

# INTERNATIONAL JOURNAL OF ARAB ARBITRATION



## **ARTICLES**

THE RECOVERY OF ATTORNEY'S FEES IN UAE ARBITRATION – ARAB  
WORLD LITIGANTS IN THE ENGLISH COURTS – ENHANCING EFFICIENCY  
IN COMPLEX CONSTRUCTION ARBITRATIONS

**ARBITRATION-RELATED DECISIONS ISSUED BY STATE COURTS IN ARAB  
JURISDICTIONS**

EGYPT – JORDAN – LEBANON – SYRIA – TUNISIA – UAE

## **ARBITRATION NEWS**

# Arab World Litigants in the English Courts (2019-2020)

By Khawar Qureshi, Catriona Nicol and Joseph Dyke\*

## I. Introduction:

1. The English courts have consistently been a popular choice with non-English parties when it comes to resolving various kinds of disputes. Perhaps the most striking demonstration of this is the large number of foreign litigants that appear in proceedings before the Commercial Court (and other business courts) in London.
2. Portland Communications (which publishes an annual report of key statistics on the users of the Commercial Court) found in its 2018 report (which considered cases between March 2017 and April 2018) that there were 16 litigants originating from the United Arab Emirates during that period.<sup>1</sup> This placed the UAE at fifth place in the list of 'litigants by nationality.' In the 2019 report, the number of UAE litigants had increased to 22, which placed the UAE ninth on the list.<sup>2</sup> In the 2020 report, Libya and Lebanon were respectively in ninth and tenth place.<sup>3</sup> However, as can be seen from the cases discussed in this article and the illustrative table below, the English courts have heard cases involving parties from throughout the Arab World.

COUNTRY	NUMBER OF REPORTED CASES (2019-2020)
Algeria	2
Bahrain	3
Comoros	0

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1. Portland Communications, 'Commercial Courts Report 2018' (2018).

2. Portland Communications, 'Commercial Courts Report 2019' (2019).

3. Portland Communications, 'Commercial Courts Report 2020' (2020).

COUNTRY	NUMBER OF REPORTED CASES (2019-2020)
Djibouti	0
Egypt	4
Iraq	2
Jordan	1
Kuwait	7
Lebanon	3
Libya	10
Mauritania	0
Morocco	2
Oman	1
Palestine	1
Qatar	13
Saudi Arabia	13
Somalia	0
Sudan	0
Syria	2
Tunisia	2
United Arab Emirates	23
Yemen	3

3. This article presents summaries of the some of the most significant cases involving litigants from the Arab World that were the subject of publicly-available English court judgments in 2019 and 2020. It is clear from the matters discussed below that the cases emanating from the Arab World have had a marked impact on the development of English law in several important areas in recent times.

## **II. Jurisdictional requirements and issues of whether to permit service of English process outside the jurisdiction:**

### **(A) Service out of the jurisdiction:**

4. The English courts are empowered to allow, in respect of certain kinds of cases, for a claim form to be served on defendants outside of the United Kingdom. In most circumstances, the court's permission is required for such service to be valid. Usually, this will mean that the court must be satisfied that the proposed claim meets one or more of what are known as the jurisdictional "gateways" that are set out in Paragraph 3.1 of Practice Direction 6B of the Civil Procedure Rules of England & Wales.

