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KEY DEVELOPMENTS UPDATE
APRIL 2022

Message from Khawar Qureshi QC, Head of Chambers

We are delighted to have been able to collaborate with Lexis-Nexis and the Qatar International Court for the launch of our Handbook on the Qatar International Court on 25 March 2022. This bulletin provides some background on the book and why it has been described as the "definitive guide". Recent English Court decisions emphasising the importance of adhering to the requirements for service of legal process are outlined, as well as how a state owned airline is to be treated as a separate entity for the purposes of legal proceedings and State Immunity considerations.

Should you be interested in any of the headlines below, please click here to see the newsletter in full or visit www.mcnairchambers.com/publications for a full list of our previous publications.

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The following updates are covered in this newsletter:

- **LexisNexis and McNair launch the "definitive handbook for practice and procedure" at the Qatar International Court and Dispute Resolution Centre**, with a foreword by Lord Thomas of Cwmgiedd, President of the QICDRC, and a chapter by Christopher Grout, Registrar of the QICDRC.

- **English Courts emphasise importance of promptly serving claim form on foreign defendants in Qatar dispute:** In two recent cases, including Qatar Investment and Project Development Holding Co v Phoenix Ancient Art S.A., the English courts emphasised the importance of serving claim forms promptly, particularly where service was to be effected outside of England, and their reluctance to grant extensions as a result of the Covid-19 pandemic or inaction of a claimant's representatives.

- **English High Court refuses Libya's challenge to enforcement of arbitral award:** In *General Dynamics UK Ltd v Libya* [2022] EWHC 501 (Comm), the High Court declined to grant Libya's application to set aside an ex parte order which had granted the claimant company permission to enforce an arbitral award. Although the enforcing company should have mentioned Libya's State immunity under the State Immunity Act 1978 ("SIA") and why it did not apply, its failure to do so was not significant.

- **A flag carrier is a separate entity for the purposes of state immunity:** In *Aelf MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV DBA Surinam Airways*, the Court held that for the purposes of

s14(1) of the State Immunity Act 1978 a flag carrier is considered to be a separate entity for the purposes of any proceedings against a State.

LEXISNEXIS AND MCNAIR LAUNCH "DEFINITIVE HANDBOOK FOR PRACTICE AND PROCEDURE" AT THE QATAR INTERNATIONAL COURT AND DISPUTE RESOLUTION CENTRE

"Qatar International Court and Dispute Resolution Centre – a Guide to the Court and Regulatory Tribunal: Procedure and Jurisprudence"

On 28 March 2022, at an event at the Qatar International Court and Dispute Resolution Centre, LexisNexis and McNair launched what has been described as the "definitive handbook for practice and procedure" at the QICDRC, with a foreword from Lord Thomas of Cwmgiedd, President of the Court, and a chapter by Christopher Grout, Registrar, on the history and legislative underpinning of the QICDRC.

The handbook contains an in-depth discussion of the procedure applicable to claims before the Court and the Regulatory Tribunal, as well as a careful analysis of key judgments on both procedure and areas of substantive law.

It is intended as a guide for anyone engaged in or contemplating litigation in Qatar before the Court or Regulatory Tribunal; or considering designating the Qatar International Court as an arbitration seat or competent court under the UNCITRAL-inspired Qatar Arbitration Law (Qatar Law No. 2/2017).

The book is available here.

Recent decisions of the Court and Regulatory Tribunal

(i) Prime Financial Solutions LLC (formerly IFSQ) v QFC Employment Standards Office [2022] QIC (A) 1 (13 February 2022)

In this decision, the Appellate Division of the Qatar International Court considered whether two employees who claimed that they had acted as whistleblowers had satisfied the requirement of acting in good faith under Article 16 of the QFC Employment Regulations when reporting concerns about contraventions of regulations by the appellant.

The appellant was a QFC company regulated by the QFC Regulatory Authority and authorised to carry on insurance mediation. The two employees whose dismissal resulted in the current proceedings were Ms. A, formerly the Chief Operating Officer of the appellant, and Ms. B, formerly the Head of Compliance. In August 2020, having noticed irregularities, Ms. B met with the QFC Regulatory Authority and Ms. A and Ms. B. subsequently produced a report on the irregularities. Shortly thereafter, they were dismissed by the appellant. The appellant's case is that in preparing this report, Ms. A and Ms. B did not act in good faith, but rather were acting for the collateral purpose of forcing out Mr. Veiss, the director and controller.

