



Issue 293 | October 2016

التميمي و مشاركون
AL TAMIMI & CO.

LAW UPDATE

Latest Legal News and Developments from the MENA Region

A Landmark Federal Supreme Court's Judgment on Ship Arrests Under UAE Law

New Guidelines for Gulf Airlines Flights Departing the EU

Securing Ship Finance Transactions in the UAE

Ship Arrest in Iran

What is the Secret Behind a Quick Judgment in Qatar?

Saudi Arabia's Vision 2030: Black Swans for Saudi Arabia's Power Sector

New Copyright Law in Kuwait



Our Regional Footprint



UAE

Abu Dhabi
Dubai, DIFC
Dubai Internet City
Dubai, The MAZE Tower
Ras Al Khaimah
Sharjah

BAHRAIN

Manama

EGYPT

Cairo

IRAQ

Baghdad
Erbil

JORDAN

Amman

KUWAIT

Kuwait City

OMAN

Muscat

QATAR

Doha

SAUDI ARABIA

Al Khobar
Jeddah
Riyadh

United Arab Emirates

Abu Dhabi Al Sila Tower, 26th Floor, Abu Dhabi Global Market Square, Al Maryah Island, PO Box 44046, AD, UAE T: +971 2 813 0444 F: +971 2 813 0445 infoabudhabi@tamimi.com

Dubai Internet City Building No.5, G 08, PO Box 500188, Dubai, UAE T: +971 4 391 2444 F: +971 4 391 6864 infodicc@tamimi.com

Dubai International Financial Centre Sheikh Zayed Road, 6th Floor, Building 4 East, PO Box 9275, Dubai, UAE T: +971 4 3641 641 F: +971 4 3641 777 info@tamimi.com

Ras Al Khaimah Julphar Office Towers, 39th Floor, Al Jisser Street, PO Box 34053, RAK, UAE T: +971 7 233 3841 F: +971 7 233 3845 inforak@tamimi.com

Sharjah Al Hind Tower, 30th Floor, Al Khan Corniche Street Near Al Qasba Canal, PO Box 5099 Sharjah UAE T: +971 6 572 7255 F: +971 6 572 7258 infosharjah@tamimi.com

The MAZE Tower, Dubai 15th Floor, Sheikh Zayed Road, PO Box 9275, Dubai, UAE T: +971 4 331 7161 F: +971 4 331 3089 info@tamimi.com

Bahrain

Manama Bahrain Financial Harbour Building 1459, Block 346, West Tower, 13th floor, Suite 1304, Office 13B King Faisal Highway T: +973 3 607 0909 infobahrain@tamimi.com

Egypt

Cairo Star Capital Tower (Building No. 5&7) 10th Floor, Geziret El Arab Street, Mohandseen Agouza Giza, Cairo, Egypt T: +20 2 3368 1000 F: +20 2 3368 1002 infoegypt@tamimi.com

Al Tamimi & Company is associated with Nour & Selim providing legal services in Egypt.

Iraq

Baghdad Al Harthiya, Kindi St., Dist 213 Building no. 106, PO Box 6051, Baghdad, Iraq T: +964 780 029 2929 F: +964 1 542 0598 infoiraq@tamimi.com

Erbil Villa no. 130, English Village, Gulan Street, Erbil, Iraq M: +964 0 780 588 7848 M: +964 0 750 445 2154 infoiraq@tamimi.com

Jordan

Amman 6th Circle, Emaar Towers A, PO Box 18055, Amman, Jordan, Zip 11195 T: +962 6 577 7415 F: +962 6 577 7425 infojordan@tamimi.com

Kuwait

Kuwait City Khaled Bin Al Waleed Street Sharq, Al Dhow Tower, 16th Floor, PO Box 29927, Safat 13160, Kuwait T: +965 2 246 2253 F: +965 2 246 2258 infokuwait@tamimi.com

Al Tamimi & Company International Ltd. provides services in Kuwait through a joint venture with Yaqoub Al Munayae. Yaqoub Al Munayae is a registered and licensed lawyer under the laws and regulations of Kuwait.

Oman *Al Tamimi & Company is a registered trade mark in Oman & Kuwait*

Muscat Al Assalah Towers Building 223, Block 237 Office 409, Street 3701 Ghubrah South Muscat, Oman infooman@tamimi.com

Qatar

Doha Adv. Mohammed Al Marri in association with Al Tamimi & Company, Al Jazeera Tower, 7th floor, PO Box 23443, Qatar T: +974 4457 2777 F: +974 4360 921 infoqatar@tamimi.com

Saudi Arabia

Al Khobar Level 21, Khobar Gate Tower (Al Shaikh Tower) King Fahd Road, PO Box 32348 Al Khobar 31952, Saudi Arabia T: +966 13 330 8433 F: +966 13 845 4369 infoalkhobar@tamimi.com

Jeddah Level 9, Jameel Square, Corner of Tahlia and Al Andalus Streets, PO Box 40538, Postal Code 21511 Jeddah, Saudi Arabia T: +966 12 263 8900 F: +966 12 263 8900 infojeddah@tamimi.com

Riyadh 2nd Floor, Sky Tower (South Tower S.2.A) King Fahad Rd. Al Olaia Area, PO Box 300400 Riyadh, Saudi Arabia T: +966 11 416 966 F: +966 11 416 9555 info Riyadh@tamimi.com

LAW UPDATE Online



Legal Editing Team



Robert Karrar- Lewsley
Senior Counsel
Arbitration
r.lewsley@tamimi.com



Gordon Barr
Partner
Employment
g.barr@tamimi.com



Andrew Hudson
Senior Associate
Financial Crime
a.hudson@tamimi.com



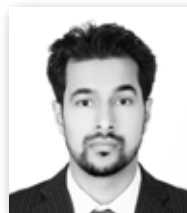
Robert Maxwell Marsh
Associate
DIFC Litigation
r.maxwellmarsh@tamimi.com



Christina Sochacki
Associate
Healthcare
c.sochacki@tamimi.com



Ronette Druskovich
Senior Associate
Property
r.druskovich@tamimi.com



Muhammad Mahmood
Associate
DIFC Litigation
m.mahmood@tamimi.com

The contents of Law Update are not intended to be a substitute for specific legal advice on any individual matters. No part of this publication may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher, except for individual use and other non-commercial uses permitted by copyright law. The permission to recopy by an individual does not allow for incorporation of the material in part or in whole of any work or publication, whether in hard copy, electronic or any other form, unless specific mention is made to the source, "Law Update published by Al Tamimi & Company," and written permission is granted by the firm. For more information, please contact us.



