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LAW UPDATE

Latest Legal News and Developments from the MENA Region

A New Seat is Born: Abu Dhabi Global Market Issues a UNCITRAL-based Arbitration Law

The New Electricity Law: Major Step Towards a Free and Competitive Electricity Market in Egypt

Qatar: Insurers and Arbitration Clauses

Gulf Airlines Competition Challenge by US and EU: The Legal Framework

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LAW UPDATE
for iPad

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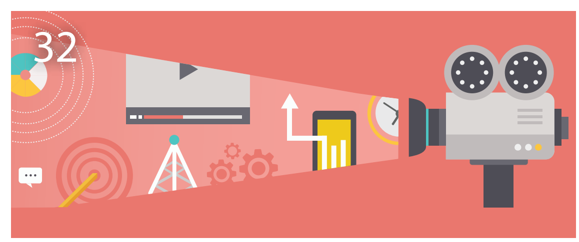

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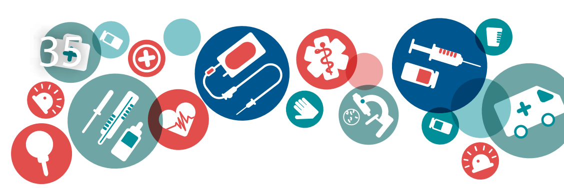

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In this Issue

Welcome to the February edition of *Law Update*, an issue which reflects the fact that 2016 has, so far, started off extremely well! This is demonstrated by the range of news and events featured in this issue which include the firm's partnership with UNICEF, involvement with Australian Unlimited MENA as well as seminars on a broad range of topics held with clients across the region.

This edition contains a number of features on Arbitration, a vital method of dispute resolution and one which is increasingly utilised across the Middle East. An example of this is featured in our cover story - the Abu Dhabi Global Market's issuance of a modern UNCITRAL-based arbitration law which governs arbitration and enforces arbitral awards in the recently created free zone. Our dispute resolution team also looks at other methods of resolving disputes, such as examining the process costs and benefits of mediation. The special feature starts on page 22.

On page 16 our Commercial Advisory team provides an overview of commercial agency registrations in the UAE, a vital consideration for any foreign business looking for the invaluable experience and knowledge provided by local, appropriately licensed agents or distributors. Meanwhile, the team also examine a number of initiatives in Egypt to address pressure on the Egyptian pound by further regulating imported goods.

Page 35 features the second instalment of legal issues, beyond licensing, relating to eHealth and Telemedicine in the Gulf, from our Healthcare practice. The issues include liability for out of jurisdiction healthcare advice, data protection and insurance reimbursement.

There has been a recent spotlight on the perceived "unfair" advantages had by airlines in the GCC over those in the US and Europe. Our Transport team looks at some of the issues considered by the European Commission and the challenge raised by US airlines on page 38.

There is a great double feature on trademarks from our Intellectual Property practice focusing on the possible adoption of a unified GCC trademark law as well as the features of trademarks and selecting one that can be both legally protected and marketable. See page 44.

In Kuwait there is a process underway to assist in diversifying the country's economy due to lower oil prices. The Kuwait legislature has recently incorporated many constructive changes into Kuwait's Capital Markets Law and on page 57 our team looks at the opportunities for project finance driven by these changes.

These are just some of the interesting pieces we have this month which I trust you will find of value. As always, if you have any feedback at all, please do get in touch.

All the best,

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LAW UPDATE Judgments

Law Update Judgments aim to highlight recent significant judgments issued by the local courts in the Middle East. Our lawyers translate, summarise and comment on these judgments to provide our readers with an insightful overview of decisions which are contributing to developments in the law. If you have any queries relating to the *Law Update Judgments* please contact l*awupdate@tamimi.com*

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Spread Betting: Debts Arising from Gambling Contracts are Uncollectable in the UAE

Introduction

In a recent judgment by the Dubai Court of Appeal (No. 514 of 2014, dated 10 January 2015), the court examined whether a contract was a gambling contract and accordingly whether the debt that accrued under the contract was payable to the Claimant. Al Tamimi & Company successfully defended the Defendant in this case which was filed by a provider of spread betting, forex and other forms of trading (the Claimant).

The agreement between the parties involved speculation on movements in international share and stock prices. The Defendant would speculate on one of the markets concerned closing at a certain level and, if that figure or sum were achieved, the Claimant would pay the Defendant an amount based on the formula set out in the agreement. If the figure or sum was not achieved (i.e. the market failed to reach the level predicated by the Defendant), the Defendant would pay the Claimant.

The question was whether this was a contract for spread betting or not.

It was argued by the Claimant that the contract was a commission-based agency contract, because it related to assets (stocks, shares and currencies) being traded, it was not a contract for gambling. The Court of Appeal however held that there was no proof of shares or securities being traded between the parties, it was strictly a case of spread betting where predictions were made on the prices of shares and stocks that were not acquired by or transferred to either party. Since betting is prohibited under UAE Law (Article 1021 of the UAE Civil Code), being a contracts of hazard (gharar), the subject matter of a spread betting contract is unlawful and renders the contract void for contravening public policy and morals.

The Claimant was therefore unable to recover the debt that accrued under the spread betting contract.

Background Facts

The Defendant entered into an agreement (and opened an online trading account) with the Claimant. The dealings between the parties involved speculation on movements in international share and stock prices where one of the parties speculates on one of the markets concerned closing at a certain level and, if that figure or sum is achieved, the other party pays the speculator an amount based on the formula set out in the agreement. If the figure or sum is not achieved i.e. the market fails to reach the level predicated by the speculator, the speculator pays the other party.

On the 9 October 2008, the Claimant suspended the Defendant's account for an unrecovered debt in the amount equivalent to AED 2,573,439.

The Court of First Instance

The Claimant filed proceedings before the Dubai Court of First Instance for the unrecovered debt and asserted that his role was that of an agent akin to a stock market agent/broker. The Defendant argued that the nature of the agreement was not an agency (which requires at least three parties). The Defendant argued that the contract was void on public policy grounds, pointing out that the Claimant had deliberately failed to produce a copy of the contract for the court's review with the hope that the Court of First Instance would not be able to ascertain that the agreement was a gambling contract known in English as a 'spread betting contract' which involves speculation on price movements. Such a contract is an explicit form of gambling forbidden under Islamic Law.

Expert Report

The Court of First Instance appointed an accounts expert who concluded in his report that the Defendant had opened an account with the Claimant (with a password) to perform online transactions and trades that allowed him to speculate on price movements. The expert established from an accounting standpoint that the Defendant engaged in betting activity based on price movements through the account in question. According to a printout of a statement of account from the Claimant's accounting system showing the Defendant's transactions, the Defendant's account had a debt balance of AUS 389,950 due to fluctuations in Standard & Poor's 500 index. The expert thus confirmed the Claimant's right to claim that amount without interest.

Both parties exchanged comments on the expert report with both parties objecting to the report. Both parties requested that the original expert be reappointed to undertake the following:

1. Provide the Court of First Instance with a detailed explanation of the nature of the transaction; and
2. Determine whether any assets (shares, stocks) were traded between the parties or whether it was only a matter of betting, prediction, and speculation without the transfer of any assets.

The Claimant submitted a report issued by a consultant in the UK with the aim of showing that the transaction in question was of the sort offered by UAE banks, and therefore the parties' agreement would be permissible under UAE Law.

The Court of First Instance subsequently ordered that the Defendant pay to the Claimant a sum of AUS 389,950 or its UAE Dirham equivalent, plus 5% interest per annum.

The Court of Appeal

The Defendant appealed the Court of First Instance's decision. The Defendant argued that the Court of First Instance had erred because it had misinterpreted the nature of the transaction and the parties' relationship by concluding that the contract was a commission-based agency contract and presuming that assets (stocks, shares, currencies) were traded when in fact the contract was based on (prohibited) betting among speculators where no assets were traded and wagers/predictions were made with respect to the prices of shares and stocks. The Defendant sought dismissal of the action on public policy grounds (Articles 1012 -1021 of the Civil Code). It was argued that the transaction was a type of gambling and requested that an Islamic finance expert be appointed to determine the nature of the contract and whether such activity (spread betting) was permissible under Islamic law or prohibited under Articles 1012 – 1021 of the Civil Code.

The Defendant also submitted documents obtained from the UK confirming that this type of transaction would not be regulated by the rules of the Financial Services Authority (FSA). These transactions are regulated by the UK Gambling Commission and any complaints relating to this type of transaction are referred to the Betting Adjudication Service.

The Defendant also highlighted that the Claimant described the activity as spread betting on its website as follows:

"[the Claimant's website allows you] to trade on the price movements of thousands of financial markets, including indices, shares, currencies, forex, commodities and more. With a spread bet, you can speculate on price movements on both rising and falling markets. This is known as 'going long' (when you buy) or 'going short' (when you sell). For example, you may know that a company is about to release quarterly results and have an opinion on whether the figures will have a negative or positive affect on its share price. Based on that opinion, you can place a spread bet to go long (buy) or go short (sell) the company share price and take advantage of any price moves."

A request for the reappointment of the expert was made in order to consider issues such as: the nature of the transaction, whether any assets were traded and to examine documents that were allegedly tampered with.

Accordingly, the original expert was reappointed to examine the Defendant's objections. The expert filed a report in which he concluded that, based on the parties' documents, it was conclusively clear that the parties conducted spread betting transactions strictly among themselves without the involvement of any other party or company in the investment.

The expert added that neither party had provided him with proof of share or securities trading between the parties and that it was strictly a case of spread betting where predictions are made on the prices of shares and stocks that are not acquired by or transferred to either party.

The Court of Appeal ruled that if the subject matter of an obligation is a thing, that thing must exist or be able to exist at the time of creation of the obligation. If the subject matter of an obligation is an act or omission, it must be possible. And if the subject matter of an obligation in either case is impossible then no obligation shall arise and the contract is void. The subject matter of an obligation must be certain or capable of being rendered certain. The subject matter of an obligation must also be capable of being disposed of. That might not be the case due to its nature (for example, sun, air) or its designated purpose (such as property with a particular public interest). That would also not be the case if disposing of the thing is unlawful either by operation of law or on public policy or morality grounds. If the subject matter is inherently capable of being disposed of but the contract is made for an objective contrary to public policy or morality, then as long as the other side is aware of such objective the contract would be void, not because the subject matter is unlawful but because its objective is unlawful for public policy or morality considerations.

It follows that if the subject matter is inherently capable of being disposed of, the issue of the validity depends on the validity of the contract's objective. In this case, the transaction is void because the objective is unlawful rather than the subject matter. Accordingly the contract is invalid on the basis of UAE Public policy grounds.

Comment

This judgment highlights that spread betting is prohibited in the UAE and is against public policy. The court will ultimately examine and discover the nature of the activity even if it is not inherently clear or described as something else. If determined to be a form of gambling, the contract will be deemed null and void and any debts that arise from these transactions are not recoverable.

The criterion for the validity of a contract is that it must be made over a lawful subject matter, and it must have a valid and existing lawful purpose. If one of these essential pillars is not established, then the contract will be void and the judge may so rule of his own motion. Such a contract will not have any effect, nor may it be ratified, and any person concerned may rely on it being void. Contracts involving speculation risk being deemed a form of gambling and being found void.

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The Power of Power of Attorneys in Abu Dhabi

Introduction

In the UAE, appointing any person to act on your behalf requires the formal delegation of your power to such a person. The range of powers being delegated can be wide and will depend on the purpose of making the delegation. Where the delegated powers are for general unspecified matters, this can be delegated using a General Power of Attorney. If the delegation is for a specific matter or for a court case, a Specific Power of Attorney will be needed.

Whilst the wording in a General Power of Attorney will imply that it covers all legal actions that could be taken by the principal, there are specific powers that need to be explicitly provided for if they are to be delegated, such as the power to settle a dispute.

The need for an explicit power to settle a dispute, or waiver of a judgment or any avenue of appeal against it, is found in articles 58 (2) of the Civil Procedures Law. Article 58(2) states:

> "2 - No admission or waiver of a right alleged or settlement or submission to arbitration or acceptance of or requisition for the oath or refusal thereof or abandonment of the proceedings or waiver of the judgment in whole or in part or of any avenue of appeal against it or the lifting of an attachment or abandonment of securities while a debt remains unpaid or allegation of forgery or recusal or acceptance of a judge or expert or true tender or any other disposition in respect of which the law requires special authorisation may be made without special authority"

The Abu Dhabi Courts of First Instance and Appeal may accept the Power or Attorney issued by the concerned party to its attorney, without requiring further documentation. However, the Abu Dhabi Court of Cassation will look more extensively into this issue and will require submission of evidence showing the delegation of powers as required on a case by case basis. This is due to the requirement to have explicit powers in certain matters, as noted above. This is also due to Article 177 of the Civil Procedures Law, the relevant parts of which state:

> "1 – A challenge by way of cassation shall be brought by a notice lodged with the office of the court, signed by an attorney licensed to appear before it, and accompanied by proof of payment of the fee in full, together with the security, and the appeal shall be entered immediately in the register kept for that purpose.
>
> 2 - .....
>
> 3 - The appellant must, before the appeal is reserved for judgment, lodge the power of attorney of the advocate instructed in the appeal.
>
> 4 - .....
>
> 5 - If the challenge by way of cassation is not made in the foregoing manner, it shall be disallowed and the court shall rule of its own motion that it is disallowed."

Although powers of attorney are often viewed by the layman as a formalistic issue, they are vital documents and if incorrectly issued (or not issued at all) they may result in a contract or act being declared void. The repercussions may also extend to the dismissal of a given case. To emphasize the importance of the above articles of the Civil Procedure Law, we now summarize three judgments. In the first, a person's power to resolve a dispute was challenged, whereas in the second and third the capacity to file an appeal before the Court of Cassation was challenged.

"Powers of Attorney are important documents and getting them wrong can cause serious problems"

Case Study 1:

In Abu Dhabi Court of Cassation (Commercial) Case 368/2012 (dated 21 October 2013, Al Tamimi did not appear in the case) a partner in two separate limited liability companies signed a contract to waive the rights of the two companies towards another third party they had contracted with. The capacity of the partner was never contested at the time the contract was signed, as he was considered to be the apparent authorized person to act on behalf of the companies (being a partner and the owner of 76% of the shares) ("the first partner").

The second partner of the two companies was appointed as a Manager for both of them ("Manager"). He had never signed or approved the above contract. He contested its validity and filed a case requesting the Abu Dhabi Court to declare the contract null and void.

The Court of First Instance deemed the capacity of the First Partner, based on the apparent authority that he holds, sufficient to consider the contract as valid. It thus rejected the Manager's case.

The Court of Appeal overturned the Court of First Instance judgment and upheld the Manager's case. This judgment was challenged before the Court of Cassation.

The Court of Cassation ruled that the authorized representative of the Company is the Manager as he is the only one who has the legal capacity to enter into dispositions.

"... settlement agreements can be deemed null and void by the Abu Dhabi Courts if the General Manager of the limited liability company did not sign it, even if it was signed by the partners of the Company."

The Court held that the signature of the First Partner was not sufficient to bind the two companies nor does it bind him personally, as he signed in his capacity as an agent (albeit without the necessary authority).

The Court of Cassation commented that the size of the first partner's shareholding has nothing to do with the management of the company, which is done by a manager appointed to do so (whether the manager is one of the partners themselves or a third party).

The wording of the judgment was broad, no doubt to express the general principle that only the manager of a limited liability company has the authority to sign all types of contracts on behalf of the company. We believe the reasoning behind this is that the shareholders of a limited liability company are legally protected, as the law prevents creditors taking legal actions against the funds and assets personally owned by the shareholders themselves. The law however puts obligations and duties on the manager of a limited liability company and exposes the manager to liability if they are breached. Managers can be held accountable, whether through civil or a criminal litigation, in respect of a breach of management obligations.

This case is authority for the fact that settlement agreements can be deemed null and void by the Abu Dhabi Courts if the General Manager of the limited liability company did not sign it, even if it was signed by the partners of the Company.

Case Study 2:

In Abu Dhabi Court of Cassation (Labour) Case 96/2015 (dated 30 September 2015) an employee filed a labour claim for outstanding dues from its employer company.

The Company issued a Power of Attorney to a lawyer to represent it before the Abu Dhabi Courts and defend the case. The Power of Attorney was accepted by the Court of First Instance and a judgment was issued by that court obliging the Company to pay a certain sum to the employee to compensate her for damages sustained.

The Company appealed the judgment using the same Power of Attorney, which was accepted by the Court of Appeal. The Court of Appeal ruled against the Company and upheld the judgment of the Court of First Instance.

The Company challenged the judgment before the Court of Cassation. The Court of Cassation did not look into the merits of the challenge filed by the Company, it rather focused on the authority of the lawyer to file the appeal. The Court stated that "Proof showing the capacity to challenge judgments before the Court of Cassation is an issue pertaining to public order" . The Court therefore had to look into the issue even though it was not raised by the parties.

The person who issued the Power of Attorney to the lawyer on behalf of the Company did so pursuant to a Power of Attorney issued to him from the official representative of the Company. The lawyer's Power of Attorney noted that the powers of the latter representative were referenced in the Articles of Incorporation of the Company. However, the Articles of Incorporation themselves were not filed along with the Power of Attorney, nor were there any other documents showing the current capacity and powers of the official representative or their limits. The Court dismissed the case for lack of such documents. The merits were not decided upon since the challenge itself was dismissed due to the problem with the Power of Attorney.

The Court noted that the right to challenge judgments before the Court of Cassation is a personal right for the party who has a judgment issued against it and that party can exercise this right or abandon it. Without its consent, no one has the right to act on its behalf in this regard. If the party is a juridical one (such as a company), the capacity of its representative must be evidenced in a clear manner. In reliance of Article 177 of the Civil Procedures Law, the Court has the right to dismiss the case if no proof is presented to show the capacity and powers allowing for challenging judgments before the Court of Cassation.

Al Tamimi represented the Company before the Court of First Instance, but not the Court of Appeal or the Court of Cassation.

Case Study 3:

In a recent challenge filed before the Cassation Court (Labour) Case No. 110 and 126 of 2016 (issued on 25 January 2016) (which was not handled by Al Tamimi), the Court of Cassation also dismissed a challenge for lack of proof supporting the Power of Attorney lodged by the appellant's lawyer (citing Article 177 of the Civil Procedures Law).

As in Case Study 2, the Court noted that this requirement is essential to verify the validity of the Power of Attorney in terms of the capacity of its issuer, the powers of the person who appointed the lawyer, and whether such powers include the right to challenge a judgment before the Cassation Court. This right is a personal one for the party who had a judgment issued against it and it is the only party that can decide to pursue or abandon it. No one can act on behalf of this party in this regard without its approval.

The Court realized from the Trade License submitted by the appellant that the appellant company was a limited liability one and that according to Article 83 of the Companies Law there has to be a manager who handles its business affairs and can represent it before Courts. The Power of Attorney in this case was issued by a person in her capacity as the manager and legal representative of the Company. However, the license showed that this person was only one of the partners in the Company and was silent as to her capacity as a manager or a representative. The Court also noted that there was no proof submitted to support the managerial capacity, such as the Articles of Association or any similar official document.

The Court thus concluded that it could not confirm that the lawyer attending before it was in fact duly appointed by the actual authorized person who has the necessary powers. Accordingly, it dismissed the case for that reason.

Conclusion

As these cases demonstrate, Powers of Attorney are important documents and getting them wrong can cause serious problems. However, these problems can be avoided. Parties need to seek legal advice before entering into a settlement agreement to confirm that the relevant parties hold the necessary powers and that all required delegations of powers are present. This is the only way to avoid the prospect of having the agreement annulled. A proper legal review of the Power of Attorney and its supporting documents is also necessary to confirm that the Court of Cassation will not dismiss the case because of an invalid authority or lack of proof confirming such authority.

Although Powers of Attorney may seem unnecessarily formalistic, they in fact touch upon public order and are essential.

