

First GAR Connect Mediterranean has broad geographical reach

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Oil rig off Cyprus (Credit: Shutterstock/Andriy Markov)

The first GAR Connect Eastern Mediterranean saw speakers discuss dispute-related trends arising from offshore natural gas fields in the Mediterranean itself, in countries bordering the sea like Cyprus, Israel, Egypt, Libya and Turkey, and as far East as the Gulf and Russia.

Chaired by Yas Banifatemi of Gaillard Banifatemi Shelbaya Disputes, Reza Mohtashami QC of Three Crowns and Can Yeginsu of 4 New Square (now, 3 Verulam Buildings), the conference in June 2021 took place on Zoom, focusing on how shared resources, international business and dispute resolution in the region could contribute to peace. Needless to say, the event occurred before the Russian invasion of Ukraine.

The economic importance of the Eastern Mediterranean region has soared in the last decade, with the discovery of giant natural gas fields off the coasts of Cyprus, Egypt and Israel. In a discussion with Banifatemi, Barbara Benzoni, legal counsel and senior vice president at Eni, described the offshore reserves as “game-changers” that have transformed nearby countries into gas export hubs and led to the building of major new pipelines to transport gas within the region and to other energy-hungry markets.

They have also led to the creation, in 2019, of the East Mediterranean Gas Forum headquartered in Cairo, an intergovernmental organisation formed by Cyprus, Greece, Israel, Italy, Jordan and Palestine. A request by France to join the forum was approved in March 2021; the European Union and UAE have also sought to join as permanent observers though the UAE’s request was reportedly vetoed by Palestine.

Broadly speaking, Benzoni thought the natural gas discoveries and construction of pipelines have led to more collaboration between states in the region and been a driver of “political discussion and peace” – though that peace has entailed many fraught commercial disputes (not

least the CRCICA, ICC, ICSID and UNCITRAL arbitrations arising out of the termination of gas supply from Egypt to Israel in the wake of the Arab Spring, on which Banifatemi worked while at her former firm, Shearman & Sterling).

It has also lessened Europe's traditional energy dependence on Russia and North Africa, Benzoni noted.

As well as offering natural gas riches, the Eastern Mediterranean is also increasingly a venue for solar power and other renewable energy projects, which were the subject of discussion in one panel.

According to Ilke Sahin Goler, a delay expert at Blackrock Expert Services in London, governments in the region are driving the investment in renewable energy projects for environmental reasons, often without sufficient consultation with the industry.

This leads to various problems, Goler explained. A major one is the tight and ambitious timeframes governments impose (often with bonuses for meeting them), which lead to contractors pressing on with projects that may have design and planning flaws from the outset and possibly relaxing quality control and misreporting the status of their work in the early stages. As a result, defects, delays and disputes only emerge late in the project, when they are harder to resolve.

Girgis Abd El-Shahid, managing partner at Shahid Law Firm in Cairo, said that a sizeable proportion of his work for the past five years, as counsel and arbitrator, has related to such projects. He spoke about the lack of sophistication of investors in renewables (compared with investors in the oil and gas industry), noting that in Egypt many have invested for decades on a feed-in-tariff basis with the state as the only off-taker of the power generated, making them susceptible to electricity price drops.

Other investors have entered cost-sharing agreements with the government that are capped for the state, leading to disputes in the event of the "typical developing country costs overruns," he said.

As the contracts entered are long term, lasting maybe 25 years, he also predicted there will be disputes on their completion when investors seek to hand power stations with inevitable wear and tear and (given the location) heat damage back to the state.

The Abraham Accords

Looking beyond the energy market, speakers considered whether there will be more international business and arbitration in the region as a result of the Abraham Accords announced in August 2020 and signed the following month.

Negotiated by Donald Trump's son-in-law Jared Kushner in the last days of Trump's presidency, the accords are agreements reached by Israel, the UAE, the US and Bahrain which are intended to normalise relations between Israel and the Arab world and pave the way for peace, cooperation and diplomatic and friendly relations. Their title emphasises the shared origins of Judaism and Islam, which have Abraham as a common patriarch and are based on the monotheistic worship of his God.

According to El-Shahid, relations between Egypt and Israel have been "normal" since the 1970s, with cooperation forced by the movement of natural gas between the two states. Jordan and Israel, meanwhile, normalised relations in the 1990s.