Both Ms. A and Ms. B filed complaints with the Employment Standards Office, who issued decisions in their favour. The appellant's appeal to the Regulatory Tribunal in respect of these decisions was dismissed in a judgment handed down on 19 May 2021.

The appellant appealed, inter alia, on the basis that Ms. A and Ms. B had not satisfied the requirement of good faith under Article 16 of the QFC Employment Regulations so that their report to the QFCRA was not protected whistleblowing.

The Appellate Division (Lord Thomas of Cwmgiedd, President, Justice Bruce Robertson, Justice Helen Mountfield QC) dismissed the appeal.

Having considered both the approach to good faith under Qatar law and the wider international practice, the Court held that, contrary to the decision of the Regulatory Tribunal, "good faith" required something more than simply an individual believing on reasonable grounds that something is true. A person must act with integrity and in accordance with good regulatory practice.

If an employee believes on reasonable grounds that what is reported is true, a significant step has been made to satisfying the requirement of good faith in Article 16, but it does not establish good faith. The employee must also act with integrity. A failure to act with integrity is not necessarily established by showing that there is another motive, even a significant motive. The circumstances must be considered in full and the conclusion reached that the person making the report has acted with integrity.

In the present case, the issue of good faith would be remitted back to the Regulatory Tribunal, subject to

payments being made to satisfy the Payment Orders made by the Tribunal are paid by 27 February 2022.

The decision is available here.

(ii) Ms Ileana Mercedes DLacoste Agudelo and Ms Eniluz Jhoana Gonzalez Aponte v Horizon Crescent Wealth LLC and Others and Qatar Financial Centre Regulatory Authority [2022] QIC (F) 1 (16 January 2022)

In a further judgment in the long-running Horizon litigation, the claimants applied for an indefinite stay of the proceedings on the basis that any criminal investigation should be concluded before the trial of these proceedings.

The Claimants' position was that they had become aware that the Qatar Department against Economic Crimes and Money Laundering (QDECML) was currently pursuing a separate criminal investigation against them and others (although the Court expressed some scepticism as to when the Claimants' had become aware). The QFC Regulatory Authority had also become aware that there were legal proceedings taking place in Canada involving many of the same companies and individuals as the claim (as well as the Claimants' husbands), which significantly impacted the present proceedings.

The Claimants would be at real risk of prejudice if required to give disclosure or provide witness evidence in these proceedings before any criminal investigation is concluded, particularly when there was a risk that doing so could result in their providing information which led to criminal charges. The Claimants wished to take legal advice so as to understand the nature of the criminal investigation and as to their position under the laws of the State of Qatar.

The Defendant did not appear (having effectively ceased to participate in the proceedings). The QFC Regulatory Authority, as an interested party, opposed the stay on the basis that a stay is only required when criminal proceedings are actually commenced against the subject concerned which has not happened or happened yet.

The Court (Justice Frances Kirkham, Justice William Blair and Justice Rashid Al Anezi) granted a stay until 31 March 2022.

In the present case, given the limited information currently available, and the obvious considerable extension in the issues before the Court, it will be difficult to issue directions as to the scope and likely duration of a trial of the issues in this case at the present time without a much better understanding of what may be involved. Fairness required that the Claimants be permitted to take legal advice. As the funds at issue were frozen, the public interest was protected and no prejudice would result from the stay.

The decision is available here.

New Small Claims Procedure

On 1 February 2022, the QICDRC announced that it had issued a new Practice Direction (No. 1/2022) on Small Claims, which would come into effect from 1 March 2022.

The new Procedure will allocate small claims cases of up to and including QAR 100,000 to a specialist small claims track within the First Instance Circuit of the Court, and is intended to streamline the process and shorten the time taken to determine smaller matters.

Once a case has been allocated to the small claims track, a claimant will have seven days to serve the Claim and supporting documentation on a defendant (rather than 4 months under the normal procedural rules), and a defendant will have 14 days (rather than 28 days) to file a defence.

Cases on the small claims track will typically be determined on the papers or virtually via a remote hearing, instead of an in-person hearing in Court.

