CARGO CUSTOMS LAW IN THE UAE

The New Waqf (Islamic Trust) Law in the Emirate of Sharjah

Cloud computing in the UAE: Legal risks and remedies for providers and users
Al Tamimi & Company’s Maritime, Aviation and Insurance practice is at the heart of the dynamic transport industry in the Arabian Gulf. The practice, led by partner, Yazan Saoudi, has been developed to cater for the needs of clients who require a global legal perspective with a strong understanding and appreciation of the specific requirements of local and regional law.

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OUR INNOVATIVE APPROACH AND SUPERIOR LEVEL OF EXPERTISE HAS BEEN RECOGNISED BY NUMEROUS INDUSTRY AWARDS

Banking & Finance Law Firm of the Year
World Finance Magazine 2010

Real Estate Law Firm of the Year
Corporate International Magazine 2010

Top 100 Global Arbitration Law Firm
Global Arbitration Review’s GAR100, 2011

Maritime Law Firm of the Year
World Finance Magazine 2010

Trademark Law Firm of the Year
Saudi Arabia, Corporate International Magazine 2010

Corporate & Commercial Law Firm of the Year
World Finance Magazine 2010
Welcome to the June edition of Law Update.

This month, it gives me great pleasure to announce the promotion of seven lawyers to the Al Tamimi partnership. The appointments (which you can read about on page 35) further reinforce our significant capability in Corporate Commercial, Employment, Maritime, Aviation & Insurance, Litigation, Intellectual Property, Construction and Insurance and underscore our market leading position in the Middle East.

We also present to you our Maritime, Aviation and Insurance team through our monthly ‘In Focus’ section. Please take some time to read more about the team and their offerings as well finding out more about cargo customs law in the UAE on page 40.

We have some interesting information for you from our regional offices with articles from Qatar, Kuwait and Iraq.

I’d also like to draw your attention to a contribution this month by the IBA on page 34 where you can read more about the evolution of the IBA. For those wishing to attend the conference here in Dubai later this year, I encourage you to register before the 29th July to take advantage of the early registration discount. We are very excited that Dubai has been chosen as the destination for the annual IBA conference and look forward to welcoming many of our international clients here in October/November.

Thank you for taking such an interest in our magazine and I do trust you find the information presented useful. If you have any comments or feedback, please get in touch.

Husam Hourani
Managing Partner
Front row from left to right: Omar Omar, Paul Turner, Yazan Al Saoudi, Angelique Watkins, Fatma Al Zeini.

Back row from left to right: Mohammed El Hawawy, Rami Al Tal, Siri Hashem, Mamoon Khan
Al Tamimi & Company’s Maritime, Aviation and Insurance practice is at the heart of the dynamic transport industry in the Arabian Gulf.

The practice, led by partner, Yazan Saoudi, has been developed to cater for the needs of clients who require a global legal perspective with a strong understanding and appreciation of the specific requirements of local and regional law.

Our lawyers come from a range of jurisdictions and backgrounds including private practice to in-house counsel for major multinational companies, and are well-positioned to provide a full range of legal services.

In addition to the traditional services provided to our clients, we work very closely with our banking and finance practice which assists our clients with shipping and aviation finance and our arbitration practice which provides alternative dispute resolution solutions, acts and advises in arbitration proceedings both ad hoc and in accordance with established procedural bodies such as the ICC, LMAA and SIAC.

We act for some of the leading regional and international institutions in the shipping, aviation and insurance sector, including ship owning and chartering companies, cargo interests, P&I clubs, insurers, brokers, underwriters, international banks and some of the major local and international carriers.

**Maritime**

Whether as court advocates or legal consultants, our lawyers have a wealth of exposure in handling the most complex shipping disputes. Our experience has been drawn from regularly advising clients who operate in a region that boasts a strong maritime tradition.

**Aviation**

Being at the heart of a rapidly growing aviation industry, we are able to handle the needs of both local and international Airlines and have advised on a wide range of legal matters. We have been involved in the set-up of new aviation companies in the region and new airlines operating within the UAE. We have also advised on leasing, chartering and purchasing of aircraft, as well and cargo and personal injury claims.

**Insurance**

With an in-depth knowledge and extensive contacts in the insurance industry both locally and internationally, we are in the unique position to handle the requirements of insurance companies, brokers, underwriters and intermediaries in both general and aviation and maritime related insurance. We are regularly called upon to advise clients on hull and cargo policies and P&I insurance claims as well as upon policies covering every conceivable kind of risk including credit, professional liability, corporate liability, product liability, construction risks, banker’s blanket bonds, property and personal injury.

We are proud of the practice we have developed which still remains at the forefront of developments within the region. We are currently advising on the revision of the statutory UAE Maritime Code and the establishment of the Dubai Maritime City, as well as other proposed infrastructural and regulatory projects.
The decision in question deals with an insurer’s pursuit of its rights of subrogation against the party responsible for damage caused to a vehicle.

Briefly, the facts are that an individual had, through ADIB (the financier) purchased a Nissan car which ADIB had in turn purchased from Al Masoud Car Agency under a murabaha contract. The individual insured the vehicle with Al Wathba National Insurance Company.

Nine months following the individual’s purchase, the vehicle caught fire due to an electrical short circuit and was completely destroyed. The insured was paid the value of the vehicle by the insurer who then sued both Al Masaoud Agency and ADIB to recover the value of the vehicle, being AED 168,000 plus Court fees and costs. The action was based on the right of subrogation as prescribed by Article 1030 of the UAE Civil Transactions Code.

The Court of First Instance refused to entertain the action due to the purported lack of capacity to sue on behalf of Al Wathba, the Plaintiff. Similarly, the action was dismissed on appeal on the following grounds:

If you have any queries relating to the Law Update Judgments please contact lawupdate@tamimi.com
1. The insurer has a right to pursue a subrogated claim against the party responsible for the damage against payments previously made to its insured pursuant to Article 1030 of the Civil Transactions Code, and to recover such indemnity payments from the party at fault who caused the damage.

2. By dismissing the action, the Court of First Instance exhausts its jurisdiction over the merits and a reversal of its decision places the merits before the Court of Appeal.

3. There is no basis for entertaining the plea that the claim is time barred under Article 555 of the Civil Transactions Code since the claim seeks recovery of the amount paid to the insured.

4. An existing defect within the meaning of Article 547 of the Civil Transactions Code is a defect which is present when the goods are delivered to the buyer or a defect that can be traced to an old problem that occurs or appears after the sale.

5. Plaintiff (insurer) has not produced any proof of the defect which caused the electrical short circuit that ignited the vehicle fire - whether it was a pre-existing defect in the vehicle that was introduced during manufacture or a defect that existed prior to purchase.

6. A defect existing in the sold item prior to sale cannot be assumed and must be proved. Plaintiff (insurer) has not proven that the defect is a manufacturing defect or had existed in the vehicle prior to the sale. The seller cannot therefore be held liable for its value.

**Opinion:**

Subrogation commonly arises in relation to motor vehicle purchase contracts and policies of insurance. Spontaneous accidents involving vehicles, machinery etc. are common types of claims.

Therefore, the Al Ain Court, which is part of the Abu Dhabi Judicial Department, has laid down important principles which burden the plaintiff with the onus of proving a pre-existing defect as follows:

1. That the vehicle suffered loss caused by fire due to a defect therein
2. That the defect is a pre-existing defect introduced during manufacture or existing in the vehicle prior to purchase
3. And the onus of proving a pre-existing defect is on Plaintiff whether the vehicle owner or the subrogee.

The action was based on the right of subrogation as prescribed by Article 1030 of the UAE Civil Transactions Code.
POWERS AND JURISDICTION OF THE COMMERCIAL AGENCIES COMMITTEE

Background

The provisions of the Commercial Agencies Law (Federal Law No. 18 of 1981) (the Law) relating to the powers and jurisdiction of the Commercial Agencies Committee (the Committee) have been the subject of two important amendments on the basis of Law No 13 of 2006:

1. All provisions and references relating to the Committee were repealed because of an amendment to Article (8) as there was reference to the powers of the Committee under this article.

2. The law further specifically repealed Articles (27) on the constitution of the Committee and Article (28) on the jurisdiction of the Committee.

Further amendments to the Law, which occurred by virtue of Law No 2 of 2010 restored the powers and jurisdiction of the Committee and added further significant and important provisions, which are discussed below.

What are the significant amendments on the jurisdiction of the Committee?

Law No 2 of 2010 has restored the Committee as initially provided for under Law No 18 of 1981. This amendment has further added a number of significant provisions. Several important points arise from these amendments and additions:

- Article 27 of Law No 18 of 1981 provides directly for the constitution of the Committee, whereas under Law No 2 of 2010 it is prescribed that the Committee shall be formed by a decision from the Council of Ministers. This decision was issued on 10 April 2011 by H.H Mohammad Bin Rashid Al Maktoum, the Vice President of the UAE and Ruler of Dubai and in his capacity as Prime Minister issued the Council Of Ministers. The relevant decree is Decree No. 3 of 2011 for the Constitution of the Committee.

- The effect of Decree No. 3 of 2011 is that no court can entertain any dispute relating to commercial agencies during the period from February 2010 when the Law was amended and April 2011 when the Committee was established. In light of this it may be foreseen that disputes pending before the competent courts which are yet undecided may also be referred to the Committee due to the procedural and immediate nature of the amendment.

- Article 28 of Law No 18 of 1981 provides that the Committee shall be competent to look into any dispute that arises by reason of a commercial agency. Law No. 2 of 2010 imposes an additional qualification in that the dispute must relate to a registered commercial agency and not just a prima facie commercial agency arrangement. The significance of this is that the door to the Committee’s jurisdiction will remain firmly closed to all commercial agency disputes which are not regulated by a registered commercial agency. There is no room for interpretation in this regard.

- Under Law No 2 of 2010 a new provision has been added to Article 28, the effect of which is that parties may not refer the dispute to courts before referring the same to the Committee. In essence, it introduces a tiered dispute resolution system. Such a system did not form part of the Law in its initial form. The significance of this amendment is discussed further below.

- In its initial form, the Law was absent a provision dealing with the timeframe within which parties could appeal or object to decision of the Committee. Law 2 of 2010 has amended Article 28 to include a provision parties may appeal decisions of the Committee to the competent Courts within 30 days from the date of notification of the Committee’s decision. Importantly, failure to appeal within 30 days will render the
Committee’s quasi-judicial decision final. This implements an equitable process, and one which mirrors procedures adopted in Court.

How to contest the Committee decisions?

The Committee is required to issue its decision within 60 days of hearing the dispute. As stated above, the aggrieved party may contest such a decision before the competent court, by way of a traditional law suit.

The Statement of Claim should include the particulars of the claim as required by the Civil Procedures Code. The parties shall be able to file all the documents and pleadings they wish, irrespective of those submitted at the Committee.

These proceedings should be filed before the Federal Courts in Abu Dhabi as the Ministry should be joined as co-defendant to the proceedings.