"I'm glad our neighbours have finally followed suit," El-Shahid said but added that ink-on-paper is not enough to achieve this alone. "From what I've seen, normalisation only happens when there is an economic and business aspect to it".

El-Shahid went on to describe Egypt's "Qualifying Industrial Zones" programme, introduced by the US Congress in 1996 to stimulate regional economic cooperation. Goods produced in QIZ-designated areas of Egypt, Jordan and Palestine can directly access US markets without tariff or quota restrictions, provided they contain a small Israeli component (9 or 10%, El-Shahid said).

This programme has contributed to normalisation of relations, he said, forcing cooperation in the production of garments, furniture and agricultural equipment. "You may not know it, but the Levi's jeans you buy in America are Egyptian-made, with buttons and zips from Israel."

In the wake of the Abraham Accords, El-Shahid said there has been a visible increase in Israeli tourism to the UAE but he suggested it will take time for them to affect other sectors of the economy.

The accords were also addressed by Eli Schulman, head of third-party funder Validity Finance in Tel Aviv, who noted that new economic opportunities in the Eastern Mediterranean region will create need for new dispute resolution infrastructure and services such as funding.

The UAE already offers these in "strategic financial freezones" like the Dubai International Financial Centre and Abu Dhabi Global Market and there is potential for more such hubs, he suggested.

Libya and the OIC Treaty

Of course, the Arab-Israeli conflict is not the only one affecting the region. Yasmin Cetinel of Cetinel Law in Istanbul spoke about the civil unrest in Libya, which she said has disrupted many construction projects involving Turkish contractors.

Since Libya has withdrawn from the ICSID Convention, she said investor-state claims in relation to these projects are mostly brought under the Turkey-Libya bilateral investment treaty, which permits ICC arbitration, or the 1981 Organisation of Islamic Conference Treaty.

Awards arising from the latter treaty have the advantage of being directly enforceable, she said, but there are practical difficulties arising from the "inactive status" of the OIC secretary general, who is responsible for appointing arbitrators for claims under the treaty, either as tribunal president or where a party has failed to appoint.

This compels parties to invoke the most favoured nation clause of the OIC Treaty to try and enlist the services of an authority who *will* appoint (the Permanent Court of Arbitration in The Hague, for example).

Cetinel addressed the controversy over whether you can import procedural rights from other treaties into the OIC Treaty via the most-favoured nation (MFN) clause in light of the decision of the Paris Court of Appeal in [DS Construction v Libya](#). In that case, the court said such rights could not be imported and suggested parties with French-seated arbitrations under the treaty look to the French courts for support in appointing arbitrators. This could also be done where one side faced a denial of justice, the court said.

For Centinel, the court's view that you cannot import procedural rights through MFN clauses was flawed given that the likely dispute resolution difficulties are priced into contracts. She also questioned whether this decision of the French court will help fill "the appointment gap" presented by the OIC Treaty or simply create further problems, since no guidance was given for arbitrations seated in jurisdictions other than France or as to whether the high burden of proof normally needed to establish denials of justice applies.

Mohtashami, meanwhile, wondered whether the judgment would survive given that four out of five of the last Paris Court of Appeal judgments dealing with investor-state dispute settlement had been annulled.

Climate change

Another development affecting the Eastern Mediterranean, along with other parts of the world, is the international movement to combat climate change by reducing carbon emissions. The 2015 Paris Agreement on Climate Change Mitigation has been signed by over 190 states, including many in the region. There are a few holdout states that have yet to ratify, however, including Turkey, Iraq and Iran.

Eva Kalnina of Arbitration Chambers in London noted that, as part of its efforts to meet the goals of the Paris Agreement, the European Union was considering imposing a border tax on imports from countries with large carbon footprints such as Russia, China and Turkey that will cause them significant financial loss (it has been estimated it could cost Russia US\$60 billion between 2022 and 2030).

If this happened, she said it could lead to disputes among existing contractual parties about who should bear liability for the tax and increased cost of performance – "Should the seller or the buyer bear the burden? It will depend on the terms of the contract and the applicable law".

Force majeure clauses might be invoked – but as practitioners have found out as a result of disputes arising from the pandemic, many contractual hardship clauses do not apply to monetary obligations like increased duties, she observed.