ENGLISH COURTS EMPHASISE THE IMPORTANCE OF PROMPT SERVICE OF CLAIM IN QATAR DISPUTE

In two recent decisions, the English Courts have emphasised the importance of ensuring that claims are served on time, and indicated their unwillingness to allow parties to blame the Covid-19 pandemic for any delays.

Qatar Investment and Project Development Holding Co v Phoenix Ancient Art S.A. [2022] EWCA Civ 422 (30 March 2022)

On 22 January 2020, two days before the expiry of the six-year limitation period, the appellants (a Qatari company and its CEO) issued a claim against the respondent, a Swiss art dealer, on the basis that it had sold them a fake art work. The claim form had to be served by 22 July 2020 (if being served out of the country).

Following their discovery on 23 June 2020 that the Foreign Process Section ("FPS") of the High Court was closed due to the Covid-19 pandemic, on 26 June 2020, the Claimants applied for an extension of time to serve. Following no response from the Court, a second application was issued on 17 July 2020 which was granted on 20 July 2020 and extended the time for service to 22 November 2020.

The Defendant, on 15 September 2020, made a successful application to set aside the order for an extension, which was upheld on appeal.

The Claimants appealed against this decision, on the basis that the Master (and the Judge) should have made some or greater allowance for the disruption caused by the pandemic, referring not only to the closure of the FPS, but also to the general upheaval experienced by businesses at this time.

The appeal was dismissed.

Lady Justice Whipple, delivering the judgment of the Court, held that the closure of the FPS was not a reason, let alone the reason, for the Claimants needing to seek an extension of time – they needed an extension of time anyway and the closure of the FPS, once discovered, simply added to their existing problems. As to the impact of the pandemic more generally, there was no evidence of its impact on the failure to effect service in this case.

The judgment is available here.

SMO v TikTok Inc [2022] EWHC 489 (QB) (8 March 2022)

The claimant (a child acting through her litigation friend, the (now former) Children's Commissioner for England) had brought a representative claim on behalf of herself and a class of children who use, or had used, the social media platform TikTok alleging that the defendants were responsible for processing the personal data of the children and for invading their privacy and misusing the children's private information. The claim form was issued on 30 December 2020.

In February 2022, it having become clear that the Claimant was unable to serve the claim form on the foreign defendants within the applicable time, the Claimant sought an extension of time.

The Court declined to grant the application for an extension of time.

In determining whether an extension of time should be granted, the principles to be applied when considering an application under CPR 7.6 were set out by Blackburne J in *Sodastream Ltd -v- Coates* [2009] EWHC 1936 (Ch) [50]. The principal and frequently the only question was to determine whether there was a good reason for the claimant's failure to serve the claim form within the period allowed by the rules. To the factors set out in *Sodastream v Coates*, the Court in this case would add various other matters, including that it should only extend the period for serving the Claim Form when it is satisfied that to do so furthers the overriding objective, and in general, an extension of time was not justified where it was needed because of the negligence of those acting for the claimant.

In the present case, the Claimant's representatives were at fault for the delay and no extension would be granted.

ENGLISH HIGH COURT REFUSES LIBYA'S CHALLENGE TO ENFORCEMENT OF ARBITRAL AWARD

General Dynamics UK Ltd v Libya [2022] EWHC 501 (Comm) (11 March 2022)

Introduction

In *General Dynamics UK Ltd v Libya* [2022] EWHC 501 (Comm), the High Court declined to grant Libya's application to set aside an ex parte order which had granted the claimant company permission to enforce an arbitral award. Although the enforcing company should have mentioned Libya's potential claim to State immunity under the State Immunity Act 1978 ("SIA") and why it did not apply, its failure to do so was not significant.

Background

This judgment is yet another in the series of judgments relating to General Dynamics United Kingdom Ltd (General Dynamics) efforts to enforce an arbitration award of over £16 million handed down in 2016 by an ICC arbitral tribunal.

Following Libya's failure to make any payments in respect of the award, General Dynamics issued proceedings to enforce the Award in England and Wales, and on 20 July 2018 Teare J made an order which, inter alia, granted General Dynamics permission to enforce an arbitral award which it had obtained against Libya in January 2016) and entered judgment in terms of the Award pursuant to s. 101(2) and (3) of the Arbitration Act 1996.