The Judgment of the Court of First Instance in this respect shall be subject to a right of appeal at the Court of Appeal and then subsequently at the Federal Supreme Court level.

What is the Extent of Jurisdiction of the Committee?

According to the clear wordings of Article 28 the disputes relating to registered commercial agencies have to be filed before the Committee first and may not be filed directly to the Court. Rather than being prohibitive, the regime is designed to foster early settlement of disputes before the parties incur unnecessary time and costs litigating in the Court.

Although this provision was not included in the old provision of Article 28 of the Law, Federal Courts have historically refused to entertain disputes relating to commercial agencies. Such judgments were based on an understanding that Article 28 granted jurisdiction to the Committee. Even in the absence of the new provision formalizing this arrangement, it had already been the consistent approach of the UAE Federal Courts.

Having said that, it is worth mentioning here that the Dubai Court of Cassation has adopted a different understanding and approach to this matter in the past. The Dubai Court of Cassation has issued several rulings confirming that it is not imperative to file the law suit to the Committee before the Court.

In these cases the Dubai Court of Cassation held that complainant / plaintiff enjoyed the option of filing his complaint to the Court directly, without going through the Committee, or to file with the Committee first and thereafter with the court. In these rulings the Dubai Court of Cassation appears to have assumed that there is nothing in the commercial agencies law that prevents such a process.

This is an important reasoning because the Court of Cassation has made it very clear that had there been any provision in the law that clearly outlined this process in that a claimant was obliged to first file the complaint with the Committee before filing with the Court, then this process should be followed. This could be understood from the judgments referred to even though they do not specifically hold so. Now, reading this in light of the amendment prescribed by Law No 2 of 2010 may give an indication as to the future process of this matter before the Dubai Courts, because the process set down by the amendment to Article 28 is very clear that parties may not refer the dispute to Courts prior to reference to the Committee. This may, therefore, be read and applied by the Courts in Dubai to rule that commercial agency disputes should be first referred to the Committee before the Court. Although this has not yet been tested before the Dubai Court of Cassation (due to the very recent issue of Decree No. 3 of 2011) this approach is expected to be taken in the future litigation of registered commercial agency disputes before the Dubai Courts.

Are there any disputes that may fall out of the committee’s jurisdiction and powers?

It is important to remember that there are some disputes related to commercial agencies which can be filed directly to the Court without prior recourse to the Committee. A number of examples, derived from rulings of the Federal Supreme Court, are set out below:

- The Federal Supreme Court defines disputes that fall within the jurisdiction of the committee as those arising by reason of the agency itself, such as its duration, territory, products and termination etc.
- The Courts shall have jurisdiction to hear disputes falling outside of the jurisdiction of the Committee, notwithstanding they appear prima facie to relate to issues of agency. Such matters include compensation for breach of contract between the agent and principal, as these disputes are considered as issues relating to the implementation of the agency agreement and not issues arising by reason of the commercial agency.
- Courts shall also have jurisdiction to hear disputes if the commercial agency is not registered as the jurisdiction of the Committee relates only to registered commercial agencies.
- Disputes in which claimants are seeking to prove the existence and validity of an agency agreement in order to procure registration fall outside the scope of the jurisdiction of the Committee and shall be heard by the Courts.
- Disputes relating to compensation for termination of unregistered agency agreement can be heard directly by Courts and not by the Committee, even if there are no written agreements.

A final note to be added here is that although Decree 3 of 2011 establishing the Committee has 60 days to fix a date for hearing the dispute, it is not clear whether a party may proceed to the court if the Committee failed to so set a date. Under the old provision of the Law there was a practice that parties would usually proceed and file their complaint to the Court after the Committee exceeded the 60 days provided for under Article 28. This however is yet to be tested in light of the new amendment.
Islamic financing has made a major breakthrough in the financial world and over the past few years and has now proven to be a major contender to conventional financing in the UAE.

Still in its infancy compared to the established conventional banking system, stumbling blocks on structuring Islamic financing products such that they are competitive with their conventional counterparts, are slowly being overcome. One of these is the interplay between the laws of the UAE and Shari’a concepts.

The Shari’a is an abstract form of law derived from Islamic principles and is capable of adaptation, development and further interpretation. It is not a codified law in the UAE. The Shari’a does not prescribe general principles of law, but rather, purports to deal with and cover specific cases or transactions and sets out rules that govern them.

Among the most important teachings of Islam for establishing justice and eliminating exploitation in business transactions, is the prohibition of all sources of unjustified enrichment and the prohibition of dealing in transactions that contain excessive risk or speculation. Accordingly, Islamic scholars have deduced from the Shari’a three principles that form the benchmark of Islamic economics and which distinguish Islamic finance from its conventional counterpart. Briefly, these are:

1. The prohibition of interest
2. The sharing of profits and losses
3. The prohibition against uncertainty and excessive speculation (being speculation over and above that which is necessary and unavoidable in a normal business transaction)

The UAE is governed by a civil law system, which means that all relevant underlying commercial and banking laws are, to a large extent codified. There is no separate legislation within the UAE which codifies Shari’a law for commercial transactions. There are also no separate Shari’a courts to hear disputes arising out of Shari’a financing transactions.

However, as many aspects of Shari’a rulings have been incorporated into the civil law, it can be said that large portions of the UAE commercial laws are underpinned by Shari’a elements and are therefore compatible with Shari’a principles. The courts are also permitted to refer to the Shari’a in the absence of clear legislation and established customary business practices. This is reflected in the approach taken by the UAE Federal Law No. 5 of 1985 Concerning Civil Transactions (the ‘Civil Code’), which, together with the Federal Law No. 18 of 1993 concerning the Commercial Transaction Law (the ‘Commercial Code’), sets out the main provisions for civil and commercial transactions in the UAE.

Applicability of Shari’a principles in the UAE

The main challenge in structuring and offering Islamic compliant products in the UAE is to bridge the occasional mismatch between the laws of the UAE and the principles of Shari’a.

In many instances, the provisions of the UAE law are reflective of Shari’a principles, such as the pre-requisites relating to capacity to contract, the requirement for clarity of contractual terms, the absence of duress and the specific conditions governing sale and purchase transactions. In these instances, such transactions are fully compliant with both Shari’a elements and UAE law from the outset.

In other cases, the provisions of the UAE laws are inconsistent with Shari’a principles. For example, the charging of interest is generally permitted under UAE law as long as it is not unduly excessive (this being reflected by the flourishing conventional banking system in the UAE). However, interest is strictly prohibited under Shari’a, no matter how nominal the amount. Similarly, while it is not illegal under UAE law to deal with certain items such as pork products and the entertainment industry, these are prohibited under Shari’a. In such cases, it is best that these restrictions and prohibitions are eliminated from the financing structure and, where applicable, removed from the relevant agreements in order to ensure Shari’a compliance.

Less clear are transactions falling within grey areas, where UAE laws are silent and customary practice offers little guidance. An example is the legally untested area of derivatives transactions. From a Shari’a perspective,
there are concerns that the speculative and uncertain nature of derivatives may breach Shari’a provisions. However, UAE laws are silent on this issue, and market practice has not developed to such an extent as to provide conclusive guidance. As the courts are permitted to refer to the Shari’a in the absence of clear legislation and established customary business practices, it is likely that courts will rely on the Shari’a criteria in analyzing the legality of a derivatives transaction.

**The role of Shari’a pronouncements**

It is standard practice for each Shari’a product to be structured and certified as Shari’a compliant by Shari’a scholars or experts (who are usually appointed by the Islamic financial institutions). Once a product is offered to the public by a licensed financial institution in the UAE, it would be reasonable to assume that such product has undergone legal and Shari’a analyses before approval was granted for such product to be made available to the public.

However, while such pronouncements formalizes the approval from the Shari’a perspective, they have no binding effect. The UAE courts are not compelled to take the Shari’a pronouncements into consideration when determining a case, and will most likely simply rely on the terms of the contract.

**Disputes under Shari’a financial transactions**

Should a dispute be brought to a UAE court, the court is unlikely to apply a different treatment to the dispute solely on account of the transaction being Shari’a compliant. The dispute will be subject to the same processes and procedures as a conventional financing counterpart.

The courts will also apply the laws of the UAE in determining the case. Notably, if a document purports to be governed by Shari’a law, courts will likely disregard such choice of law, and will instead apply the applicable UAE laws. To maintain the legal enforceability of an agreement, it is prudent that all the elements necessary for Shari’a compliance purposes are contractually provided for within the body of the agreement itself. Notably, under the Civil Code, where the intention of the parties is clear from the language of the contract, the courts will not imply any further meaning or additional terms to the contrary. Save in the cases where the contract was unclear and the provisions of the law and customary practice are silent on an issue, the UAE courts are unlikely to examine the Shari’a aspects of a document.

**Shari’a products offered in the UAE**

The Islamic financial institutions within the UAE offer many mainstream products that one would expect to find, such as ijarah, murabaha, mudaraba and istisna. These are both from the loan and deposit aspects, and are fully supported by the normal ancillary services such as the provision of chequebooks, internet banking and Shari’a compliant credit cards. It is a Shari’a requirement that all Shari’a structures must comply with the laws of the jurisdiction in which it is made available. For that reason, due to legal limitations, certain products such as those which involve trust arrangements or beneficial ownership over land, are not offered in the UAE, as their structures are incompatible with UAE land laws.

**Security arrangements for Shari’a financing**

Security arrangements for Shari’a compliant products are similar to their conventional counterparts, with modifications to remove elements of interest. One can therefore expect to find the standard security documents such as mortgages, assignments over assets, pledges and guarantees. While the suitability of such security arrangements depends on the underlying Shari’a structure, such security documents will be enforced by the UAE courts provided that they have been duly perfected under UAE law.

As a general overview, the UAE Civil Code has a strong Shari’a foundation which supports the proper regulation of Islamic financial mechanisms. Due to economic realities, certain mismatches between UAE laws and Shari’a principles exist, however, such incompatibilities are minimal compared to other major financial jurisdictions.
2010 brought about significant changes for contractors and consulting engineers in Abu Dhabi with the introduction of new regulations relating to the classification of contractors ("Contractors") and engineering consulting offices ("Consultants"). These new regulations will mean that all Contractors and Consultants must obtain a classification certificate as well as a commercial licence before they can tender for, or undertake work on, a construction or engineering project in Abu Dhabi.

**The Regulations**

The relevant changes to the legal regime for Contractors and Consultants arise from the following regulations and related resolutions:

1. Regulation No. (2) of 2009 Concerning Contractor Classification in the Emirate of Abu Dhabi and its associated instructions under Administrative Resolution No. (56) of 2010 Concerning Instructions for Contractor Classification; and
2. Regulation No.1 of the year
2009 Concerning Engineering Consulting Office Classification in the Emirate of Abu Dhabi and Administrative Resolution No. (58) for the year 2010 concerning instructions on Engineering Consultancy Offices Classification; with each set of regulations and resolutions implementing separate regimes for Contractors and Consultants.

Whilst the two regimes are broadly similar in their framework, the requirements for classification and certain minimum thresholds required to qualify to operate on projects of differing sizes are specific to each regime depending on various components of the applicant’s business.