Succession Procedures and Creditors' Rights

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Succession process has always been an important issue for banks and financial institutions in the UAE holding the accounts of the deceased or such deceased being a creditor or guarantor of such bank or financial institution. In this article, we highlight and simplify the succession process, the rights of financial institutions in succession proceedings and safeguards that should be taken by the banks when dealing with such succession proceedings and the estates of deceased persons.

General Approach on Death of UAE Resident

In determining the legal position of a deceased person leaving assets (including bank accounts) in the UAE and matters of inheritance, the UAE Civil Code (Federal Law No. 5 of 1985) as amended ("Civil Code") and The Law of Personal Affairs (Federal Law No. 28 of 2005) as amended ("Personal Affairs Law") are applicable.

Article 17 of the Civil Code states the following:

1. Inheritance shall be governed by the law of the deceased at the time of his death.
2. Property rights located in the territory of the state which belong to an expatriate having no heir shall become vested in the state.
3. The substantive provisions governing testamentary dispositions and other dispositions taking effect after death shall be governed by the law of the state of which the person making such dispositions is a national at the time of his death.
4. The form of wills and other dispositions taking effect after death shall be governed by the law of the state of which the person making such disposition is a national at the time the disposition is made, or the law of the state in which the disposition is made.

5. The law of the United Arab Emirates shall apply to wills made by expatriates disposing of their real property located in the state.

In essence, the above article does recognise that the law of the deceased will apply to succession proceedings. Having said that, Article 27 of the Civil Code, to an extent, dilutes the effect of Article 17 by stating the following:

> *It shall not be permissible to apply the provisions of a law specified by the preceding articles if such provisions are contrary to Islamic Shariah, public order or morals in the state of the United Arab Emirates.*

This is primarily the reason behind the difference in application of law by the different Courts in the UAE. Some Courts take a relaxed attitude towards applying Article 27 above, while others are quite strict.

The Personal Affairs Law on the other hand governs how the estate of a UAE national or resident will be managed and distributed upon the death of the individual. Article 1(2) of the Personal Affairs Law sets out:

The provisions of this law shall be applicable to all UAE nationals unless the non Muslims thereof have different provisions for their different religions. Further the provisions of this law shall be applicable to non UAE nationals unless they insist on the applicability of their own laws.

Accordingly, the Personal Affairs Law recognises the provisions of the Civil Code as stated above (pertaining to governing law provisions) when a non-UAE national insists on the same and is qualified to do so under the Civil Code and allows for application of foreign law.

Succession Procedures

Upon death, the personal assets of the deceased, including local bank accounts, are frozen (Article 379(4) of Federal Law No. 18 of 1993 ("Commercial Transactions Law")) until the local court issues a succession order.

When a person dies, a death certificate is issued. A named executor or a close relative of the deceased should submit this certificate to a UAE Sharia Court. The Shariah Court in the relevant Emirate has jurisdiction to review any application for a death declaration (declaring the death of and identifying the survivors of the deceased) ("Death Declaration") and to conduct any proceedings relating to succession for a Muslim or a non-Muslim expatriate. Once the Death Declaration is obtained, any of the potential heirs may apply to the Shariah Court to institute succession proceedings, which will only be necessary if the deceased has assets in the UAE in order to obtain a certificate of succession.

In order to ascertain the identity of the heirs, documents will have to be provided to the Sharia court such as passport copies, birth certificates, marriage certificates, and such other evidentiary documents that will assist the court in issuing the conclusive certificate of succession. Additionally, if the deceased left a valid and acceptable will, it should be submitted to the Sharia Court. On the basis of these documents, the court will issue a certificate of succession setting out the manner of the distribution of the estate.

Similarly, if an expatriate non-Muslim having property in the UAE passes away outside the UAE, the named executor or a relative of the deceased would usually file the appropriate succession proceedings before the relevant court in the individual's home country. It is required that the order (Letters of Probate, Letters of Administration, Succession Certificate etc.) issued by that court is legalized and submitted before the Shariah Court in the UAE along with the necessary documents for issuance of a certificate of succession and an order for distribution of UAE assets.

Form of the Estate

An estate under the Personal Affairs Law takes form of tangible properties and rights under such properties and other financial rights through a judicial declaration. There is no concept of common law trusts under UAE law, which would arise automatically in common law jurisdictions. Further, under the applicable provisions of the Personal Affairs Law, burial expenses followed by the deceased's debts (discussed below) and executable wills have priority over any assets to be distributed to the successors. The court may also appoint a trustee who will receive the properties of the deceased and will liquidate such properties under the court's supervision.

Protection of Creditors' Rights

Under Article 275 of the Personal Affairs Law (as stated above) the creditors of the deceased would take priority over any other distribution except for any burial expenses. In order for the lending bank ("Bank") to ensure that their debt is due and thus has priority on the death of the obligor (whether acting in the capacity of a borrower or a guarantor or a security provider) it should be stated as an event of default (under the relevant facility agreement or security document) entitling the Bank to accelerate the loan and seek recourse against the estate and the heirs of such deceased obligor.

It is important to note that in case of lending to a corporate secured by personal guarantees, the death of the personal guarantor should be stipulated as a mandatory event of default which would afford the Bank a priority of claim in the estate of the deceased personal guarantor.

Once the Bank comes to know of the Death Declaration and the distribution of assets, the Bank should immediately file proceedings against the estate and the heirs (as the case may be) to exercise its rights under the applicable provisions of the Personal Affairs Law in its capacity as a creditor.

In relation to any proposed or ongoing legal proceedings by the Bank (as creditor) at the time of death, the Bank would be restricted by certain requirements to pause such proceedings pending settlemtent of all the debts of the estate, as set out in Article 284 of the Personal Affairs Law, which provides that:

1. From the time of appointing a trustee for the estate, creditors may not take any procedure regarding the estate or pursue any procedure they have taken except vis-à-vis the estate trustee.
2. All procedures taken against the deceased shall be discontinued pending settlement of all the debts of the estate once any concerned party so requests.

Article 287 of the Personal Affairs Law sets out the procedure to make a claim as follows:

> *The estate trustee shall invite the estate creditors and debtors to submit a statement of their rights and debts within two months from the date of publishing the relevant order.*

Such an order is posted in court premises where the majority of the assets of the deceased are located and also in the daily newspaper. The Bank needs to be vigilant of such an order and ensure that it submits its claims to the estate trustee within a period of two months from the date of such an order.

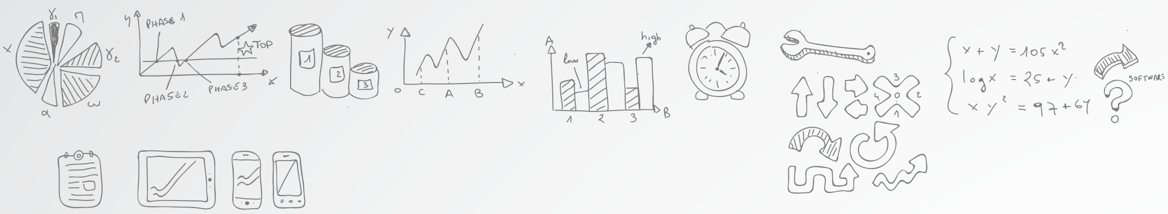
> "It is very important for the Bank to check that its liabilities have been clearly reflected in the inventory statement as per Article 297 of the Personal Affairs Law."

Once a claim has been made, the estate trustee will prepare a report in accordance the provisions of the Personal Affairs Law and deposit at the court three months from the date of appointment an inventory statement of the estate's assets and liabilities and an estimation of these funds. In the event that the Bank is not satisfied with its liabilities listed in the inventory statement, the inventory statement can be challenged by the the Bank under Article 291 of the Personal Affairs Law within 30 days from the date of submission of the report to the court.

It is very important for the Bank to check that its liabilities have been clearly reflected in the inventory statement as per Article 297 of the Personal Affairs Law. There have been instances where creditors have not recovered their rights because of not having been recorded in the inventory list. However they may have a seperate recourse against the successors for their portion of assets realised from the estate.

Article 292 of the Personal Affairs Law stipulates that, at the end of the aforementioned 30-day period, the estate trustee may settle the estate's debts with the permission of the Court. However, if the estate is insolvent or is likely to be insolvent, the estate trustee may not settle any debt until a final decision has been reached in relation to any insolvecny proceedings connected with the estate's debts.

Lastly, the Personal Affairs Law provides that the debts are settled from the proceeds of any claims of the estate, the liquidation of moveable assets and finally from the liquidation of real estate (forming part of the estate), if such procceds are insufficient. Moveable assets and real estate shall be sold at public auction pursuant to the terms of the Civil Code unless the successors agree on another method. If the estate is insolvent, the approval of all creditors to such alternative method will be required.



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Commercial Agency Registrations: What's covered?

A popular method of doing business in the UAE is through arrangements entered into with local, appropriately licensed, agents/distributors. These types of arrangements can provide a foreign business with invaluable local experience and knowledge allowing it to benefit from pre-existing relationships that an agent may have with other local businesses. However, any business wishing to enter the UAE market must consider the impact of the applicable UAE commercial agency regime. We all too often see the aftermath of a failure to appreciate local laws and customs, when seeking advice at the outset could have significantly reduced, if not eliminated, the issues parties may face.

As set out in more detail in a number of previous articles in Law Update, the registration of a UAE agent in the commercial agencies register (established by the Ministry of Economy ("Ministry")), places an agent in a very strong position. One of the key benefits of registration, pursuant to Federal Law No. (18) of 1981 Concerning the Organisation of Trade Agencies, as amended (the "Agency Law"), is the rights of the registered agent to block the products that are the subject of a registered agreement from being imported into the agent's registered territory (whether it be the UAE generally or one or more Emirates).

Registration involves the agent, in short, presenting a duly signed and notarised (before a notary public) copy of the agreement (and attested if signed outside the UAE) to the Ministry (although we are aware that there have been some instances where registrations have been effected by the Ministry in the absence of such criteria not being met). Additionally, there is the prospect that an agent, in the absence of a notarised copy of the agreement (because, for example, the principal refused or did not provide a notarised copy, or the agreement is not in Arabic), could apply to the local court to obtain an order for registration, subject to the agreement meeting the requisite criteria.

Once registered, the particulars of an agreement, such as the names of the parties, the date of registration and the products for which the agent is to be the exclusive agent in the UAE, are entered in the commercial agencies register.

What's covered?

The issue of exactly what products may be covered by a commercial registration is one that sometimes comes up and this can have a significant commercial impact on the principal. There are several issues that a principal may want to consider when dealing with a prospective registered agent.

> "We all too often see the aftermath of a failure to appreciate local laws and customs, when seeking advice at the outset could have significantly reduced, if not eliminated, the issues parties may face."

Historically, it was not unusual for an agent to be appointed for a "brand", often on the basis of a very short form agreement, which lacked any specificity. This placed a registered agent in a very strong position to claim that they were the appointed agent for any product bearing such a brand name. In recent years, the trend has been for principals to be far more detailed in identifying, in the agreement, the specific products that an agent will be their appointed representative for in the UAE. Generally speaking, it is perfectly legitimate for an agreement to grant an agent the right to distribute only certain products, allowing the principal the freedom to appoint other agents/distributors for its other products.

Where a principal is entering into an agreement that is to be registered it would be sensible for the principal to be actively involved in the registration process, be it directly or through legal representatives. This will allow it to monitor and try to ensure that the details which are recorded on the registration system maintained by the Ministry and which are reflected in any commercial agency registration certificate (which is subsequently issued), are correct. This is not to say that the Ministry are incapable of correctly transposing the key elements of an agreement into the commercial agency register, but differing approaches by the administration staff could mean that the way in which the products are recorded and thereafter reflected in the commercial agency registration certificate, is not an accurate reflection of the agreement between the parties.
We have seen some instances whereby there is a considerable disparity between the products listed in an agreement and those transposed into the commercial agency register, such as a generic reference to "all products and equipment" having been put into the registration system where the agreement was more specific. Unless checked, the only time this issue is ever likely to be noticed is upon a dispute arising between the principal and the registered agent, by

which time a registered agent's willingness to amend any inaccuracies in the registration will, no doubt, have waned considerably. If there is a clear mistake in how the products are recorded in the commercial agency register then the principal may be able to approach the Ministry and ask that they take administrative steps to amend the registration to accurately reflect the products listed under the agreement. However, there is no guarantee that a unilateral approach would work, as the Ministry may be reluctant to facilitate the changes without the agent's consent. Therefore, the principal's involvement at the outset is suggested so all parties can be sure that the scope of an agent's appointment is clear and accurately recorded at the start of the agent's appointment.

Another factor to be considered by principals and agents is that, on occasion, policy decisions made by the Ministry may dictate that the registration of an agency is only possible in respect of a principal's entire product range. In these circumstances guidance should be sought from the Ministry prior to the principal signing any agreement with a proposed agent. Recent discussions with Ministry representatives have suggested that they may, by virtue of internal policy decisions, require that, in some industry/market sectors, only one agent be registered in relation to a specific manufacturer's product range i.e. products or even "brands" manufactured by the same parent entity may be caught by a pre-existing registration in respect of a parent entity's other brands/products. The practical effect of this would be that an agent could have a right to acquire the rights to distribute a second brand or product line, based on their pre-existing registration in respect of another brand/product line of the same principal. Obviously, the potential impact of any policy decisions of Ministry must be considered on a case by case basis, at the time of entry into the agreement. Note, this is not a broad brush approach and is only applicable to certain market sectors as and when policy dictates.

Another interesting consideration is how, if at all, a registered agreement is treated if there are operational changes which effect the principal entity that is party to a registered agreement. It is not uncommon for a company to undergo internal restructuring whereby divisions of an entity become standalone subsidiaries or for a group reorganisation to result in one member of the corporate group taking over the responsibility for the appointment of distributors/agents from another. We have seen on

Managing Employee Communications in Times of Economic Uncertainty

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With collapsing oil prices, increasing business gloom and a marked drop in consumer confidence, organisations are already beginning to re-examine their resourcing plans and, in some sectors, news of job losses has already begun to trickle through.

Speaking to a number of my colleagues in the region who are dotted around the retail, banking, hospitality and construction sectors, uncertainty has replaced optimism which in itself is usually a pre-cursor to fear. For the vast majority of us who are expats, we know only too well how closely our lives here are tied to our jobs. Whilst the loss of a job anywhere can be stressful and debilitating, the loss of a job here can mean an enforced relocation back to our home country with the corresponding disruption and upheaval that this signifies for our families.

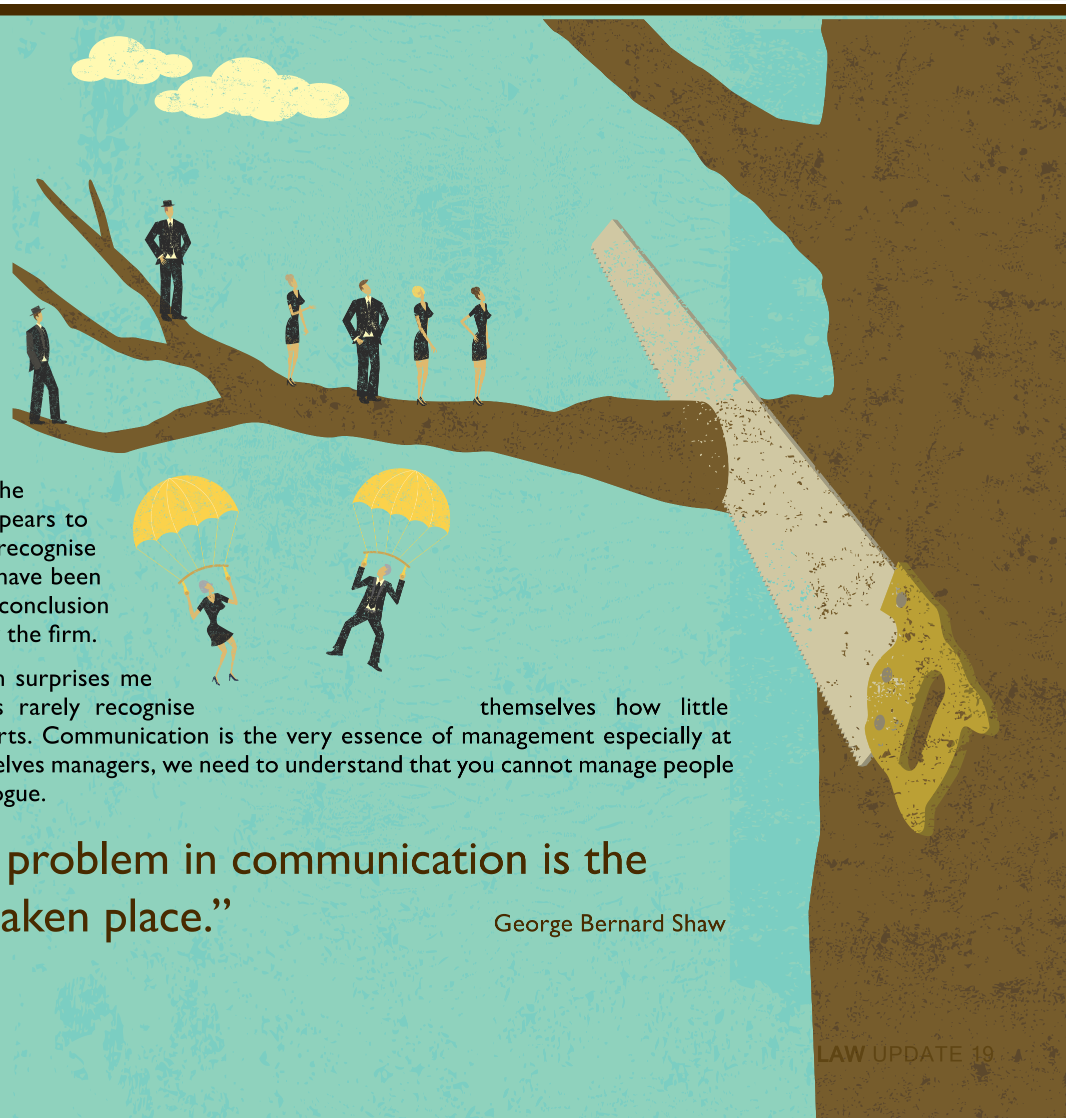
It is at times of uncertainty such as these when sensitive and emotionally intelligent management styles matter most. The last recession which began in 2008 was notable for the disappointing way in which people issues were dealt with. In the UAE in particular, the lack of previous exposure to any major economic upset meant that there were relatively few managers who had experienced what it was like to manage in a downturn. As a consequence, stories abound of highly directive and aggressive management styles coming to the fore which seemed to be the style needed to deal with a rapidly deteriorating economic environment. Of course, what is actually needed is the reverse.

Uncertainty lends itself to more open and visible styles of management underpinned by ongoing dialogue. Even if you feel you have little in the way of news to relay to colleagues, it is always best to ensure that the dialogue channels are open. As managers, we may ourselves feel apprehensive about the future but we have to try and avoid showing this as our staff look to us to be strong and to maintain morale. The worst managers often try to use uncertainty to instil unease and force up productivity or working hours with thinly veiled threats around what might happen to us if we don't work harder but this is a hollow victory in itself. Employees are at their most productive and professional if they are engaged.

By having regular conversations with those you manage, you are also more likely to pick up on uneven workflows which you may then be able to address pro-actively by an early intervention e.g. redeploying resource elsewhere. The more you know about those you manage and their workloads, the better informed your decisions will be. Letting people know that their lives matter to you and reinforcing your interest and a number of occasions, more so with older registered agreements, that the entity responsible for supplying the products to the agent is not the entity that is recorded in the registration. In our view, it is likely that the Ministry will consider that the entity subject to the original registration remains bound by the registration and will remain so until such time as the registration is deregistered or updated at the Ministry. Of course, there may be circumstances where this approach would not make sense, such as where the original contracting party ceases to exist. In any event, the key issue for both the principal entity that is supplying goods into the UAE and for the registered agent is that, in our opinion, the registered agent will continue to be recognised as the registered agent for those products under UAE law and, in particular, will continue to benefit from the protections afforded to registered agents under the Agency Law.

