a commercial decision to be made by the client, and the uncertainty in the reaction of a Tribunal to termination means it is risky.

- **performance bonds** – The panel discussed the various countries in the region's approach to attachments on the calling of bonds, which, in many of the countries require 'serious and certain reasons' to be granted. **Nada Sader** discussed how in Lebanon this is a relatively high threshold and that sometimes the calling of bonds was considered 'manifest abuse' – for example if they were called after the expiry of a defect's liability period. The panel also discussed the types of bonds – particularly the 'on demand' bond which can as a matter of principle be called at any time. She added that in some instances where the contractor fears that the employer is likely to abusively and unlawfully call the bond, the contractor can attempt to seek an order from the court to prevent the employer from calling the bond and the bank from liquidating it.
- **risk allocation and the market** – the panel also discussed the more general state of the construction market where **Akram Abu El-Huda** stated that the position largely remains that contractors in the UAE do not have the same negotiating power against employers as they may have in other jurisdictions. He added that employers are still largely passing the risk onto main contractors, who are then attempting to pass it down to the subcontractors. The panel considered that one way to attempt to shift the market were if specialized suppliers could push back on unfair contract terms, especially to ensure they are paid on time.

Yasemin Cetinel further spoke on third party funding, particularly in Turkey. She outlined how third-party funding has recently been treated in various jurisdictions. In the Middle East in particular, third-party funding is not prohibited – and more specifically not prohibited under Sharia law. It has even been found in recently reported cases to increase access to justice. The concept became quite prevalent in Turkey after the Libyan crises in 2011. Many of the Turkish contractors were heavily invested in Libya and so were significantly affected by the crisis, with many of them becoming bankrupt. Their claims, however, remained, and funders often stepped in to assist in claim recovery. The difficulty was (and still remains) that contractors are facing significant upfront cost and work to provide the due diligence required by the funder (i.e. 'frontloading'), which they may not have the capacity to take on.

The panel concluded with some general discussion and again took a poll of hands on whether FIDIC Red Book contracts' dispute resolution provisions were being amended to litigation, or were largely being kept as arbitration. The majority seemed to reflect that construction disputes were still mostly going to arbitration instead of litigation.

A civil/common law judicial roundtable on the review and enforcement of arbitral awards

Members of the panel: **Saif Ahmad Alhadad AlHazmi** (judge, Court of Cassation, Dubai Courts), **Mostafa Mahmoud Ali El Sharkawy** (judge, Court of Appeal, Dubai Courts), **Nabil Omran** (Deputy Chief Justice, Court of Cassation, Egypt), **Shamlan Al Sawalehi** (judge, Court of Appeal and judge in charge of Arbitration Division, DIFC Courts), **Zalfa El Hassan** (President of the Civil First Instance Court of Beirut, Lebanon), and **Georges Affaki** (Chair of the panel, Partner, AFFAKI, France).

This was ICC MENA's first ever session held in Arabic, which also hosted court judges from the region.

Nabil Omran talked about sham arbitral institutions in Egypt and the fraud convicted by the administrative body of that institution in the *Chevrolet vs. Aramco* case. In this case, a local sham institution wrongfully seized jurisdiction and reappointed a second arbitral tribunal after an award was initially rendered by a first tribunal that was appointed by the same institution. The second arbitral tribunal rendered an award 16 days after its appointment, ordering Aramco to pay Chevrolet US$ 18 billion. The award's debtor objected to the execution of the award and filed for the nullification of the award before the California courts, which rendered a judgment refusing execution

of the same. The matter was raised before the courts in Egypt, which ordered the imprisonment of the individuals that were involved in the fraud, declared the institution as a sham and rendered a judgment defining 'arbitration institutions' under Egyptian law.

As for Lebanon, **Zalfa El Hassan** talked about the limited conditions set in the Lebanese law for nullifying a domestic arbitral award, which are aligned with international standards. She then touched upon the fact that the Republic of Lebanon is signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and on the courts' criterion for determining whether an award is domestic or international, one of which being whether the commercial dealing is international or domestic. She then talked about the notion of public order and clarified that the Lebanese courts' trend has been to consider the international public order when enforcing international arbitration awards. She then queried whether that trend will remain in light of the internal economic crisis, the 'exceptional circumstances', the country is presently facing.

As for the UAE, **Saif Ahmad Alhadad AlHazmi** and **Mostafa Mahmoud Ali El Sharkawy** talked about the latest positive trends in enforcing arbitration awards following the enactment of the UAE Federal Law no. 06 of 2018 (the 'Arbitration Law'). They explained that the process has become very fast and efficient and that the courts are acting in support of arbitration. They discussed Article 7(1) of the Arbitration Law and clarified that any decision on jurisdiction that is issued by an arbitral tribunal is deemed 'interim' until the 15-day period mentioned in the law lapses, following which it will become final and cannot be reopened before the court. They also clarified that the courts are being more lenient in determining what constitutes an arbitration agreement. They then touched upon the notion of public order and explained that what is taken into consideration is the domestic public order of the UAE, which is the public, social, political and economic interests of the society in the UAE. **Judge Shamlan Al Sawalehi** discussed the case *Assas OPCP Limited v. VIH Hotel Management Ltd Assas* where the Dubai Courts had nullified the arbitration award for lack of capacity of the signatory of the arbitration agreement, whereas the DIFC courts had accepted jurisdiction and rendered a judgment declaring the arbitration agreement valid. He added that the latest position of the Judicial Tribunal For the Dubai Courts and the DIFC Courts which dealt with conflict of jurisdictions between these two courts was that DIFC Courts have jurisdiction when the parties agree to that, or when the arbitration is seated in the DIFC, or one of the parties is based/ licensed from the DIFC, or when the arbitration is subject to the DIFC-LCIA arbitration rules or DIFC arbitration law.

Arbitrating M&A disputes in the MENA

Members of the panel: **Demet Kasarcioglu** (Senior Associate, Esin Attorney Partnership, Turkey), **George Traub** (Managing Partner, Lumina Capital Advisers, Dubai), **Marwan Sakr** (Member of the Beirut and Paris Bars, admitted before the DIFC Courts, Chartered Arbitrator, Partner, SAAS Lawyers, Lebanon), **Omar Zizi** (Lawyer, Member of the Paris Bar, Allen & Overy, Morocco), and **Dany Khayat** (Chair of the panel, Partner, Mayer Brown, France).

The panel's discussion generally focused on the most common types of disputes in M&A transactions – some of which arise in the pre-contractual and negotiation phases of a deal (such as to what extent Letter of Intent and Memorandum of Understanding are binding, breach of confidentiality, abusive termination of negotiations) and other post completion matters (e.g. price adjustment, breach of representation and warranties). The panel considered the importance and frequency of interim measures being sought in M&A disputes, again the most common being:

1. **During the negotiations / pre-contractual steps:**
   - in relation to the letters of intent and breaches thereof;
   - breaches of the non-disclosure / confidentiality agreements – where specifically, the panel recommended considering a penalty clause to be inserted into NDA's where damages cannot be quantified to simplify the claim; and
   - allegations in relation to abusive termination of negotiations
2. **During the contractual-phase such as:**
   - injunctions to prevent breaches of non-compete clauses;
   - in relation to the put and call options and breaches of the rights of first refusal (which are very time-limited); and
   - in relation to breaches of the guarantees and indemnities in the contract.

The panel also considered how the ICC's emergency arbitrator process is used in M&A cases and can be quite efficient to obtain remedies such as urgent injunctions.