**Effect of the Regulations**

Classification is mandatory for all Contractors and Consultants and will be required in order for them to carry on business in Abu Dhabi. Under the regulations, existing Contractors and Consultants will have until the end of 2012 to obtain classification and new businesses will have one year from the date of issue of their commercial licence to comply.

Classification is required regardless of whether a Contractor or Consultant is operating as a branch of a foreign company, or whether it is a locally incorporated limited liability company. While obtaining a commercial licence for a new business is the first step towards operating as a Consultant or Contractor in Abu Dhabi and is necessary to enable the business to hire staff or sign up for utilities connections etc., a new Consultant or Contractor will not be able to execute or engage in projects until it has completed the classification process. Once classification is obtained, the Consultant or Contractor will be recorded in a Consultants/Contractors registry maintained at the Abu Dhabi Department of Economic Development (“DED”). Existing Contractors and Consultants who are already operating will generally be permitted to complete projects that have already commenced, but should obtain classification before they commence any new projects. However, in some cases a non-objection certificate may be obtained from the Consultant’s/Contractor’s department at the DED to permit work on new projects while the application for classification is being processed.

Obtaining classification allows Contractors or Consultants to tender for and work on construction and engineering projects in Abu Dhabi. The value of the project, which a Contractor or Consultant wishes to engage in, will determine the requirements that the Contractor or Consultant must fulfil in order to obtain the requisite classification. The Consultant/Contractor must always conform to the category under which its business is classified.

**Classification Procedure**

Contractors or Consultants can apply for classification for one or more specialisations within various fields of contracting or consultancy specified in the regulations. The fields of activity differ for Contractors and Consultants. The Contractor or Consultant may then apply for and be awarded classification at certain specific graded levels. The level at which a Contractor or Consultant is classified will determine the range of value of projects that the Contractor or Consultant will be permitted to engage in. As classification may be requested for one or more specialties, a Contractor or Consultant may obtain different levels of classification for its different specialisations.

The Contractor or Consultant will be eligible for classification at particular levels depending on certain criteria relating to its business, for example:

- the number, academic qualifications and relevant professional experience of its technical staff (engineers/architects) and accounting staff;

- the legal form of the business (LLC/branch of a foreign company), its ownership and the technical qualifications of its proprietors;

- the details and values of the projects which the Contractor/Consultant has completed in the past (previous experience of shareholders of a company or of a branch office registrant within and outside of the UAE may be considered in certain circumstances);

- the details of its financial standing, in particular, taking account of its paid-
up share capital and the value of its asset base; and
- the details of its health, safety and quality certifications and the level of insurance cover it holds.

Each level of classification requires proof of compliance with particular thresholds pertaining to the above criteria. In its application for classification, a Contractor or Consultant must demonstrate that it meets the criteria for the level at which it wishes to be classified.

Effect of Classification

The level at which a Contractor or Consultant is classified will determine the monetary thresholds applicable to projects which the classified Contractor or Consultant may participate in, as well as the ongoing requirements that the Contractor or Consultant must satisfy as part of its maintenance of classification. For example, Contractors with a “Special” level of classification may participate in the largest projects (over AED100 million for Contractors and over AED70 million for Consultants), but are subject to the most onerous requirements in terms of obtaining and maintaining classification.

Classification Process

In order for a Contractor or Consultant to obtain classification under the Regulations, it must submit an application to the Consultant’s/Contractor’s department within the DED in Abu Dhabi along with all the documents relating to its business and evidencing its past experience, its staff qualifications and experience, financial standing and its health and safety and insurance records.

The process of gathering the requisite documentation in order to obtain classification may take several weeks. Once an application is approved, it will be recorded in the appropriate register in the DED and the Contractor or Consultant will be issued with a certificate of classification. The certificate will include the date of classification, its term of validity, levels of classification, field and specialisations. Under the new regimes, classification certificates will be valid for two years.

However, it is arguable that the requirements of the new classification regime are proportionate given the importance and desirability of contractors and engineers being properly regulated and supervised, ensuring due compliance with health, safety and environmental standards in Abu Dhabi as well as ensuring the quality and safety of infrastructure and building projects for developers, investors, commercial occupiers and residents alike.

Summary

All Contractors and Consultants in Abu Dhabi will need to be aware of the new classification regime and determine what level of classification will be required for them to be involved in forthcoming or anticipated projects.
In the Gulf region, the most commonly used form of building contract is the 1999 Conditions of Contract for Construction prepared by FIDIC – The International Federation of Consulting Engineers (the ‘Red Book’). This is a traditional form of contract where the employer appoints its own designers to design the works and the contractor is only responsible for constructing the works to the employer's design.

In recent years the 1999 FIDIC Conditions of Contract for Plant and Design - Build (the ‘Yellow Book’) has also become more widely used. Under this form of contract the contractor accepts responsibility for both the design and construction of the works and the resulting single point responsibility is seen as being a significant advantage for employers.

However neither of these forms of contract is suitable for use where infrastructure projects are concerned, for example oil, gas or petrochemical plants or where the project is financed through third party lenders. FIDIC recognised this throughout the 1990’s and in 1999 published its Conditions of Contract for EPC / Turnkey Contracts (the ‘Silver Book’). The introductory note to the Silver Book states that “during recent years it has been noticed that much of the construction market requires a construction contract where certainty of final price and often of completion date are of extreme importance. Employers on such turnkey projects are often willing to pay more - sometimes considerably more - for their project if they can be more certain that the agreed final price will not be exceeded”. The note continues “for such projects it is necessary for the contractor to assume responsibility for a wider range of risks than under the traditional Red or Yellow Books”.

The aim of the Silver Book is therefore to transfer certain risks (which would normally fall to the employer) to the contractor in order to achieve a degree of time and cost certainty while recognising that contractors will, of course, price the degree of risk they are expected to bear. The upshot is that employers will, in all likelihood, pay more for a project procured under the Silver Book that they might otherwise do, were the same project procured under say the Yellow Book. However in return employers achieve a greater
degree of time and cost certainty which is appealing to banks and lenders. This article highlights some differences between the risk allocations of the Yellow and Silver Books.

**Ground Conditions**

The issue of responsibility for the physical conditions of the site is an example of risk transfer under the Silver Book. The Red and Yellow Books (at clauses 4.10 to 4.12) treat this issue in the same manner. The employer is required to have made available to the contractor all relevant information in his possession prior to the base date on sub-surface and hydrological conditions at the site. The contractor is responsible for interpreting this data.

The contractor is deemed to have obtained all necessary information as to risks, contingencies and other circumstances that may affect the tender or the works, although this investigation is limited to the extent practicable taking account of cost and time. The contractor is also deemed to have satisfied himself as to the sufficiency of the accepted contract amount however the contractor is deemed to have based the accepted contract amount on the data and interpretations referred to above.

Notwithstanding these provisions, the existence at the site of unforeseen physical conditions will allow the contractor to claim an extension of time and payment of any additional cost incurred provided the contractor complies with the relevant procedural requirements and the condition is ‘Unforeseeable’ as defined in the Red and Yellow Books.

The position is however different under the Silver Book as while, according to clause 4.10, the employer is to make available to the contractor all relevant data in his possession on the subsurface and hydrological conditions at the site, the employer shall have no responsibility for the accuracy, sufficiency or completeness of such information. The contractor is responsible for verifying and interpreting the data and the contract price is stated to cover all of the contractor’s obligations under the contract. Under clause 4.12 the contractor is deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may affect the works and by signing the contract the contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the works. The contract price shall not be adjusted to take account of any unforeseen difficulties or costs.

Under the Silver Book therefore the risk of unforeseeable ground conditions falls to the contractor. While the contractor will undoubtedly allow for this in his tender, lenders and employers are afforded certainty with regard to their potential exposure to additional costs in this regard. Where employers are not willing to pay for this certainty an alternative form of contract should be used.

**Design**

Design is another area where the contractor’s obligations under the Silver Book, differ from those under the Yellow Book. Both contracts impose a fitness for purpose obligation on the contractor which is a high standard to comply with in the first place. However under clause 5.1 of the Yellow Book the contractor is to review the employer’s requirements after receiving the notice of commencement and to give notice to the engineer (within a certain number of days to be agreed on a case by case basis) of any fault, error or defect found in the employer’s requirements. On receipt of the notice, the engineer shall determine whether a variation is to apply. If an experienced contractor exercising due care would have discovered the error, fault or other defect before submitting the tender, the time for completion shall not be extended and the contract price shall not be adjusted.

In addition, under clause 1.9, if the contractor suffers delay or incurs cost as a result of an error in the employer’s requirements and an experienced contractor would not have discovered the error when conducting the clause 5.1 review referred to above, the contractor shall notify the engineer and shall be entitled to an extension of time and payment of its costs plus reasonable profit.

The test therefore is whether an experienced contractor would have found the error when conducting his previous reviews of the employer’s requirements. If not, the contractor shall be entitled to relief.

As would be expected, a different line is taken in the Silver Book. Clause 5.1 of the Silver Book provides that the contractor shall be responsible for the design of the works and for the accuracy of the employer’s requirements except in four limited circumstances. The employer is not responsible for any error, inaccurate or omission of any kind in the employer’s requirements and any data received by the contractor from the employer or otherwise shall not relieve the contractor from his responsibility for the design and execution of the works.

This clause coupled with the contractor’s liability under clause 4.12 for unforeseen difficulties (referred to above) and the overall fitness for purpose obligation means that the contractor is under significant obligations with respect to design (including any design which may be contained in the employer’s requirements). While it is open to the contractor to negotiate on these points, the single point of responsibility of the contractor is likely to be on the employer’s “wish list”, even if it means that the employer will pay more for the works than would otherwise be the case.

**Other Risks**

The Silver Book imposes additional risks on the contractor in other areas too. Examples include the provisions regarding extensions of time and employer’s risks. In relation to extensions of time, the contractor is not entitled, under the Silver Book, to extensions of time in respect of exceptionally adverse climatic conditions or for unforeseeable shortages in the availability of personnel or goods caused by epidemic or governmental actions. The contractor is entitled to an extension of time in respect of these events under the Red and Yellow Books.
Under clause 17.3 of the Red and Yellow Books the employer assumes the risk of the occurrence of certain events. Under the Silver Book the contractor bears responsibility for the following risks, the occurrence of which would be an employer risk under the Red or Yellow Books:

- Use or occupation by the employer of any part of the permanent works, except as may be specified in the contract.

- Design of any part of the works by the employer’s personnel or by others for whom the employer is responsible.

- Any operation of the forces of nature which is unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative measures.