@Al Tamimi & Company



@AlTamimiCompany

Production

Angela Maglieri
a.maglieri@tamimi.com

Graphic Design

Noura Haggag
n.haggag@tamimi.com

Federal Gazettes

Zane Anani
z.anani@tamimi.com

Translation

Vincent Percival
v.percival@tamimi.com

Images

shutterstock.com

For information on Law Update
info@tamimi.com

LAW UPDATE for iPad



www.tamimi.com

Contents

Judgment

- 6 [Helpful Dubai Court of Cassation Judgment on Capacity and Foreign Arbitral Awards](#)
- 10 [What is the Secret Behind a Quick Judgment in Qatar?](#)



12 Arbitration

[Time, Payment, Performance Bonds and Termination Under the 1999 FIDIC Red Book](#)

16 Litigation

[Abu Dhabi Establishes English-Language Commercial Courts](#)

20 Corporate Structuring

[What to be Aware of Regarding Treasury Shares in Kuwait](#)

22 Sports Law

[UAE's Adoption of FIFA's Regulations for Football Intermediaries](#)

26 Banking & Finance

[Fund Regulation in the UAE](#)

28 Technology, Media and Telecommunications

[A New Electronic Transactions Law in the DIFC](#)

30 Technology, Media and Telecommunications

[Supervisory Visits by the DIFC Commissioner of Data Protection](#)

32 Commercial Advisory

[An Overview of the New Governance Rules in the UAE: Part I](#)

35 Commercial Advisory

[UAE Companies Law: Ministry of Economy Acts to Clarify its Scope](#)

37 Intellectual Property

[Dubai Department of Economic Development launches IP](#)

Transport Supplement

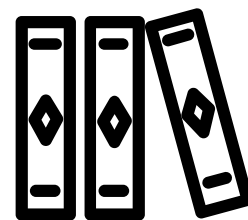
- 40 Aircraft Repossession Under Cape Town Convention in the UAE
- 46 A Landmark Federal Supreme Court's Judgment on Ship Arrests Under UAE Law
- 49 The Regulation of Insurance Brokers in UAE
- 52 Passenger Rights Under EU Regulation 261/2004: New Guidelines for Gulf Airlines Flights Departing the EU
- 56 Securing Ship Finance Transactions in the UAE
- 60 Ship Arrest in Iran
- 64 Demurrage Payments Under Kuwaiti Law
- 67 Procedures of Arrest in Egypt
- 70 Ship Arrest in Saudi Arabia (Introduction to the Domestic Practice)
- 74 New Qatari Law on Small Vessels Registration

Jurisdiction Update

- 76 Saudi Arabia's Vision 2030: Black Swans for Saudi Arabia's Power Sector
- 79 Dispute Resolution: An Overview of Document Production in Egypt
- 82 New Copyright Law in Kuwait



News and Events 84



UAE Federal Gazette 91



*It is with deep regret that we inform you of the passing of one of our colleagues,
Ahmed Al Kalatawy from our Kuwait office.*

*Our sincere condolences go out to Ahmed's family and friends. He will be sorely missed by
everyone at Al Tamimi & Company*



In this Issue

Welcome to the October edition of *Law Update*.

In this issue we reflect back on another busy, yet rewarding month, and turn the spotlight on our regional Transport and Insurance Department. In this month's special feature, we focus on the hot topics of aviation, shipping and insurance while covering a wide array of interesting, challenging and complex issues that include; vessel arrest, aircraft repossession, demurrage and vessel finance. Also in this month's *Law Update* we include a number of other compelling articles, including an in depth look into Saudi Arabia's Vision 2030 and the 'Black Swans' of their power sector, a report on Kuwait's important new copyright law and a look at the composition, structure and functioning of the Abu Dhabi Global Market Courts.

Earlier this month I attended the Legal 500 GC Powerlist Middle East Teams cocktail reception in Dubai. Al Tamimi & Company were again proud to sponsor this great initiative that highlights in-house teams truly making a difference to the companies they work for. The reception was a great opportunity to celebrate the achievement and importance of quality and consistency in teams, both in-house and in private practice. To see the full listing I invite you to visit www.legal500.com, once again I congratulate all who made the final list, some photos from the evening can be found on page 90.

We were also very excited to attend the 2016 IBA conference in Washington D.C. recently. Home to a number of multinational firms, D.C. was the perfect location to reconnect with many good friends and build new relationships. For the first time during the IBA we also held a very successful and informative seminar in collaboration with the IIEL - Georgetown University Law School titled *Doing Business in the Middle East: Legal Considerations & Successful Strategies*. With the current global business interest in the Middle East, particularly from the U.S., the seminar was a timely opportunity to hear from senior industry experts who provided valuable insight into the legal considerations and successful strategies that are top-of-mind for those doing business in the Middle East. We have shared a brief summary of the event and photos on page 87.

On page 84 we have also included a selection of photos from our cocktail reception which was held at the Newseum roof terrace with a fantastic view of the US Capitol. Each year professional development opportunities at the IBA have become increasingly invaluable, with our involvement enabling the firm to help shape the legal profession in the Middle East and beyond. We look forward to seeing many of you next year in Sydney for the 2017 IBA Conference.

I do hope you enjoy this month's issue.

All the best

Husam Hourani
h.hourani@tamimi.com

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 lawupdate@tamimi.com



Omar Omar
Partner
Dubai, UAE
o.omar@tamimi.com



Saif Almobideen
Associate
Dubai, UAE
s.almobideen@tamimi.com

Helpful Dubai Court of Cassation Judgment on Capacity and Foreign Arbitral Awards

When it comes to resisting the enforcement of an award in the UAE, a common defence is that the Defendant was not a party to the arbitration agreement because the person who signed on its behalf did not have the required authority to bind the company to arbitration.

This can be a persuasive argument because in the UAE arbitration is seen as an exceptional form of dispute resolution, one that deprives

parties of their rights to refer disputes to the national courts. The Courts will therefore need to be satisfied that the company signatory had the required authority when signing to ensure the company consented to arbitration.

Where a UAE company is subject to a foreign award, a question that often emerges is which law needs to be complied with when determining the authority of the signatory. Is it



UAE law (being the law under which the party was formed and exists); the governing law of the agreement; or the law where the arbitration takes place?