5. Questions of whether service out of the jurisdiction should be permitted or whether the requirements of the jurisdictional gateways have been met comprise a large part of the English litigation concerning litigants from the Arab World.
6. One prominent example can be seen in *FS Cairo (Nile Plaza) LLC v Brownlie* [2020] EWCA Civ 996. This case arose out of the death in 2010 of the renowned public international lawyer Sir Ian Brownlie QC in a road traffic accident in Egypt. The accident occurred while he was traveling in a chauffeur-driven vehicle as part of a tour arranged by the defendant company's hotel. Paragraph 3.1(9)(a) of Practice Direction 6B provides a gateway for the English courts to have jurisdiction over a tort claim where damage was sustained within the jurisdiction. In a previous round of the litigation ([2017] UKSC 80), a majority of the Supreme Court had held (*obiter*) that the case satisfied the tort gateway. In this round of litigation, the Court of Appeal (by majority) agreed with the first instance judge that there was no reason why the 'indirect' suffering of significant damage in England should not amount to a real "connecting factor" between the English jurisdiction and the Egyptian defendant. The Court of Appeal also discussed what was required in terms of providing evidence of foreign law on an application to serve a claim form out of the jurisdiction. The Court held that the claimant had established a reasonable prospect of being able to rely upon the 'default rule', which provides that, in the absence of satisfactory evidence of foreign law, the court will apply English law. The claimant could discharge that burden by demonstrating a real prospect of success until the defendant adduced substantive evidence of applicable foreign law. In other words, what was required was for the defendant to adduce expert evidence on the foreign law in order to displace the 'default rule', as opposed to a mere objection to its application.
7. Many applications for permission to serve proceedings outside of the jurisdiction are made (at least initially) without notice to the potential defendant. However, the claimant is expected to give 'full and frank disclosure' in those circumstances, including of potential defences available to the intended defendant.
8. A stark illustration of the consequences of failing to fulfil the requirements of the duty of full and frank disclosure in that regard was shown in *Libyan Investment Authority v JP Morgan Markets Ltd* [2019] EWHC 1452 (Comm). The Libyan Investment Authority (LIA) alleged that one of the defendants had fraudulently assisted in arranging a US\$200 million derivatives trade in November 2007, had agreed to accept secret commissions in return for exercising corrupt influence to ensure they entered into the trade, and had paid bribes in relation to the trade. The LIA's position was that it had become aware of these matters during separate proceedings (in which it had alleged fraud against the same defendant) that were settled in 2017. The instant claim was made in April 2018 and the LIA obtained *ex parte* permission to serve out of the

jurisdiction. The claim was subject to a 6-year limitation period. Accordingly, in order to succeed, the LIA needed to demonstrate that it had a reasonable prospect of obtaining an extension of time for limitation purposes; however, it had not drawn this to the attention of the court when obtaining permission to serve out of the jurisdiction. The Commercial Court held that the evidence showed that the LIA either knew or could have discovered these facts before April 2012 (for limitation purposes), that the LIA had failed in its duty of full and frank disclosure, and, accordingly, the permission to serve out of the jurisdiction was set aside.

**(B) Jurisdiction / domicile / *forum non conveniens*:**

9. Whether or not an intended defendant is domiciled in the English jurisdiction is a highly important factor in terms of ascertaining whether England is an appropriate place for proceedings to be commenced and/or the likely success of any challenge to the English jurisdiction.
10. In *Gulf International Bank BSC v Al-Dawood* [2019] EWHC 1666 (QB), the defendant was a citizen of Saudi Arabia and the claimant was a Bahraini bank that had advanced two loan facilities to the defendant's company in Saudi Arabia. The loan agreements were governed by the law of Saudi Arabia and provided that the parties submitted to the non-exclusive jurisdiction of the Saudi Arabian Monetary Agency committee to resolve disputes, but that the claimant could bring a claim in "*any competent court*". The defendant challenged the jurisdiction of the English court. Initially, the challenge included the argument that the jurisdiction clause in favour of Saudi Arabia excluded the jurisdiction of the English courts. However, the judge confirmed that the defendant was right not to pursue that line of argument because he was domiciled in England & Wales at the time that the proceedings were commenced and, further, the claimant's claim was a "*civil and commercial matter*" within the meaning of EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Recast Regulation).
11. In *Public Institution for Social Security v Al-Rajaan & ors* [2020] EWHC 2979 (Comm), the Commercial Court gave an important judgment illustrating the limits of trying to use a single UK-domiciled defendant as an "anchor" for substantial broader claims against other parties. The facts (also referred to below in the context of freezing orders) were that the claimant Kuwaiti public institution had sued its former director-general (Mr. Al-Rajaan, now domiciled in the UK) in the English courts. However, there were some 37 defendants in total and Mr. Al-Rajaan was being used as "*the main anchor defendant in relation to other defendants*". Ten of those defendants (banks and individuals based in Switzerland) challenged the English court's jurisdiction on the

basis that the disputes were within the scope of valid and binding jurisdiction agreements in favour of Geneva or Luxembourg (to the exclusion of England). The Commercial Court upheld that argument in respect of some of the claims and also held that, were the English court to take jurisdiction over the rest of the claims, there would be a risk of irreconcilable judgments as against those defendants, which would run contrary to the requirements of the Lugano Convention and/or the Brussels Recast Regulation.