EPC contracts are, by their nature, different to traditional or design and build forms of contract and are intended for entirely different types of project. The risk allocation contained in them means that the contractor is required to assume a greater degree of risk, although the rewards for the contractor can also be greater, especially if the priced risks do not arise. Many of the risks referred to in this article will be the subject of negotiation but in today’s market, where projects are few and contractors are many, contractors might be willing to assume this degree of risk. In addition the types of projects to which EPC contracts are suited are often highly complex and there are often a limited number of contractors with the skills and experience to perform the relevant works. In such cases it is perhaps proper for contractors to assume a greater degree of risk as they are best able to manage the occurrence of those risks and to mitigate the consequences of those risks should they occur.
In Part 1 of this article, I sought to introduce and outline the first stages of the life of a hotel - from inception through to opening. My intention was to present a simple account, for the benefit of hotel developers and owners, of the hotel development process and to show just how complex this process can be. In terms of the interaction between owner and operator, the article also sought to highlight how this relationship works, and how important it is to develop the relationship at the very earliest stages of the project.

Part 2 is the final part of my article, and follows the process through the construction stage to fit-out and procurement, appointment of the hotel personnel, pre-opening activities and finally, to opening.

Construction and beyond...

The nature of the project will dictate what is required in terms of construction. The process will differ depending on what is required, i.e. construction of a new hotel, completion of construction of a partially built hotel, or refurbishment/renovation of an operational hotel.

Renovation/ refurbishment of an operational hotel will bring additional complications and considerations. In most ways, this situation raises the greatest risk to owner and operator alike, and will require the most management by all parties to ensure that it is successfully executed with minimal impact on the operator, guest experience and revenue.

Once schematic design is completed (incorporating the operator’s input to ensure compliance with its brand standards and requirements), the owner can finalise the pricing and programme. The owner can then also commence the tender process for appointment of its contractor.

The owner’s professional consultants should advise on the type of procurement method best-suited to the project. This advice will structure the
construction process, the team and the type of construction contracts to be entered into. The owner’s consultants will assist in putting together the tender package and will identify suitably qualified, experienced and licensed contractors who should be invited to tender for the construction works.

In the event that the project is the completion of a partially built hotel, it may be that the best advice for the owner is to re-engage the original contractor for completion of the works. This would be appropriate where the quality of the work is acceptable and will avoid the need to find another contractor who is willing to take responsibility (and liability) for the existing works – something which is often difficult to achieve and will come at a cost to the owner in any event.

Once the contractor has been appointed and the project costs and programme set, detailed design of the hotel can be finalised and fed to the engineer and contractor, and physical construction may commence (subject to obtaining all necessary approvals).

Throughout the construction process, the operator and the owner should continue to work together, to ensure that the operator remains fully involved in the design process, so that each stage of design and construction can be signed-off by all parties. It is inevitable that issues, problems and delays will arise at some point, and this is where a cohesive and communicative relationship between owner, operator, professional team and contractor will prove to be of benefit. The construction process very rarely runs smoothly, and it will save time and money in the long term to deal with any issues quickly and pro-actively.

Completion of the detailed design will also enable the owner to fix specifications of all furniture, fixtures and fittings, thereby allowing these items to be procured. It is important to get the timing of this right and to work backwards from the estimated project completion date, ensuring that items with the longest lead times for order and delivery can be procured first. If things do not go as expected, further changes should be necessary. It is inevitable that issues, problems and delays will arise at some point, and this is where a cohesive and communicative relationship between owner, operator, professional team and contractor will prove to be of benefit.

**Mockup and benchmark rooms**

Completion of the detailed design will also allow the creation of a ‘mockup room’ for each room type, for inspection and acceptance by the operator. Sign-off of the mockup room establishes and fixes the design, layout and specification of the rooms and no further changes should be necessary.

Also, during the construction and fit-out process for the rooms, a ‘benchmark room’ should be established for each room type. Whilst the mockup rooms fix design, layout and specification, the benchmark room fixes quality, actual construction processes and finished detail of the rooms. This serves as a marker for all those engaged in the construction, (from the plasterers to the electricians, the plumbers to the carpenters), and the benchmark room should not be deviated from, either in process or finishing quality.

**Completion**

Upon completion of the construction works in accordance with the construction contract, the owner’s engineer will issue a certificate of practical completion. This is issued subject to a defects liability period (usually of 12 – 24 months), and any snagging or minor defects will be remedied. The authorities will also be required to issue a completion certificate, a permanent utilities connection, and ensure that the building is approved and insured for occupation following inspection of the works.

Completion of the works pursuant to the construction contract is a major milestone - upon this date, the hotel is physically handed over by the contractor to the owner and the risk and responsibility for the property passes to the owner. The owner will, in turn, pass the responsibility for management of the hotel to the operator, pursuant to the terms of the hotel management agreement (and ancillary agreements, as appropriate).

**Pre-Opening**

Approximately 12 months prior to the estimated completion date, the operator must hire the executive personnel for the hotel. These are the people who will work with the owner to take the hotel through the pre-opening stages to opening and full operation. Generally, the hotel general manager, the sales and marketing director and the financial controller are among the first employees usually hired. The owner should be entitled to interview candidates proposed by the operator for these roles and to approve or reject such candidates.

The 12 months leading up to the opening date are busy for the operator – it is during this time that the sales and marketing strategy plan for the hotel must be put together, the pre-opening budget compiled for agreement by the owner, the first annual operating budget and performance forecast is compiled, cashflow forecasts and working capital requirements are prepared, and the rank and file hotel staff employed and trained. It is also an expensive time for the owner, as they will now start to provide the working capital that the operator requires to implement all such things.

At the same time, the ff&e is being installed at the hotel and the
The construction phase is coming to a close. The operator will remain involved with completion of the hotel fit-out and decoration, protecting its brand throughout and ensuring compliance with the brand standards.

All the various operational licences must be applied for and obtained, including the liquor licence (if applicable) and local police/security department clearance in terms of surveillance and security systems at the hotel. Most of the operational licences will necessarily be applied for in the name of the owner, with the operator’s assistance. To facilitate this and the management of the hotel generally, it is usual for the owner to provide the hotel general manager with a power of attorney.

Where a hotel is operated under a management agreement (which is the most common form of agreement throughout the Middle East), then usually the owner will be the legal employer and sponsor of the hotel staff. Therefore, whilst the operator will manage the staff on a day to day basis, and the staff remuneration and benefits packages will reflect those implemented by the operator (either on a regional or international basis), the owner remains legally responsible for the employees, including payment of salaries and any end-of-service benefits.

In terms of marketing and advertising of the hotel, this period sees a gradual rise in activity, as the hotel will officially be included in the operator’s portfolio and customer loyalty programmes, and centrally marketed through its international sales networks for bookings to commence. Closer to the opening date, the hotel will also be marketed on a local and regional basis and events will be planned for the opening date. Sometimes, where the operator is comfortable to do so, a hotel may open on a ‘soft opening’ basis. This is a period prior to the official opening date where the hotel may be partially occupied and therefore not very busy with guests, which allows the staff a period of time to implement their training on a ‘live’ basis and to debug any problems that may arise.

The opening date...

At some point during the pre-opening period, the owner and the operator will agree and fix the official opening date of the hotel. This might be timed to coincide with a particularly busy period for the tourism industry specific to the location of the hotel, or with any major conferences, exhibitions or sporting/leisure events taking place within the vicinity of the hotel. Wherever possible, the intention should be to maximise the impact of the launch of the hotel and to capitalise on these events by attracting as many guests as possible. This should allow the hotel to firmly establish itself and commence development of its reputation and customer loyalty.

Completion of the hotel under the construction contract will be subject to snagging and rectification of any minor defects, and the operator will play an important part in logging all the various items with the owner, which will require such remedy by the owner’s contractor over the next 12 – 24 months. The operator will want these items to be remedied as swiftly as possible with as little inconvenience to the hotel operation as possible. Retention of a percentage of the construction costs from the owner until all the defects have been remedied also provides the contractor with an incentive to remedy as soon as possible.

The start of a beautiful relationship...

On the opening date, the development process (save for snagging) draws to a close and the operator assumes full responsibility for operation of the hotel and, hopefully, a return of profit to the owner.

The official launch of the hotel is an exciting time for all involved. It is the culmination of the hard work and endeavours by many individuals involved during the time leading up to this event. It may have been a very stressful or relatively painless process, but however the hotel comes into being, the road ahead should hopefully be the start of a long, fruitful and mutually beneficial relationship between owner, operator and of course, the guest.

This article was commissioned and first published in the May edition of Hotelier Middle East Magazine.
Executive Council Resolution No. (4) of 2011 ("Resolution No. (4)") has clarified whether or not tenancy contracts can be registered in Abu Dhabi. Law No. (3) of 2005 ("Law No. (3)") confirmed that leases of more than four years must be registered with the municipalities in Abu Dhabi City, Al Ain or the Western Region (the "Municipalities"). Law No. (3) also allowed discretion for landlords and tenants to voluntarily register tenancy contracts of less than four years. In practice however registration has only been undertaken for leases of more than four years.

Resolution No. (4) now requires the Municipalities to establish and maintain a register of tenancy contracts. All tenancy contracts of less than four years, whether existing prior to Resolution No. (4) taking effect on 31 January 2011 or entered into after that date, must now be registered. Landlords have until 31 July 2011 to ensure that all registrations have been completed.

If a tenancy contract has not been registered then it will not be recognised for transactions involving any government department, Abu Dhabi Distribution Company ("ADWEC") or Etisalat. If a tenancy contract is not correctly registered in accordance with Regulation No. (4) then the tenant could experience difficulties when applying for commercial licences and permits from government departments or when opening accounts with ADWEC and Etisalat.

Tawtheeq

Shortly after Resolution No. (4) was issued the Municipality of Abu Dhabi City introduced an online system known as Tawtheeq for the registration of letting properties and tenancy contracts throughout the Emirate of Abu Dhabi. The system will operate online and information will only be available to landlords and their appointed property managers. Tawtheeq will not require landlords to provide evidence of their ownership when registering properties, for example by providing a title deed, however cross-checks will be made with land registration records.

Terms of the Tenancy Contract

All tenancy contracts must be either in
English and Arabic or in Arabic only. Tenancy contracts in English only will be rejected by Tawtheeq. Certain key information must be included in the tenancy contract and this will be inputted into the Tawtheeq system. It is expected that Tawtheeq will publish a compulsory standard form tenancy contract which will set out this key information. Landlords and tenants remain free to negotiate the terms of their tenancy contract and when a standard form tenancy contract is released it will be possible to include special conditions. If special conditions are included in the tenancy contract then Tawtheeq will review the special conditions to ensure that they comply with the law. This review is expected to take approximately five days. If the special conditions are approved then Tawtheeq will register the tenancy contract. Tawtheeq will only allow registration of a tenancy contract that breaches the rent cap, currently set at 5%, if the tenant confirms that he understands that the tenancy contract will breach the rent cap.

**Registration Process**

Resolution No. (4) states that it is the responsibility of the landlord to register all data concerning their properties. Once the landlord has been registered to use the Tawtheeq system and has added details of all his lettable properties the registration process should only take a few minutes per property. The landlord will input details of each tenancy contract online and upload a copy of the signed tenancy contract. Tawtheeq will then send a PDF copy of the registered tenancy contract, which will include an individual bar code, by email to the landlord as an acknowledgement that the registration has been completed.