In the present proceedings, Libya sought to set aside that ex parte award on the basis that General Dynamics did not comply with its duty of full and frank disclosure when applying for and obtaining that order. Libya relied in particular on its contention that General Dynamics had failed to inform the Court that Libya had adjudicative and enforcement immunity under the SIA, subject to the exceptions thereto (although it also contended that General Dynamics had failed to inform the Court that there was only one recognised government in Libya).

Decision

The Court dismissed the application to set aside the order. The principles applicable to the duty to make full and frank disclosure were set out in *Brink's Mat Ltd v Elcombe* [1998] 1 WLR 1350, and include the following:

- The duty of the applicant is to make "a full and fair disclosure of all the material facts";
- The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the applicant or his legal advisers;
- The applicant must make proper inquiries before making the application (and therefore the duty applies not only to material facts known to the applicant, but also to any additional facts which he would have known if he had made such inquiries);
- Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented;
- Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded".

In the present case, it would have been preferable if there had been an express mention of the immunity accorded to Libya under s. 1 SIA (and indeed this was desirable in any case in which it is sought to obtain relief against a State ex parte), coupled with an explanation as to why it was said that it was inapplicable. However, the failure to refer to the immunity under s. 1 SIA was not, in the present case, of significant importance, and the non-disclosure had not obtained any benefit for General Dynamics which it ought not to have had. The order would not be set aside. The Court could appropriately mark the importance that it attached to any non-disclosure by depriving General Dynamics of its costs of the application before Teare J.

The decision is available here.

A FLAG CARRIER IS A SEPARATE ENTITY FOR THE PURPOSES OF STATE IMMUNITY

Aelf MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV DBA Surinam Airways [2022] EWHC 544 (Comm) (14 March 2022)

Introduction

In *Aelf MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV DBA Surinam Airways*, the Court held that for the purposes of s14 (1) of the State Immunity Act 1978 ("SIA") a flag carrier is considered to be a separate entity for the purposes of any proceedings against a State, and accordingly the national flag carrier of Suriname was not permitted to be served with a claim form by transmission through the diplomatic route.

Background

The claimant was an aircraft leasing company which had initiated proceedings against the defendant, alleging that it had breached a settlement agreement. The defendant issued a CPR 11(1) application on the grounds of purported defective service of the claim form.

The defendant believed that it was entitled to be served the claim form pursuant to s12 (1) of the SIA, which provides that a claim form in proceedings against a State has to be served by transmission through the Foreign Office.

The defendant stated that although it was not a state it was a state-owned airline and s considered a separate entity pursuant to the definition set out in s14(1) SIA 1978. Therefore, the claim against it was in relation to an act done in the exercise of the state's sovereign authority and it should be served pursuant to s12(1) of the SIA 1978.

The court held that defendant had submitted to the jurisdiction of the court by way of common law waiver. The defendant applied for permission to appeal against the refusal of the jurisdiction application on the basis that s12(3) of the SIA did not include a common law waiver.

After rejecting the jurisdictional challenge in accordance with CPR 11 (1), the court considered permission to appeal and whether there were any other grounds for state immunity to justify the dismissal of the order.

Decision

The court held that the national flag-carrier was not permitted to be served with a claim form by the Foreign Office pursuant to s12(1) of the SIA, as this provision expressly applied to proceedings against a state, whereas the flag-carrier was a "separate entity" under s14(1) of the SIA.

It was held that the language, structure and effect of s12 (1) was clear and explicit to understand and follow. In that it applied to proceedings in relation to a state and there was no mention to a separate entity. So this section of the SIA was not applicable to a separate entity whatsoever.

S14(1) SIA provided further clarification with regards to a state and made no reference to an entity at all. It made provision for individual entities to be considered to be immune from the jurisdiction of UK courts. The privileges mentioned in s14(1) were in relation to something other than the reference to "privileges". These were not intended to be extended to separate entities as there was no separate express provisions present to this effect.

The settlement agreement was considered to be an act in the exercise of the state's sovereign authority, as it was commercial in nature and its compromise of claims with regards to the aircraft lease agreement between the parties. The defendant was not entitled to have been served in accordance with the procedure stipulated in s12(1) of the SIA.

Furthermore, there was held to be no agreement of service pursuant to s12(6) SIA, as there was no provision to the effect that this applied if the agreement to an alternative form of service had been effected in the exercise of the state's sovereign authority, nor was there any requirement for the state, rather than the defendant, to have agreed an alternative method of service in order to engage s12(6) SIA.

The decision is available here.