12. Also significant at the jurisdictional stage are considerations of whether England is the convenient forum for the resolution of the dispute.
13. In *Performing Right Society Ltd v Qatar Airways Group QCSC* [2020] EWHC 1872 (Ch), the High Court declined to stay a worldwide copyright infringement claim made against Qatar Airways either on grounds of *forum non conveniens* or on case management grounds as it had not been demonstrated that Qatar was the most appropriate forum for those disputes.

### **(C) Service of English process upon foreign sovereign States:**

14. There have been several recent cases in the English courts, including some involving Arab World litigants, concerning the interplay between the doctrine of state immunity and service upon sovereign States, particularly in the context of arbitration and enforcement proceedings.
15. For example, in *Qatar National Bank QPSC v Eritrea* [2019] EWHC 1601 (Ch), the High Court held that, although Section 12 of the State Immunity Act 1978 and Rule 6.44 of the Civil Procedure Rules required that service of process on foreign States take place through the diplomatic route, this did not preclude the English court from dispensing with service in "*exceptional circumstances*", which were found to be present in this case as Eritrea had sought to avoid its legal obligations by obstructing service through the diplomatic route. Furthermore, the court held that the fact that there would be nothing to serve if the requirement for service were dispensed with did not preclude the issuance of summary judgment on the claim.
16. Shortly thereafter, in *General Dynamics UK Ltd v Libya* [2019] EWCA Civ 1110, the Court of Appeal held that it was not mandatory for an arbitration claim or an order permitting the enforcement of an arbitration award to be served in accordance with the provisions of Section 12 of the State Immunity Act 1978. The court had jurisdiction in an appropriate case to dispense with service. The Supreme Court considered this case at a hearing in December 2020, and its judgment is pending at the time of writing.

17. *R (Certain Underwriters at Lloyds London) v HM Treasury* [2019] EWHC 3182 (Admin) was a further episode in a long-running effort to enforce a US judgment obtained in April 2012 by the insurers of an EgyptAir flight that was hijacked in November 1985. That judgment found that certain Syrian government agencies and officials were State sponsors of the attack. In 2018, the Commercial Court gave judgment for the enforcement of the US judgment. In the course of efforts to enforce, the claimants sought judicial review of the UK Treasury's decision to refuse to provide them with information regarding assets held in UK bank accounts in the names of certain Syrian agencies/officials (who were made 'interested parties' to the claim). In English judicial review proceedings, interested parties are required to be served with notice of the judicial review claim. The claimants attempted to do so by emailing Syria's Ministry of Foreign Affairs and their US attorneys, as well as by delivering the documents by courier and following up with telephone calls. Those attempts were unsuccessful, and the claimants applied for an order dispensing with the need to serve the interested parties. The Administrative Court held that there were exceptional circumstances that justified dispensing with service in light of the deliberate obstructiveness of the Syrian authorities and the breakdown of diplomatic relations with Syria.
18. In *Union Fenosa Gas SA v Egypt* [2020] EWHC 1723 (Comm), the Commercial Court gave an important judgment on the process through which an ICSID award is enforced, and the differences between that and how a New York Convention award is enforced, in the English jurisdiction. In particular, the Commercial Court held that, for the procedure to enforce an ICSID award, service of a claim form on the respondent State was not required, and it was permissible for the court to make an order dispensing with service of the order for registration of the award.

**(D) Applications for extensions of time and service by alternative means:**

19. Typically, as a matter of English procedure, a claim form that is to be served on a defendant out of the jurisdiction has a lifespan of 6 months within which it must be served before it lapses.
20. In *Al-Zahra (Pvt) Hospital v DDM* [2019] EWCA Civ 1103, the claimant had applied for an extension of time for service of the claim form on a hospital in Dubai for an additional 11 months above and beyond that standard 6-month time limit. That application was granted on the basis of advice the claimant had received that service in Dubai was likely to take more than 12 months. In the event, the claimant secured a further extension of time due to difficulties experienced in arranging for service in Dubai. On appeals against both extensions of time, the Court of Appeal held that, whilst the first extension had been appropriate, the second extension was refused on the basis of unexplained delays by the claimant's solicitors in contacting the Foreign

Process Service, preparing documents and instructing experts. These had amounted to delays of 12-14 months after the commencement of proceedings. The case serves as an illustration of the importance of proactively ascertaining and understanding what is required to serve a party abroad and the potential problems that can arise.