**Registration Fees**

When the landlord applies to register all the properties he lets with Tawtheeq a registration fee of AED1,000 per property will be charged. Once the landlord’s properties have been registered the grant, expiry or amendment of all tenancy contracts must be added. The current fee to register the grant of a tenancy contract is AED100 and the fee to register amendments to a tenancy contract or its expiry is AED50. It is the landlord’s responsibility to pay these registration fees however there is nothing to prevent the landlord passing on the cost to the tenant. New tenants would be wise to check that the landlord has registered the property before signing a tenancy contract in order to avoid difficulties and delays when dealing with ADWEC, Etisalat and government departments.

**Landlords failing to register**

If a landlord fails to register a property, a tenancy contract or amendments to a tenancy contract, then the tenant may apply to the Rental Disputes Settlement Committee (“Rent Committee”) to issue a judgment on the validity of the tenancy contract. If appropriate, the tenancy contract or amendment will then be registered with Tawtheeq and the cost of registration will be borne by the landlord. The Rent Committee will not hear any other complaint from the tenant until judgment on validity has been issued and the registration completed.

**Changes to Renewal Rights for Tenants**

Executive Council Resolution No. (56) of 2010 (amending provisions of Law No. (20) of 2006) will bring about a change in the rights of tenants upon expiry of all tenancy contracts and leases with effect from 9 November 2011. Under the current law, a landlord may not request that a tenant vacates premises at the end of the term of the tenancy contract or lease except in very limited circumstances. From 9 November 2011 a landlord will be entitled to request that a tenant vacates and may refuse to renew a tenancy contract or lease provided that the landlord has given the prescribed notice. At least two months’ written notice is required in the case of residential property and three months’ written notice is required for commercial property.
On 3rd May 2011, Qatar deposited its instrument of accession to the Patent Cooperation Treaty (PCT), and on 3rd August 2011, will become bound by the PCT. Consequently, Qatar came to be the 143rd PCT Contracting State.

Along with Qatar, there are now eleven Arab member states in the PCT. Along with Qatar, these are Algeria, Bahrain, Egypt, Libya, Morocco, Oman, Sudan, Syria, Tunisia and the United Arab Emirates.

Qatar issued its first patent law in 2006 by Decree Law No. 30 for 2006. The Ministry of Economy and Commerce is entitled to enforce this law, however this law has not yet come into force and there are no implementing regulations and no active patent office.

The Qatari patent law grants patents a term of protection for 20 years as from the grant date in Qatar, which looks a long term compared to the other PCT contracting states. The same law provides protection for all sorts of technologies, except the following:

- Scientific theories, mathematical methods, computer programs, perform metal activities and games.
- Plant varieties, animal species, or biological methods of producing plants or animals. Exceptions shall be allowed for the microbiological methods and their products.
- Diagnostic methods, treatments, and surgical operations needed for humans and animals.

The patent law grants owners of infringed patents civil and criminal remedies in addition to provisional measures. The penalty for any person who may infringe a patented invention can be imprisonment up to two years and/or a fine of up to 10,000 Qatari Riyal. The court may also order the confiscation of items ‘attached’ at the time the action was initiated or subsequently confiscated. The court may also order that the evidence of the illegal act, as well as the equipment and tools used in the infringement, be destroyed.

Despite the fact that there is no active patent office in Qatar, both nationals and residents in Qatar have the advantage to file international patent applications under the PCT as from 3 August 2011, by submitting their applications to any PCT Receiving Office (such as the International Bureau in Switzerland).

Clients who wish to obtain patent protection in Qatar may rely on the Gulf Cooperation Council (GCC) patent office, as the protection of GCC patents is extended to all member states of the GCC, namely, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates.
INTRODUCING OUR NEW PARTNERS

Al Tamimi & Company is pleased to announce the appointment of 7 new partners.

These new appointments further demonstrates our commitment to developing the finest legal talent in the Middle East, with each new partner having specialist legal skills and an ability to provide practical and innovative solutions for our clients based on sound business experience.

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AL TAMIMI & COMPANY
Advocates & Legal Consultants

المحاماة والاستشارات القانونية
TECOM SME BUILDER WORKSHOP OFFERS INSIGHT INTO INTELLECTUAL ASSET MANAGEMENT FOR SMEs

An initiative of Tecom’s Partner Development Management (PDM) department, the Tecom SME Builder event was held on 19 May 2011 at the Dubai Knowledge Village Conference Centre. As the Legal Partner for the event, Al Tamimi & Company presented two key topics for business owners who, throughout the day, were encouraged to ‘think big’. Partner and Head of Corporate Structuring, Samer Qudah provided some key considerations for business owners in the UAE through the expert roundtable discussions. Samer talked about key areas which owners need to take into consideration when structuring businesses in the UAE including business licenses held and activities conducted within the scope of such held licenses, work visas, work premises and corporate compliance. Also presenting at the seminar was Senior Associate, Stephen Jiew. Stephen delivered a presentation on “Intellectual Asset Management – A holistic approach in creating value”. Commenting, Stephen Jiew said, “Intellectual assets form the most valuable component of successful companies operating in the knowledge economy of today. Think Coca Cola, BMW, Rolex or Virgin, their intellectual assets are the reasons why the market is willing to pay a vast premium over the book value of these companies. Never has it been more critical than now in this prolonged economic recovery period to harness one’s intellectual assets to differentiate your business in this ruthlessly competitive business landscape.”

CLOUD COMPUTING AND DATA CENTRE ROADSHOW 2011

On 2 May 2011, David Yates, Head of TMT, gave a seminar at the Cloud Computing and Data Center Roadshow 2011 entitled “Cloud Services in the UAE: Legal risks and remedies for providers and users”. David was the only legal representative presenting at the conference, which brought together a range of cloud providers and potential cloud users to discuss developments in the technology and the availability of such services in the UAE. The cloud computing relationship is one that gives rise to considerable legal risks and good contract management is critical. David presented on a range of issues arising under UAE law and made recommendations as to how cloud providers and cloud users can protect themselves and come together to create a relationship of trust.

DUBAI CHAMBER OF COMMERCE AND INDUSTRY: POLISH TRADE MISSION – BUSINESS MATCHING

On 8 May 2011, Izabella Szadkowska, Senior Associate, Corporate Commercial Department, presented at the Dubai Chamber of Commerce and Industry on the subject of “Doing Business in the UAE”. The seminar was aimed at a group of Polish investors interested in establishing companies, branches or representative offices in the UAE as well as closer co-operation with companies in the UAE (particularly, contemplating joint venture, distributorship or agency arrangements). Izabella’s presentation formed part of a series of events held under the auspices of the UAE Ministry of Foreign Trade and the Embassy of Poland, in relation to the Annual Investment Meeting 2011 that was held in Dubai between 10 -12 May 2011.
PERSPECTIVES IN INTERNATIONAL ARBITRATION

On 16th May, PwC hosted a seminar in Dubai on Perspectives in International Arbitration. Essam Al Tamimi, founder and senior Partner of Al Tamimi & Company and other pre-eminent legal practitioners from the world of International Arbitration considered present and future trends with International Commercial and Investment Treaty Arbitration. Essam spoke concerning the future of Arbitration and Dispute Resolution in the current Middle Eastern Crisis. Commenting, Essam said “if there is any way that this current crisis can be described in a few words, it is the lack of liquidity of companies, the government and indeed clients. Half way through the crisis disputes arose and the number of arbitration cases has been doubling year after year throughout the international arbitration institutes, including those based in Dubai. A number of professional law firms, accountancy firms and other professional services firms have actually reallocated their resources to focus on the dispute resolution and arbitration departments to support the increased demands in dispute resolution and arbitration. Even companies that do not wish to litigate find themselves in litigation as a result of the knock-on-effect of the financial crisis, primarily due to non payment, insurance claims, and employee redundancies default on the part of the government or being joined into proceedings by a creditor or debtor in one form or another.”

AL TAMIMI & COMPANY ATTEND INTA

A delegation from the Intellectual Property Department comprising of Head of Department and Partner Omar Obeidat, Faisal Daudpota, Munir Suboh and Shernaz DeSa. attended the 133rd Annual meetings of the International Trademarks Association (INTA). This annual convention attended by nearly record of 9,000 participants from 140 countries representing brand owners and trademark attorneys and professionals was held in San Francisco California. Faisal Daudpota moderated a seminar on the 17th May at the 133rd Annual Meeting of the International Trademark Association (INTA) entitled, ‘Regional Update – Middle East, India and Pakistan: The Status of Jurisprudence as to Well-Known Marks, Geographical Indications and Anti-counterfeiting’ INTA’s Annual Meeting is the trademark community’s premier event for networking, continuing legal education, and committee and client meetings.

IACC 2011 ANNUAL SPRING CONFERENCE EXPLORING GLOBAL GATEWAYS: IMPACT OF THE INTERNET

On 12 May 2011 in San Francisco, both Omar Obeidat Partner and Head of Intellectual Property and Senior Associate Faisal Daudpota, Head of Data Privacy & Information Security, presented at the 2011 Spring Conference of the International Anti Counterfeiting Coalition (IACC). In their two presentations the lawyers addressed the transhipment of counterfeit goods in the Middle East. Omar focused on Trends, Disguise methods in transhipment and re-export of counterfeit goods and explained the role of Customs authorities in anti counterfeiting and border measures. Faisal’s presentation entitled, ‘Follow the Goods – Delivery, Fraudulent Documentation and Redistribution by Region’, Faisal discussed what happens when counterfeit pharmaceutical or tobacco goods are transshipped through the UAE and what enforcement and legislative solutions can be adopted to reduce transshipment of counterfeit goods.
We will be honoured to welcome Nobel laureate, seasoned diplomat and international lawyer, Dr. Mohamed ElBaradei as this year’s Opening Ceremony Keynote Speaker. Dr. ElBaradei emerged as a high-profile opposition figure in the Egyptian protests that culminated in Hosni Mubarak’s resignation. He continues to be a voice for change in Egypt’s march toward democracy, calling for open dialogue, transparent legal standards and respect for human rights.

REGISTER BY **29 JULY** TO RECEIVE EARLY REGISTRATION DISCOUNT
Dubai will be the destination for international lawyers to congregate for the International Bar Association’s (IBA) 2011 Annual Conference. The event is at the forefront of bringing the international legal fraternity together, and typically assembles lawyers from across the globe – representing more than 120 nations. This year’s Conference will take place in Dubai between 30 October and 4 November 2011 – making it the first time in the 64-year history of the Association that the Middle East will host the event.

Established in 1947 in New York – in the year of the drafting of the United Nations Universal Declaration of Human Rights – the International Bar Association is the world’s leading organisation of international legal practitioners, bar associations and law societies. Its membership includes over 40,000 individual international lawyers from most of the world’s leading law firms and almost 200 of the world’s bar associations and law societies.