Kamalia Mehtiyeva, an arbitrator and associate professor at Pantheon Sorbonne University in Paris, spoke about how the Paris Agreement will affect investor-state dispute settlement, along with the recent development of environmental law at a national, constitutional level. In April 2020, the German constitutional court found that companies owe a responsibility to future generations to reduce carbon emissions; while just two days before the GAR Connect event in June 2021 the first article of the French constitution was amended to guarantee protection of the environment and biodiversity and action against climate change, she noted.

Future bilateral investment treaties will have to reflect these new national obligations, Mehtiyeva said, while states also might want more general carve-outs to allow them to act for environmental reasons. She noted the example of the "advanced" 2016 Model BIT between Morocco and Nigeria, which contains "specific, binding and burdensome" obligations regarding investors' treatment of the environment and gives the state parties policy space to take any decision detrimental to investors to protect the environment, as long as it is not discriminatory.

Going forward, Mehtiyeva said there is likely to be an increased tendency for governments to take political decisions to cancel projects that are environmentally controversial, just as US president Joseph Biden cancelled the Keystone Excel pipeline project, potentially triggering massive ISDS claims.

Mehtiyeva also foresaw a growth in counterclaims brought by states against investors based on breaches of national environmental law and harm to resources, like those successfully brought by Ecuador against Burlington and Perenco (the oil companies were ordered to pay millions in damages to remediate the Amazon rainforest).

In the Eastern Mediterranean and Middle East, Mehtiyeva envisaged investors' overuse of the scarce resource of water being particularly contentious.

In the wake of a Dutch court decision ordering Shell to comply with international climate change policy and the obligations of the Paris Agreement by cutting its carbon emissions by 45% by 2022, Mehtiyeva predicted that private parties and states would also make increased use of the agreement as a tool in investment arbitration.

There has already been a SCC award against Spain in which the tribunal said national regulatory changes triggered by the agreement were reasonably foreseeable and therefore likely to fall within legitimate expectation, she noted.

She thought tribunals, meanwhile, would increasingly seek to push forward the development of international environmental law using principles of international arbitration and public international law.

In claims like the US\$1 billion one filed by Canadian investor Alamos Gold [against Turkey](#) under the Netherlands-Turkey BIT in April 2021, over the state's refusal to renew licences for an environmentally controversial gold mine, she said arbitrators will have to weigh up not just rights, profits and losses but environmental costs – resulting in "extremely interesting" decisions.

If the rights of future generations are taken into account too – in line with the German court decision – this will make the balancing act still more complex.

In general discussion on the environment, hope was expressed that Turkey may take steps to bring down its carbon emissions to avoid the proposed EU border tax (as Russia appears to have been doing).

Yeginsu also questioned whether cooperation on a "European Green Deal" might save the EU's relationship with Turkey, building trust and improving the "mood music" on other contentious issues such as immigration and asylum.

Merchants of peace?

Not all speakers focused on the region. As one of the arbitrators in *DS Construction v Libya*, Nassib Ziadé of the Bahrain Chamber for Dispute Resolution was unfortunately unable to opine on that case. He instead spoke about the latest draft of the ICSID/ UNCITRAL Code of Conduct for Adjudicators published in April 2020.

Ziadé also tackled the tricky topic of how to deal with lawyers "double-hatting" as arbitrators and counsel, a theme later taken up by Shulman who addressed the disclosure requirements that should bind parties in regard to funding arrangements in these circumstances.

Ercument Erdem of Erdem & Erdem in Istanbul spoke about the success of virtual hearings during the pandemic, leading to discussion of whether the power of oral testimony is diminished when given virtually and if arbitrators are less likely to be less interventionist in online proceedings.

In the Eastern Mediterranean, where change normally happens slowly, the "adaptation" to virtual hearings has been amazing, said El-Shahid, but there is still "abuse" by those who wish to delay, postpone or strategically derail proceedings. Erdem also mentioned the threat to due process where participants in arbitrations have different access to technology or internet connectivity.

As Banifatemi noted in closing remarks, the Zoom event demonstrated both the geographical reach of the Eastern Mediterranean region and how "fertile" it is in terms of the development of both industry and international arbitration and the rule of law, with many talented professionals.

Striking throughout the event was speakers' belief in the potential of the region and their hope that business people and dispute resolution practitioners could – in the words of Shulman – live up to the ambitions of the founders of the ICC and prove to be "merchants of peace".

The event ended with the co-chairs expressing hope that GAR would continue to hold an event dedicated to the Eastern Mediterranean in the wake of the pandemic, whether live or on Zoom.

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