21. The English courts have the power to grant applications for service by alternative means in various circumstances.
22. In *Ashley v Jimenez* [2019] EWHC 1806 (Ch), a further case concerning service of English process in Dubai, the court held that, in situations where there were treaties governing service between two jurisdictions, it would generally be inappropriate to allow the English procedural rules governing service by alternative means to run roughshod over those treaties. However, in that case, it was considered appropriate to permit alternative service by leaving documents at the defendant's Dubai address or by posting them there.

### III. Freezing orders:

23. The principles of full and frank disclosure on without notice applications for service out of the jurisdiction apply with equal force on without notice applications for freezing order relief. The jurisdiction to grant worldwide freezing orders is a powerful weapon in the arsenal of the English court, and great emphasis is placed on the importance of exercising that jurisdiction appropriately and properly.
24. In *Sheikh Mohammed Al-Jaber v Salfiti* [2018] EWHC 3038 (Ch), the claimant Saudi businessman and companies connected to him obtained without notice worldwide freezing orders against the defendants, which included a moneychanger in Palestine. At the without notice stage, the court was told that the first claimant was the beneficial owner of the group containing the second and third claimants, that he had not signed the main loan agreement and would not borrow money at a rate of 12% per annum, and that he had never met the second defendant and thought that he might not even exist. By the time of the on notice stage, those positions had completely changed: it was no longer said that he was the beneficial owner of the companies (which were owned by his children), and it was accepted that he had signed the loan agreement and that the second defendant did exist. The court set aside the worldwide freezing order on grounds of breach of the duty of full and frank disclosure.
25. By contrast, in *The World LLC v Dalal* [2019] EWHC 2993 (Comm), the Commercial Court declined to discharge a worldwide freezing order obtained by a Dubai entity in proceedings to enforce a Dubai court judgment. The court rejected arguments that the order had been obtained through non-disclosures, misrepresentations or failures to

make fair presentation of the case - in particular noting that the claimant had properly notified the court of a defence potentially available to the defendant that the Dubai court judgment was tainted by fraud.

26. In *Les Ambassadeurs Club Ltd v Albluewi* [2020] EWHC 1368 (QB), the court held that, the mere fact of a non-disclosure on an application for a freezing order was not sufficient to justify the assessment of the defendant's costs of seeking to discharge that freezing order on the indemnity basis - although it was plainly a factor to be taken into account in the judge's assessment of costs. In that case, the court had previously refused to continue a freezing order obtained against the defendant (a resident of Saudi Arabia) on the grounds of material non-disclosures relating to the value of the defendant's London property and the claimant's granting of cheque cashing facilities to the defendant in spite of his poor payment history.
27. Apart from the power that comes from the freezing of assets, the freezing order brings other advantages for a litigating party through the disclosure obligations it imposes on the counterparty. Standard form freezing orders from the Commercial Court contain requirements for those subject to the asset freeze to disclose further assets - which allows for further opportunities to increase the chances of successful enforcement of a court judgment and allows the court greater scope to police the freezing order.
28. In *Public Institution for Social Security v Al Rajaan & others* [2020] EWHC 1498 (Comm), the claimant was the operator of Kuwait's social security and pension scheme and the defendant was the claimant's former director-general. In an earlier decision ([2020] EWHC 1220 (Comm)), the Commercial Court had allowed the claimant an extension of time to serve proceedings (even though it affected a potential limitation defence for the defendant) in circumstances where service of the proceedings earlier might have adversely affected the claimant's freezing order application. The claimant obtained a worldwide freezing order against the defendant on the basis that it had an arguable proprietary claim against secret commissions allegedly paid to him. Under the disclosure obligations imposed by the freezing order, the defendant was ordered to disclose all assets exceeding GBP50,000 in value. After the defendant gave disclosure of his assets, the claimant's solicitors applied for a further "enhanced" disclosure order on the basis of the "remarkable disconnect" between the assets personally received by the defendant over a 20-year period (in excess of US\$440 million) and the assets he had disclosed (US\$183 million). The court held that the defendant's disclosure had been inadequate and that there was a real prospect that there were further assets to which the freezing order might apply. The court granted the application for further disclosure.