Initially, the membership of the IBA consisted entirely of bar associations and law societies, as the Association was established after the Second World War – in the belief that a ‘Bar of the World’ could make a contribution to post-war reconstruction and assist in bringing about worldwide stability, understanding and peace. As good governance and the rule of law have been increasingly recognised by international organisations, both in the realm of international justice and in the commercial sphere, as essential to economic growth and stability, the need to look to appropriate bodies for ideas, leadership, guidance and support has expanded. The IBA’s unique position as the global voice of the legal profession has thus given it an important role to play in promoting and advancing the rule of law internationally.

The IBA has accordingly been active in initiatives such as the training of lawyers in emerging jurisdictions, as for example, the judges and prosecutors of post-conflict Iraq in international human rights law, and in the establishment of the first Bar Association for Afghanistan.

Further, the steady march of globalisation has brought with it sustained growth in cross-border legal work. The IBA has been active in this area by suggesting ways to harmonise law across borders in order to make the international economy more productive and efficient, sometimes by bringing together regulators and practitioners to identify unnecessary variations, blockages and impracticalities, or to spread best practice.

It is through its vast network and partnerships with other global bodies, including the Organisation for Economic Co-operation and Development (OECD) the United Nations Global Compact, the Financial Action Task Force (FATF), and the World Trade Organisation (WTO), that today the IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. The Association’s work is expanding at a remarkable pace, reflecting a growing recognition around the world of the central importance of justice to economic growth and stability. The IBA Rules on the Taking of Evidence in International Arbitration is an example of this and is used globally as a vital component of arbitral proceedings. Work with partners includes the recent launch of the video training guide entitled Lawyers as Leaders: The Essential Role of Legal Counsel in the Corporate Sustainability Agenda. Produced in partnership with the United Nations Global Compact, its aim is to increase awareness of international standards and legal frameworks relevant to business for human rights; anti-corruption; environment; and labour standards. Similarly, the IBA works with the FATF, the inter-governmental organisation addressing the agenda for anti-money laundering legislation worldwide.

In today’s world, there is an increasing demand for international awareness, dialogue and facilitation, and in some areas, for rules and guidelines. This has enticed more people and institutions to look to the IBA for its legal expertise, as seen with regard to the global financial crisis which broke out in 2007, having a disastrous effect on the world economy. As the causes and implications of the crisis became clearer, the political leaders of the major countries of the world agreed that substantial changes needed to be made to the existing ‘regulatory architecture’ of the world’s financial markets as well as to the rules applicable to financial market activity. The legal issues involved are intricate and complex, so, with a view to contributing to the search for efficient and lasting solutions to the problems confronting the world’s financial markets, the IBA set up a task force on the financial crisis. This comprised leading legal practitioners and academics focusing on financial regulation. The IBA was able to provide global expertise in relation to the legal framework of financial market regulation and offer objective commentary on, and suggestions for, the reform agenda from a legal perspective.

Such initiatives are showcased on the IBA’s website, in its many specialist publications and 30 plus seminars, and at its Annual Conference, the central place of which in the international legal calendar confirms the Association’s ever-growing relevance to twenty-first century global priorities.

The IBA’s administrative office is in London, England with regional offices located in Sao Paulo, Brazil and Dubai, United Arab Emirates.

Further information about the IBA can be found on the IBA website: www.ibanet.org
The term “cloud computing” is often used to describe a broad range of remote access computing services, many of which have been around for a number of years. However, these days a cloud computing environment is generally one in which users have access to applications and data storage services on demand and delivered over an external network, on a user-pays basis. Providers also draw a distinction between public and private clouds, but the focus of this article will be on public cloud services.

The term “legal risks” in this context refers to issues that may expose a cloud provider or user to legal liability, issues which arise from an applicable legal system, and issues which can and should be addressed from a legal perspective in order to create an effective and trustworthy cloud services relationship. The UAE does not have a comprehensive set of laws, regulations and/or official standards specifically for the provision of cloud computing services, and general laws apply. In the absence of a prescriptive legislative framework, however, providers and users must come together in a relationship of trust in order to facilitate the use of a financially advantageous service relationship.

In terms of risk management, users of cloud services are often placing in the hands of third parties responsibility for direct control of critical data and applications. If there is an outage or a security breach, the cloud user could be exposed to claims from its own customers, a failure in business continuity, and potentially reputation damage, even though the cloud provider or a third party telecommunication service provider was responsible for the default. Many SME’s will investigate cloud services and be presented with a service contract which offers the cloud services “as is”, without the cloud provider assuming any risk, and with an exclusion of the cloud provider’s liability to the extent permitted by applicable law. Whether or not a cloud provider and cloud user negotiate a services contact will depend on the parties and the value of the contract. However, even if SME’s must accept stand terms without negotiation they should conduct serious due diligence and contingency planning to mitigate exposure to legal risks.

The claims which a cloud user may bring against a provider when things go wrong, outside the scope of contractual rights, are limited and may not prove to be effective – particularly if the cloud provider is located offshore. For instance, claims for compensation under the UAE Civil Code (number 5 of 1985) will require the cloud user to prove the value of the loss claimed, and this might be difficult. The UAE Federal Law number 2 of 2006 concerning Cyber Crimes focuses on the criminal actions of the hacker, but does not provide a framework which specifically addresses the claims which a cloud user may have against a faulty cloud provider. Other than the law applicable in the DIFC, there is no single data protection / privacy law in the UAE, and the range of laws which speak about the protection of secrets (for instance the Penal Code) do not provide a detailed legislative framework that might protect cloud users from the mishandling of personal and sensitive information. The UAE does not have an information security law as such. However, there can be information security policies which are of vital importance to individual organizations and government departments. For instance, the Abu Dhabi System and Information Centre has developed and implemented an information security policy under Federal Law number 1 of 2006 concerning Electronic Transactions and Commerce with which Abu Dhabi government entities must comply. Ironically, this places added pressure...
on Abu Dhabi government entities who wish to outsource applications and data storage to a cloud provider, as it is the government entities who nonetheless remain subject to the obligation to be compliant with the ADSIC information security policy.

In the space available it is not possible to consider all of the legal / contractual issues arising, and the following points are a summary of some key issues:

• Data location – Users must consider the impact of the various UAE laws governing the privacy of secrets on the collection and transfer of data to the cloud provider, and the movement of that data across different jurisdictions as part of the provision of the cloud service. Further, what will be the impact, upon the delivery of the cloud services, of the various laws governing data transfer and use which are applicable in the different jurisdictions across which the data is moved?

• Record retention obligations – Under Federal Law number 18 of 1993 Commercial Transactions Law, organizations in the UAE have clear record retention obligations. Under that law, and under the Electronic Commerce and Transactions law, many such records may be kept in electronic form. However, if data storage obligations are outsourced to a cloud provider, the UAE company must ensure that there are adequate protection mechanisms such that a failure by the cloud provider does not result in the UAE company failing to comply with its local record retention obligations.

• Data ownership – Under the cloud arrangement, the cloud user will generate data in the ordinary course of business which is stored in the cloud. However, the cloud provider also will be creating data in relation to the cloud user. The cloud user’s ownership rights over all data which it creates and which is created on its behalf by the cloud provider must be firmly established in the service contract.

• The providers in the cloud relationship – Cloud services can be provided by multiple parties working together, and sometimes the user may not appreciate the different parties involved. It is important for the cloud user to know whether it has a directly enforceable contract with the key players in the relationship or whether it is relying on those with whom it does have a contract to enforce relevant terms against other providers.

• Data security – The cloud user will have its own data security and access management policy internally. The cloud user must determine how to ensure that its security measures are reflected in the data hosting service offered by the cloud provider.

• Availability – Cloud computing services inevitably will experience outages and performance slowdowns. While a provider may agree in a contract to give 99.95% reliability excluding scheduled maintenance downtime, the cloud user must nonetheless have sensible options if, for whatever reason, the cloud provider cannot meet that target.

• Planning for the end of the cloud services relationship – Cloud users must avoid a situation, to the extent possible, where the applications and data storage mechanisms which they are provided by a cloud provider do not lock the user into the provider’s services, in that a transition to another provider may not be possible without expending significant cost and time in restructuring.

Cloud users should conduct thorough due diligence of the provider they are considering and in particular focus on the privacy and security levels of the services to be offered. It is in the interests of cloud providers to make this information available and for the parties to act reasonably in contractual negotiations in order to bring about a relationship of trust.
What is a Waqf?

Waqf is a concept which resembles closely the Anglo-American trust. It is a form of endowment under which the ownership of assets is transferred to a juristic body (namely the Waqf), which manages the assets and the fruits of the assets for named beneficiaries for a defined period of time.

The Emirate of Sharjah (by Law No. 4 of 2011) has now introduced a special decree facilitating the establishment and operation of Waqfs.

Why was the Sharjah Law Needed?

Islamic Sharia law has developed the concept of the Waqf and also legal rules on how Waqfs are to be regulated or governed. However, there is not complete consensus amongst Sharia scholars on some of the base legal principles concerning Waqfs. This has created areas of uncertainty in Islamic jurisprudence and led to the Waqf being rarely used as a vehicle for asset management. Because there was previously no secular civil law to use as reference source and rely upon in creating Waqfs, or settling their terms and conditions, most Waqfs were vulnerable to challenge due to this unsettled and contentious Sharia jurisprudence.

Although Waqfs are not infrequently used to manage small assets, the use of a Waqf structure previously carried high risks when administering large and highly significant assets, where challenges to the Waqf and its administration were more likely.

What are the Key Terms of the New Sharjah Law?

The Sharjah law requires the settlor/creator of a Waqf to decide and record their wishes on several subjects. The most important are:

- the assets to be transferred;
- the beneficiaries of the proceeds of the assets; and

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the governance/management of the Waqf.

A Waqf deed needs to be drafted and certified by the competent judge at the Sharjah Court. The Waqf, once certified, acquires full and separate artificial legal personality as provided under Article 16 of the Sharjah Waqfs Law. This legal personality enables the Waqf to operate autonomously in carrying out the objectives set by the Waqf’s creator.

The law mandates that a coherent management structure must be put in place. Articles 37 to 50 of the Sharjah Waqfs Law regulate the management of Waqfs. The management of any Waqf is to be conducted by a trustee or a board of trustees. The trustee or board of trustees is authorized to act on behalf of the Waqf. The new law contains provisions designed to ensure that any trustee acts in good faith and in line with the objectives of the Waqf. It is an option open to a settlor/creator to assign the management of the Waqf to a new statutory body created by the Sharjah law, namely the Waqf General Secretariat.

Article 8 of the Sharjah Waqfs Law lists the types of assets which are able to be owned and managed by a Waqf. The traditional view was that Waqfs could own only immovable assets. However, Article 8 of the new law now provides explicitly that movable as well as immovable assets may be transferred to a Waqf.

Moreover, the law provides that interests in movable and immovable assets held in common with other owners or parties may be validly transferred to a Waqf, even if the assets concerned are under common ownership, provided that the transfer does not harm the interests of the other owners or partners.

Article 8 further makes it clear that Waqfs may own all kinds of securities, trade names, moneys and intellectual property rights.