Finally, "evolutions of products" can also cause potential ambiguity. Again our discussions with the Ministry have indicated that if an agent can prove that a "new" product entering the market is effectively an "evolution" or a later model of a pre-existing product already subject to registration in their name, then the registered agent could have a strong argument to claim that they are also the registered agent for that product. Of course what constitutes an "evolution" of a product, as opposed to a standalone new product is subjective, and very much depends on the facts and, often, on the technical specifications of the products in question and/or their target market (if the "new" product is aimed at the same market and is seen as a substitute for the "old" product it is moiré likely to be seen as an evolution of that product as compared to a situation where it is aimed at a different market and not seen as a substitute for the "old" product).

We recommend, in the context of appointing a registered agent in the UAE that a principal be actively involved in the registration process to try to ensure that an agent's registration with the commercial agencies register is a true reflection of the parties' contractual agreement. However, simply ensuring that the products as listed in a registered agreement are accurately reflected in the registration certificate is not necessarily the end of the story when considering what products, in fact, may be covered by that registration!



concern about them on a daily basis is by far the most effective approach.

If and when difficult decisions have to be made, the real value of ongoing dialogue with those you manage then becomes apparent. Instead of just being on the receiving end of a decision that appears to have come out of the blue, they will recognise that the decision is more likely to have been the difficult and maybe inevitable conclusion of the circumstances being faced by the firm.

In people management, what often surprises me most is that too many managers rarely recognise themselves how little they communicate with their reports. Communication is the very essence of management especially at times of uncertainty. If we call ourselves managers, we need to understand that you cannot manage people effectively without continuous dialogue.

"The single biggest problem in communication is the illusion that it has taken place."

George Bernard Shaw

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Currency Support and Quality Importation Initiatives in Egypt

Rather than accept calls for devaluing the Egyptian Pound, the Central Bank of Egypt ("CBE") and the Egyptian Government seem to have a different strategy to address pressure on the Egyptian Pound derived substantially from massive importation.

The strategy adopted by Egypt appears to be a combination of qualitative and quantitative control approaches as embedded in the following measures fostered by the Government and the CBE.

Quality & Officially Branded Products Only

The Ministry of Trade & Industry has issued Resolution No. 992 of 2015 on 31 December 2015 as published in the official Gazette (the "Resolution"). The Resolution attempts to improve the regulations in respect of the importation of certain products including some food products, dairy products and electrical equipment as well as certain accessories and other products outlined in the annex attached to the Resolution (the "Regulated Products").

The Resolution establishes a register for all manufacturers of the Regulated Products. Registration will be pursuant to a decision of the Minister of Trade & Industry who will have discretion to exempt certain manufacturers from part, or all of, the requirements of registration.

Article 2 of the Resolution provides requirements for registration which include submission of an application form, copy of licensing as well as evidence of trademark rights to the Regulated Product. Furthermore, the Resolution requires submission of information relating to the manufacturer as well as an undertaking from the manufacturer to accept an inspection from a technical team to ensure that environmental and safety requirements are part of the manufacturing process.

One of the key requirements for admission for registration under the Resolution is to submit a certificate confirming that the plant in which the products are manufactured has quality assurance systems including ILAC certification or other certification issued from one of the Egyptian governmental entities or non-Egyptian ones that are approved by the Minister of Trade & Industry.

These requirements have been misperceived by some market players and importers as a ban on importation of products or an attempt to make importation of the Regulated Products difficult or burdensome. In our view, we believe that these requirements have taken a step towards improving the quality of products imported into Egypt. In addition, the Resolution once implemented and when the register is activated will support efforts to stop the importation of counterfeit products.

Reducing Pressure on Currency

Furthermore, in a recent circular from the CBE, the documentary credit requirements for importation of commercial products were reregulated to minimise importation of "unnecessary" goods but not to "ban" them. Creation of documentary credit for importation of tradable goods requires a 100% guarantee with banks pursuant to this new circular.

Aside from the content of the circular, the Governor of the CBE explicitly announced that the measures being undertaken by the CBE and the Government target the reduction of imports by US$ 20 billion this year.

Moreover, the CBE has announced a vision to support funding SMEs in Egypt as a parallel step to encourage production in the local market.

Conclusion

When one assesses the implications of both the Resolution and the circular, together with the announcements recently made by the Governor of the CBE, the targeted outcome seems to be reducing pressure on local Egyptian currency by reducing imports of unnecessary goods while at the same time improving the quality of goods imported into Egypt and increasing local production via supporting SMEs. These steps will also help stop the importation of counterfeit products in line with Egypt's international commitments requiring protection of IP rights.

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Should you Mediate?

When a dispute arises there are numerous methods that can be used to resolve it. If the parties are unable to agree a solution then they will need to go to a court or an arbitral tribunal which will force a binding resolution on the parties, a process which can be costly, time-consuming, and still produce a result that neither party is satisfied with.

However when a negotiation fails, the next step does not have to be litigation or arbitration. There are a myriad of other ways that can be used to help parties break the deadlock and reach an amicable settlement. Mediation is one of the most effective. In its conventional form it is a confidential process that involves having a neutral third party (the mediator) facilitate the settlement negotiations by listening to the parties and then, over a period of perhaps a day or two, having a series of separate meetings with them to discuss the issues and how they might be overcome. By having a trained professional whose sole purpose is to focus the parties' minds on settlement, parties are often able to rise above any emotion, posturing or unreasonable conduct, and find a solution to the real issues that divide them.

The Process

The mediation process is flexible to meet the demands of the parties and the issues involved. As with arbitration, mediation can be administered by the parties themselves or with the assistance of an institution (such as the ICC or LCIA). Although an institution will charge fees for its services, the assistance it brings in terms of providing a set of rules, identifying and negotiating fees with a mediator, and ensuring the process progresses in a timely manner, means the fees are usually well spent.

Mediation does not have a set format, but most follow a familiar pattern. The following summary of the process is based on the 2012 LCIA Mediation Rules:

1. A Request for Mediation is filed, either by one party or by all the parties jointly. The Request briefly states the nature of the dispute and the value of the claim, and should be accompanied by a copy of the agreement to mediate.

2. The LCIA appoints a mediator, having regard to any nomination or criteria put forward by the parties. The mediator must be impartial and independent.

3. The parties will discuss with the mediator what procedural steps are needed, but unless agreed otherwise each party will submit, seven days before the first mediation session, a brief written statement summarising its case and the issues to be resolved, accompanied by any documents referred to within the statement.

4. The mediation session itself will then take place. The rules do not dictate how this will be conducted, but typically it starts with a group session where the mediator explains the process and the parties have an opportunity to make an oral statement on their position and the issues. The parties will then retire to separate rooms, and the mediator will shuttle from one room to the next, trying to facilitate progress in the negotiations. Within their own teams the parties will have identified a person who has the authority to settle the dispute on behalf of that party, and that person will usually be present so that a settlement can be entered into at the mediation session.

5. The mediation ends when either there is a settlement or one of the parties (or indeed the mediator) declares that a

settlement cannot be reached and they wish to terminate. It can also happen that a time limit set by the parties will expire without an agreement for its extension.

A key aspect of the process is that nothing communicated to the mediator in private during the course of the mediation is to be repeated to the other party without the express consent of the party making the communication. This allows the parties to speak openly with the mediator, something they could never do with the opposing party, and this often allows for new solutions to be identified.

The Costs of Mediation

The costs of mediation tends to fall into three categories:

1. Institutional Fees
2. Mediator Fees
3. Legal Fees

The institutional fees are usually modest. When a request is filed a registration fee needs to be paid (which for an LCIA mediation is GBP 750). After this the institution will estimate its fees, either on a time spent basis (the approach of the LCIA for example) or with reference to the amounts in dispute (the approach taken by the ICC for example).

As regards the mediator, his or her fees will usually be charged on an hourly rate (for example, the LCIA dictate an hourly rate of no more than GBP 450 per hour). An estimate of the time that the mediator will likely need is made at the start of the process and paid by the parties in equal shares. If at the end of the process there is an excess this will be repaid to the parties; if the process takes longer than expected, further funds will be requested.

Finally, although the parties are not required to be legally represented, this will almost always be the case. The flexibility of a mediation means that it is not possible to accurately say how much the costs will be, but because the parties are not presenting their cases in detail, no evidence is being examined, and no award or judgment written, the costs involved will be much smaller than if the dispute were arbitrated or litigated.

In terms of time, mediations tend to take 2-4 months from the date of filing the Request to the end of the mediation session.

The Benefits of Mediation

The benefit of mediation above most other forms of dispute resolution is that because the mediator is able to speak privately with both parties, the mediator can strive to bridge the gap between them. The mediator has the ability to challenge those parties that have unrealistic expectations regarding the strength of their case, cut through the emotions that may have built up, and suggest possible solutions, pushing the parties to reach a settlement. Even if the process does not result in settlement during the session, settlement will often occur shortly afterwards as a result of the discussions. Settlement avoids the risks, costs and time of a court or arbitral claim, and parties are much more likely to comply with the solution, having consented to it.

Should the mediation fail the parties can be satisfied that they did all they could to reach an amicable settlement.

The Risks of Mediation

Despite its benefits mediation is not a perfect process and will not be suitable for every dispute. The process does cost time and money and there is no guarantee that it will be successful. Sometimes the parties are too far apart, and there is always a risk that one party may have no genuine desire to settle and is merely delaying the prospect of litigation (or arbitration) or trying to learn more about the strengths of the case against them. They may agree to a settlement agreement and then refuse to comply with it. Although these risks can all be managed, they do exist and parties need to be aware of them.

When is the Best Time to Mediate?

If the contract has a mediation clause in it then it may dictate when the mediation is to take place. Otherwise it is for the parties to choose. The conventional time would be once negotiations have identified some issues but both parties remain committed to resolving the dispute amicably. Although mediation can take place during litigation, usually the parties mediate to avoid the time and cost of litigation, since the later it is left the less benefit there will be.

Parties are often concerned that if they propose mediation this will be taken as an indication that they believe their case is weak and wish to avoid litigation. However there are two reasons why these concerns should not dissuade a party proposing mediation:

1. Whilst it is true that a party with a weak case will be less keen to litigate (or arbitrate) a dispute, there are also good reasons why parties with strong cases will want to avoid litigation. Litigation is expensive, time-consuming, inherently risky and limited in terms of solutions it can impose. A party would be foolish to think that an offer is a reflection that the other party has doubts regarding its case.
2. There is nothing to lose by proposing mediation. The strengths of the parties' respective positions will remain the same, and if the proposal is rejected the case will proceed to litigation or arbitration as before. However if the proposal is not made, one will never know if an amicable solution might have been possible.

Some Practical Issues

There are a number of practical issues to be borne in mind when considering mediation:

1. Since mediation is not suited for every dispute, it may be best not to agree to mediation in the contract but to wait until the dispute has arisen, at which time the parties can assess whether settlement might be possible.
2. When choosing a mediator the parties will want someone who is trained in mediation techniques and who ideally is familiar with the industry in question (this will ensure the mediator has some insight into what is commercially suitable as a settlement). The mediator does not need to be a lawyer but often this helps as a lawyer will be aware of the legal aspects of mediation and settling disputes.
3. Each of the parties will need to be sure that the person settling the dispute for the opposing party has the necessary authority. This should be assessed before the mediation session.

Should you Mediate?

Fundamentally, whether you should mediate a dispute comes down to perhaps three issues:

1. Are the issues suitable for compromise?

Although rare, some issues that arise may simply not be suitable for settlement. There may also be cases where a party requires a judgment in order to set a helpful precedent, or where there is a significant risk that a settlement will encourage other potential claimants to bring claims.

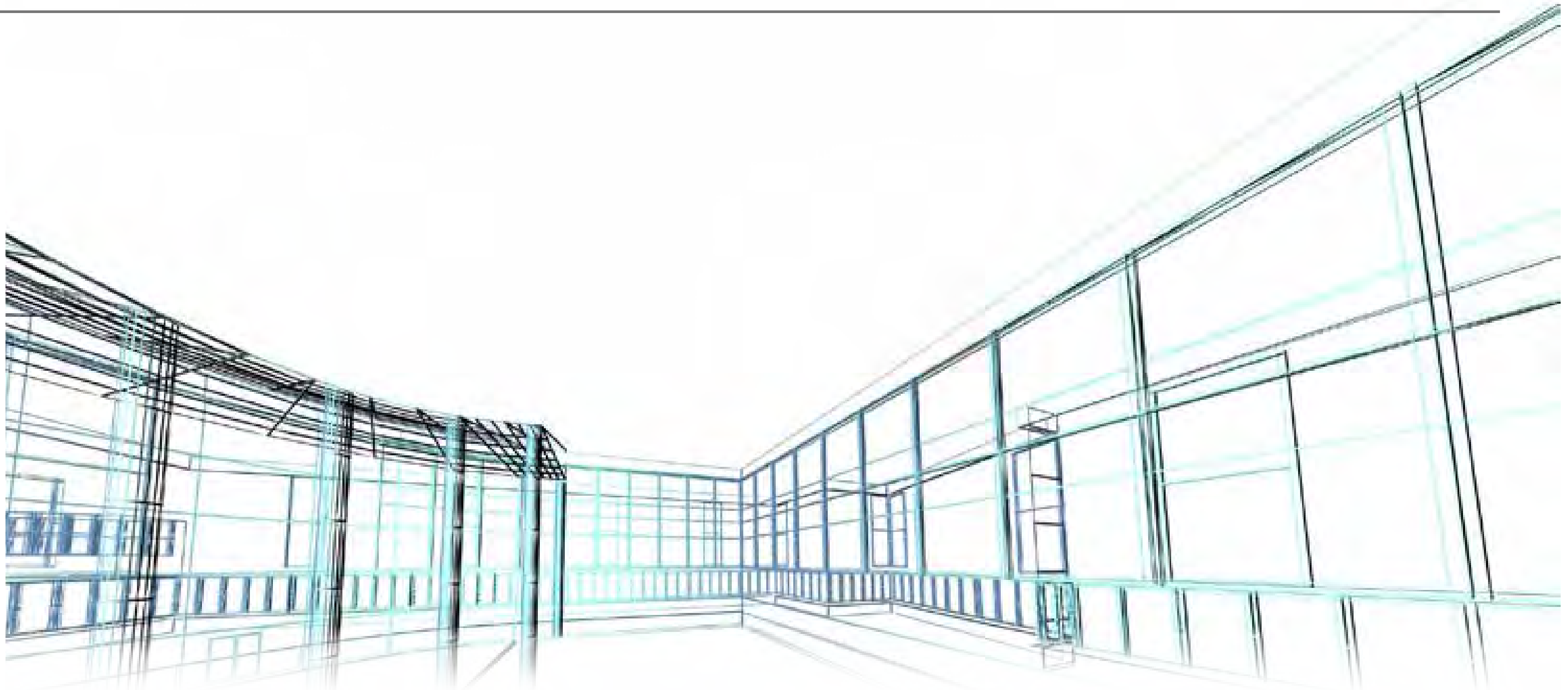
2. Does the other party have an incentive and ability to settle?

Given the costs and risks of litigation, parties almost always have some incentive to settle. However it may be the other party is short on funds and will not be able to settle on realistic terms. Furthermore, if trust between the parties is low one party may suspect that the other party will only use the process to delay matters.

3. Will mediation significantly save costs if successful?

The answer will almost always be that mediation will save costs if successful. However if the case is shortly to be tried before a court, the parties may have already incurred the bulk of the litigation costs. Not only do these incurred costs become a further issue to be resolved in any mediation, but the parties are more likely to take the view that having already spent the time and money preparing the case for trial the process should continue.

In conclusion, whilst not every dispute is suitable for mediation, it is always appropriate to consider whether mediation might help the parties reach an amicable settlement that could not only save considerable time and money, but possibly the relationship between the parties themselves.



Using Dispute Adjudication Boards to Resolve Construction Disputes

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The preferred method for resolving construction disputes in the region is arbitration. This stems primarily from the fact that the standard forms of contract of the Federation International des Ingenieurs-Conseils ('FIDIC') are the predominant forms used in the region, FIDIC's means of formal dispute resolution is by way of (ICC) arbitration.

There are clear benefits to arbitration (e.g. the parties can decide on the seat, applicable rules, the tribunal and the arbitral process allows for a detailed analysis of claims and defences), but those involved in the process will be familiar with its current misgivings.

Some say that arbitration takes too long and costs too much and even after an award has been issued there remains an uncertainty of how the local courts will act in terms of enforcement. For example, concerns about the Dubai Courts is making the 'offshore' Dubai International Financial Centre an increasingly more attractive potential seat and is now seen as a serious alternative to 'onshore' Dubai. Whilst their arguments may be legally sound, it is not unknown for a losing party to invoke technical legal arguments to challenge an arbitral award in an attempt to further delay its ultimate liability to make payment.

The above misgivings of arbitration are not unique to the region or the construction industry; indeed, these complaints are shared with the international arbitration community for both general commercial and investor state arbitrations.

Those familiar with statutory adjudication in the UK will recall that prior to the enactment of the Housing Grants, Construction and Regeneration Act 1996, domestic arbitration in the UK was suffering with the same complaints. Around that time the construction industry in the UK was in need of a credible form of alternative dispute resolution and it came along in the guise of statutory adjudication. Whilst contractual adjudication already existed in the UK, it needed the intervention of statute to provide the traction to take off. Its success is now well versed, so much so that its model was subsequently mirrored in Australia (1999), New Zealand (2002) and Singapore (2004). It may be said that statutory adjudication has become a short-form quasi-arbitration process, save that, amongst other things, unlike an arbitration award, an adjudication decision is only temporarily binding.

With the above in mind, should the region's construction industry be looking for an alternative means of resolving its disputes? The answer must be a resounding yes. According to FIDIC, internationally, contractual adjudication (in the guise of a Dispute Adjudication Board ('DAB')) works extremely well. However, there appears to be a genuine reluctance in the region to use DABs. Our experience is that the DAB provisions of most of the 'new' FIDIC contracts we encounter are either struck out or simply ignored. Leaving aside the fact that the benefits of DABs to projects and their participants are being lost, there is also a risk that construction professionals and the region's industry are falling behind international standard practice for dispute resolution.

This article seeks to provide a general overview of what the DAB process is, how the concept originated, how it works and highlight some of the benefits of the process.

What are DABs and what was their genesis?

Simply stated, DABs are a form of alternative dispute resolution ('ADR'). More specifically, DABs can be said to fall under the generic category of adjudication. ADR includes:

- **Mediation:** the parties agree to have a third party attempt to facilitate a settlement;
- **Conciliation:** often used interchangeably in the region with mediation, but in normal construction parlance it is generally taken to mean where the facilitator ends up issuing a recommendation if there is no settlement;
- **Mini-Trial:** both parties present their cases in a summary form to the senior management of both organizations with an independent third party acting as referee;
- **Med-Arb:** an individual first acts as a mediator and if a settlement is not achieved at he then goes on to sit as arbitrator (this may give rise to legal issues for the individual acting in both roles);
- **Early Neutral Evaluation:** the parties submit their respective cases to a neutral third party (e.g. a QC or judge) who then provides his opinion on the matter;
- **Expert Determination:** the parties agree to submit their (technical or valuation) dispute to a third party who then issues a binding determination; and
- **Adjudication:** contractual or statutory adjudication (including DAB or Dispute Review Boards ('DRBs')), the parties agree or are obliged to submit their respective claims to a third party who then makes a decision which is temporarily binding.

A benefit of ADR can be succinctly stated as being a means of resolving disputes by avoiding the cost, time and inflexibility of litigation or arbitration.

ADR should be less costly because there should not be the same level of involvement of lawyers and experts. The cost of arbitrators, institutions and tribunal secretaries can be avoided. It also avoids the waste of a party's valuable management time otherwise spent dealing with his continuous involvement in a dispute over many months, if not years, in the litigation or arbitration process. Speedy resolution of a dispute allows the managers to spend their time performing their primary day-to-day business duties rather than getting involved in ancillary dispute management.

Another benefit of ADR is that, if used properly, it should lead to the quicker resolution of a dispute. Mediations are often conducted in a single day, statutory adjudication in the UK requires a decision within 28 days and a DAB is required to render a decision within 84 days.