In a recent decision 693/2015 Commercial Appeal, the Dubai Court of Cassation has clarified that it is sufficient that the signatory has the authority to sign under the laws where the arbitration took place. Al Tamimi represented the successful Plaintiffs.

Background

In October 2014, a major shipping line (the “Owners” or “Plaintiffs”), filed a claim for the recognition and enforcement of a foreign arbitral award in the UAE. The award has been issued pursuant to the LMAA rules in London. The party against whom the arbitral award was issued was a commercial company based in the UAE (the “Defendants” or “Charterers’ Guarantor”).

The facts of the arbitral award are as below:

The Owners chartered their vessel to ‘X’, with the Defendants countersigning the Charterparty as a Charterers’ Guarantor. X went into compulsory liquidation and failed to pay the hire amount punctually to the Owners. In accordance with the terms of the Charterparty, the matter was referred to arbitration in London.

By a Second Final Partial Arbitration Award, the arbitrators ordered the Charterers’

Guarantor, as the counter signatory, to pay the Owners an amount of USD 12,221,875.00 plus costs, 5% annual interest from 2011 until complete payment, and arbitration fees.

Dubai Court of First Instance

The Charterers’ Guarantor submitted a reply to challenge the enforcement proceedings, raising, amongst other arguments, the below defences:

1. The Defendants were not a party to the Charterparty, as their counter-signature was only to authenticate the Charterers’ signature on the Charterparty.
2. The Second Final Arbitral Award should be refused pursuant to Article V (1)(a) of the New York Convention, on the basis that the Defendants were under some incapacity. The person who signed the Charterparty, which contains the arbitration clause, was not authorized on behalf of the Defendants to bind them in arbitration proceedings. As per the UAE laws, which ought to be the applicable law on the Defendants (as it is a UAE entity), only a director of the company or its board can bind the company to an arbitration clause.
3. The Second Final Arbitral Award should be refused pursuant to Article V (1)(c) of the said convention, as the Defendants were not given proper notice of the

appointment of the arbitrator and/or of the arbitration proceedings of the Second Final Arbitral Award, hence, they were unable to present their defense.

The Second Final Arbitral Award should be considered as null and void, as the Second Arbitral Award dealt with a difference not contemplated by and not falling within the terms of the submission to arbitration, and the arbitral tribunal ended its jurisdiction over this dispute by issuing its First Final Arbitral Award.

The Plaintiffs argued that:

1. Pursuant to Article 5(1)(a) of the New York Convention, the issue of whether the Defendants were a party to the charterparty or not was an issue that could only be determined by the applicable law to the contract (which was English Law). The tribunal had found that under English law the Defendants were bound by the charterparty and the arbitration clause it contained, and there was no reason to disturb this finding.
2. The issue of whether the person who signed the arbitration agreement was an authorized signatory on behalf of the company or not should not be considered, as the Defendants had previously acknowledged its signature on the arbitration agreement as a countersigning party. In addition, this issue was subject to English law, being the applicable law on the Defendants. Under English Law an arbitration clause can be agreed upon by the representative of the company, its brokers, or by any way of communication.
3. As regards the alleged procedural defects, the Plaintiffs submitted that there was no merit to these allegations as the Defendants had been duly served and had an opportunity to present its case and attend hearings, but had refused to do so.
4. With regard to the allegation that the Second Arbitral Award dealt with a difference not contemplated by and not falling within the terms of the submission

to arbitration, the Plaintiffs argued that this defence was not arguable before the Dubai Courts as the Defendants failed to submit a proof of this argument.

Furthermore, a mere denial and objection on the arbitral award before the court where it is sought to be recognised should not have any effect as long as Defendants had not obtain a judgment from the competent authority to invalidate the award (in this case the English courts).

The Court of First Instance decided to dismiss the arguments of the Defendants, and decided to recognise the Second Final Arbitral Award in the UAE. It was satisfied that the award complied with the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (which the UAE signed in 2006), and was in compliance with local laws and did not contradict or breach UAE public policy.

Dubai Court of Appeal:

The Defendants appealed the Court of First Instance judgment, raising the same arguments. However, the Court of Appeal upheld the arguments made by the Plaintiffs and ordered that the arbitral award be recognised and enforced in the UAE. In a short judgment the Court referred to the New York Convention, acknowledging that it applied directly to the enforcement of foreign arbitral awards, and rejected the arguments made by Defendants.

Dubai Court of Cassation:

The Defendants chose to lodge a further appeal before the Dubai Court of Cassation, and also submitted an application to stay the execution proceedings until a final judgment had been issued by the Dubai Court of Cassation. The application for a stay of execution proceedings was approved by the Dubai Court of Cassation, as it was held that prior to enforcing the award it was necessary that a final court judgment be issued by the Court of Cassation.

The Defendants appeal was based on two main reasons, namely:

1. The Defendants were not served duly with the arbitration proceedings. Although a special federal decree (no 38 of 2007) had been enacted to regulate the judicial cooperation between the UAE and the UK, the proceedings had not been served through diplomatic channels.
2. The Defendant is an LLC company, based and incorporated under UAE laws. Only its director had the authority to bind the company to an arbitration clause. The director of the company had never signed or agreed to the arbitration clause.

The Dubai Court of Cassation issued its judgment on 10 April 2016, dismissing the appeal and affirming the Court of First Instance and the Court of Appeal judgments, for the following reasons:

1. Article V of the NY Conventions regulates when a foreign award can be refused enforcement, and states that:

“ 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c)etc.”

2. The advantage of this article is that an arbitral award shall not be dismissed and a party against whom it is invoked shall not challenge the arbitral award, unless he proves to the competent authority where the recognition and enforcement is sought to be recognised that he was under some incapacity pursuant to the law where the arbitral award was issued, or that he was not duly served with the appointment of the arbitrator or the

arbitration proceedings which made him unable to present his defense.

3. Upon reviewing the Second Arbitral Award, it is apparent that the tribunal did mention in paragraph 6 of its award that the Defendants denied its responsibility in this claim, as it was not a party to the Charterparty. This meant that the Defendants were aware of the arbitration proceedings and did attend before the tribunal to submit its initial defences.
4. It is apparent to the court upon reviewing the charterparty that the Defendants had signed the charterparty and its company stamp was placed on the charterparty. This meant that they were charterers of the vessel and a party to this agreement.
5. Furthermore, the Defendants did not submit any proof to the UAE courts confirming that they were under some incapacity pursuant to English law, despite being granted this opportunity before the Dubai Court of First Instance the Court of Appeal.