Conclusion

The Sharjah Waqfs Law means that Waqfs are no longer a risky option to adopt as an ownership structure. The absence of a secular civil source code to rely upon was previously the main deterrent against establishing a Waqf. Fortunately, the new Sharjah Waqfs Law covers most aspects of the Waqf structure and provides answers to many questions. Accordingly, the risk of a successful challenge to a Waqf duly established under this new law should be minimal.

In light of the new Sharjah Waqfs Law, there is a possibility that this long dormant form ownership structure will be revived, particularly as its unique attribute is that it is a Sharia compliant vehicle for owning and managing assets.

"In light of the new Sharjah Waqfs Law, there is a possibility that this long dormant form ownership structure will be revived, particularly as its unique attribute is that it is a Sharia compliant vehicle for owning and managing assets."
The UAE is a federacy of seven states. Each state has its own ruler and the rulers together form the supreme counsel governing body of the UAE, with the ruler of Abu Dhabi as the president of the country and supreme commander of the army. Each Emirate is subject to its own local laws and regulations governing internal affairs. Matters related to the UAE as a whole legal body, would require a federal law or decree approved by the president of the UAE.

The UAE applies the “Common Customs Law of the GCC States” which is applicable in all GCC states, in which any commodities crossing the customs line, at importation or exportation, are subject to the provisions of this law. This law is approved by federal decree No. 85 for the year 2007. The commodities imported into the country are subject to the custom dues specified in the Customs Tariff issued pursuant to the Common Customs Law. There is no local UAE law regarding customs. Any laws or regulations issued in the UAE regarding customs are all subject to the Common Customs Law.

According to the Law no. 13 for the year 2007 of the import and export control, a committee named the “national committee of commoditisers that are subject to control of import, export and re-export” should be established under presidency of the representative of the ministry of economy. This committee should control the rules that regulate the affairs of import and export as well as provide the required technical
consultation concerning the non-violation of the states interest or the international conventions to which the state joined or approved.

Generally, most of the imported commodities are subject to 5% customs duty. Products such as tobacco and manufactures tobacco substitute’s are subject to 100% customs duty or on the minimum collectable rates basis, whichever is higher, as outlined in a specific table. Alcohol is subject to 50% duty of product value. There are 734 items exempt from the customs duty under the customs tariff, for example, certain animals, vegetables, plants, chemicals, and medicines, certain diamonds, silver, and gold, as well as carriages and accessories for those who are disabled. Helicopters, cruise ships and excursion boats are also exempt.

As long as there is an agent registered in the specified register maintained for this purpose by the UAE Ministry of Economy and Commerce, parallel importing is prohibited in the UAE. The Customs Departments, at the registered agent’s request, detain any products imported by any other person and deposit them in the port warehouses until the dispute is determined. This is of course a headache for inexperienced traders, agents and forwarders who allow cargo to be imported without first checking if the cargo has an agent registered in the UAE. A high proportion of cargo imported into the UAE perishes while waiting for disputes to be resolved concerning whether or not the cargo can be imported without the prior approval of the registered commercial agent.

According to Law No. 13, it is illegal to import any strategic commodity that forms danger against public safety, public health, environment, natural resources, and national security or for reasons related to the UAE foreign policy, taking into account any restrictions which may currently be imposed on those commodities according to the applicable legislations in the state. The UAE authorities are extremely strict and intolerant when it comes to cargo they believe jeopardizes or threatens national security. The mere discovery of an unannounced handgun with the master or crew member will lead to vessel detention, imprisonment of the master and a criminal action against the vessel and its owners. Finding smuggled and prohibited cargo on board a vessel will most probably lead to the vessel being confiscated.

Meanwhile, there is a list of prohibited products of which the import and export of is prohibited. In addition to drugs and radiation polluted substances, this list includes printed matters, paintings and drawings which contradict with Islamic teachings or decencies, used and inlaid tyres, children's toys in the form of a dinosaur and goods which consist of led.

One of the prohibited products mentioned in the list concerns those which are imported or exported to or from Israel. According to the federal law no. 15 for the year 1972 of the “Israel Boycott”, the Israeli products shall not be imported or exported from or to Israel. The decision by the Israel Boycott office prohibits goods from Israel, bearing Israel marks or logos. However, some goods imported from different countries and which have some small undetected Israeli made components would not cause
problems with customs.

If a cargo was shipped from a Malaysian port to Israel in transit through the UAE, the UAE authorities will not permit the shipment to continue its course to Israel. However, cargoes indirectly destined to Israel going through other ports should not be considered against the law.

The UAE applies the UN Security Council Resolution 1929 which relates to various issues and sanctions over Iran. In particular, the resolution requires implementation by the member States for certain financial directives which include primarily exercising vigilance over transactions involving Iranian banks in order to prevent such transactions contributing to the proliferation of sensitive nuclear activities or the development of nuclear weapons. The resolution further calls upon member states to implement measures which prevent the provision for any financial services (such as insurance; re-insurance; the transfer to or from such States’ territory; or to or by nationals or entities organised under such State laws; or financial institutions, other assets or resources) if such services, assets or resources could potentially contribute to the sensitive nature of Iran’s nuclear activities or the development of nuclear weapons.

The below prohibitions set out by the UN Security Council restrict the flow of importing and exporting commodities to and from Iran:

- Prevention of the supply or sale of vessels directly or indirectly, that may be used for the benefit of Iran, as well as any additional items contributing to enrichment-related, reprocessing or heavy water-related activities which may develop nuclear weapon delivery systems;
- Prohibit procurement from Iran, or using their flag vessels, whether or not originating in the territory of Iran any of the items mentioned in a specific list (with particular regard to Industrial Equipment, Test and Production Equipment, Equipment, Assemblies and Components (where applicable), Heavy Water Production Plant Related Equipment, and other “Trigger List” activities).

The UAE has undertaken several steps to implement the UN Sanctions against Iran. The main step being the issuance of a circular by the UAE Central Bank pertaining to Anti Money Laundering and the Combat of Terrorist financing. The circular outlines the requirements of the UN Security Council Resolutions including the freezing of suspicious accounts and recommending banks to conduct the necessary due diligence in relation to their correspondent banks in Iran. The UAE Central bank has informed all financial institutions in the country, including banks, to freeze all accounts and stop bank transactions as per the instructions of the UN Security Council based on its Resolution 1929 on Iran connection. Furthermore, the Central Bank has issued a circular listing Iranian entities with which UAE banks are not allowed to deal with under any circumstance. The circular states: “If you (banks) receive funds from a natural/judicial persons mentioned in the enclosures or in their favour, you are to freeze such funds immediately.” Currently there is no list issued by the UAE authorities detailing the banned items however; the banned items are similar to the circulars and directive issued by the UN in this regard. It should be noted that on 20th June 2010, the Dubai Financial Services Authority warned companies based in the free zones to conduct risk assessments when dealing with banks and other clients domiciled in Iran. The Dubai Financial Services Authority said that companies should “ensure that the due diligence processes for each correspondent bank domiciled in Iran has been completed, consistent with the enhanced due diligence procedures”. It is however, no secret that the UAE, with its free trade and open market policy is a destination to Iranian traders and cargos.

Accordingly, any goods not included within the UN sanctions will find its way through the UAE ports.
In principle, a company is a legal person in its own capacity to create rights and bear liabilities, and as such can own property, enter into contracts with other parties and be involved in any dispute with other legal persons, etc. The company can only enjoy those rights and incur those liabilities through decisions made by those that own or control it who may be one or more directors. The day to day management of a company is usually entrusted to its directors. The Commercial Companies Law of Qatar, No. 5 of 2002 ("The Law") imposes duties upon directors of a Limited Liability Company "the Company" based on the particular nature of the company. However, each company’s constitutional document should include the directors’ duties, responsibilities and any limitation upon their authority. What is the liability of the directors for any unlawful act and what remedies are imposed?

The aim of this article is to provide a basic explanation of the main liabilities of directors of limited companies towards the Company and third parties under the law in Qatar, and the information hereunder is not exhaustive and not sufficiently detailed to apply to the circumstances of any particular situation.

**Civil liability of LLC directors:**

1. Civil liability to the Company and its shareholders:

   In principle, the Company is bound by actions and decisions made by its director which have been carried out under their competence. However, the Company’s directors should maintain a duty of care of an ordinary person in managing the company and they are liable to company, shareholders or third parties for damages as a result of the following actions, as imposed by Article (112) of the Law:

   - **Deceit:** A misrepresentation of fact, which, when made with the intention that the other party will rely on it to his detriment, constitutes the torts of fraud or misrepresentation.
   - **Abuse of authority:** This is sometimes may be referred to as
“Control Fraud” which occurs when directors use their powers to subvert the company and to engage in fraud for personal gain.

- Breach of the provisions of the Commercial Companies law;
- Breach of the company’s Articles of Association; and
- Default in performance; directors’ failure in performing their duties and responsibilities set out in the Company’s Articles of Association or in the law. This may also include willful neglect.

2. Civil liability to others/third parties:
In addition to the matters set out in Article (112) of the Law, the directors may also be personally liable for the company’s debts either if (1) they have undertaken personal liability (such as giving a written guarantee), or (2) if they have been deemed to have acted in their personal capacity where they did not disclose that they are acting on behalf of the Company.

Although the Company is liable to compensate any damages may result from any unlawful act or neglect of its directors, the Company has the right of return compensatory indemnification. Such right is set out in the Law through the “Directors Liability’s Law Case” which can be raised within five years of the date of any illegal action or neglect. Without prejudicing the right to claim compensation when needed, any act or dealing or decision issued in contrary to the provisions stipulated in the Law will be null and void, without prejudicing the right of bona-fide third parties.

Where losses of the Limited Liability Company reached half its capital, the directors should, within thirty days of reaching this loss limit, propose to the General Assembly to reinstate the capital or dissolve the company. If the directors neglect to call the Assembly, they may be personally responsible for the Company’s obligations resulting from their neglect.

Criminal liability of LLC directors:

The directors of the Company are exposed also to criminal liability according to the provisions of the Corporate Commercial Law in Qatar (No. 5 of 2002). Some of the more serious offences may result in a term of imprisonment for two years or less and/or a fine of between ten and hundred thousand Qatari Riyal. The wording is wide enough to include misdistribution of profits and interests, misstatements in the memorandum, and specifically refers to forecasts and the dishonest concealment of material facts or disclosing of confidential information.

It is fundamental for parties dealing with a Company, shareholders in a Company and directors of a Company to seek legal advice in order to prevent any contravene of the Law or the company’s Articles of Association or to prevent any action may impose the personal liability upon directors in their day to day management of the Company.
ACQUISITIONS UNDER THE NEW KUWAITI CAPITAL MARKETS LAW AND BY-LAWS

Last year, Kuwait enacted the Capital Markets Law (CML) (Law No. 7 of 2010) followed by its executive bylaws (CML Bylaws) which seeks to regulate the securities businesses in Kuwait and provide protection to those involved in trading.