Because ADR is flexible and not as adversarial as litigation or arbitration, the parties should be able to agree upon the process for themselves, which should lead to maintaining working and commercial relationships.

The early involvement (and possible decision) of an independent third party allows the parties to seriously consider their respective positions before embarking on a possible lengthy and costly process of formal dispute resolution via the courts or arbitration.

Those familiar with the history of FIDIC's dispute provisions will be aware that when it published its 1st Edition (1957) a dispute was, in the first instance, to be referred to the Engineer for his decision and any dissatisfied party had to wait until the works were completed before it could start an ad hoc arbitration. The FIDIC 2nd Edition (1969) moved from an ad hoc arbitration to an ICC arbitration (which still remains the position today), whilst the 3rd Edition (1977) allowed for an arbitration to be started before the works had been completed. The FIDIC 4th (1987), colloquially known as the 'Red Book', introduced the requirement for a 56 day amicable settlement period before starting an arbitration.

The genesis of DABs can be said to be the use of DRBs on large civil engineering projects in the USA in the 1960s. The primary difference between a DRB and a DAB is that the former makes a recommendation which can become binding whilst the latter issues a decision which is immediately binding, albeit temporarily. In short, therefore, a DRB is advisory; whereas, a DAB is adjudicatory.

Subsequently, in the 1980s the World Bank included the use of DRBs in its standard conditions for contracts above a certain value. FIDIC first included for a DAB in its 1985 'Orange Book'.

When the 'new' FIDIC contracts first came on the scene in 1999 they included somewhat radical changes to the dispute provisions of the previous FIDIC standard forms, which until 1999 had pretty much mirrored the dispute provisions of the English ICE forms of contract. Despite these 'new' forms now being over 15 years old, we still regularly encounter the 'Red Book', the 'Orange Book' and, to a lesser extent, the FIDIC 3rd Edition.

One of the most fundamental changes in the 'new' FIDIC contracts was the mandatory obligation in Clause 20 to refer a dispute to a DAB before going to arbitration. As mentioned above, in the previous FIDIC contracts (save for the 'Orange Book' (and Section A of the 1996 Supplement to the 'Red Book' which provided an option to use a DAB)), a dispute had to be referred to the Engineer for his decision before it could be referred to arbitration. When drafting its new suite of contracts FIDIC took on board the concerns raised by the contractors that the previous Engineer decision process was not working.

As an aside, in 2004 the ICC introduced its new Dispute Board Rules, which included for both DRBs and DABs and also a hybrid between the two known as a Combined Dispute Board ('CDB').

How does a DAB work?

FIDIC provides for two different types of DAB: a standing DAB (Red, Pink and Gold Books) and an ad hoc DAB (Yellow and Silver Books).

With a standing DAB, the DAB is named in the contract and appointed at the outset. In this way the DAB will be involved in a project from its start. The DAB will make regular site visits, contemporaneously read important communications, become familiar with the parties and key individuals and deal with issues as and when they arise. A standing DAB may be called upon to issue an opinion on a matter and will issue a report after each site visit.

With an ad hoc DAB, the DAB will be appointed only after a dispute has arisen and will deal with the dispute accordingly.

If there is to be a three member DAB each party will appoint its own DAB member and the third member (chairman) will be agreed upon. The FIDIC contracts provide a mechanism in case there is a deadlock in the DAB's appointment process. Just like arbitration, the parties should give careful consideration as to who they will nominate as their chosen DAB member and should have regard to the following when making that choice:

- Independence
- Impartiality
- Qualifications
- Experience
- Availability

Depending on whether a standing or ad hoc DAB is used, the DAB members will enter into a DAB agreement with the contracting parties either at the start of the project or when the dispute arises.

As for remuneration, the way in which the DAB is paid depends on whether it is a standing or ad hoc.

A standing DAB will be paid a monthly retainer, a daily fee for site visits and/or dealing with a dispute, and also its reasonable expenses. Whilst the DAB's fee will be shared equally between the parties, the DAB will invoice the Contractor who will make payment and then seek 50% recovery by way of the interim payment certificate process. Payment is due to the standing DAB within 56 days of its invoice.

An ad hoc DAB will be paid for its daily fee and reasonable expenses. It will not receive a monthly retainer because it only gets appointed after a dispute has arisen. The ad hoc DAB can request an advance of up to 25% of its estimated daily fees and can expect payment within 28 days of its invoice.

Generally, the process will start when the chairman receives the referral (however, the time starts from the date of response in the Gold Book (note that the 84 days will be extended to 105 days if no response is served), or the date when the 25% advance is paid in the case of an ad hoc DAB.

Whichever start date applies, the DAB will usually have 84 days in which to make its decision. Taking into account the usual referral, response, reply, rejoinder, reading time, preparation for and attending meetings, preparation and writing of a decision, this 84 day period will quickly evaporate. Indeed, it would not be unusual for the DAB to request at the very outset that this 84 day period be extended. It would be a brave party to object to the request for such an extension by the decision maker.

Once faced with a referral the DAB will (or should) quickly determine the procedural steps to be implemented. Helpfully, the FIDIC Guide provides a format for a DAB process along the following lines:

- Referral
- Response
- Reply
- Rejoinder
- Hearing
- Claimant's case
- Respondent's case
- Claimant's response
- Respondent's response
- DAB questions

The DAB is free to act in an inquisitorial manner and can decide who will attend the meetings. Therefore, provided that the DAB acts fairly and impartially, it can pretty much decide for itself how it wishes the process to flow. Another important issue is that the DAB is empowered to decide on its own jurisdiction (in arbitration the ability of a tribunal to decide upon its own jurisdiction is known as the Kompetenz - Kompetenz principle).

As mentioned above, the DAB is usually obliged to issue its decision within 84 days. This time period must be strictly adhered to, as must the other formalities expressly provided in Clause 20.

If a party is unhappy with the DAB's decision then it must issue a notice of dissatisfaction within 28 days of receiving the decision.

If a decision is acted upon then there are no further issues. If the decision is not complied with then steps will have to be taken by the successful party to enforce the decision.

Whilst there are provisions provided within the FIDIC conditions to assist the successful party in terms of enforcing a decision, some legal commentators identified a lacuna in Sub-Clause 20.7 in that it failed to deal with how to enforce a DAB decision which had been challenged in the 28 day period (this problem did not apply to the Gold Book). Those familiar with the recent Persero cases will be aware of the problems caused by this lacuna. Consequently, in 2013 FIDIC issued a Guidance Memorandum (2013) recommending that future users of the 'new' FIDIC contracts amend the existing Sub-Clause 20.7.

Notwithstanding that the most recent Persero case ([2015] SGCA 30) resulted in a majority judgment to enforce the DAB decision, it will be interesting to see if the points promulgated in the dissenting judgment will be developed further in other legal jurisdictions if and when enforcement proceedings are brought there, especially if the instant FIDIC contract has not been amended in the manner suggested above.

Whilst there are provisions in the laws of the UAE that could possibly be relied upon in the local courts in an attempt to directly enforce a DAB decision, it remains to be seen how receptive these courts will be when faced with an application to enforce a DAB decision in the manner prescribed by FIDIC and the Persero cases, i.e. an interim arbitral award regarding the DAB decision, whilst the main arbitral proceedings relating to the underlying dispute and subsequent challenge to the DAB decision remain undecided. What is clear, however, is that just like their brethren common law courts, the local courts are likely to uphold FIDIC's pre-conditions to arbitrate if, that is, the DAB provision has not been struck out.

The benefits of using Dispute Adjudication Boards

So what are the benefits of using a DAB?

If a standing DAB is used (which is the preferred option of the many legal commentators on the subject) then the DAB members become fully familiar with issues that have the potential to manifest themselves into disputes. They can, therefore, take measures early on in attempt to nip these potential disputes in the bud, i.e. this can be seen to be proactive dispute avoidance as opposed to reactive dispute resolution. Indeed, having a standing DAB in place is probably the only method of ADR which is in place before a dispute arises.

The DAB members will visit site and also review key correspondence. The DAB will become familiar with the main individuals involved on the project and, importantly, identify personality issues/clashes which can itself often lead to disputes.

It also allows the parties to have an independent third party involved and observe the actions of others, which should provide confidence that both parties will adhere to their obligations from the outset and behave properly, knowing that their respective actions are being constantly observed and monitored.

Clause 20 provides that the DAB is to make its decision within 84 days. Compare this with the usual 18 – 24 months to get an arbitration award in construction arbitrations.

The DAB controls the process. There should not be the need for extensive use of lawyers, experts and witnesses, therefore, the costs should be significantly reduced compared to litigation or arbitration.

If there is to be a meeting, as opposed to a formal hearing, then it will often take place on site, which can eliminate the costs for a venue which are incurred in arbitration.

Importantly, because of the flexibility of the process and because it should operate quickly and cost effectively, there should be a greater opportunity to maintain working and commercial relationships.

Summary

Both regionally and internationally, the reputation and image of arbitration is suffering. There are complaints (possibly justifiable in some cases) that it takes too long and costs too much.

Therefore, those involved in disputes in the region's construction industry may wish to consider alternative methods of dispute resolution.

There are reports from both FIDIC and legal commentators alike that standing DABs often lead to the speedy resolution of disputes without the need to resort to arbitration.

It is suggested that, if used properly, standing DABs can add value to a project in terms of real life dispute avoidance. Factoring in the cost of a DAB at the outset should be seen as a proactive step towards dispute avoidance, rather than the alternative negative step of waiting for an issue to manifest itself into a fully blown dispute necessitating formal, costly and lengthy arbitration proceedings.

It remains the case that DABs are not being used in the region to the extent they are in other parts of the world. Whilst there is no clear reason for this lack of uptake, it may be that employers continue to dictate the allocation of risk in contract negotiations, which includes the risk associated with dispute resolution provisions, and they may be concerned that DABs could issue adverse decisions in terms of time and/or money. There may also be a perception that the additional up-front costs of a standing DAB are not warranted as part of the overall project cost. Finally, even if a DAB decision is rendered and subsequently challenged, given it would not be final and binding, and leaving aside possible contractual ways for its enforcement, there remains an uncertainty of how such a decision would be dealt with by the local court leading to ancillary litigation and wasted time and costs.

In light of the above, it appears that a cultural shift in the mindset of employers is required and, possibly like the UK before it, maybe statutory intervention with a subsequent groundswell of judgments from the local courts if DABs are to gain any traction in the region. *Footnotes available online at www.tamimi.com/lawupdate*

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A New Seat is Born: Abu Dhabi Global Market Issues a UNCITRAL-based Arbitration Law

Introduction

Abu Dhabi Global Market, the recently-created commercial free zone in the heart of the UAE's capital city, issued a modern UNCITRAL-based arbitration law on 30 December 2015, pursuant to the "Arbitration Regulations 2015". The Regulations govern all arbitrations seated in Abu Dhabi Global Market, as well as the enforcement of all arbitral awards in the jurisdiction. This article gives some background to the Regulations, discusses their focus and approach, and highlights some notable features.

Abu Dhabi Global Market

Abu Dhabi Global Market (ADGM) is an international financial centre and free zone for local, regional and international companies, which is headquartered on Al Maryah Island in Abu Dhabi. ADGM, which commenced operations in 2014, is overseen by three independent authorities: the Registration Authority, the Financial Services Regulatory Authority and the ADGM Courts.

The ADGM Courts are broadly modeled on the English judicial system. English common law (including the rules and principles of equity) is directly applicable in ADGM. In addition, a wide ranging set of well-established English statutes on civil matters are also applicable in ADGM. ADGM is thus the first jurisdiction in the Middle East to directly apply English common law.

The ADGM Board of Directors (ADGM Board) is empowered to enact ADGM laws and legislation.

The Arbitration Regulations

Following a consultation process, in which Al Tamimi & Company participated, the ADGM Board decided to enact comprehensive Regulations to govern arbitration and the enforcement of arbitral awards within ADGM in furtherance of its objective to offer market participants a worldclass legal system and regulatory regime.

In a break from its general approach of adopting English law, the Arbitration Regulations enacted by ADGM does not follow the English law in this area, but instead closely follow the UNCITRAL Model Law. In doing so the ADGM has enacted a modern law reflecting the most widely acknowledged best practice in international arbitration, which will encourage the wide use of ADGM as a seat of arbitration in the region.

A pervasive pro-arbitration approach has been taken in the Regulations: there is limited scope for court intervention in the arbitral process; tribunals have the power to consider and decide disputes concerning their jurisdiction; and the grounds for challenging an arbitral award are limited to narrow circumstances with no review of the merits of the dispute. The Regulations are also intended to ensure that tribunals constituted within a ADGM are independent of, and impartial as between, the parties, must respect due process and must ensure equal treatment of the parties.

Enhancements made to the Model Law

The Board has implemented a series of modifications and enhancements to the UNCITRAL Model Law to reflect the most modern and progressive arbitration practice internationally, which it believes will appeal to end users of ADGM arbitration and the regional legal community. Significant modifications and enhancements include:

Enhanced confidentiality and privacy

Given the nature of the business that will be conducted in ADGM and the prevailing culture of discretion in the region, the Model law has been amended as follows:

- The award and any information relating to the arbitral proceedings are confidential and may not be disclosed to a third party, save for certain limited circumstances.
- All arbitration-related proceedings in the Court are to be heard in closed court.

Joinder of third parties

The Regulations provide that the ADGM Court or the arbitral institution administering the arbitration (if there is one) can join a third party to the arbitration even if that third party is not a party to the arbitration agreement and other parties do not consent. The criteria, similar to that found in the LCIA Rules, is that (i) the request must be made by a party to the arbitral proceedings; (ii) the third party must consent in writing to the joinder; and (iii) it is in the interests of justice to allow the joinder and does not prejudice any of the parties.

Waiver of right to bring an action for setting aside

The Regulations provide that the parties may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the right to bring an action for setting aside, or to limit it to certain grounds. While the foregoing provision is intended to make the award completely final and "unappealable", the award may nonetheless still be denied recognition and enforcement (if the award is to be enforced in the ADGM).

In addition to the foregoing, the Regulations contain comprehensive and helpful provisions on numerous issues relating to the conduct of arbitration proceedings, including a wide range of available remedies to assist the parties and the process generally.

Conclusion

The enactment of the Regulations is another important milestone for ADGM: its birth as a fully-fledged arbitral seat. It is a further indication that ADGM is committed to providing clear, transparent and robust rules and regulations to an international "best practice" standard. ADGM has taken the lead in enacting one of the most modern and progressive arbitration laws in the Middle East. The Regulations may serve as a bellwether for other initiatives, including the long-awaited enactment of a UAE federal arbitration law.

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Clients, Contractors and Associated Liability Issues in Media and Events

Many years ago, a production facility was undertaking a rebuild and upgrade of a studio. They hired a contractor, who put in a subcontractor, who then got a subcontractor, who put in place a subcontractor, who hired a team of young freelancers to undertake the work. Unfortunately there was a serious accident involving one of the freelancers and suddenly the production facility was faced with many layers of contracts, none of which had been reviewed by a lawyer. What also became clear was that none of the subcontractors had contracts with each other that reflected the terms that were in place between the client and the contractor itself. The production facility ended up being held fully liable for the accident.

The media and events industry rely heavily on subcontractors to provide services to their clients. Whilst accidents are uncommon, properly passing liability down the chain (and back up again in some cases) remains important for all aspects of the contractual relationship. In this article, we will review those areas which should be carefully reviewed as well as looking at the possible legal ramifications of signing subcontractor agreements without checking them.

The Scenario

To assist in explaining the importance of contractual relationships in the media and events industry, let's consider the following, very normal, scenario.

A client, Acme Retail, is working with their advertising agency, The Agency. Acme Retail and The Agency have carefully reviewed their contract terms before they are signed at the highest level, each aware that they are in a day-to-day relationship that is very important to both. Acme Retail asks The Agency to develop, deliver and produce a short live musical event to promote its brand. They also want the event to be filmed so that it could be used in digital media, with the eventual goal of it becoming viral content. The Agency gives the task of delivering the event to an events company, Events R Us, who then subcontract the filming activities to production company, Film Inc. Film Inc subcontracted the post production to an edit house, Edit.Com.

Contractually, Acme Retail has an annual contract with The Agency to be their creative agent and oversee production of content. The Agency signs a short form agreement that is supplied by Events R Us which they use for all their live corporate events. Film Inc supplies a purchase order to Events R Us and there is no contract at all with Edit.Com.

What could go wrong?

Intellectual Property Ownership

In the media and events industry, focusing as it does on creativity and buzz, it is easy to forget that underpinning the creation of materials is the legal concept of copyright. In the UAE, as with most places globally, copyright vests in the person that creates the material. Additionally, in line with the Berne Convention, which underpins most copyrights systems globally, an assignment of copyright will not be valid unless it is in writing. In short, if there is no written contract, then the person that created the works still owns them.

It is easy to see in the above scenario that there might be a problem. It is common in agency contracts for the client to demand that all materials created under the contract are wholly owned by them so that they can be used in perpetuity globally and in all media. So The Agency must deliver all rights to Acme Retail. Unfortunately, as it has contracted with Events R Us on a standard form events contract and it is not common for events to be filmed, it contains no clauses regarding copyright. But as they have no contract at all with Film Inc, then we know that copyright in the film created of the event will remain with Film Inc. Acme Retail does not own the film.

But Acme Retail thinks it does. It moves the film on-line and it becomes a sensation, winning awards and acquiring 2 million views in a short time.

The music that was used at the event is still contained in the film - it was shot live and is an important part of the event. As there are no contracts, there is no clear line of responsibility about the clearance of the music. Record companies will definitely seek damages for the infringing use of their material and will likely seek them from the brand. Acme Retail received a notice regarding the infringing use of the music. It looks to The Agency as there is generally a very clear indemnity clause in the agency contract. With no clear contract noting the liability for clearing music between The Agency and Events R Us, The Agency will most likely end up paying the damages. All The Agency had to do was ensure that the indemnity contained within its contract with Acme Retail was mirrored in the subcontractor relationships. It should also, at every stage, ensure that all subcontractors under Events R Us sign a contract with a similar clause.

This not only protects itself against potential liability but ensures that Acme Retail does not receive legal notices. It also saves its reputation in the market place.

Talent

As we noted above, Events R Us provided its own basic event contract to The Agency which was signed without being reviewed. It contained the dates, the venue and a synopsis of the services and provided for payment.

Events R Us then hired two dozen dancers to perform at the event. Each performer signed a one page release about performing which, again, included terms about dates, venue and payment. So what happens when the performers see themselves on an on-line campaign? After all, they were only booked for a live performance.

If Events R Us did not acquire a broad range of rights from the performers, then the performers have a right to seek additional fees from Events R Us. In fact, we have seen this happen many times in the region and the result is always

"In line with the Berne Convention, which underpins most copyrights systems globally, an assignment of copyright will not be valid unless it is in writing. In short, if there is no written contract, then the person that created the works still owns them."

the same – extra money must be paid to the performers. Sometimes a performer did not consent to being filmed at all but, more commonly, performers agree to be filmed to appear in (say) a billboard campaign for six months but then see themselves two years later in a magazine.

Of course, in the contractual matter raised above, Events R Us is not in a strong position to claim the extra payments from anyone contractually. It can hardly pass liability to Film Inc, which did not arrange the performers. There is no question that both Film Inc and Edit.Com could have requested copies of the performers' agreements but, as they have no contractual liability for the clearance of rights, they might simply ignore the matter as being someone else's problem.

Acme Retail, now pushing this content across to television advertising, will likely remain oblivious to the further payments being negotiated with performers for the content.

Payment Dates

The vast majority of contractual disputes come back to payment, and the media and events industry is no exception. And in our scenario above, we do have to feel sorry for Edit.Com, who sits at the bottom of the chain and needs to be paid.