Practice Note:

This case helpfully clarifies at the highest level that a company’s capacity to enter into an arbitration clause shall not be limited to its director, but can also be extended to its employees, agents or brokers as long as this is in compliance with the laws applicable where the arbitration proceedings take place (the seat). This means that even if the signatory may not have been authorised pursuant to UAE law, provided the signatory would have had the authority under the foreign law, that is sufficient.

This is because the Court interpreted the phrase “the law applicable to them” referred to in article V(1)(a) of the New York Convention, as the laws governing the arbitration proceedings (i.e. the laws of the seat) rather than the laws governing the incorporation of each party.

This is a welcome judgment that demonstrates the Dubai Courts’ supportive attitude towards the enforcement of foreign arbitral awards, and will strengthen the perception of the UAE as a pro-arbitration jurisdiction.



Ahmed Eljaily
Paralegal
Doha, Qatar
a.eljaily@tamimi.com

What is the Secret Behind a Quick Judgment in Qatar?

In general, cases of a commercial nature lodged at the Qatar civil and commercial Court of First Instance usually take around 1 to 2 years for judgment to be issued. This inefficacy and delay are attributed mainly to court proceedings, and, in particular expert appointment and time spent by the expert to present his report.

Indeed, in December 2015 the press reported that the Supreme Judicial Council had removed several court experts from its approved experts list due to the delays in cases assigned to them and further, a few have been referred to the Public Prosecution to be questioned in respect of alleged wrongdoing and dereliction of duty.

This article considers recent litigation which has offered the prospect of quicker access to justice for parties in Qatari litigation disputes.

Historically, the Qatari courts, when faced with matters of a technical nature or a requirement to deal with voluminous documentation as typically associated with construction disputes, will usually issue a preliminary judgment to appoint an expert to meet the parties, study the subject matter and write a report with their findings. At that stage, the parties have the right to object to the report and the court may send the file back once again to the expert if it finds that the objections raised by the parties need to be addressed. Eventually once the court is satisfied with the final report it will rely heavily upon it in making its determination. Furthermore, even in simple and direct monetary claims, the Qatari courts have tended to refer such cases to an expert.

This prolonged process takes approximately 6 to 18 months. As a result, it can financially debilitate businesses due to the uncertainty caused by the overhanging litigation.

However, in two recent cases before the civil and commercial court circuits in Qatar's Court of First Instance, a new and potentially significant approach has developed which has reduced the time taken for the issuance of a judgment.

Both cases involved monetary claims and resulted in the issuance of a judgment within a period of less than four months from the date that the claim was filed. In both cases, the Court reached its decision without the appointment of an expert.

It is necessary to briefly consider each case in order to further analyse this alternative approach taken by the Qatari Courts.

The first case involved a subcontractor's claim for QAR 6 million against a main contractor in respect of unpaid dues arising from the full execution of the contract.

The Court found in favour of the Claimant (the sub-contractor) on three findings:

1. The document submitted by the Claimant established a contractual relationship between the parties.
2. The Claimant carried out the agreed works as contracted.
3. The Respondent admitted the debt in writing.



Further, it should be noted that the Respondent, which had been served duly with the case summons, did not appear to refute the claims.

The second case involved a seller's claim of unpaid instalments (in addition to the remaining purchase price pre-matured due to the buyer's failure). The Court based its judgment on the following findings:

1. The document submitted by the Claimant established the contractual relationship between the parties.
2. The buyer failed to pay his dues and thus a breach of the contract was established.
3. The buyer and guarantor's failure to appear to refute the claim with a sound defence.

In summary, these two claims were both monetary claims and similarities were present as noted by the reasons founded upon by the Court in its respective judgments.

What does the future hold?

As set out, for many parties excessive delay is the most worrisome issue in civil and commercial litigation in Qatar with the preliminary appointment of a court appointed expert appointment being highlighted as one, if not the major exacerbating factor.

The recent case developments give some encouragement to the prospect that the appointment of an expert (and the associated delay) can be avoided at least in some cases.

In order to try and avoid the appointment of an expert, litigants ought to provide all relevant documentation related to the matter to their lawyers for consideration.

It goes without saying that the Court is much more likely to fast track a decision without the reliance of a court appointed expert in circumstances where a claim is supported by clear and convincing evidence and observance with the other governing rules and procedures that the Court requires.

Furthermore, it should be borne in mind that even in complex contractual claims, an explicit or implied admission may be considered as conclusive evidence and a determinative factor. In the event of such an admission, the prospect of the judgment being issued without the appointment of an expert will certainly be increased.

Where possible, it is to be hoped that procedural delays will be avoided and that the Qatari Courts will continue to issue judgments without recourse to court appointed experts.

Our Qatari litigation practice at Al Tamimi can assist with all enquires related to these developments. For further information please do get in touch.



Dean O' Leary
Partner
Dubai, UAE
d.oleary@tamimi.com

Time, Payment, Performance Bonds and Termination Under the 1999 FIDIC Red Book

This article offers an insight into the reoccurring issues of time, payment, performance bonds and termination which we regularly encounter when arbitrating construction disputes involving the FIDIC Red Book¹ in the UAE.

Introduction

Internationally, the FIDIC forms of contract are the most widely used standard forms for construction and engineering projects.² Whilst this success can be attributed to a number of factors, the most prominent is down to the support by the World Development Bank.³

In terms of FIDIC's history, the 1st Edition was published in 1957. The FIDIC 1st Edition was based upon the ACE form of contract which was itself based on the ICE 4th Edition (an English civil engineering contract).⁴ The FIDIC 2nd Edition was published in 1969. The 3rd Edition was issued in 1977, and the FIDIC 4th Edition was issued in 1987. In 1999 FIDIC published its 'Rainbow Suite' of contracts, which included, along with the FIDIC Red Book, the Yellow Book (Design and Build), the Silver Book (EPC) and the Green Book (Short Form). Other forms followed by way of the Red Book Subcontract (2002), the Pink Book (MDB) (2004), the Blue Book (Dredging) 2006 and the Gold Book (DBO) in 2008. In 2000 FIDIC published an extremely useful Contracts Guide.⁵

The Rainbow Suite was drafted to create a more balanced allocation of risk between the parties, though, of course, different forms of contract seek to allocate risk in differing proportions, e.g. the Silver Book shifts the majority

of risk and responsibility onto the Contractor with little involvement by the Employer during the project execution phase. Users of the Pink Book will be aware of its subtle but important differences with the Red Book (e.g. sub-clauses 2.5, 3.1, 3.5, 4.2, 8.1, 12.3, 15.6, 17.6, 20.1 and 20.6).⁶

The FIDIC Red Book comprises a set of General Conditions (with 20 main clauses), Particular Conditions (prepared on a project-by-project basis) and an Appendix to Tender (which includes crucial contract data). Whilst FIDIC contemplates the execution of a formal Contract Agreement, the contract between the parties in the Red Book will actually be made by way of the issue of a Letter of Acceptance. In the Silver Book a contract is concluded by way of execution of a Contract Agreement.