#### IV. Disclosure:

29. The disclosure requirements of English civil procedure are of fundamental importance in terms of achieving procedural efficiency and procedural fairness. The English courts generally police the disclosure obligations of parties and assess their compliance closely.
30. A striking example of the consequences of non-compliance with disclosure obligations was given in *Byers v Samba Financial Group* [2020] EWHC 853 (Ch), proceedings between the liquidators of a Cayman Islands company (part of the Saad Group of companies) and a Saudi Arabian bank. Large numbers of shares in five Saudi Arabian banks were transferred by the ultimate controller of the Saad Group to the defendant, notwithstanding the existence of a freezing order. The claimants' case was that those transferred shares included shares that were held on trust for the Cayman Islands company, and they claimed equitable compensation for the value of those shares. The defendant asserted that it would require the consent of the Saudi Arabian Monetary Authority (SAMA) to disclose some of the documents required and, on that basis, was ordered to give disclosure in two tranches. The defendant applied for further extensions of time and variations of the disclosure obligations in respect of documents regarding its regulation by SAMA. The defendant then said that SAMA had refused consent for the defendant to give disclosure of communications with SAMA and suggested that the court contact the Ministry of Foreign Affairs of Saudi Arabia. The requests for further extensions of time were denied, as the court inferred that the defendant had not properly communicated with SAMA regarding its disclosure obligations. On an application by the claimant, the court barred the defendant from defending issues except where it was clear that the claimants could not be prejudiced by the defendant's default on its disclosure obligations.
31. The case of *GFH Capital Ltd v Haigh* [2020] EWHC 2223 (Comm) involved an application by a defendant for the variation of asset disclosure orders made against him in the course of English proceedings to enforce a summary judgment granted in the courts of the Dubai International Financial Centre. The variation application was on the basis that he was too unwell to effectively participate in the litigation, relying upon various medical documents in respect of a road traffic accident in March 2020. The Commercial Court refused the application, finding that the medical evidence was insufficient to establish that he was unable to fulfil his obligations in the English litigation and was at odds with the fact that he had already participated extensively (including his submission of voluminous documentation and his attendance by telephone at a May 2020 hearing). It appeared that, in fact, the defendant had deliberately attempted to evade his disclosure obligations and obstruct the claimant.

32. In *Al-Subaihi & anor v Al-Sanea* [2020] EWHC 3206 (Comm), the claimants were Saudi lawyers who had provided legal services to the defendant's father. The claimants had sued the defendant for monies allegedly due to them under a 'final clearance agreement' entered into in 2017. The defendant denied that that agreement was enforceable against him. The Commercial Court had held a case management conference and given directions for disclosure in December 2019. The disclosure given by the parties thereafter gave rise to a skirmish regarding compliance with the court's directions. On 30 July 2020, the defendant issued an application for further disclosure to be provided by the second claimant and sought the order to be made on "unless" terms (i.e. that, if the second claimant failed to comply with his disclosure obligations, his claim should be struck out). However, on or around 28 July 2020, the second claimant had been detained in connection with ongoing investigations by the Saudi authorities and was unable to communicate with his solicitors. In light of the obvious difficulties that existed with respect to the second claimant's ability to meet his disclosure obligations, the Commercial Court held that, despite the second claimant being in "*extremely serious*" breach of his disclosure obligations, the making of an "unless" order would be "*disproportionate and inappropriate*".

## V. Arbitration cases:

33. In addition to litigation, parties from the Arab World often appear before the English courts on matters arising out of arbitrations governed by English law or seated in the English jurisdiction. There have been several important recent decisions on arbitration-related matters concerning parties from the Arab World.