The usual response to lack of payment is to withhold the materials to be delivered. Edit.Co will probably do that. This places Film Inc in a difficult position. It has a purchase order and quite a significant number of emails agreeing to a delivery date but nothing ties delivery to payment. The fee is probably noted on the purchase order as being 'payable on delivery'. Most smaller production companies in the region do not have the cashflow to pay Edit.Com to release the materials but Edit.Com knows that if it releases the materials, it has no way of securing its payment.

Payment schedules are incredibly important in documentation. They should line up perfectly from Acme Retail across each contract and eventually to Edit.Com. Failure to do this can compromise deliverables and this can be exacerbated if any contract contains penalties for failure to deliver on key dates. These must also be passed down verbatim in order to avoid one entity being financially punished for the slow delivery of another.

Liability

It is often the case that certain terms that have been agreed in the client agreement are omitted in subcontractor agreements. For example, Acme Retail may have included a cap on liability in their contract with The Agency. This is not of course reflected anywhere else in the documents relating to the event.

This may not be relevant as, in most cases, Acme Retail will not be providing services for the event. But let's imagine that they are actually arranging a branded car to be part of the event. Events R Us obviously secure the venue under a standard venue contract – this will have no cap on liability. Then their marketing manager drives the branded car from the venue, crashing it into the DJ booth and causing severe damage to the electrical system.

Acme Retail is contractually liable (other legal obligations aside) to the value of the cap. However Events R Us, as the signatory to the contract with the Venue, are liable for the full amount of the damage. A cap on liability is never a preferred position, but if you have one then it should always be passed down to subcontractors (including, in this case, the venue) to ensure you do not end up with liability.

Conclusion

From a practical perspective, allowing a subcontractor to commence work before the terms of the supply are properly finalised means that they can assess the work and realize that they need higher fees, meaning either a late re-negotiation or the replacement of a subcontractor midway through the project (neither of which is commercially satisfactory). But this issue becomes very difficult legally when the key commercial terms are not passed down into to subcontractors.

Fundamentally, any ambiguity in a commercial relationship provides an excellent basis for misunderstandings, arguments and eventually a legal action. The situation is no different in the media and events industry. Prepare your contracts well, pass on key liabilities to the appropriate subcontractors and ensure that, if anything does go wrong, you are not the one left opening your piggy bank.

Al Tamimi & Company's Technology, Media & Telecommunications team regularly advises clients in respect of contracts in the media and events industry.
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Part Two: Telemedicine in the Gulf - Further Legal Issues

This article is the second of two articles to explore the topic of eHealth - and in particular telemedicine services – in the Gulf countries. In this final instalment, Andrea and Christina consider some of the legal issues, beyond licensing, relating to telemedicine services.

Liability for out-of-jurisdiction healthcare advice

An important issue that all parties to a telemedicine arrangement need to understand is how medical liability is determined, both between providers within the region, and between providers where one is local and the other is from outside of the region. There is inevitably some uncertainty over which party will be left holding the proverbial 'baby.' In the UAE the position is governed by a suite of Federal and local Emirate laws. Federal Law No. (10) 2008 concerning Medical Liability and the Cabinet Decision No. (33) of 2009 are the governing medical liability laws in the UAE (together, 'Liability Law'). The Liability Law pertains to practitioners within the UAE. This law does not address liability as it relates to foreign practitioners engaged in activities with local facilities. In general, UAE laws would not have jurisdiction over foreign providers except insofar as they are parties to a contract governed by UAE law.

“What is urgently needed is a consistent regional approach to regulation governing the use of telemedicine services.”

In terms of individual healthcare practitioner liability, all healthcare providers in the UAE are subject to the Liability Law. Failing to observe the law or committing a medical error would expose the practitioner to the risk of a civil claim for damages. A medical error under the Liability Law, Article 14, is an ‘error which is due to ignorance of technical matters which every practitioner of the [p]rofession is supposed to be familiar with, or to negligence or lack of due care.’

Regulations such as the Dubai Health Authority’s (‘DHA’) Hospital Regulation and Day Surgical Center Regulation indicate that while clinical services provided by an external contractor are permitted (such as radiology, laboratory, pathology and allied health) the contracting DHA licensed healthcare facility retains the fundamental responsibility for quality. Given that the DHA places this burden on the contracting facility, even when out-of-jurisdiction contracts are not specifically contemplated, in circumstances where healthcare services are performed by out-of-jurisdiction providers, such as in tele-radiology services using foreign providers, we expect that the facility or a named practitioner at that facility could be named as a party to civil (i.e. tortuous) proceedings brought before the UAE courts in the event of a malpractice case resulting from the errors of a foreign provider. We expect that such a case would centre around (i) evidence of negligence with regard to the services provided, and (ii) the potential failure of the local facility to perform proper due diligence in contracting with the third party or (iii) proper quality regulation and oversight of the third party.

The question of whether the out-of- jurisdiction provider can be drawn-in to the proceedings will depend on the facts. Then, if a local provider is found to be liable, the commercial contract with the out-of-jurisdiction provider may then govern whether any indemnity or claw-back provision applies.

The Health Authority - Abu Dhabi (‘HAAD’) has implemented similar standards governing how liability is managed in a telemedicine arrangement. HAAD regulations place liability on the originating HAAD-licensed healthcare facility for the clinical and medical services provided through telemedicine. Medical and legal risk exposure can be reduced by implementing facility telemedicine policies and guidelines, including continual training and licensing requirements, and proactive monitoring of staff performance.

Data protection issues

In the event of a data breach, the key issues are (i) what are the legally required mechanisms for reporting and rectifying the breach and (ii) to what extent does the provider have liability for the release of confidential information.

The use of telemedicine services, especially those which require personal health information to be transmitted electronically out-of-jurisdiction, increase the risk of a security breach and loss of confidential patient data. Digital health records can be valuable to criminals. Medical identity theft, the fraudulent use of someone’s personal identity to obtain medical services, prescription drugs or devices, are a few examples of the potential damage.

In Abu Dhabi, the management of data is governed by a very chunky Data Standard. Accordingly, compliance with these requirements require both the local licensed healthcare provider and the foreign service provider to implement IT systems to meet this standard as a minimum. This ensures a robust regulatory environment along with basic data protection and confidentiality standards, together with a process for reporting and remedying breaches, as well as provider liability to patients in the event of a breach.

Securing the data network, from both outsider threats and from a business continuity perspective, is of paramount importance. Advances in telemedicine and eHealth across the region will be determined by regulators developing efficient policies, developing appropriate data protection laws, and ensuring that legal and regulatory constraints do not impede innovation.

The advertising of services from out-of-jurisdiction

Health service advertising is regulated in two main ways, primarily under the aegis of the Ministry of Health of each Gulf country, which typically have oversight powers over all health-related matters in their jurisdiction, and secondarily by other regulators, such as the Ministry of Information in the Kingdom of Saudi Arabia ('KSA'), which regulates all publications in KSA with specific oversight and licensing powers as regards to publicity, advertising and public relations.

A healthcare provider wishing to target patients within a Gulf country from outside the jurisdiction in order to advertise their services and attract patients to travel outside the jurisdiction for treatment, or for telemedicine consultations, needs to be aware of the restrictions in the countries in which advertisements are likely to be viewed. The question of whether a provider would be deemed to be caught by the laws of a particular country will depend on many factors, such as the classification of advertising, social media, print media, magazines and commercials, coupled with the extent to which it is targeted at a certain country or region.

Whilst a high-profile advertising campaign may extend the potential pool of patients, thought should be given as to how to ensure payment for services delivered. Some providers are using such advertising to target only high net-worth individuals and insured patients who will pay themselves then seek reimbursement from their insurer. Thought should be given to addressing advertising, licensing, permit, and regulatory issues, as applicable.

Insurance reimbursement

The opportunity to grow telemedicine services as a tangible alternative to traditional face-to-face consultations relies heavily upon there being a reliable route to obtaining reimbursement. Typically, healthcare providers in the region have arrangements in place with governments or insurers for reimbursement of services. The various payment codes set up for this must include payment for telemedicine in all of its various formats. Progress on this has been made in the UAE with many insurers now recognising the benefits of telemedicine as a preventative medicine tool. However, as the overall cost of healthcare provision escalates, insurers are looking for opportunities to cut costs and are pruning certain benefits out of the reimbursement scheme. Such cut backs are currently on the radar of the government of Abu Dhabi for certain telemedicine services, which are at risk of being withdrawn. The reasons for this are currently unclear but must be viewed as a set-back that we hope will not contaminate other Emirates of the UAE or regional thinking for these benefits.

The urgent need for clarity and consistency

There remains a significant gap between the traditional laws that govern the establishment and 'setup' of a healthcare business, on the one hand, and the telemedicine laws on the other. For example, a local healthcare provider must demonstrate that it has the requisite number of employed radiologists and radiographers etc. at its facility, but if it later adopts telemedicine services and outsources radiology services via a telemedicine provider, there is no relaxation of the rules with regard to the number of on-site employed personnel. This situation clearly impacts upon the question of whether the outsourcing of those services is a cost-effective option. As this issue is becoming increasing more common and as outsourcing via telemedicine services grows in popularity, local health authorities should be consulted about outsourcing plans and their approval sought to enable a downscaling of requirement for on-site support.

Conclusion

What is urgently needed is a consistent regional approach to regulation governing the use of telemedicine services based upon internationally recognised standards. For the Gulf countries, this means a whole-scale re-think of how telemedicine will impact upon the existing set-up of healthcare facilities to enable a smooth transition over to telemedicine outsourcing on a larger scale. As things currently stand, the fact that the region lacks leadership on this point should not be seen as a barrier to entry. The Gulf countries are keen to embrace telemedicine as the weapon of choice that will meet the future needs of the region.

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Gulf Airlines Competition Challenge by US and EU: The Legal Framework

On the 7th of December 2015, the European Commission adopted and published a package of measures entitled "Aviation Strategy for Europe" with its accompanying stated intention being "to ensure that the European (EU) aviation sector remains competitive and reaps the benefits of a fast changing and developing global economy". A key part of the package of proposals is an attempt by the European Commission to change the way aviation agreements with key partner countries are negotiated.

In an accompanying fact sheet to its Aviation Strategy, the European Commission specifically targets the Gulf Co-operation Council (GCC) region, and notably UAE and Qatar, and announces that the Commission is seeking a new EU level policy to challenge the region which it "sees as one of the most dynamic and fast growing aviation markets in the world". The document states that "while the additional connections provided by Gulf airlines are welcome, there are concerns regarding the conditions under which they operate. Comprehensive aviation agreements between the EU and the GCC states would be the right way forward to bridge the interests of both sides by creating conditions that would allow further market developments and growth based on common rules and transparency".

The Convention on International Civil Aviation (1944) "The Chicago Convention" governs international civil aviation and it provides for a system whereby individual States have complete and exclusive sovereignty over their own national airspace. By Article 6 of the Chicago Convention "special permission" may be granted by a State for the operation of scheduled international air services. Such "special permission" is traditionally given in "bilateral air service agreements" between States opening each other's national airspace to international air traffic.

In its Aviation Strategy document, the European Commission acknowledges that traditionally, international air transport has been governed by bilateral air service agreements between States, but it refers to these agreements as "a patchwork of differing market access and rules for airlines... and consequently the EU has developed an external aviation policy aimed at concluding comprehensive aviation agreements and aviation safety agreements between the EU as a whole entity and key aviation partners worldwide". The European Commission points out that the EU has already concluded comprehensive aviation agreements with the United States and Canada, and is currently finalizing an agreement with Brazil, and has concluded aviation safety agreements with the United States, Canada and Brazil.

This attempt by the European Commission to move away from existing bilateral agreements between the Gulf States and individual European countries is a new departure and development. Indeed, one UAE airline issued an immediate response to the European Transport Commissioner's proposal by saying that "the competition related issues are already covered under existing sovereign bilateral air service agreements, as well as existing EU regulation. Therefore, we find it interesting that rather than use these tools to address specific grievances, the European Commission is instead looking at a new EU level policy or updated instrument. We would also be interested to see what such policy would mean for state supported airlines in Europe, as well as existing anti-trust immunised joint ventures between European and non-European carriers and other "protected" commercial arrangements of this nature".

The European Commission announcement follows on the heels of a challenge commenced in February 2015 by three US airlines, American, United Airlines and Delta, who published a 55 page report alleging, among a series of perceived grievances, that Etihad, Emirates Airlines and Qatar Airways have benefitted from state subsidies, and requesting that US administration officials begin talks with the UAE and Qatar to renegotiate existing international air service agreements.

The debate with the US carriers has brought into sharp focus the position of the Gulf Carriers who argue that they have flourished because they are clean-sheet business model businesses based on exemplary customer service, on new aircraft, with international hubs at the crossroads of the world's main trade routes. Consequently, Gulf Carriers perceive the challenges to existing international arrangements as particularly ill advised.

Given the heated nature of the debate surrounding the attempts by the European Commission and the three US carriers to re-negotiate existing arrangements, it is worth stepping back and briefly explaining the historical legal framework under which the Gulf airlines have successfully conducted aviation business.

The Chicago Convention provides for the principle that states can impose limitations on flights of foreign aircraft and that each state has complete and exclusive sovereignty over the airspace above its national territory. In essence, national airspace is closed to foreign aircraft unless there is "special permission". This "non-freedom of the air" can be turned into freedoms of the air pursuant to the terms of bilateral or other international air service agreements which have the effect of opening up the airspace of the parties to the agreement. Essentially a bilateral air service agreement is a contract between states to liberalise aviation services.

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The Chicago Convention introduced "nine freedoms of the air" for States that have adopted the Convention, and the first "five freedoms of the air" are now recognized by international treaty so that States may enter into bilateral air service agreements that may grant any of the following rights:

1. To fly across the territory of the State without landing
2. To land in either State for non-traffic purposes e.g refuelling/disembarking passengers
3. To land in the territory of the first State and disembark passengers coming from the home State of the airline
4. To land in the territory of the first State and board passengers travelling to the home State of the airline
5. To land in the territory of the first State and board passengers travelling to a third State where the passengers disembark – e.g scheduled flight from United States to UAE can pick up traffic in the U.K and take it all to UAE.

Since the Chicago Convention came into force, there has been a gradual development in aviation regulation to move from closed to open airspaces. When finalizing bilateral air service agreements, States followed a pattern based on the Bermuda 1 agreement of 1946, which was a treaty originally made between the US and the UK. It is fair to say that the Bermuda 1 regime was a compromise between a more restrictive market view put forward by the UK and a more open market view put forward by the US.

Following on from Bermuda 1, bilateral air service agreements between States have been used to designate which airlines may operate agreed services. The agreements generally provide for the designation of routes, ensuring "fair competition" certification of operating certificates, designation of prices and capacity, rules for safety and security, code sharing provisions, noise and emissions and environmental provisions, user charges for air services, taxation, access to airports, dispute settlement, and termination provisions if a State decides to withdraw its rights to fly.

The United States began pursuing the policy of negotiating "Open Skies" agreements from 1979 onwards, and it has signed many bilateral air service agreements worldwide to achieve this policy. Most of these existing "Open Skies" bilateral agreements include provision for free market competition and pricing determined by market forces, an equal opportunity to compete and co-operative marketing arrangements, such as code sharing and leasing arrangements with airlines, provisions for dispute settlement, safety and security provisions, together and what are called optional "seventh freedom on cargo rights", so that the airline of one country can operate cargo services between another country and a third country via flights that are not linked to its homeland.

The Gulf state airlines argue that its existing Open Skies and bilateral air service agreements have succeeded and do not require re-negotiation either with the US carriers or with the European Commission.

In the context of the Chicago Convention, and aviation regulation generally, the European Union has pursued a policy to liberalise the transport sector both internally within the EU, and externally with countries outside of the EU.

Internally within the EU, the EU agreed to liberalise the air transport sector in 1987 and to create a single European aviation market by giving all airlines within the EU in possession of a community license "unrestricted access" to the intra European market. Until 1987, International air transport in Europe was governed by bilateral air service agreements between pairs of European countries which often allowed only one airline from each country to operate services on a limited number of specific routes. Liberalisation Packages were introduced in 1987 and 1990 so that European carriers were granted almost unfettered freedom to fix their own routes, schedules, fares and capacities without any State intervention. This liberalisation and unrestricted access to intra EU markets have facilitated the emergence of low cost carriers, operating a different model to the legacy owned national carriers, with low cost, high capacity flights.

The EU's external aviation policy has also evolved so that the EU has increasingly has sought to enter into treaty negotiations on behalf of its member States. In 2002 , the European Court of Justice (ECJ) concluded that member States were entitled to negotiate bilateral air service agreements provided that such agreements did not breach EU law. The ECJ confirmed that certain provisions of these agreements did not contravene EU rules, and in particular the provisions regarding the nationality of air carriers and the fares that foreign carriers were entitled to charge on inter-community flights.

In parallel with this, the European Commission issued a document commenting on the ECJ decision, and seeking a mandate to negotiate with third countries on behalf of member States as a whole. As a result, the EU Council has since given mandates to the European Commission to negotiate Open Aviation Air Agreements, examples of which are the EU-US Agreement on Air Transport (2007and 2010) and the EU-Canada Air Transport Agreement of 2009.

The European Commission's Aviation Strategy for Europe is perhaps a continuation of this process, so that the European Commission is seeking to renegotiate on behalf of the EU as a whole, and potentially it is seeking a mandate to replace existing bilateral air service agreements concluded between EU member States and the Gulf Carriers.

It is difficult to predict whether the European Commission will succeed in its aim, or whether the US carriers will succeed in pressing for a re-negotiation of existing arrangements. There are provisions within the European bilateral agreements and the 2002 Open Skies agreement made between the US and the GCC states for dispute resolution, and indeed termination, but at this stage it is fair to say that the attempt by the European Commission to seek to tackle a perceived issue of competition from the Gulf Carriers within its new Aviation Strategy, and the position of the three US carriers, has raised much comment from the aviation industry.

Perhaps the best example of this divergence of views is exemplified by a new association of European airlines which was formed in January 2016 under the name Airlines for Europe (A4E). The new association is made up of Ryanair, IAG, (BA, Iberia Veuling, Aer Lingus), Easyjet, Air France-KLM and Lufthansa. Whilst the association's stated intention is to provide a unity of approach, where possible, within the European aviation industry, A4E made it clear that its inaugural press conference in January 2016 that one area where the association will "agree to disagree" is the attempt by the European Commission to change existing arrangements with the Gulf carriers.

It is evident that the present system under which Gulf Carriers conduct aviation business is being challenged by the European Commission in that it is seeking a mandate to negotiate a new comprehensive aviation agreement on behalf of the EU as a whole. The possibility of this, coupled with the possibility of the US administration re-negotiating existing bilateral air service agreements again if the US carriers' arguments succeed, is an important issue for the forthcoming year. Nevertheless, it is hoped that Gulf carriers will continue to flourish as they have done so within the framework of international aviation law for the foreseeable future.

Footnotes available online at www.tamimi.com/lawupdate

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GCC Unified Trademark Law: Key Provisions and Challenges

Since 2007 there have been significant talks within the Gulf Cooperation Council (GCC) regarding the adoption of a unified trademark law. In the present article we will discuss the key elements of the unified GCC trademark law (the "Trademark Law") and the prospect of it being adopted throughout the GCC.

In a nutshell the main focus of the Trademark Law is to create uniformity between the local trademark laws of each of the GCC member states namely, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. Whilst the adoption of the Trademark Law will result in a more unified set of regulations for GCC trademark protection, it is important to point out that the Trademark Law will not provide a unified filing system. As such, right holders will still be required to file separately in each applicable GCC country in order to ensure protection and enforcement rights. We explore matters in further detail below.

Background

The Trademark Law was initially submitted by the GCC General Secretariat and approved by the GCC Trade Cooperation Committee in 1987. However, the GCC member states have to date only used the law for consultative purposes and there has been no direct application of the law in any of the member states. In 2006 and 2013, further amendments to the Trademark Law were approved by the GCC Supreme Council before being published in the GCC Official Gazette.

Although the Trademark Law has been enacted as law from a GCC perspective, in order for it to be applicable within each GCC member state, the law needs to be (i) approved locally in each sovereign state by a decree or a law, (ii) published in the local official gazette of each member state to become effective, usually after six months from the date of issuance of the implementing regulations.