Time

In terms of time, sub-clause 8.2 of the FIDIC Red Book makes it clear that the Contractor must complete the Works by the Time for Completion, the latter being stated in the Appendix to Tender. The Contractor's progress will be monitored against its baseline programme and any updated/revisions thereto.⁷ The Particular Conditions may prescribe the level of detail and format required of the Contractor's programme. Once it has started the Works the Contractor must then proceed with 'due expedition and without delay'.⁸ As part of its monthly reporting obligations set out in sub-clause 4.21, the Contractor must provide information on all matters likely to affect the progress of the Works so that all concerned parties can identify potential problems and deal with them accordingly.

If during the course of the Works the Contractor believes that it is entitled to an extension of time for one of the grounds listed in sub-clause 8.4 it is required to make a claim pursuant to sub-clause 20.1 within 28 days of becoming aware of the delay event.⁹ To the extent that the Engineer believes that the Contractor's progress is too slow to meet with the Time for Completion then, pursuant to sub-clause 8.6, the Engineer may issue a notice for the Contractor to speed up its rate of progress. The Contractor should be aware that failing to act upon a sub-clause 8.6 notice could ultimately lead to an Employer termination pursuant to sub-clause 15.2(c)(i).

Following receipt of a claim for an extension of time the Engineer is required to follow the process prescribed in sub-clauses 20.1 and 3.5 to make a 'fair' determination as to the Contractor's entitlement.¹⁰ To the extent that the Contractor is not awarded an extension of time then it will be liable for delay damages for the late completion of the Works pursuant to sub-clause 8.7. Difficulties often arise when the Contractor believes it has been wrongly denied an extension of time and is subsequently issued with a sub-clause 8.6 notice.

Ultimately, the Works will be complete when a Taking-Over Certificate has been issued under Clause 10.¹¹ Determining whether the Works are ready for taking over will be a matter of fact for the Engineer to decide on.¹²

Payment

In terms of payment, the FIDIC Red Book is a remeasurable contract. Whilst the payment process is briefly described below, it should be noted that if certain conditions are not met then the process can be derailed.

The Contractor will submit monthly applications (i.e. statements).¹³ The Engineer will, following an evaluation carried out pursuant to sub-clause 12.3, issue an Interim Payment Certificate within 28 days thereof¹⁴ and the Employer should make payment within a further 56 days.¹⁵ Within 84 days of the issuance of the Taking-Over Certificate the Contractor will submit its Statement at Completion¹⁶ and the Engineer will issue a Payment Certificate accordingly. 56 days after receiving the Performance Certificate the Contractor will submit its Application for Final Payment Certificate.¹⁷ To the extent that the Engineer agrees with this Application,¹⁸ the Contractor will issue its Final Statement for the agreed amount along with a written discharge¹⁹ following which the Engineer will issue a Final Payment Certificate. Importantly, if the Employer fails to pay on time against

a certified amount then the Contractor will be entitled to finance charges,²⁰ and possibly to terminate.²¹

Clause 13 defines what will constitute a Variation and also prescribes how a Variation is to be dealt with and valued.

To the extent that the Contractor believes it is entitled to additional payment (there can sometimes be a dispute as to what is meant by 'additional') then it is required to make a claim in accordance with sub-clause 20.1. The time bar provision included within this particular sub-clause has been the subject of numerous articles over the years and its applicability in the UAE remains a hot topic.

The FIDIC Red Book caters for Provisional Sums, though such work will only be carried out if instructed by the Engineer.²²

Crucially from the Contractor's perspective (who may be tendering for large construction or engineering projects), sub-clause 14.2 allows for an Advance Payment to be made. The Contractor will be required to provide a guarantee for this Advanced Payment and the Employer will claw this money back incrementally via interim payment certificates.

An often overlooked provision of the FIDIC Red Book is the ability of the Contractor to request that the Employer provides reasonable evidence of its financial arrangements. During periods of economic downturn this could be a useful tool for the Contractor. Contractors should be wary of an Employer who wishes to have this sub-clause deleted.

Performance Bonds

Ever since the global financial crisis hit Dubai in late 2008 there has been a propensity for calls to be made against 'on-demand' Performance Bonds ('PB').

Sub-clause 4.2 provides (paraphrasing) that a Contractor must provide a PB within 28 days of receiving the Letter of Acceptance, usually for 10% of the Accepted Contract Amount.

Sub-clause 4.2 prescribes the circumstances under which an Employer may make a demand on the PB: (i) a failure by the Contractor to extend the period of validity of the PB; (ii) a failure by the Contractor to pay an amount due to the Employer; (iii) failure by the Contractor to remedy a default; and (iv) where the Employer has grounds to terminate (importantly, the Employer need not actually terminate).

The sub-clause itself is silent as to what form a PB should take and that is a matter of separate negotiation but the FIDIC Red Book does provide a template. The wording of the PB itself needs to be carefully considered

because the agreed version may actually contain pre-conditions to making a demand. The FIDIC template includes optional wording that the PB will expire upon the issuance of a Taking-Over Certificate; however, it is quite usual in the UAE for the period of validity of the PB to be extended through to the issuance of a Performance Certificate.²³ Difficulties for the Contractor often arise when a Performance Certificate is never issued or there is no fixed period for the PB.

However, and quite often in the UAE, the Employer often forgets (or ignores) that it has a duty to account for the monies called under a PB. The Employer would do well to remember the penultimate paragraph of sub-clause 4.2 whereby the Employer provides the Contractor with an indemnity for any claim made on the PB which it was not entitled to make. In practice, if the Employer makes a call for the full amount of a PB during the Defects Notification Period when it has already taken over the Works and is operating the same for its intended purpose, the Contractor will often seek to rely on arguments under the UAE Civil Code to challenge the validity of the call, including, amongst other things, that the demand was an unlawful exercise of a contractual right (Article 106) or made contrary to good faith (Article 246(1)).