### (A) Law applicable to an arbitration agreement:

34. Issues of how to ascertain the law applicable to an arbitration agreement have proved to be thorny and have been considered on several occasions in the English courts, including recently by the Supreme Court in *Enka v Chubb* [2020] UKSC 38, which authoritatively set out the relevant principles.
35. *Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 (issued before *Enka v Chubb*) was an important case concerning the correct interpretation of the validity of an arbitration agreement, the determination of the law that is applicable to it, and whether a party had been validly added to the arbitration agreement. The underlying dispute involved a Lebanese company which had entered into a franchise development agreement with a Kuwaiti company that then became a subsidiary of another Kuwaiti company. The dispute was to be resolved by an ICC tribunal seated in Paris but was only taken against the parent company, not the subsidiary. The

arbitrators held that the parent company was bound by the arbitration agreement (as a matter of French law), that there had been a novation of substantive rights and obligations to the parent company (under English law), and that the parent company was in breach of contract. The parent company sought the annulment of the award in France, whilst the claimant commenced enforcement proceedings in England. On an application for the English court to refuse recognition and enforcement of the award, a judge held that the validity of the arbitration agreement was a matter of English law. The judge considered (but did not make a final ruling) that the parent company had never become a party to the contract or (consequently) the arbitration agreement. On appeal, the Court of Appeal held that the judge had been correct to hold that there had been a clear intention that the entire contract, including the arbitration agreement, was to be governed by English law. The Court of Appeal also held that the judge should have made a final ruling that, because the contract contained a "No Oral Modifications" clause, and it was not suggested that the parent company had agreed in writing to be added to the arbitration agreement, the parent company was not a party either to the contract or to the arbitration agreement. An appeal against this decision is pending with the Supreme Court at the time of writing.

**(B) Anti-suit injunctions, anti-arbitration injunctions and other injunctive relief in support of arbitration:**

36. Anti-suit injunctions and anti-arbitration injunctions have also been the subject of important decisions in the English courts, which have attempted to strike a balance between the pro-arbitration (non-interventionist) approach and the need to safeguard validly commenced English proceedings, whilst also keeping in mind principles of international comity.
37. In *Sabbagh v Khoury* [2019] EWCA Civ 1219, the underlying dispute was between the heirs of Hassib Sabbagh who, together with Said Toufic Khoury, established and developed the Consolidated Contractors Company group (the largest engineering and construction business in the Middle East). English proceedings had been commenced in July 2013 by his daughter on the basis of the first defendant's domicile in England. Her brothers commenced arbitration in Lebanon in March 2014 pursuant to the articles of association of Consolidated Contractors Group SAL. In England, the Court of Appeal, denied her brothers a stay of the English proceedings in 2017 on the basis that none of the English claims fell within the arbitration agreement. When the daughter of Hassib Sabbagh obtained an injunction from the English court restraining the Lebanese arbitration, her brothers appealed to the Court of Appeal.
38. The Court of Appeal, importantly, rejected the argument that the English court had no jurisdiction to restrain a foreign arbitration. A proper reading of the Arbitration Act

1996 and the New York Convention did not deprive the English court of the power to grant such an order, under Section 37 of the Senior Courts Act 1981, where the foreign arbitration would be vexatious and oppressive. It was, however, a power that should only be exercised sparingly.

39. In *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm), the bank had commenced *in rem* proceedings in Singapore asserting misdelivery against a carrier under 27 bills of lading in respect of cargo to be shipped on a vessel. Those bills of lading incorporated an arbitration clause providing for proceedings in London and also applied a 12-month time bar to the misdelivery claims under the Hague-Visby Rules 1968. The bank commenced arbitration in London just before the 12-month time bar expired. After it expired, the vessel's owner claimed that the vessel was, at the material time, under bareboat charter to the claimant. The claimant applied for an interim anti-suit injunction restraining the Singaporean proceedings. The Commercial Court held that, whilst the claimant had satisfied the jurisdictional basis for an anti-suit injunction, the missing of the time bar and the question of delay were factors that militated against the grant of an injunction. Ultimately, the court granted the anti-suit injunction, on condition that the claimant undertook not to rely on the time-bar argument in the arbitration.
  
