such cases: a law that prohibits third-party challenges to contracts entered by the state unless in response to a final, unchallengeable penal judgment relating to a crime involving public funds.

This extends to contracts concluded by private companies in which the state or state-owned entities have shares, he said.

The law is intended to limit disruption to state contracts to cases where corruption has been firmly established and thus curb the flood of investor-state claims.

While Abdel Wahab said it is still to be tested by the courts and various ambiguities need to be ironed out, he saw it as an encouraging sign that Egypt is open for business and taking steps to promote foreign investment.

Speakers agreed that many of the Arab Spring-related claims that have been filed will not proceed very far. Especially when it comes to claims over executive paralysis, the claimant often has no intention of pursuing the case to an award and simply hopes to get an audience with the relevant Egyptian officials to get the investment back on track, said Heiskanen.

Other claimants have too much invested into the economy as a whole to take on the government in a serious way, Hafez pointed out. And Egypt itself has been keen to settle recent claims brought against it by investors from Kuwait, Saudi Arabia and the UAE because of those countries' economic support of the new regimes.

At the moment, most post-Arab Spring claims have not got past the jurisdictional stage, it was observed. While these claims have the potential to push the frontiers of jurisprudence on issues such as the effect of force majeure, speakers agreed they would probably not get to final awards.

#### **States – get organised; institutions – get empathy**

It had been suggested at the outset of the session that the Middle East and North Africa region could become a new Latin America flooded by so many claims that it would end up renouncing its treaties. However, by the end the consensus seemed to be that this was unlikely.

Indeed French-Iranian lawyer **Yasmin Mohammad**, senior counsel at litigation funder Vannin Capital in Paris, argued that in fact Europe not the Middle East is “the new Latin America”. With Central Asia, Europe accounted for 45 per cent of new ICSID cases registered in the 2014 financial fiscal year consistent with its status as the world's biggest capital importer.

Resistance to investor-state arbitration is at its highest ever in Europe, she noted and is affecting policy at EU level.

But panellists noted the need for Middle Eastern and North African states to be alive to the growing number of investment claims and to keep their investment

treaties and other regional instruments updated.

Treaties containing most favoured nation (MFN) clauses are an “obvious candidate” for revision, warned Hafez. Such clauses were introduced as “a perfectly legitimate policy objective” to ratchet up standards of protection across the whole network of bilateral investment treaties. However, their extension to procedural issues in recent years has turned them into “weapons of mass destruction on steroids”.

States should seek to address the problem promptly through “new or revised BITs”, he advised.

There was also talk of the need for states to organise themselves better to fight investment claims, as Egypt is currently doing through the establishment of a commission on arbitration to manage the abundance of cases against it.

States can also learn a great deal from Iran, which became experienced in investor-state arbitration through the Iran-US Claims Tribunal established in the early 1980s to resolve economic claims arising from the Iranian Revolution, Gharavi said. The tribunal is still continuing that work.

Iran (which recently won its first known investor-state case under an investment treaty, defeating Turkish telecoms company Turkcell) has a central ministry staffed by experienced practitioners in charge of all international disputes. According to Gharavi, this allows it to react early and fast in the process.

Nassib Ziadé, meanwhile, had a plea to ICSID in relation to administering cases against states from the region. Try to appreciate the special political circumstances of states undergoing a “different transition”, he urged – for example, by recognising that strict procedural timetables may be problematic in some cases.

A big step forward would be to make more use of arbitrators from the region, who understand the process these countries are going through, he suggested. Numbers remain lamentably low.

On the positive side, it was observed by several speakers that Middle Eastern and North African states have a good track record of paying investment treaty awards, with no reported defaults under the Washington Convention that renders ICSID awards automatically enforceable.

Only Gharavi had experienced otherwise, when the courts of Amman in Jordan admitted an attempt to annul an ICSID costs award in favour of his client, Turkey.