Given the importance of this issue, the process and implications of making a call on the PB are considered in more detail below.

Firstly, the Employer will make a demand on the bank which provided the PB. For tactical reasons this demand is often made so that the bank has as little time as possible to inform the Contractor, and at an inconvenient time so that the Contractor struggles to engage lawyers to prevent the bank from paying out on the PB.

Notwithstanding that a call on the PB has been made and that it should be paid out immediately it can sometimes take up to 2 or 3 weeks for a bank to release the money.

Once it has been notified by the bank that the Employer has made a call on the PB the Contractor will almost certainly apply for an attachment order (the equivalent of a freezing order injunction).²⁴ The Contractor's application is made *ex parte*. It is quite usual for the attachment to be granted at this first *ex parte* hearing.²⁵ Often, the first time the Employer becomes aware of the attachment is when it receives notice that its bank account has been frozen.

Once the attachment has been granted the Contractor is required to commence proceedings for the main dispute within 8 days of the attachment,²⁶ and if it does not do so the attachment will be dismissed.²⁷ However, the commencement of proceedings for the main dispute within this 8 day period can be problematic for the Contractor if the main contract includes for arbitration and there are

pre-conditions to commencing arbitration (e.g. a dispute first has to be referred to a Dispute Adjudication Board).

At the first *inter partes* court hearing after the Contractor has filed a claim for the main dispute the court will normally join the attachment order proceedings to the main proceedings.

As one would expect, and so as not to undermine the status of bonds in the international banking community, the *inter partes* court hearing will usually, though not always, result in the lifting of the attachment. The court will generally take the view that the issue of whether the PB was properly called is a matter to be decided as part of the main dispute.

Termination

The termination of a construction contract which is subject to the FIDIC Red Book is far from straightforward in the UAE because of the interface between the contractual termination provisions and what local law provides for in respect of termination.

At the outset, one would do well to remember some important provisions of UAE law. Firstly, Article 2(1) of the UAE Commercial Code provides a hierarchy of laws whereby the contract comes first, followed by the Commercial Code, then custom and practice and then the provisions of the UAE Civil Code. Secondly, Article 31 of the UAE Civil Code provides that a mandatory provision of law will take precedence over any conflicting contractual provision. Therefore, mandatory provisions of UAE law, along with others, need to be carefully considered when contemplating a termination under the provisions of the FIDIC Red Book.

Clauses 15 and 16 set out the contractual grounds for termination in the event of default by the Contractor or Employer respectively (sub-clause 15.5 allows the Employer to terminate for convenience). In short, provided the relevant grounds exist and, in some instances, the appropriate notices have been issued, the aggrieved party may serve a 14-day notice on the other party to terminate.

That all sounds relatively straightforward. However, the problem lies in how these contractual provisions sit with UAE law.²⁸

Article 267 of the UAE Civil Code provides that a contract can only be terminated in one of three ways: (i) by consent; (ii) by order of the court (or tribunal); or (iii) by a provision of law.²⁹ This last provision is generally taken to mean (in a construction setting) a force majeure type event as prescribed in Article 273 of the UAE Civil Code.³⁰ It is

the first two provisions which create issues in the context of a termination under the FIDIC Red Book.

The first type of termination, i.e. by consent, sometimes gives rise to the argument that when the parties negotiated and signed the contract they thereby agreed (consented) that either party would be able to terminate the contract if the grounds for termination were met, such that a court order for termination is not needed and termination takes effect immediately. However, the contrary view to this argument is that such agreement can only take place when the termination itself is contemplated. The least risky challenge to a termination by consent is to ensure that the contract expressly includes a provision that a termination can be made without the need for a judicial order, which would make the termination compliant with Article 271 of the UAE Civil Code.

The second way of terminating a contract under UAE law is by way of a court (or tribunal) order pursuant to Article 272 of the UAE Civil Code, but there are pre-conditions to be met if a termination under this provision is to be lawfully effected.³¹ Indeed, what will often happen when terminating under the FIDIC Red Book is that the terminating party will seek to rely upon its contractual default and termination notices as Article 272 compliant notices.

One can foresee the potential issues that may arise. On the one hand a party may terminate a contract in real time under FIDIC but, under UAE law, the contract may be said to remain in existence until a court (or tribunal) declares the contract terminated.³² Some lawyers may argue that the contractual termination under FIDIC gives rise to a 'determination', i.e. it is only the primary obligation of performance which has been ended, but the ancillary secondary obligations remain intact. However, a UAE court may well take a more broad-brush approach and simply ask itself whether a party is seeking to argue that a contract has been terminated, yes or no. Furthermore, the local courts have previously decided that upon a termination a party's ancillary rights (e.g. liquidated damages) fall away, which is inconsistent with the termination provisions of FIDIC.

Ultimately, no matter what the parties argue or their lawyers advice, it will be for a court (or tribunal) to decide whether the termination was lawful.

Summary

The perennial problems surrounding time, payment, performance bonds and termination have carried across from the use of the FIDIC 4th Edition through to FIDIC's

1999 Rainbow suite and there is no reason to suggest that they will disappear when FIDIC introduces its updated standard form contracts. With this in mind, and given that the UAE's construction industry has now experienced its first boom-bust cycle, maybe it is time that the industry's players started looking at more collaborative approaches to contracting and consider using other industry standard forms such as the NEC3.

The footnotes to this article can be found in the online version at www.tamimi.com.



Tarek Shrayh
Partner
Dubai, UAE
t.shrayh@tamimi.com



John Gaffney
Senior Associate
Abu Dhabi, UAE
j.gaffney@tamimi.com



Malak Nasreddine
Paralegal
Abu Dhabi, UAE
m.nasreddine@tamimi.com

Abu Dhabi Establishes English-Language Commercial Courts

In 2013, the Abu Dhabi Government established the Abu Dhabi Global Market (“ADGM”), an international financial free zone in the heart of the UAE’s capital city. ADGM is comprised of three authorities, including the Abu Dhabi Global Market Courts (“ADGM Courts”). The ADGM Courts have recently commenced operations. The purpose of this article is to briefly introduce readers to the composition, structure and functioning of the ADGM Courts.

Overview

The ADGM Courts are common-law courts, based on the English court system. They form part of both ADGM and the Abu Dhabi judicial system. The Courts adjudicate civil and commercial disputes. The ADGM Courts thus offer a common law system in the midst of a predominantly civil law Middle East region. Moreover, English law will be directly applicable in the ADGM, making the ADGM the first jurisdiction in the Middle East to directly apply English law.