40. In *SRS Middle East FZE v Chemie Tech DMCC* [2020] EWHC 2904 (Comm), the parties' underlying contract (which was governed by English law and provided for disputes to be referred to ICC arbitration) was for the engineering and construction of a tank storage terminal and connecting infrastructure in Sharjah, UAE. A third party issued a performance guarantee to the claimant that was governed by UAE law. The claimant terminated the contract and called on the guarantee. The defendant commenced Sharjah proceedings for interim relief and also commenced arbitration proceedings in London. The defendant then initiated substantive Sharjah proceedings based on the understanding that its claim for interim relief would otherwise be at risk of becoming void. The claimant sought an anti-suit injunction to restrain the substantive Sharjah proceedings on the basis that any pursuit of the Sharjah claim outside of the London arbitration proceedings was a breach of the arbitration agreement. The Commercial Court granted the anti-suit injunction to restrain the Sharjah proceedings, finding that the claimant had established a *prima facie* case that a breach of the arbitration agreement was at least threatened and that there was no good reason not to restrain that breach by way of injunctive relief. The judge rejected the defendant's contention that its claim for interim relief in Sharjah would have been lost had it not commenced substantive proceedings there as unsubstantiated by the evidence; if the correct position in UAE law was that the claim for interim relief could not be maintained without prosecuting the Sharjah claim through to substantive judgment (which was a breach of the arbitration agreement), then it should not have been sought in the first place.

41. It was also reported in October 2020 that the English High Court had granted an injunction to prohibit payment under a structure of guarantees involving banks in the Middle East and the United Kingdom. The injunction was made in support of DIFC-LCIA arbitration proceedings between Aggreko PLC (a FTSE 250 company carrying on the business of supplying temporary power generation equipment) and Al-Sadi Trading Group concerning a contract for the use of temporary power generators in Yemen. The injunction was granted on the basis of the judge's finding that there was a serious arguable case that the termination of the underlying contract had also terminated the performance guarantees.

**(C) Challenges to arbitration awards:**

42. In line with its pro-arbitration stance, the Arbitration Act 1996 allows challenges to arbitration awards only in narrow circumstances: Section 67 (lack of substantive jurisdiction), Section 68 (serious procedural irregularity) and Section 69 (appeal on a point of law).
43. In *Obrascon Huarte Lain SA (t/a OHL Internacional) v Qatar Foundation for Education, Science and Community Development* [2019] EWHC 2539 (Comm), the underlying dispute arose out of a contract for the construction of a hospital complex in Qatar that was governed by Qatari law and contained an ICC arbitration clause. In a subsequent arbitration commenced by the employer following its termination of the contract, the contractor argued that Article 184 of Qatar's Civil Code only allowed for termination without a court order in circumstances where that had been expressly agreed in the contract terms, and there was no such express wording in the instant contract. The tribunal heard expert evidence on Qatari law and accepted the evidence given by the employer's expert that the instant contract was sufficiently clear where it provided the employer with the right to terminate on notice in the event of a default by the contractor. The contractor alleged that there was a serious irregularity under Section 68 of the Arbitration Act 1996 because the tribunal had not decided the question of whether the contract contained an automatic termination provision, but appeared instead to have decided that there was no such requirement under Qatari law. By contrast, the Commercial Court held that the issue of whether such a condition existed under Qatari law had been squarely before the tribunal, which had considered it on evidence, before rejecting the contractor's definition of the condition. There was no such procedural irregularity.
44. In *Soletanche Bachy France SAS v Aqaba Container Terminal (Pvt) Co* [2019] EWHC 362 (Comm), the underlying dispute arose out of a contract for the construction of extensions to the Aqaba Container Terminal. The employer gave notice to terminate the contract before the claimant had completed the work, and the work was completed

by a replacement contractor. One of the arbitrators disclosed that he was instructed by the replacement contractor in an unrelated matter, but the employer waived any conflict of interest that might exist. That unrelated matter subsequently turned into a live dispute. The tribunal gave an award in favour of the defendant, and the claimant challenged that award, *inter alia*, on the basis that the arbitrator should have disclosed the "material change" in terms of his relationship with the replacement contractor since the time of his initial disclosure. In addition, various arguments were raised that the tribunal had failed to consider arguments as to the claimant's contractual entitlement to an extension of time prior to termination and had reached a decision on an issue of concurrent delay without affording the claimant an opportunity to address it. All grounds of challenge were rejected by the Commercial Court.

## VI. Public international law:

45. Issues of public international law continue to arise frequently on matters involving foreign parties (including from the Arab World) before the English courts.

