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The tricky question as to the legal status of governments in times of upheaval routinely falls to the English courts to wrestle with. By Charles Brasted

As the Arab Spring moves into its first, but perhaps not last, autumn; the work of building a future begins for countries that have gone through political and social convulsions. Much of the legal world is focused on the opportunities that this future-building will bring.

For others, however, the legal impact has been more immediate. Regime change other than via the operation of the usual constitutional mechanisms inevitably brings with it - to put it mildly - legal issues. With English law remaining predominant in commercial contracts, it is no surprise that those legal issues have been played out in the English courts in recent months.

One of the key questions for those doing business with governmental bodies in Libya has been: who is now our client? The answer to that question can be crucial to an assessment of whether any proposed action would be in breach of the UN sanctions regime. It is also fundamental to the ability of companies in the UK and elsewhere to comply with - and to enforce - the terms of their contractual arrangements.

TIDE OF CHANGE

After people poured onto the streets of Benghazi in early February 2011, and were met immediately by deadly force from Gaddafi's forces, the uprising spread quickly and by the end of February anti-Gaddafi forces were in control of most of Libya.

The National Transitional Council (NTC) was established on 5 March in Benghazi. It was set up not only to act as the political face of the revolution, but also as the interim legislative and executive authority in Libya. With anti-Gaddafi forces in control of much of the country it became the de facto civil administration in those areas. However, its legal status - and the corresponding status of the Gaddafi regime - was initially unclear.

What constitutes, as a matter of English law, the government of a foreign state can be a complex question. The Foreign and Commonwealth Office's (FCO) practice of routinely granting formal recognition of foreign governments ended in 1980, with the then foreign secretary confirming, somewhat unhelpfully, in a parliamentary statement that "in future, cases where a new regime comes to power unconstitutionally, our attitude on the question of whether it qualifies to be treated as a government will be left to be inferred from the nature of the dealings, if any, which we may have with it".

While it is now a matter of fact and law for the courts, the Government's attitude remains crucial. Where it is dealing with an entity on a normal basis as the government of another

state, it is unlikely in the extreme that the inference that the entity is the government of that state will be capable of being rebutted. However, as Mr Justice Hobhouse tantalisingly added in *Somalia v Woodhouse Drake ti Carey Eg Ors (1993)*: "Now that the question has ceased to be one of recognition, the theoretical possibility of rebuttal must exist."

In the case of Libya, the language of the international community and the FCO in particular, is instructive. By the end of March the foreign secretary had acknowledged the "utter absence of legitimacy for the Gaddafi regime", but was silent on who had acquired governmental legitimacy,

By mid-May the FCO recognised publicly the NTC as "the legitimate interlocutor representing the aspirations of the Libyan people", but fell short of endorsing it as the government of Libya. By 15 July, however, notwithstanding its policy of not recognising governments, the FCO had declared publicly that it would treat the NTC as "the legitimate governing authority in Libya".

That the NTC was the lawful government as a matter of English law was confirmed in *British Arab Commercial Bank plc v The National Transitional Council of the State of Libya (2011)*. Although concerned in part with the accreditation of Libyan diplomats, those proceedings exemplify the dilemma faced by parties to contracts with the Libyan state and its organs during much of 2011.

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TAKING NOTES

The question was also fundamental to the efforts of the NTC to secure the release of more than £1bn of unissued Libyan dinar banknotes, printed by a UK company under a contract with the Central Bank of Libya (CBL) and frozen in the UK under UN sanctions. Alongside frantic diplomatic and legal efforts to have the sanctions lifted to allow the delivery of the banknotes, both the UK Government and the printer needed to be assured that people being put forward by the NTC as representatives of the CBL were indeed entitled to act on its behalf. In the end the answer to that question was to be found above all in the political reality, as exposed by the FCO, and in the flexibility of English law in recognising that reality.

In Libya the answer is now clear, but questions remain, particularly in countries where 'springtime' is blossoming. Those questions are likely to be answered first in the English courts.

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