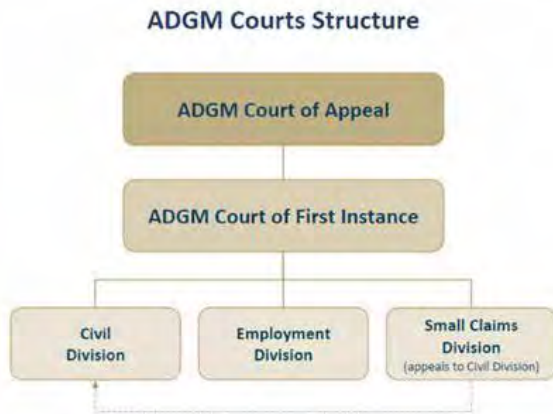
The ADGM Courts are located in the ADGM Building in Al Maryah Island, Abu Dhabi, although sittings and any

other business may be conducted in any place in the world, i.e., hearings are not limited to the ADGM hearing rooms. Hearings may be conducted by video conference and will be available for real time viewing in ADGM Courts’ hearing rooms. This allows ADGM judges to manage cases with greater flexibility, expeditiously, efficiently and economically. ADGM Court hearings are fully open to the public; however, all arbitration-related proceedings are to be heard in closed court (unless all parties agree otherwise, or the Court is satisfied that the proceeding ought to be heard in open court).

The ADGM Courts are accepting cases electronically since becoming operational. The electronic and physical infrastructures for the conduct and hearing of cases are close to being finalised.

ADGM Court Structure

The ADGM Courts are comprised of a Court of First Instance and a Court of Appeal. The Court of First Instance consists of a Civil Division, Employment Division and Small Claims Division.



**Chart courtesy of ADGM*

Legal Framework

The ADGM Courts' legal framework comprises the ADGM Courts' Regulations, a single unified statute, which are complemented by the ADGM Court Rules ("Rules") and Practice Directions. The Rules comprise the Division and Jurisdiction Rules, ADGM Court Procedure Rules, Certification of Enforcement Agents Rules, Taking Control of Goods and Commercial Rent Arrears Recovery Rules, Judicial Discipline Prescribed Procedure Rules, Judicial Conduct Rules, and Rules of Conduct.

Judges of the ADGM Courts

The Judges of the ADGM Courts are drawn from around the world and led by the Chief Justice of ADGM Courts, Lord Hope of Craighead KT.

The ADGM Courts Judges are the Right Honourable the Lord Mark Saville of Newdigate PC, the Honourable Kenneth Hayne AC, the Right Honourable Sir Peter Blanchard KNZM, William Stone SBS QC, and the Honourable Lord McGhie (who will preside over the Small Claims Division). The judges have significant experience in England & Wales, Scotland, Australia, New Zealand and Hong Kong. The judges may sit both in the Court of First Instance and the Court of Appeal. They may also act as arbitrators under ADGM's arbitration framework. ADGM Judges are required to be independent and impartial.

In addition to the foregoing judicial appointments, ADGM has appointed Linda Fitz-Alan as Registrar of the ADGM Courts in 2015. She was previously CEO and Principal Registrar of the Supreme Court of New South Wales.

Jurisdiction of the ADGM Courts

Court of First Instance

The Court of First Instance has jurisdiction over matters relating to:

1. Civil or commercial cases and disputes involving
 - the ADGM;
 - any of ADGM's Authorities (which are the ADGM Registration Bureau, the Financial Services Regulatory Authority, and the ADGM Courts); or
 - any company or entity which is registered and licensed to operate within the ADGM;
2. Lawsuits and civil or commercial disputes arising out of or relating to
 - a contract or a transaction conducted in whole or in part in the ADGM; or
 - to an incident that occurred in the ADGM;
3. Any appeal against a decision or a procedure issued by the ADGM Authorities; and
4. Any request which the ADGM Courts has the jurisdiction to consider under the ADGM Regulations.

In relation to the matters specified in (1.) and (2.) above, parties may specify in their commercial contracts and transactions that they agree to 'opt out' of the ADGM jurisdiction, and instead choose any other jurisdiction or agree to refer their disputes to arbitration. Conversely, parties with no nexus to the ADGM can also 'opt in' to the ADGM jurisdiction.

Civil Division

The Civil Division has jurisdiction over cases where the claim exceeds USD100,000. It also hears appeals in relation to judgments of the Small Claims Division and reviews decisions of the ADGM Authorities.

The Civil Division does not have jurisdiction over any claim or dispute:

1. Where the value of the claim or dispute is, or is less than, USD100,000;
2. Arising out of or in connection with family proceedings; and
3. Relating to employment matters.

Small Claims Division

The Small Claims Division has exclusive jurisdiction over:

1. Claims and disputes with a value of USD100,000 or less;
2. Disputes falling within Employment Division jurisdiction, where all parties have agreed in writing that the relevant claim or dispute is to be heard in or determined by the Small Claims Division.

Employment Division

The Employment Division of the Civil Division has exclusive jurisdiction over claims and disputes:

1. Relating to the enforcement of rights and obligations under the Employment Regulations; and
2. For the enforcement of any claim relating to employment matters other than the enforcement of any right or obligation under the Employment Regulations 2015.

The Employment Division does not have jurisdiction over any claim or dispute relating to the Civil and the Small Claims Divisions.

Court of Appeal

The Court of Appeal has jurisdiction (a) to consider appeals made against judgments or decisions issued by the Court of First Instance, and (b) to interpret any articles of the ADGM laws and regulations. There is no automatic right to appeal in respect of judgments issued by the Civil and Employment Divisions. A party must apply for permission to appeal the judgment, either to the Court of First Instance or Court of Appeal. In the case of a judgment issued by the Small Claims Division, an appeal can only be made on a question of law. The Court of Appeal's judgments are final and may not be appealed.

Types of cases the ADGM Courts may and may not hear

The ADGM Courts will hear the following types of cases:

1. Commercial and contract disputes;
2. Tort cases;
3. Personal injury cases;
4. Judicial review cases; and
5. Application relating to the recognition and enforcement of arbitral awards.

The ADGM Courts are common-law courts, based on the English court system. They form part of both ADGM and the Abu Dhabi judicial system. The Courts adjudicate civil and commercial disputes. The ADGM Courts thus offer a common law system in the midst of a predominantly civil law Middle East region.