To date the following member states have taken the below actions:

1. **Saudi Arabia** - Decree No. M/51 dated 26 April 2014 approved the Saudi Council of Ministers decision No. 306 of the same date and the Trademark Law is to be published within 30 days from the date of issuance of the Implementing regulation and will come into force after 90 days of its publication in the official Gazette.
2. **Qatar** - Decree No. 7 of 2014 approved the Trademark Law which was published in June 30, 2014.
3. **Bahrain** - Decision No. 6 of 2014 approved the Trademark Law which was published in the official Gazette No. 3145 dated February 27, 2014.
4. **Kuwait** - Law No. 13 of 2015 was issued and published in official Gazette No. 1228 dated March 22, 2015
5. **Oman/UAE** - At present, neither country have published any legislation with regard to the Trademark Law. It therefore remains to be seen how or when the Trademark Law will be implemented in each of these member states.

Key Features of the Trademark Law

Trademark Definition and Multi Class Applications

In order to maintain pace with the introduction of new technology which allows right holders to identify their brands through other means than those identified as conventional trademarks, the Trademark Law has broadened its definition of trademarks to include items such as 'sounds' and 'smells'.

Although in some GCC member states such as the UAE, certain unconventional trademarks such as 'sounds' can already be registered this is not the case in some other GCC countries such as Saudi Arabia. Accordingly, the Trademark Law provides right holders with an opportunity to protect their trademarks in a more unified way, and they will no longer face the challenges of differing trademark laws and varying protection awarded to such rights.

Furthermore, under the Trademark Law, multiclass trademark applications will be allowed. This change of practice is a significant departure from the present practice as it is currently only possible to file applications covering a single class in each of the GCC member states. None of the GCC member states allow for multi-class applications to be filed under their current regional trademark laws.

Priority Claims

In another significant change, the Trademark Law (Article 11) provides that an applicant who has applied for a trademark in a country that is a signatory to a multinational treaty to which a GCC state is a party may claim priority within six months of the date of filing the earlier corresponding application.

In order to make a valid priority claim, the application must be accompanied by a copy of the earlier application and a statement setting out the filing date, application number and country.

'Famous' Trademarks

In line with the GCC member states' obligations under the Paris Convention and the Trade Related Aspects of the Intellectual Property Rights (TRIPS), well known/famous trademarks are protectable in each of the GCC member states.

Through the Trademarks Law, famous trademarks are provided a greater ambit of protection. The Trademarks Law prohibits the registration of such marks which constitute a reproduction, imitation or translation of well known marks. It also prohibits the registration of a mark with relation to dissimilar goods, whereby consumers may be lead to believe that the goods emanate from the same trader, and which would likely the damage the famous trademark owner's interests.

In addition to broadening the ambit of protection for right holders of famous trademarks, the law also provides clear criteria as to the determination of famous trademarks. To date, the determination of whether a trademark is considered famous or not, is left to each state's Courts and is reviewed on a case by case basis. This is not an exact science and trademark practitioners often have to refer to previous case laws to identify the factors considered by the Courts in recognizing the "famous" stature of trademarks. Under the Trademark Law, conditions for a mark to be declared as a well known mark have been clearly stipulated and can be summarized as the following:

1. Extent of recognition by consumers resulting from the marketing efforts of the trademark owner;

2. The duration and extent of the registration and use of the mark; and

3. The number of countries where the trademark has been registered or recognized as a well-known mark.

Trademark Infringement

The GCC member states have well implemented provisions to deal with trademark infringers. Similarly, the Trademark Law addresses the infringement of both registered and unregistered trademarks. Article 42 of the Trademark Law sets out the maximum penalties available for trademark infringement:

- a fine of between SAR5,000 (approx. $1,300) and SAR1 million (approx. $260,000) and/or imprisonment for between one month and three years where a person counterfeits a registered trademark in a manner which misleads the public and affixes this mark to its products; and
- a fine of between SAR1,000 (approx. $260) and SAR100,000 (approximately $26,000) and/or imprisonment for between one month and one year where a person knowingly sells goods which contains a counterfeit or unlawfully affixed trademark.

In cases of repeat offenders, the penalty may not exceed double the maximum limits specified for the offence. In addition, the establishment may be closed for between fifteen days and six months.

The potential sanctions under the Trademark Law and particularly the monetary penalties are a significant increase as compared to the present sanctions available in the individual GCC member states. One explanation for the increase in penalties is that the GCC member states have collectively set such amounts for a deterrent affect so as to curb infringement and counterfeiting activity. By way of example in the UAE, Articles 37 and 38 of the Federal Law No. 37 of 1992 on Trademarks (as amended by Law No. 19 of 2000 and Law No. 8 of 2002) (the "UAE Trademark Law") provide penalties including imprisonment limited to one year and monetary penalties of AED5,000 (approx. $1360) and not exceeding AED10,000 (approx.$2,722). In comparison the current penalties under the UAE Trademark Law are significantly less than those sanctions set out by the Trademark Law.

Official fees in the GCC - Trademark Offices

Although the GCC has no unified trademark filing system; Article 50 of the Trademark Law states that implementing regulations shall be put in place to set out the applicable filing charges. To date, the implementing regulations have not yet been released. Within the GCC there has been considerable increases in the official filing fees within the past year notably within the UAE, Kuwait and prior to that in Qatar and Saudi Arabia. We look forward to a new schedule of charges that will be binding in all GCC member states for charges related to trademark prosecution procedures. It is still unclear which fee model will be adopted and the ongoing uncertainty is unhelpful.

In conclusion, the prospect of having in place a unified trademark law in the GCC is broadly good news as it allows right holders to enjoy the same protection across the GCC. Although separate trademark filing will still be required, we consider that managing trademark portfolios in the region should be easier and more accessible given that the methods and maintainance of registrations will be more aligned though the GCC member states. However, there are also a number of challenges through the introduction of the Trademark Law. In terms of practice and implementing the concepts, some GCC member states may find it difficult to upkeep their obligations as set out in the Trademark Law. One case in point is the concept of famous trademarks. Although most GCC member states have long been part of the Paris Convention and as such developed case law on the subject, Kuwait only adhered to the Paris Convention in 2014. Accordingly, Kuwait will need to heavily rely on the experiences of the other GCC member states in order to attain the necessary expertise in the subject matter. The reality remains that the level of capacity and expertise vary drastically from one GCC Trademark Office and Court regime to another.

Further adding confusion over the matter is the fact that the GCC and, in particular the UAE, has some of the highest official fees in the world when it comes to trademark registration. The question remains that should a unified fee schedule be applied in the GCC member states, the right holders will have to significantly increase their budgets for the GCC region and some right holders may even limit their scope of protection opting to file in the larger markets of UAE and KSA and thereby foregoing the smaller GCC markets.

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Strength of Trademarks

When it comes to developing a brand, whether it is a new business or an existing business looking to roll out new products, service names or slogans, the underlying challenge of selecting a trademark that is both legally protectable and marketable remains.

When it comes to identifying trademarks, there a number of categories to consider. Often, trademarks fall within one of the below categories, fanciful and arbitrary marks being the strongest, suggestive trademarks falling somewhere in the middle, descriptive trademarks being weaker but sometimes protectable, and generic trademarks being unprotectable under the trademark law.

Fanciful trademarks

A fanciful trademark is made-up, invented for the sole purpose of functioning as a trademark; it can also be referred to a coined term. Words in such marks are entirely invented and do not refer to anything else. By way of example, a trademark such as Kodak is a good example of a fanciful trademark.

Arbitrary Trademarks

Arbitrary trademarks are words that have a common meaning and are part of everyday language, but the meaning of the words is unrelated to the goods or services offered for sale under the mark. By way of example, the word Apple is common and part of everyday language, clearly describing a fruit in the literal sense; however the word Apple used in connection with computers and communication devices, renders the trademark as an arbitrary one.

Suggestive Trademarks

Suggestive marks are marks that suggest a quality or characteristic of the goods and services. Despite the fact that suggestive marks are not as strong as fanciful or arbitrary marks, suggestive marks are common due to the fact that, in the mind of consumers, they create a link to a product/services. Suggestive marks are often difficult to distinguish from descriptive marks (described below), since both are intended to refer to the goods and services in question. Suggestive trademarks require some imagination, in that they require a subtle leap in thought and perception, thereby allowing the consumer to reach a conclusion as to the exact nature of the goods/services. An example of a suggestive trademark would be the word Penguin as a brand for refrigerators, or Microsoft which is suggestive of software for microcomputers.

Descriptive Trademarks

Descriptive trademarks are words that merely describe some portion of the goods or services to be sold under the trademark. Through Court precedents, it has been established that trademarks that simply describe the ingredients, shapes, qualities or characteristics of the goods/services, are identified as descriptive trademarks. As a rule of thumb, descriptive marks are not inherently distinctive and therefore cannot be protected because they use every day words to describe products and services. By way of example a trader in the business of operating a pizza restaurant, cannot register a trademark called "PIZAZZZ" since it is merely descriptive of the intended goods/services.

However, some trademarks, although being identified as descriptive, can nevertheless be considered as trademark and therefore protectable. In order for a descriptive trademark to be protectable it is required to establish that it has acquired a secondary meaning. Secondary meaning indicates that although the mark is on its face descriptive of the goods or services, consumers recognise the mark as having a source-indicating function. The threshold of recognising a secondary meaning requires that the brand owner establishes widespread, long term and exclusive use. The acquisition of secondary meaning is often proven through the use of consumer surveys that show that consumers recognise the mark as a brand.

Generic Trademarks

Generic trademarks are identified as the actual names of the goods/services and therefore are incapable of functioning as a trademark. Unlike descriptive marks, generic trademarks will not be recognized as trademarks even with longstanding and exclusive use, as generic trademarks are considered as part of the public domain and therefore one trader cannot claim exclusivity on such common terms. As such, the rationale for creating the category of generic marks is that no manufacturer or service provider should be given the exclusive right to use words that generically identify the product/services. By way of example, a trader operating a hair salon cannot seek protection over the name "Hair Salon".

In addition, a valid trademark can become generic over the years if the consuming public misuses the mark sufficiently for the mark to become the generic name for the product. Examples of trademarks that have become generic names for products are Klennex, Aspirin and Jacuzzi.

Trademarks are an important asset, serving to distinguish a business' products and services from those of other trademarks. Given the potential value of trademarks to almost any business and the cost of building brand awareness in the marketplace, the selection of an enforceable trademark is crucial.

Upcoming Deadline to register as a Developer in Abu Dhabi

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On 1 January 2016, Law No. 3 of 2015 Regulating the Real Estate Sector in the Emirate of Abu Dhabi (the "Law") came into effect. Developers now need to act swiftly to meet short deadlines imposed by the Law to avoid incurring considerable penalties.

This article discusses the new requirements for licensing as a developer in Abu Dhabi, including the conditions, procedures, deadlines and penalties set out by the Law and its implementing regulations.

Deadline

Developers operating in Abu Dhabi must apply for a licence and register on the Real Estate Development Register at the relevant Municipality no later than 31 March 2016.

Penalties

The Law provides that no person may engage in real estate development in Abu Dhabi unless they have been registered in the Real Estate Development Register and licensed as either a master developer or a sub-developer. Developers who fail to apply for a licence and register by 31 March 2016 risk penalties of between AED 100,000 and AED 2,000,000. In addition, the Law provides that developers who are not licensed and registered will not be entitled to any fees, profits or rewards in return for the activities they undertake. If any fees, profits or rewards are received by a developer that is not licensed and registered, those fees, profits or rewards must be returned to the purchaser or, if it is not possible to return them, the developer must suitably compensate the purchaser.

Licensing requirements

The registration of developers in the Emirate of Abu Dubai is regulated by the Department of Municipal Affairs ("DMA"). Only companies with real estate development activities permitted by their trade licence and registered with Abu Dhabi Chamber of Commerce and Industry may apply to the DMA for a licence to be recognised as a developer in Abu Dhabi.

The following documents must be submitted to the relevant municipality in the Emirate in order to apply to be registered as a developer:

- the prescribed application form
- the developer's trade licence or initial approval from the Department of Economic Development for licensing to carry out real estate development projects
- Abu Dubai Chamber of Commerce and Industry membership certificate
- directors or board of directors list
- copy of the developer's headquarters offices rental agreement or title deed
- audited financial report
- details of the developer's real estate development projects, whether existing or proposed
- master plans and construction designs of the projects
- atitle deed of the lands to be developed
- a project feasibility study issued by an auditor approved by the DMA
- for master developers, the sale and purchase agreements with their sub-developers
- for sub-developers, the unit sale and purchase agreement template for each project if the unit sales are made directly by the sub-developer
- any project marketing agreement with real estate brokers
- any other documents and information that may be required by the DMA.

A licensed developer may open one or more branch offices, in addition to its head office, to carry out any of its licensed activities provided it gives prior notification to the DMA. A developer's licence will be valid for one year from the date of issue and must be renewed annually.

Conclusion

As it could take some time for developers to comply with the requirements for obtaining a licence and registering on the Real Estate Development Register, developers need to act quickly to avoid incurring a penalty after 31 March 2016.

Enhanced Protection Against Financial Crimes

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Introduction

There is a well-known legal principle that 'ignorance of the law excuses no one', which means that a person who is unaware of a law may not escape liability for violating that law, on the basis of such ignorance. This principle is codified in UAE law by Article 42 of the UAE Federal Law No. 3 of 1987 as amended ("Federal Penal Code"), which states 'Ignorance of the provisions of this law excuses no man.'

The UAE has a relatively young and tech-savvy population, which is extremely active on social media and information technology generally. In addition to its visitors, and peculiarly to the Middle East, the majority of residents in the UAE are from other parts of the world. There is a high turnover of population and movement of people in and out of the UAE, which makes for a diverse and rich environment on a positive note. On the other hand, the world-wide growth in the use of the internet has undoubtedly led to an increase in the number of crimes committed through the use of computers. High disposable incomes and other factors, such as the relative inequality in language abilities, make people in the UAE a target for criminals looking to commit financial crime by electronic means.

This article highlights that the UAE legislature has introduced additional provisions that may be applicable when criminal offences are committed by the use of information technology.

The UAE legislature recognised a need to guard against the misuse of information technology in a law that would protect members of the community and their privacy and send a message to anyone thinking of misusing information technology to commit crime. The result was the promulgation of Federal Law No. 5 of 2012 ("Cyber Crimes Law"), which has now been in force for over three years. Although there have been few convictions under this law so far, given the ongoing rise in the use of technology, there is every reason to believe that the number of investigations and prosecutions will increase as time goes on. In addition to criminalising certain acts that could be described as 'stand alone' information technology offences - such as disabling access to an Information Network or Electronic Site (Article 8) - the Cyber Crimes Law also provides penalties for non-IT offences that are committed by the use of an Information Network, Electronic Information System or Information Technology Tool (Article 37).

Penalties for money laundering

Federal Law No. 4 of 2002 (as amended by Federal Law No. 9 of 2014) ("AML Law") provides the following penalty for acts of money laundering that are committed without the use of information technology:

Article 13:

Whoever commits or attempts to commit an [act of money laundering] shall be punished by imprisonment for a term not exceeding ten years, or by a fine of not less than AED100,000 and not more than AED500,000, or by either of these penalties.

If the perpetrator of a money laundering offence makes use of information technology to commit the crime, however, Article 37 of the Cyber Crimes Law be applicable. This states:

Article 37:

1. Taking into consideration the provisions provided for in the AML Law, any person who intentionally performs any of the following actions using an Information Network, Electronic Information System or any of the Information Technology Tool shall be punished by imprisonment for a period not exceeding seven years and a fine not less than AED500,000 and not exceeding AED2,000,000:
    a. Transferring, moving or depositing illegal funds for the purpose of concealing or disguising the illegal source.
    b. Concealing or disguising the reality, source, movement of the illegal funds or the rights related or ownership.
    c. Earning, acquiring or using illegal funds while being aware that they are from an illegal source.
2. Any person, who establishes, operates or supervises an Electronic Site or publishes information on the Information Network or an Information Technology Tool to facilitate or incite committing any of the actions provided for in Paragraph (1) of this Article shall be punished by the same punishment.

It can be seen that the sentencing provisions that relate specifically to the offence of money laundering in the Cyber Crimes Law are imprisonment up to seven years and/or a fine of between AED500,000 and AED2m. This was an increase in sentencing powers from those available under the AML Law prior to its amendment in 2014. Previously, the sentencing powers available under the AML Law were imprisonment up to seven years and/or a fine of between AED30,000 and AED500,000. Following the amendment in 2014, however, the available sentences under the AML Law are imprisonment up to ten years and/or a fine of between AED100,000 and AED500,000.

Additional penalties under the Cyber Crimes Law

In addition to the sentence available to the court in respect of all offenders, whether UAE nationals or otherwise, the UAE legislator has also included a mandatory requirement to deport foreigners who are convicted of any of the crimes contained in the Cyber Crimes Law. Article 42 states:

Article 42:

The Court shall adjudge to deport the foreigner convicted for committing any of the crimes provided for in this Decree by Law after executing the prescribed punishment.

As Article 42 makes clear, the courts are duty-bound to make a deportation order against a foreign offender. This undoubtedly will send a message as to the seriousness with which such offences are viewed and should be seen as a deterrent, so long as such deportations are reported in the media.

Other ancillary powers available to the court under the Cyber Crimes Law include: confiscating the hardware, software or other items used to commit a cyber crime; closing down premises or websites completely or for a specified period; ordering that the convicted person be kept under close supervision or surveillance, or to deprive him from using any Information Network and Electronic Information System, or to be kept in a therapeutic shelter or rehabilitation centre for the period that the court deems appropriate.

Conclusion

At a time when more and more people are doing more and more online, the presence of a law that combats cyber crimes is potentially just as important as the laws that govern how people behave away from the world wide web. In accordance with the Cyber Crimes Law, people who use modern technology intentionally to commit crimes will be punished as severely, if not more, than if they had used 'traditional methods'. Indeed, the Federal National Council is currently considering a draft bill that proposes an increase in the financial penalties available for cyber crimes and re-classifies some offences from misdemeanours to felonies. We will continue to keep an eye on developments in this area and update our readers accordingly.

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To Pay or Not to Pay... That is the Question!

The perils of failing to discharge an execution judgment issued by the UAE Labour Court

In recent years, labour disputes have become somewhat similar to televised court room dramas - highly charged and acrimonious given they often arise out of a breakdown in a previously working relationship. Emotions run high and professionalism is often lost in a war of words before the courts.

The UAE Labour Courts follow the same process as other claims filed with the UAE courts, in that there are three stages: Court of First Instance, Court of Appeal and Court of Cassation/Supreme Court. Once a UAE Labour Court of Appeal issues its judgment and in the event that it is awarding an amount to the employee, that judgment may be enforced/ executed immediately notwithstanding that parties may further appeal the judgment before the Court of Cassation.

In order to enforce/execute the judgment an employee must approach the Execution Court and apply for the enforcement of the judgment. The Execution Court will then serve notice on the employer seeking payment within 15 days from the date of the service of the notice. Historically, it was common practice for an employer to file objections and grievances to unnecessarily delay the payment since this would only be due once those applications had been considered by the courts.

As a means to secure the judgment debt the Execution Court has the power to impose certain measures. These include attachment orders on bank accounts, shares, stocks and bonds as well as on any real or tangible assets that the employer may have in the UAE. However, all of the above measures may take many months to finally conclude.

In a bid to address this reluctance to satisfy judgments and ensure a speedy resolution of the issues, the Ministry of Labour ('Ministry") has introduced added sanctions for any UAE entity failing to discharge a judgment debt within the 15 day deadline.

Ministerial Resolution No 797 of 2014 ('the Resolution"), which has been in effect since 1 October 2014, empowers the Ministry to suspend the business license of an entity for non co-operation or payment of a judgment issued by the Labour Courts. Furthermore, it may also order the issuance of an arrest warrant for the General Manager named on the employer's license and the imposition of a travel ban. Moreover, the Resolution can also have a wider application by not only sanctioning the employer but also to a wider group of associated entities. Individual owners and partners of the defaulting entity may find that other entities, of which they hold a vested interest, are also subject to the Resolution's sanction.