Acquisition of 50-100% of a Company’s share

One of the definitions given by the CML and the CML Bylaws on Acquisition is the offer, attempt or request to hold all the shares of a listed company or all the shares of any category or categories within a listed company regardless of the shares already held by the offeror or its affiliates on the date of submitting the offer.

The company that is the subject of the offer is any listed company or non-listed company, in the case of a reverse acquisition.

Kuwaiti law does not yet recognize the concept of categories of shares, as there is only one category of shares in shareholding companies in Kuwait. However, the use of the words category and categories above may be an indication that the Kuwaiti companies’ law may be amended to expand the categories of shares.

The CML Bylaws states that any person may, after obtaining prior written approval from the Capital Markets Authority (CMA), submit an offer of acquisition at any time according to the provisions of the CML Bylaws. The absence of clarity on the phrase at any time creates a few issues: (i) there is no time limit on making an offer of acquisition after obtaining the approval from the CMA, therefore an offeror can hold on to such approval for an
indefinite period; (ii) once the CMA approves an application for an offer of acquisition, the CMA can then grant another approval to a second offeror and, if the first offeror has not made an offer yet, there would exist two separate offers for the same company; and (iii) if the CMA can only grant one approval at a time, an offeror may misuse this restriction to block other parties from making offers of acquisition.

The offeror must give equal treatment to all the shareholders of the subject company and in particular the offeror, the subject company and any advisers may not submit any information gathered during the period of offer to some of the shareholders and not the others.

The offer parties (the offeror and the offeree) must appoint an investment advisor licensed by the CMA who must be independent and has no interest in the acquisition of the subject company. At this time, it is unclear if both the offeror and the offeree can appoint one investment advisor or if each is required to appoint one.

The Board of the offeror and the Board of the subject company must provide their respective shareholders with information and recommendations to enable them to reach a decision for accepting or rejecting the offer at least fifteen days before holding the general assembly of shareholders. From the wording of the CMA Bylaws on this provision, we assume that in the case of acquiring all the shares of the subject company, the approval of the shareholders’ ordinary assembly of the subject company is required. In other words, at least 51% of the shareholders of the subject company have to approve the offer, subsequently forcing the non-approving shareholders to sell their shares as well. This concept is new to the Kuwaiti practice and has never been applied before. The shareholders of the offeror have to approve the offer as well. The issue arising from this requirement is that when the offeror is required to obtain the approval from its shareholders, which are either before or after the application to the CMA seeking its approval for the offer of acquisition. If after, then the board of directors decides on the offer of acquisition and applies to the CMA on behalf of the offeror.

The offeror shall, before proceeding to acquisition procedures, obtain the approval of the Competition Protection Agency according to Law No. 10 of 2007 concerning competition protection. With respect to the timing of the application for approval of the Competition Protection Agency, which the exact timing for such application is, either before or after the application for approval of the CMA or the approval of the shareholders.

**Acquisition of more than 30% of shares (Mandatory offer)**

Any person must within a period of thirty days of directly or indirectly obtaining equity of more than 30% of the voting shares of a company listed in the Kuwait Stock Exchange (KSE) immediately submit an acquisition offer for all the shares remaining from the same category. The CMA can make exceptions to this requirement if it is in the best interest of the shareholders or public policy. The question arises as to whether this article will apply to acquisition of 30% or more in the event of foreclosure, or pursuant to any court order. Would the mortgage then have to extend a mandatory offer to the remaining shareholders?

The offeror shall, in the case of a mandatory offer, submit its offer to the shareholders of the company, subject of the offer, directly without the need for holding a general assembly of shareholders of the company subject of offer. Each shareholder shall be allowed the option to sell its shares to the offeror or keep them during the offer period decided by the CMA.

The offer submitted under the mandatory offer shall be a cash offer not less than the likely average of the daily price per share in the KSE for the company subject of offer within the six years preceding the beginning of offer period, and the KSE shall calculate this price.

It should be noted that the above provisions regarding the mandatory offer are the consequence of obtaining more than 30% of the shares, and not the method that an offeror is to acquire shares of more than 30%. The mandatory offer only kicks in after an

Kuwaiti law does not yet recognize the concept of categories of shares, as there is only one category of shares in shareholding companies in Kuwait.
offeror obtains more than 30% shares. For instance, if an offeror wishes to acquire 49%, it will have to complete the acquisition of the 49% and then shall have 30 days to submit a mandatory offer for the remaining shares. When using the method of acquisition of up to 49% (before reaching 30%), the following provisions of acquiring 5%-30% of shares will apply.

**Acquisition of between 5% and 30% of shares**

When a person holds, individually or jointly with parties affiliated thereto or allied therewith, about 5% or more of the shares of any company listed in the KSE and intends to raise the holding percentage of the company shares, it shall disclose such intention when disclosing the interests pursuant to the provisions of Chapter Ten of the CML, and shall submit to the CMA the information it requires in this respect. If the person holding, individually or jointly with parties affiliated thereto or allied therewith, 5% or more of the shares of a company listed in the KSE, is willing to raise such percentage at no more than 30% of the shares of the same company, it shall achieve the same in any of the following forms:

1. Purchasing shares directly through the KSE;
2. Submitting an application to the KSE for holding an auction for purchasing a specific number of shares. For submitting this application, there shall be a preliminary agreement with a person or group of company shareholders willing to sell a specific number of shares at a price agreed upon in advance. For holding the auction, the conditions and requirements laid down by the CMA and KSE shall be complied with in this respect.
3. Announcing submission of an offer to the shareholders of the company to purchase a specific number of shares at a specific price and within a specific period of time, provided that it shall obtain the prior written approval of the CMA in this respect and to comply with the conditions and requirements laid down by the CMA. It is unclear if the above provisions supersede the current block trading rules.

**Reverse Acquisition**

Reverse acquisition means any arrangement under which a listed company offers new shares to shareholders of an unlisted company instead of their shares where the new shares represent more than 50% of the voting shares in the listed company after acquisition.

Reverse acquisition operation, the listing of offeror’s shares shall be suspended until the operation is completed. Once completed, the listing of offeror’s shares shall be cancelled and the offeror shall submit an application for a new listing, provided that it shall meet the requirements of listing according to the regulation in respect of the same. This acquisition, acceptable with a majority resolution, is passed by the general assembly of shareholders in the company subject of offer in approval thereof.

**Conclusion**

The passing of the CML and the CML Bylaws marked an important milestone in the Kuwaiti capital markets industry. Other than the provisions on acquisitions, the CML and the CML Bylaws introduced clearer provisions which clarified the earlier provisions on the protection of minority rights, disclosure obligations and insider trading which was either previously unregulated or the previous law relevant to these areas was unclear. We have yet to see how the CMA will implement the CML and CML Bylaws and we look forward to the application of any new test case on the same. Hopefully, when more information becomes available and actual application of the CML and the CML Bylaws will take place, we will be able to shed more light on this subject in future articles.
ENCOURAGING INVESTMENT IN BASRA

Basra is one of the oldest Islamic cities, which was established during the Islamic conquest in 625 A.D. Prophet Mohammed (PBUH) ’s companion, Utba Bin Gazwan, chose the city site in 14 A.H (636A.D) and the city was planned and built by Abu Musa Al- Asha’ari six months prior to the building of Kufa city upriver.

Why Invest in Basra?

Location

Basra is strategically located within Iraq and is home to all six of Iraq’s ports including its only deep-water port; and as such, is a major transportation nexus in the southern part of the country. In fact, Basra has the only marine transportation point in Iraq. Further, Basra is easily linked to the Iraqi capital, Baghdad by a railway.

Oil and other Resources

Basra has an abundance of energy sources especially in oil and natural gas. Assured oil reserves in Basra amount to more than 67.8 billion barrels. This is about 59% of all oil reserve of Iraq. A great deal of Iraqis oil is exported through Basra’s ports.

Furthermore, some of largest oil fields (Rumaila, Majnoon and Rumaila south) are located in the Basra province. Additionally, there is an abundance of crude material for some industries, with the capacity to extract such materials; as well as an enormous agricultural potential.

Local Market

Basra has a vast local market built upon 3 million people and it acts as a gateway to the rest of Iraq. Basra is ideally placed to provide goods and services through its promising market to some 31 million individuals within Iraq.

The existing infrastructure can further attract and facilitate investment. Basra Airport, Um Qasser harbor, FAO harbors, existing railway lines and the road network connecting Basra with other Iraqi provinces as well as with neighboring countries, all contribute to ensuring the greatest possible output from investments. Similarly, there are several power stations that can be developed to meet local and foreign investment requirements.

Finally, there is further potential for expanding tourism as the security situation in Iraq continues to be stabilized and with Basra being one
of the oldest cities in the world; it consists of an array of archeological, traditional and religious locations and sites that attract people from all over the world.

**Investment Laws**

Investment in Basra is supported by clear laws and simple processes to obtain an investment license. To further encourage investment in Iraq, the Iraqi government introduced a number of legislative measures (including Investment Law No. 13 of 2006, Investment Regulation No. 6 of 2010 and the First Amendment to Investment Law No. 7 of 2010) which greatly simplifies and assists the investment process.

Firstly, the laws provide for the freedom of transferring profits and revenues in and outside of Iraq, as well as the right to open banks in and outside Iraq. Further, they provide a number of exemptions and privileges (including certain tax and custom fee exemptions) for investors who have obtained an investment license.

The one-stop-shop in the National and Provincial Investment Commissions further assists investors, by facilitating the process of obtaining the investment License, allocating land, securing a number of tax exemptions for investors, as well as facilitating the entry and exit of investors and their employees.

The aforementioned Commission also provides guidance to investors, through issuance of an Investment Map which lists a number of investment opportunities in Iraq, including a geographic description at the different provinces where investment is sought. Similarly, an Investor Guide is provided, which contains necessary information for investors, such as mechanisms to facilitate entry and exit procedures to and from Iraq and how to enjoy the many benefits of the Investment Laws.

It is worth mentioning that First Amendment No. (7) of 2010 (which came into force in February 2011), allows for the ownership of land by certain housing projects, as well as establishing the conditions for leasing lands for other projects.

The Amendment assists investments in four main ways; first, by providing for allocation of land without land speculation, which greatly encourages foreign investments by cutting down on costs, and making it easier for investors to determine fees they are subject to. Under the housing field, the Amendment provides for the sale of the housing unit at a price to be set in accordance with offer and demand in the free market; as well as providing that the government shall provide the land to the investor for development of housing a unit only, and which shall be determined in accordance with location of land.

The implementation of the aforementioned Investment Laws is a great step further encouraging investment in Iraq in general, and in Basra in particular; and is felt by many to be a vital base for launching the investing wheels in Iraq.

"with Basra being one of the oldest cities in the world; it consists of an array of archeological, traditional and religious locations and sites that attract people from all over the world."
### MINISTERIAL DECISIONS

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<th>Number</th>
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<td>Ministry of Health</td>
<td>Minister of Justice decision regarding the implementing regulations of Federal Law No. 18 of 2009 regulating births and deaths</td>
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<td>95 of 2011</td>
<td>Ministry of Justice</td>
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