### (A) Recognition of foreign governments:

46. Several decisions were given in heavily-contested proceedings concerning competing claims to the chairmanship of the Libyan Investment Authority (*Mohamed v Breish*):
  - 46.1.1. On 14 February 2019 ([2019] EWHC 306 (Comm)), the Commercial Court declared that the question of which body represented the executive authority and government of Libya fell to be determined under English law, if it arose before the English court, and, since April 2017, that the executive authority and government of Libya had been represented by the Government of National Accord and the Presidency Council.
  - 46.1.2. On 1 April 2019 ([2019] EWHC 786 (Comm)), the Commercial Court declined an application by Mr. Breish seeking a supplementary clarifying declaration in that regard.
  - 46.1.3. On 10 July 2019, the Commercial Court ([2019] EWHC 1765 (Comm)) held that, if the UK Foreign & Commonwealth Office chose to recognise someone as the executive authority of a foreign State, then the court could not second-guess that recognition (under the "one voice" doctrine) or consider a challenge to the lawfulness or validity, under the relevant foreign law, of the acts of that recognised foreign government.
  - 46.1.4. On 25 March 2020 ([2020] EWHC 696 (Comm)), the Commercial Court declared that the claimant had been validly appointed as the chairman of LIA, and that

this appointment had not expired or been withdrawn, terminated or cancelled. The court also continued receiverships over certain LIA assets pending a decision of the Court of Appeal and the termination of the claimant's 3-year term of office.

- 46.1.5. On 15 May 2020 ([2020] EWCA Civ 637), the Court of Appeal dismissed appeals against the 14 February 2019 judgment and upheld the "one voice" doctrine concerning recognition of foreign governments.

## **(B) International humanitarian law:**

47. In *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020, the claimant sought judicial review of the decision of the UK Government to continue granting export licences for arms sales to Saudi Arabia notwithstanding the fact that the exported items were possibly to be used in ongoing conflict in Yemen where there was a large body of evidence to demonstrate that Saudi Arabia had committed serious and repeated breaches of international humanitarian law. At first instance, the High Court dismissed the judicial review claim. However, on appeal, the Court of Appeal held that the decision to continue to license military equipment for export to Saudi Arabia was unlawful because the Secretary of State for International Trade had failed, when assessing whether there was a "*clear risk*" (as required by Criterion 2c of the Consolidated EU and National Arms Export Licensing Criteria) that equipment sold to Saudi Arabia might be used in the commission of serious violations of international humanitarian law, to consider whether there was an historic pattern of such breaches by Saudi Arabia. The UK Government was given permission to appeal to the Supreme Court but, on 7 July 2020, announced its intention to withdraw that appeal in light of its assessment (on the retaking of the decisions as ordered by the Court of Appeal) that possible violations of international humanitarian law were only "*isolated incidents*".

## **VII. International financial sanctions / restrictive measures:**

48. The interpretation by national courts of the scope and application of sanctions (or restrictive measures) is highly significant for their effective implementation.
49. The efforts to enforce the US judgment concerning the 1985 hijacking of an EgyptAir flight are discussed further above in the context of the attempts to serve the judicial review proceedings on the interested parties in Syria. In *R (Certain Underwriters at Lloyd's London) v HM Treasury* [2020] EWHC 2189 (Admin), the claimant reinsurers challenged the UK Treasury's interpretation of EU sanctions on Syria contained in Regulation 36/2012. In particular, the claimants asserted that the UK Treasury was

able to release funds frozen pursuant to the sanctions in order to satisfy the judgment. The UK Treasury's position was that banks provided it with information for the purpose of "*facilitating compliance*" with the sanctions regime, and Article 29 of Regulation 36/2012 expressly provided that "*any information provided or received in accordance with [Article 29] shall be used only for the purposes for which it was provided or received*". The UK Treasury's position was that "*facilitating compliance*" did not include facilitating requests to release frozen funds to satisfy an outstanding judgment. The Administrative Court rejected the UK Treasury's interpretation as being inconsistent with the purposes of the sanctions regime and found that there was no reason why providing information about the location of frozen funds would not be considered as "*facilitating compliance*" with the sanctions regime.

### **VIII. Concluding Remarks:**

50. As the summaries above illustrate, MENA parties have appeared regularly before the English Courts in complex commercial litigation, as well as matters related to international arbitration and public international law. This is unlikely to diminish in the near future.