"The Resolution... empowers the Ministry to suspend the business license of an entity for non co-operation or payment of a judgment issued by the Labour Courts. Furthermore, it may also order the issuance of an arrest warrant for the General Manager named on the employer's licence."

The Ministry has announced that an employer must be given two advanced warnings of the proposed suspension, although the method or manner of communication is not clear or routinely followed. The newly imposed sanction will remain in effect until the Execution Court has received payment of the judgment in full (inclusive of accrued interest, court fees, etc) and requested the Ministry to raise the suspension.

Increasingly more and more disgruntled employees are taking advantage of the Resolution and are quick to approach the Execution Court to seek enforcement of a judgment closely followed by an urgent application to freeze the employer's licence. The Execution Court does not hesitate to suspend the business license of a non compliant employer and we are noting that these suspensions are quickly becoming the norm and may be applied even without the requisite two advanced warnings.

In the event an employer fails to satisfy the judgment irrespective of a restriction having been placed on its business license, the Execution Court will proceed to issue an arrest warrant for the General Manager on the employer's licence. Once arrested, the General Manager remains in custody until such time as the judgment and all associated costs have been satisfied in full and the Execution Court issues a clearance certificate confirming that all amounts due have been fully paid.

The procedure to remove the suspension and the arrest warrant is proving to be fairly arduous, time consuming and costly with varying applications necessary to ensure they are lifted correctly.

Free Zone Entities

Although free zone entities are governed by the relevant free zone authority and do not necessarily fall under the remit of the Ministry, they do not have explicit immunity from other UAE government departments. Therefore, there is a risk that the Resolution will empower the Ministry to extend its application to any related entity of the defaulting party irrespective of whether it is based onshore or within a free zone.

Conclusion

In addition to the threat of an attachment order and a visit from Court Bailiffs, this new Resolution highlights, to all UAE entities and employers, the importance of prompt payment of judgments within the 15 day deadline from date of notification to ensure business operations are not brought to a sudden halt.

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Part II: How does Bahrain's Financial Regulatory Approach Compare with the Rest of the GCC?

The regulation of financial services in GCC countries takes different forms. Alone within the GCC Bahrain has opted for the unitary approach. One body, in the form of the Central Bank of Bahrain (CBB), regulates both the conduct of financial services business in (or from within) Bahrain as well as the financial institutions that provide those services.

The CBB argues that this approach creates a consistent and coherent regulatory model that can be applied across the board and it also provides a straightforward and efficient regulatory framework for financial services firms operating in Bahrain.

However as the following summaries demonstrate, different regulatory approaches are possible. Often - leaving to one side the regulation of international financial centres -- the regulation of capital markets is undertaken by a separate body on the grounds that the ongoing supervision of capital markets is generally distinct from the regulation of financial services. Indeed it could be argued that the CBB tacitly acknowledges this by virtue of the fact that the supervision of Bahrain's capital markets is undertaken by a dedicated unit within the CBB, namely the Capital Markets Supervision Directorate. Viewed in this light, one perfectly feasible conclusion is that the Bahrain's unitary approach is, in reality, not so different for the multi-agency approach taken by the other GCC countries.

Qatar

The financial regulators in Qatar, outside the Qatar Financial Centre (QFC), are mainly the Qatar Central Bank (QCB) and the Qatar Financial Markets Authority (QFMA) as the onshore regulators and the Qatar Financial Centre Regulatory Authority (QFCRA) in respect of the QFC, a separate financial free zone located in Qatar with its own civil and commercial laws and court system with no geographical boundaries.

The QCB is the primary regulator of financial institutions operating in Qatar, and the QCB Law No 13 of 2012 expanded the QCB's supervisory powers to cover the QFC financial institutions. Presently there is no practical impact of the expansion of the QCB powers on the QFC financial institutions and the QFC banks remain subject to the supervision of the QFCRA.

The Qatar Central Securities Depository (QCSD) was established by the QCB and Qatar Exchange (QE). The QCSD has assumed the duties relating to central clearing, depository and registry activities which were previously undertaken by the QE. The QCSD also provides related services, including registration, acceptance and transfer of government bonds and treasury bills (T-bills). The QCSD offers additional services including DvP, securities lending and borrowing settlement, management and follow-up of limits placed on non-Qatari shareholders, registration and authorisation of exchange-traded funds as well as services in connection with initial public offerings.

Qatar has executed an InterGovernmental Agreement (IGA) with the United States in relation to compliance with the US Foreign Account Tax Compliance Act (FATCA). The QFC was first set up to offer domestic and international firms the opportunity to establish and provide a broad range of financial services related to banking, asset management and insurance businesses. In addition to its financial regulated activities QFC has expanded the scope of its permitted activities to include non-regulated activities that are not "financial services" in nature. The QFC offers its own legal, regulatory, tax and business infrastructure which allows 100 percent foreign ownership, unlimited repatriation of profits and charges a competitive rate of 10 percent corporate tax on locally-sourced profits. Since the QFC is not a separate geographical zone all entities in the QFC operate on a fully-onshore basis with the availability to access the local market and operate from over 50 locations all over Doha with no restrictions on the currency they can trade in.

Recently Qatar has issued strategic legislation in response to the speed of development in the economy and business. This includes the new Qatar Central Bank Law, the QFMA Law, the Real Estate Development Law and, the most recent, new Companies Law.

Kingdom of Saudi Arabia

Financial regulation in the Kingdom of Saudi Arabia (KSA) is primarily carried out by the Saudi Arabian Monetary Agency (SAMA - the Central Bank of KSA) and the Capital Market Authority (CMA).

SAMA is the regulatory authority for activities involving the banking and insurance industries while the CMA regulates licensed securities businesses (investment banks).

As well as dealing with the banking affairs of the KSA Government, SAMA performs a variety of important functions pursuant to a number of KSA laws and regulations. SAMA is tasked with promoting the growth of the financial system and ensuring its soundness and has a supervisory role over: commercial banks and money exchange dealers; co-operative insurance companies and other professions relating to the insurance sector; finance companies; and credit information companies.

As a supplement to laws and regulations, SAMA issues industry circulars from time to time to KSA-licensed banks and insurance companies. These circulars act as formal directives that must be followed and the compliance department of SAMA is very active in reviewing operations of licensed institutions in KSA to ensure consistency and compliance with laws and directives.

Many of the industry standards promoted by SAMA follow international trends, so SAMA will continue to be very proactive in implementing policies and procedures to address matters such as the eradication of illegal financial transactions – particularly money laundering and terrorism financing.

Importantly, in 2004 SAMA also began supervising KSA's only licensed credit bureau known as SIMAH, offering consumer and commercial credit information services to KSA members. In order to access credit information of potential clients (individual or corporate), the requesting entity must be a registered member of SIMAH.

Investment banks in KSA are licensed securities businesses (called Authorised Persons) and they may hold one or more of the following five security business licenses issued by the CMA: Arranging; Advising; Managing; Dealing; and/or Custody.

The CMA's primary functions are to regulate and develop the KSA's capital market by issuing rules and regulations for implementing the provisions of the Capital Market Law. The basic objectives are to create an appropriate investment environment, boost confidence and reinforce transparency and disclosure standards in all listed companies and, moreover, to protect the investors and dealers from illegal acts in the market.

In a similar manner to SAMA, the CMA also issues industry circulars from time to time to KS- licensed security businesses. These circulars act as formal directives that must be followed and the compliance department of the CMA is very active in reviewing operations of licensed security businesses in KSA to ensure consistency and compliance with laws and directives.

As well as dealing in securities, investment banks are able to manage real estate investment funds and offer financial investment advisory services to clients.

In recent years the CMA has introduced initiatives relating to the KSA stock market (Tadawul) in an effort to allow foreign investment in KSA-listed equities. For example, in 2008 equity swaps were made available and in June 2015 the CMA rules that allowed qualified foreign investors to invest directly in Tadawul came into force.

United Arab Emirates

The regulatory landscape in the United Arab Emirates (UAE) consists of three principal bodies: the UAE Central Bank (Central Bank) and the Securities and Commodities Authority (SCA) as the onshore regulators and the Dubai International Financial Services Authority (DFSA) in respect of the Dubai International Financial Centre (DIFC), a separate financial free zone located in Dubai with its own civil and commercial laws and court system. The list of regulators will soon be expanded to include the Financial Services Regulatory Authority as regulator for the Abu Dhabi Global Market, a recently-launched financial free zone located in Abu Dhabi similar to the DIFC.

The Central Bank has devolved the securities and markets regulation to SCA as part of the UAE's efforts to develop a more sophisticated regulatory framework. The Central Bank now oversees banking and financial business. The SCA's oversight, which was once limited to publicly-listed companies and the two securities exchanges, now also oversees custody, securities brokerage, funds, financial consultancy, research, and since 2015 investment management activities. Both the Central Bank and the SCA have been active in reviewing, amending and implementing changes to their respective regulations.

The enactment of the new federal Anti Money-Laundering law, brings the UAE's position in line with international standards and expands the regulatory and enforcement powers of the Central Bank to impose administrative sanctions and restrict the powers of senior management. The UAE has also agreed with the United States to adopt Model 1B of the InterGovernmental Agreement (IGA) in relation to compliance with the US Foreign Account Tax Compliance Act (FATCA).

Having operated now for over 10 years and established critical mass, there have been recent and ongoing amendments to the DFSA's regulatory regime as the DIFC matures as a jurisdiction and also partly in response to market demand (such as the introduction of qualified investor funds and other amendments). The DFSA has also increasingly been proactive with enforcement actions including the imposition of hefty fines.

He was assisted in compiling this article by his colleagues: Sarah El Serafy, Senior Associate Qatar; Ahmed Al Barwani, Head of Office, Oman; Omar Handoush, Senior Associate, Kuwait; Glenn Lovell, Partner, KSA; and Jody Glenn Waugh, Partner, UAE

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Project Finance Boosted by Effortless Pledge Enforcement

Kuwait is currently in a position of adopting significant reform of most of its commercial legislation, particularly those related to the economy where there is a persistent need to find various resources to eliminate the recent deficit in oil prices. As we witness a global drop down in oil prices, Kuwait, as an oil-dependent economy, currently has no choice but to adopt a new approach for the purpose of ultimately diversifying its economy in upcoming years.

On that basis, a great step was taken by the Kuwait legislature to reform the Capital Market Authority Law No 7 of 2010 (the "Law") by promulgating the new Capital Market Authority Resolution No. 72 of 2015 (the "By-laws"), which came into force on 10 November 2015 and, in our opinion, incorporated with many constructive changes into Kuwait's Capital Market laws. These amendments will boost the investment sector in Kuwait, and will encourage investors to extensively engage with more exposure in the Kuwait market through entry into the capital market. Indeed, commercial lenders are one of the main players that are likely to increase their exposure in the Kuwaiti market, as they will have more confidence in the new legal framework for the Kuwait capital markets as set out by the By-laws. More specifically, the project finance sector will likely flourish on the basis of the By-laws permitting parties to collateralise shares, which are one of the most important types of collateral that might be taken to secure project finance loans.

This article discusses the role of project finance loans as a means of raising funds on a limited recourse basis to the extent that a lender can primarily look into projected cash flows of that project as a security in addition to the suitable collateral typically taken under these kind of loans (i.e. pledge over shares) and how the By-laws indirectly boost this sector of financing.

Project Finance

A 'project' is usually a large-scale, capital-intensive and long-lived collection of assets, liabilities, and related construction and operation contracts. Project finance is raising of funds on a limited recourse or non-recourse basis to finance an economically separable capital investment project in which the providers of the funds look primarily to the cash flow from the project as the source of funds to service their loans and provide the return of, and a return on, their equity invested in the project. In other words, project finance is the extension of credit to finance an economic unit where the future cash flows of that unit serve as collateral for the loan. This is done primarily by facilitating the separation of project assets from the sponsor and enabling the financing of those assets on the basis of the cash flows they are expected to generate. Moreover, project finance can allow a sponsor to undertake a project with more risk than the sponsor is otherwise willing to underwrite independently. Project finance can also help sponsors avoid incurring leverage beyond tolerable levels, thereby helping them preserve their debt capacity, credit ratings, and cash flows for alternative capital investment activities.

Funding by Commercial Banks

Commercial banks are the largest providers of funds for large-scale, capital-intensive projects, often accounting for as much as 50 percent of the overall project funds and up to 100 percent during pre-completion. Project loans from banks generally take the form of senior loans, both secured and unsecured. Senior secured project loans generally give banks a security interest in the core assets of the project. Typical forms of collateral pledged to creditors in senior secured project loans include real estate, an assignment of insurance proceeds, and a pledge over shares. In light of the fact that Kuwait's laws are very conservative with respect to enabling a borrower to grant a real estate mortgage in favour of a lender, particularly if that lender is a foreign bank, the pledge over shares has become the most essential collateral to secure project finance loans especially during the pre-completion stage.

As such, lenders frequently require sponsors to pledge their shares in the project company as a part of the loan security package. This is important if lenders feel that the value of the mortgaged assets is insufficient or there is uncertainty about the enforceability of other mortgages. Therefore, the pledge of shares in Kuwait is important collateral for project finance due to the legal and practical barriers that hinder the collateralisation of real estate in addition to the uncertainty about its enforceability. On the other hand, effectuating a pledge of shares is generally a relatively simple procedure and, once obtained, can be a useful negotiating tool for lenders. When sponsors pledge their shares to lenders, the lenders may take control of the borrower company in the event of default and may take the steps necessary to protect their investment.

Impact of By-laws

The CMA Bylaws have greatly improved the legal environment for project finance deals in Kuwait by streamlining the process of enforcing a pledge of shares. In particular, Article 9-13 of Book Eleven of the By-laws provides that where the creditor or mortgagee is a bank or financial institution and the debtor or mortgagor is a professional client, the parties may enter into an agreement at the time of concluding the pledge contract or at a later date to give the creditor or mortgagor the right to acquire or sell the pledged asset in the event of the debtor's breach of its obligations. In exercising this right, the creditor or mortgagee does not need to adhere with the provisions stated under Articles 231 to 233 of the Trade Law (Law No. 68 of 1980) or the provisions stipulated under Book 3 of the Civil and Commercial Procedures Law (Law No. 38 of 1980).

> "Article 9-13 of Book Eleven of the By-laws provides that where the creditor or mortgagee is a bank or financial institution and the debtor or mortgagor is a professional client, the parties may enter into an agreement at the time of concluding the pledge contract or at a later date to give the creditor or mortgagor the right to acquire or sell the pledged asset in the event of the debtor's breach of its obligations."

Also, Article 9-14 of Book Eleven of the By-laws provides that, where the creditor or mortgagee has exercised its right under Article 9-13, the investment portfolio manager and clearance agency, as applicable, shall execute the instructions issued to them by the creditor or mortgagee for the acquisition or sale of securities and satisfy the right of the creditor or mortgagee. This is subject to the debtor and in-kind guarantor, if any, being given written notice in accordance with the pledge contract at least five business days before the date of acquisition or sale. Further, the sale may not include more securities than are sufficient to settle the right of the creditor or mortgagor.

In our opinion, these articles constitute a major reform in the usual enforcement process for pledges of shares. With the By-laws, we now have a straightforward process of enforcement whereby a party can merely notify the debtor or mortgagor and in-kind guarantor with five business days prior written notice and thus easily transfer the pledged shares in its favour. As such, the creditor or mortgagor only needs to apply to the Kuwait Clearance Company to transfer the title of these shares, whether in its favour or to any third party as chosen by the creditor or mortgagor. Prior to the implementation of Articles 9-13 and 9-14, a lender would have to struggle through a very long process of court enforcement procedures as previously set out under the Kuwait commercial and procedural laws. It is further of note that the By-laws explicitly exclude the previous approach of enforcement by setting aside the provisions of the commercial and civil procedural laws. As a key characteristic of the new By-laws, there is no need now to liquidate pledged shares through a public auction so that the proceeds of the auction can be distributed to the lender. The requirement of an auction is now repealed by the direct transfer of shares to the creditor or mortgagor or to any third party. As such, the lender may take control of the borrower company in the event of default and may take the steps necessary to protect its investment or to obtain its proceeds directly under an effortless enforcement process.

Conclusion

As a pledge over shares in Kuwait constitutes the most essential security that might be taken to secure a project finance loan, the By-laws, including the enforcement process, will have a significant impact on project financing in Kuwait. This is expected to give investors an appetite to step into the Kuwait market with more assurance.

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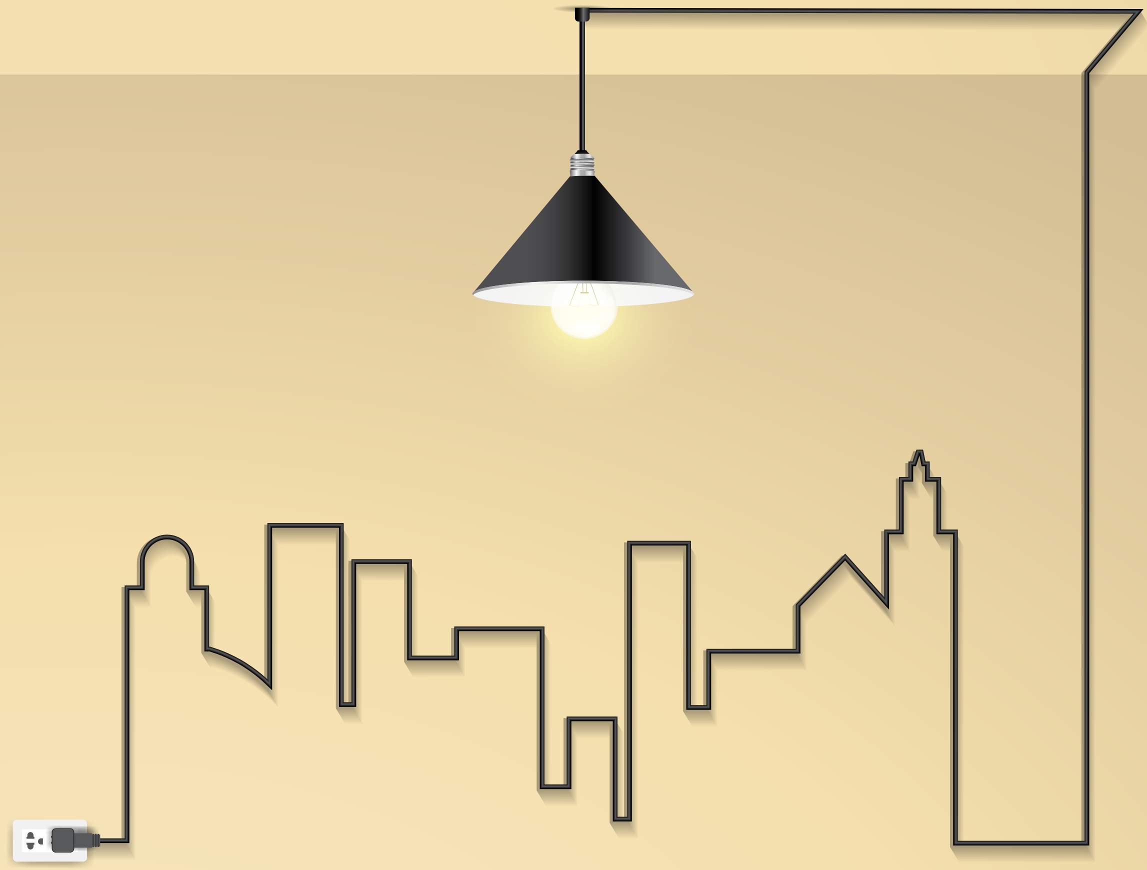
The New Electricity Law: Major step Towards a Free and Competitive Electricity Market in Egypt

Egyptian Electricity Law, issued by law no. 87 for year 2015 last July, (the "Electricity law") along with its executive regulation, which is expected to be issued before the end of the year, will represent the general legal framework for the electricity sector for decades to come. The Electricity Law, a long awaited reform, paved the way to move from a state monopoly into a free market for electricity.

The law provided for open market for electricity generation and distribution, while maintaining transmission under state control through the ownership and monopoly of the national electricity transmission grid through the Egyptian Electricity Transmission Company ("EETC").

A key ingredient of a free and fair electricity market is independent and neutral transmission network operator, which is essential to avoid conflict of interest between the owner/operator of the network and users of the network, in addition to ensuring impartial treatment of all players, producers and/or distributors. Hence, the Electricity Law mandated that EETC shall be restructured to become a Transmission System Operator independent from all of the electricity sector related parties within three years. The Ministry of Electricity and Energy has taken steps to achieve this in collaboration with the World Bank.

The second pillar of a competitive electricity market is the regulator. The Egyptian Electric Utility and Consumer Protection Regulatory Agency ("EgyptERA") was founded in the year 2000 by virtue of a presidential decree and has been carrying the regulator rule since



that date. Under the Electricity Law EgyptERA has been reorganised as an independent government agency established by law empowered with the necessary powers to regulate, supervise, and develop all aspects of electricity from generation to consumption, through transmission and distribution of electricity. Under the Electricity Law EgyptERA is responsible of ensuring the availability, quality, and stability of electric power supply at suitable prices.

Big part of EgyptERA's role is promoting investment and free competition in the electricity sector. To that end, EgyptERA is entrusted with issuing rules and adopting policies that will achieve this goals and empowered to take actions against any market player who is involved in any anti-competitive behaviour.

In order for the competitive electricity market to function properly, there must be sufficient, if not surplus, of supply of electric power. In recent years, Egypt has witnessed record shortages of electric power. However, the Ministry of Electricity has adopted an emergency programme for the maintenance and renovation of existing power stations as well as building new stations with an aggressive plan of adding a total of 18,000 megawatts of installed capacity by year 2018 from conventional sources. In parallel, the New and Renewable Energy Authority embarked an ambitious renewable energy programme aiming to generate 20% of electricity from renewable sources by 2020. Under this programme, a Feed-in Tariffs scheme has been introduced by law 203/2014, and round-one of developers has been selected with a total capacity of 4300 megawatts expected to come into service by 2017. In addition to 950 megawatts wind and solar BOO projects that are currently being tendered at different stages.

Bottom line, while there is still a long way to transform electricity sector into a functioning free and competitive market, there some positives to be taken. Egypt has initiated the transformation with a fundamentally sound legal framework and is taking the steps toward restructuring the electricity state-owned enterprises, building capacity of concerned authorities and taking steps to secure reliable and steady supply of electricity.

A version of this article first appeared in the December 2015 edition of IFLR Magazine International Briefing Egypt.

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Qatar: Insurers and Arbitration Clauses

Many insurance policies contain clauses that require disputes to be resolved by arbitration, rather than through the courts. For the most part, insurance companies generally prefer arbitration over the traditional judicial system. However, some countries, such as Qatar, have statutes that purport to impose some restrictions on insurance companies in inserting arbitration clause in their policies. The principle adopted by the Qatari legislature is that any dispute should be resolved by the courts, and the arbitration is an exceptional way to resolve such disputes.

A few years ago, a fire broke out in a mall in Doha owned by the claimant resulting in severe damages. The Claimant submitted a claim before the Qatari courts against the insurance company under the insurance policy for the losses suffered, noting that the dispute resolution clause in the insurance policy refers to arbitration and not to the Qatari courts.

At the first hearing before the Qatar Court of First Instance, the defendant pleaded that the case should be dismissed and referred to arbitration, because the insurance policy contained an arbitration clause. In this particular insurance policy the arbitration clause was only contained in the general terms of the policy.

Accordingly, the claimant argued that the arbitration clause was not valid, since it should have been included in the specific terms of the insurance policy. Having the arbitration clause in the general terms did not suffice, and therefore the Qatari court should have had jurisdiction regarding this dispute.


Calligraphy sculpture by british artist Sabah Arbilli on the Corniche of Doha.

The claimant cited Articles 775, 801 and 107 of the Qatari Civil Procedure Code in its submissions. Article 775 of the Civil Procedure Code applies to insurance policies and provides that: "it shall not be permissible to challenge the insured neither with the conditions relating to nullity or loss of right unless it was clearly presented, nor the arbitration clause unless it was made in a special agreement independent of the general conditions."

However, the court of first instance did not accept the claimant's argument, and held that, even if the arbitration clause was not separately presented in the general insurance policy and, was nevertheless included in the general conditions of the policy, the arbitration clause was still enforceable. Therefore the court of first instance dismissed the case on the basis that the insurance policy included an arbitration clause, notwithstanding that it was set out in the general conditions of the policy.

The claimant filed an appeal before the Qatari court of appeal based primarily on Articles 775, 801 and 107 of the Qatari Civil Code, in conjunction with other supporting references from the doctrine and jurisprudences. Respected civil law jurists, such as Sanhouri, are of the view that an arbitration clause in an insurance policy should be set out in the policy in such a way as to obtain special attention from the insured/beneficiary, so as to ensure that the insured/beneficiary is aware of the inclusion of the arbitration clause and therefore such clause should be separated from the insurance policy.

The court of appeal rendered a judgment in favour of the claimant and held that the arbitration clause should be contained separately in the insurance policy in order to be enforceable. The arbitration clause has an autonomous nature, and must be clearly apparent and the arbitration clause must be separate from the insurance policy.

Therefore, if insurance companies want to ensure that an arbitration clause in an insurance policy is enforceable in Qatar, then based on this recent court of appeal judgment it would appear that the most prudent course of action would be for insurance companies to arrange for the insured/beneficiary to sign a separate arbitration agreement alongside the insurance policy; or at least place the arbitration clause as an independent annex to the insurance policy. Otherwise an insurance company runs the risk that the Qatari courts will state that the arbitration clause is not enforceable and will not be valid under Qatari law.

News & Events

Al Tamimi's Partnership with UNICEF

Al Tamimi & Company has worked with many organisations through its pro-bono program and is very proud to announce its partnership with UNICEF which will support a vital program developed to build capacity of social workers in child protection institutions in the Gulf.

The project, titled **Capacity development of Social Workers:** focuses on increasing the capacity of social workers who work with children in challenging circumstances, based both in and out of social care institutions, in order to ensure the protection of these children in all aspects.

To achieve this, a training workshop organized by UNICEF and Supreme Council for Motherhood and Childhood took place in February in Abu Dhabi where lecturers from Zayed University, Jordan and Egypt presented a 3-day course to social workers to provide them with the tools and support necessary to assist children.

It is programs like this that make a real difference to the world we live in today, and we at Al Tamimi encourage all organisations to contribute and participate in similar projects that will ultimately improve the quality of life of children everywhere.

About UNICEF
UNICEF is an international inter-governmental organisation established by the United Nations (UN) in 1946. It works with governments, civil society organisations and other partners worldwide to advance children's rights to survival, protection, development and participation, and is guided by the Convention on the Rights of the Child. UNICEF Gulf area office works very closely with the governments and the private sector through long term strategic partnerships to advance the welfare of children.

18 JAN

Al Tamimi Sponsors the Palestinian Business & Finance Forum

Al Tamimi & Company were proud sponsors of the Palestinian Business & Finance Forum which took place in Dubai on the 18th of January. The forum was a great opportunity to discuss topical issues with prominent businessmen and economically renowned figures from the private and public sectors, chambers of commerce, investment bodies, and government officials. Al Tamimi's lawyers Mohammed Kawasmi, Partner Property, Munir Suboh, Partner Intellectual Property and Samer Hamzeh, Senior Associate, Corporate Structuring also presented at the event and shared their insights on expansion and investment opportunities in the UAE Market.

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19 JAN

Technology, Media & Telecommunications 'Hot Topics' Seminar

On January 19th, our Technology, Media & Telecommunications team ran a seminar for clients entitled "Hot Topics for In-house Counsel" in the Abu Dhabi office. The seminar addressed topical issues including data protection, e-signatures and use of VoIP in the workplace, and was very well-attended, indicating the relevance of the subject matter to in-house counsel.

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24
JAN

Al Tamimi Sponsors Australia Unlimited MENA 2016

In January, Al Tamimi partnered with the Australian Trade Commission (Austrade) on Australia Unlimited MENA 2016 (“AU MENA”) - the Australian Government’s annual campaign to promote bilateral trade, investment and cultural ties between Australia and the MENA region. This year, AU MENA focused on Health Investment and Health Education bringing delegations from both areas interested in doing business in the Middle East. Al Tamimi representatives from our Healthcare and Education sector groups along with Heads of Office attended events across the region.

UAE

Representatives from Al Tamimi’s Healthcare and Education sector groups attended the launch of AU MENA in Dubai on Sunday 24 January, with 2 sessions focused on Healthcare Investment and Health Education. This was followed by a gala dinner in the evening where Sheikh Nahyan bin Mubarak Al Nahyan gave an excellent speech.

Our lawyers hosted the delegations in Abu Dhabi on Monday 25 January where we facilitated panel discussions. The morning session was hosted by our Healthcare Practice representatives James MacCallum (Partner & Head of Healthcare) Christina Sochacki (Healthcare Associate) along with Corporate Partners Omer Khan and Izabella Szadkowska. The afternoon Education session was led by Ivor McGettigan (Partner & Head of Education). Both forums focused on an overview of doing business in the UAE, Establishing a healthcare/education entity, partnering with local business partners and international investment in the UAE.

Saudi Arabia

In Saudi Arabia, Senior Associate’s Chris Webb, Daniel Goodwin, and Francis Patalong, attended an official Australia Day reception at the Australian embassy in Riyadh. This year, the embassy devoted this special occasion to celebrating the business and cultural links between the Kingdom of Saudi Arabia and Australia with a high level delegation of Australian business people, politicians, including the Australian Minister for Tourism Senator Richard Colbeck, Numerous Saudi representatives, including the Governor of the Riyadh region Prince Faisal bin Bandar bin Abdulaziz, were present as well as other prominent members of the Riyadh diplomatic corps from other countries. Our colleagues engaged with members of diverse cultural and business backgrounds, raising awareness of Al Tamimi locally.

Egypt

In Egypt Mohamed Khodeir (Partner and Head of Egypt office) and Ayman Nour (Partner and Head of Corporate Structuring - Egypt) attended the Investment and Education roundtables. Mohamed presented an optimistic note, while highlighting the legislative roadmap attained thus far on recent Egyptian investment legislations, to the Australia Unlimited delegates following the Minister of Investment’s speech. Mohamed also attended the investment roundtable event following the presentations.

25 JAN

Cybercrime Seminar

Al Tamimi's Intellectual Property Department in cooperation with the Institute of Training and Judicial Studies hosted an informative Cybercrime seminar at the Fairmont hotel, Dubai on Monday, 25th January 2016. The seminar focused on the legal landscape and challenges concerning Cybercrime in the UAE. The firm was delighted to welcome as part of the speaking panel renowned international expert speaker in the area of Cybercrimes, Alexandra Neri, Partner and Head of the Intellectual Property Department at Herbert Smith Freehills in Paris and the Honourable Judge Dr Mohamed Kamali, Head of the Centre for Judicial Institute who participated as guest speakers. Omar Obeidat, Partner and Head of the Intellectual Property Department also delivered an insightful presentation.

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25-26 JAN

GCC Regulators Summit

Al Tamimi were proud sponsors of the 10th GCC Regulators Summit which took place at the Emirates Palace Hotel in Abu Dhabi in association with the Abu Dhabi Global Market (ADGM) and under the patronage of the UAE Minister of Economy, H.E Sultan bin Saeed Al Mansouri.

Andrea Tithecott, Head of Regulatory Law, joined Mubadala, Deloitte and Thomson Reuters on a panel discussing "Investigations, When Where and How" which examined investigation fundamentals, root cause, integrity of investigations and techniques. Ibtissem Lassoued, Partner, Financial Crime, shared her insights on economic sanctions, a hot topic at the moment with opportunities in Iran a focus in our region.

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26 JAN

Arab Health Evening Reception

On the occasion of the 2016 Arab Health Congress, Al Tamimi & Company's Healthcare Practice hosted clients and friends at an evening cocktail reception, held at the Conrad Hotel Dubai on 26th January. With the growing importance of healthcare and the vast opportunities for investment in the region, the cocktail reception gave the opportunity for our healthcare specialists to informally network with clients and industry experts to discuss some of the latest sector developments.

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26 JAN

Bahrain GC Cocktail Reception

On Tuesday 26th January 2016, the firm's Bahrain office hosted a drinks reception at Bushido restaurant and lounge, in Bahrain. The successful event was in the format of an informal cocktail reception which was attended by both public and private companies in Bahrain. We had the pleasure of welcoming over 30 clients and contacts to the event. We were also joined by our colleagues from the regional offices: Samer Qudah, Ibtissem Lassoued, Zafer Oghli and Anne K Hoffmann. The event provided a great opportunity to network with a number of existing and new contacts.

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27 JAN

4th Annual Dubai International Arbitration Summit

On the 27th of January Al Tamimi sponsored the 4th Annual Dubai International Arbitration Summit. The event brought together arbitrators, lawyers and in-house counsel under one roof to discuss and present the latest local and international arbitration information. Speakers from across the globe discussed tips and tricks in arbitration, recent changes in global arbitration as well as arbitration practices from Turkey, India, North Africa and of course the Middle East. Robert Karrar-Lewsley, Senior Counsel presented at the summit and gave insight on 'Should You Go To Mediation Before Arbitration?'

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27 JAN

The New Labour Regulations

On the 27th of January our employment lawyers Ivor McGettigan and Anna Marshall hosted a breakfast seminar on the New Labour Regulations, which covered an analysis of the three newly enacted labour decrees and the impact on employers. The session also reviewed the key employment issues in 2015 and gave a forward look into the future. The seminar was very interactive and informative, we received positive feedback from those that attended.

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United Arab Emirates
Ministry of Justice

45th Year
Issue No. 588
3 Safar 1437 AH
15 November 2015

FEDERAL LAWS

9 of 2015	Amending Federal Law No. (9) of 2006 regarding the census and identification card.
10 of 2015	On food safety.
11 of 2015	On the regulation of trading and hallmarking of precious stones and metals.

FEDERAL DECREES

102 of 2015	On the ratification of the Protocol Amending the Agreement between the UAE and the Grand Duchy of Luxembourg on the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital and its Protocol done in Dubai on 20 November 2005.
103 of 2015	On the ratification of the Agreement between the UAE and Kenya for the promotion and protection of investments.
104 of 2015	On the ratification of the Agreement between the UAE and the Hong Kong Special Administrative Region of the People's Republic of China on the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.
105 of 2015	On the ratification of the Agreement between the UAE and the Republic of Tajikistan on the Allocation of Land for the Construction of Buildings for Diplomatic Missions.
106 of 2015	On the UAE's accession to the International Date Council.
107 of 2015	On the ratification of the Agreement between the UAE and the Republic of Korea on Mutual Administrative Assistance in Customs Matters.
108 of 2015	On the ratification of the Agreement between the UAE and the Republic of Belarus on Mutual Legal Assistance in Criminal Matters.
109 of 2015	On the ratification of the Agreement on Extradition between the UAE and the Republic of Uzbekistan.
110 of 2015	On the ratification of the Agreement between the UAE and the Republic of Uzbekistan on Mutual Legal Assistance in Criminal Matters.
111 of 2015	On the ratification of the Agreement between the UAE and the Republic of Kyrgyzstan on Mutual Legal Assistance in Criminal Matters.
112 of 2015	On the ratification of the Agreement on Extradition between the UAE and the Republic of Belarus.
113 of 2015	On the ratification of the Agreement between the UAE and the Republic of Kyrgyzstan on Mutual Legal Assistance in Civil and Commercial Matters.
114 of 2015	On the ratification of the Agreement on Extradition between the UAE and the Republic of Kyrgyzstan.
115 of 2015	On the ratification of the Agreement on Extradition between the UAE and the Russian Federation.

116 of 2015	On the ratification of the Agreement on the Transfer of Convicted Persons between the UAE and the Republic of Uzbekistan.
117 of 2015	On the ratification of the Agreement between the UAE and the Russian Federation on Mutual Legal Assistance in Criminal Matters.
118 of 2015	Appointing a judge in the Federal Supreme Court.
119 of 2015	Appointing judges in the federal courts.
120 of 2015	Appointing judges in the federal courts.
121 of 2015	Establishing a UAE consulate general in Guangzhou, People’s Republic of China.
122 of 2015	Terminating the duties of the UAE Permanent Representative to NATO.
123 of 2015	Terminating the duties of the UAE Ambassador to Libya and the UAE Non-Resident Ambassador to the Republic of Malta.
124 of 2015	Terminating the duties of the UAE Non-Resident Ambassador to the Republic of Mozambique.
125 of 2015	On delegating the duties of the UAE Permanent Representative to NATO.
126 of 2015	Appointing the UAE Ambassador to the Republic of Mozambique.
127 of 2015	On delegating the duties of the UAE Ambassador to the Republic of India.
128 of 2015	On delegating the duties of the UAE Ambassador to Japan.
129 of 2015	Appointing the UAE Ambassador to Mongolia.
130 of 2015	Appointing the UAE Ambassador to the Republic of Cuba.
131 of 2015	Appointing the UAE Ambassador to the Federal Democratic Republic of Ethiopia.
132 of 2015	Appointing the UAE Ambassador to the Republic of Peru.
133 of 2015	Transferring the UAE Consul General in Shanghai to the Office of the Ministry of Foreign Affairs.
134 of 2015	Promoting members of the diplomatic and consular corps.

About Us

Al Tamimi & Company is the largest law firm in the Middle East with 16 offices across 9 countries. The firm has unrivalled experience, having operated in the region for over 25 years. Our lawyers combine international experience and qualifications with expert regional knowledge and understanding.

We are a full-service firm, specialising in advising and supporting major international corporations, banks and financial institutions, government organisations and local, regional and international companies. Our main areas of expertise include arbitration & litigation, banking & finance, corporate & commercial, intellectual property, real estate, construction & infrastructure, and technology, media & telecommunications. Our lawyers provide quality legal advice and support to clients across all of our practice areas.

Our business and regional footprint continues to grow, and we seek to expand further in line with our commitment to meet the needs of clients doing business across the Middle East.

16 offices

9 countries

55 partners

330 lawyers

620 staff

46 nationalities

Our Accolades

Corporate Counsel Middle East Awards 2015 Winner

IFLR Winner Middle East Awards 2015

The Legal 500 EMEA Top Tier 2015

An Asian-MENA Counsel Deal of the Year 2014

Our Practices

- Arbitration
- Banking & Finance
- Commercial Advisory
- Construction & Infrastructure
- Corporate Governance
- Corporate Structuring
- Employment
- Equity Capital Markets
- Family Business
- Financial Crime
- Financial Services Regulation & Enforcement
- Healthcare
- Hospitality
- Insurance
- Intellectual Property
- Legislative Drafting
- Litigation
- Mergers & Acquisitions
- Property
- Regulatory
- Sports Law
- Technology, Media & Telecommunications
- Transport

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Construction & Infrastructure Breakfast Seminars: Dubai

Al Tamimi & Company is pleased to present the Construction & Infrastructure Seminar Series: a series that will be covering topical issues on the legal aspects surrounding construction in the region.

Upcoming sessions include:*

Topic: Variations, EOT's and the FIDIC Engineer — **15 March 2016**
The seminar will cover the relevant FIDIC provisions and some common amendments as well as valuation/evaluation basis.

Speaker: Scott Lambert
Regional Head of Construction & Infrastructure / s.lambert@tamimi.com

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Topic: Arbitration Update – Don't fall into common traps – Notices, appointments, why use A over B when it comes to arbitration bodies. — **24 May 2016**

Speaker: Dean O'leary
Partner / D.Oleary@tamimi.com

Topic: Procurement options – PPP, Alliances and Traditional Contracts — **23 August 2016**
An overview of the different types of contract procurement and when it would be used – also cover construct only and design and build and ECI.

Speaker: Scott Lambert
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** Please note that the dates are subject to change*

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