The jurisdiction of the ADGM Courts is, of course, not unlimited. ADGM Courts *cannot* hear:

- Criminal cases;
- Family cases (i.e. matters relating to divorce, guardianship, alimony, personal status, and inheritance which are matters governed by Sharia).

Relief available to parties

The ADGM Courts may order a range of effective remedies in respect of disputes falling within their jurisdiction:

1. The Courts have the power to order injunctions to restrain parties from acting in a position, in relation to which they are not entitled to act. The Court of First Instance may grant specific performance.
2. The Court may award damages in addition to, or in substitution for, an injunction or specific performance.
3. The Courts may appoint a receiver. The power to appoint a receiver by way of equitable execution will operate in relation to all legal estates and interests in real property.

4. The Courts may order debtor-specific remedies. The Court may order goods to be returned to the debtor, or order an enforcement agent to pay damages for loss suffered by the debtor.
5. The Courts have the power to grant relief against forfeiture for non-payment of rent.
6. The Courts can order damages for personal injuries.
7. In judicial review cases, the ADGM Courts may order mandatory, prohibiting or quashing orders, a declaration, or an injunction to restrain parties from acting in offices in which they are not entitled to act. (The Courts can also award damages, restitution or the recovery of a sum due.)

Rights of audience before the ADGM Courts

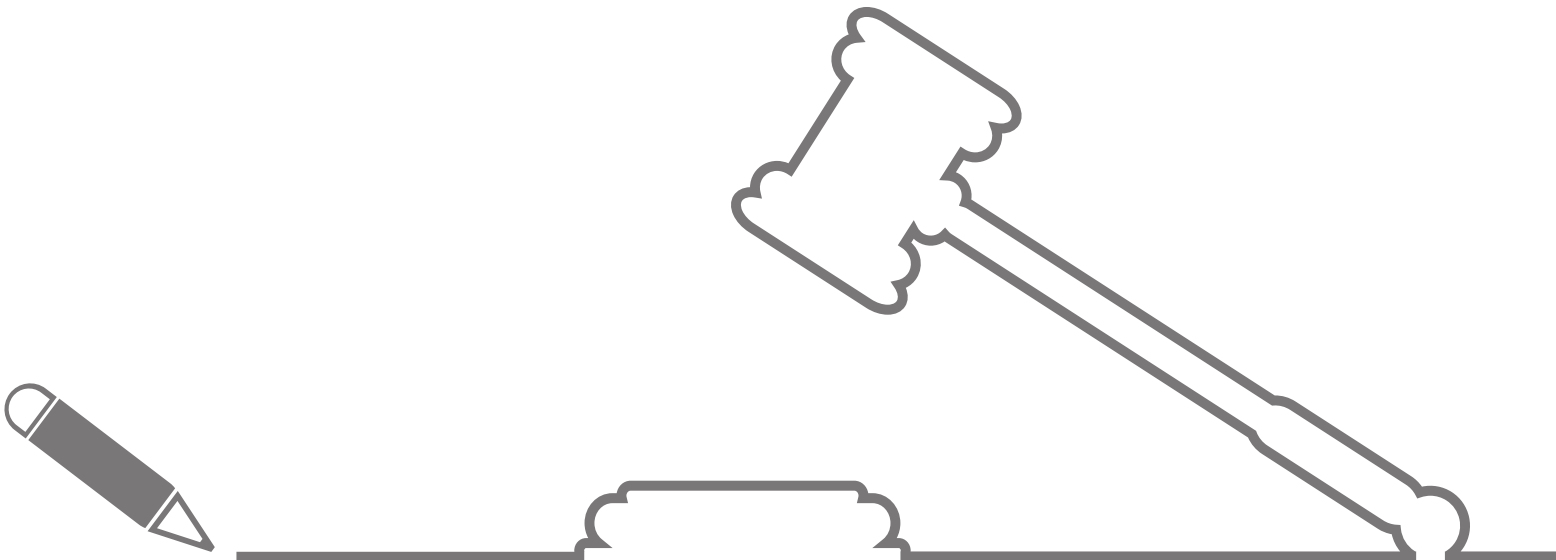
Any person may have a right of audience and appear before the Small Claims Division of the Court of First Instance, but such appearance is subject to compliance with the rules of conduct of the Courts.

Otherwise, in order to appear before the ADGM Courts, one must be a lawyer who has been practising for a continuous period of at least 5 years prior to appearing before the Court. Lawyers who have been banned or

suspended as a result of disciplinary proceedings do not enjoy a right of audience. ADGM Courts have not instituted a registration system of legal practitioners as a pre-requisite for a right of audience, as is the case for the Dubai International Financial Centre Courts.

Online Services

Parties will be assisted with the ADGM Courts' electronic services, as soon as the e-services become fully implemented. ADGM Courts will offer a range of electronic services, including e-filing, e-case management and e-trials. ADGM Court e-services will include (a) e-filing for all documents, and the ability to conduct payments online, (b) communication between parties and ADGM Courts, and allowing lawyers to track their cases, and (c) e-trials, with access to electronic documents, audio visual remote connections, real time transcript and research capability.





Mohamed Afifi
Associate
Kuwait City, Kuwait
m.affi@tamimi.com

What to be Aware of Regarding Treasury Shares in Kuwait

Treasury shares have been always a mystery to simple investors and shareholders around the world. The purpose of this article is to give a general overview of treasury shares as regulated under Kuwaiti laws.

Treasury shares are the portion of shares that a company keeps in its own treasury. They may have come from a re-purchase or buyback from shareholders, or they may have never been issued to the public in the first place. Treasury shares do not pay dividends, have no voting rights and should not be included in shares outstanding calculations.

The concept of treasury shares is an accounting concept and the debate over how to treat them goes back for decades. In 1946, the California Law Review

published an article by Henry W. Ballantine entitled ‘The Curious Fiction of Treasury Shares’. Ballantine is quoted as saying: *‘Treasury shares are indeed a masterpiece of legal magic, the creation of something out of nothing. They are no longer outstanding shares in the hands of a holder.’*

Under Decree No. 287 of 2016 Promulgating the Executive Regulation of Law No.1 of 2016 Promulgating the Companies Law (‘Companies Law’), the Kuwaiti legislator has defined treasury shares as: *“the shares acquired and resold by the company and used on its issued shares traded in the stock exchange within the limit of the decreed percentage”*. However, the Kuwaiti legislator did not address treasury shares in the Companies Law with any deeper or clearer research.

In November 2015, the Kuwaiti legislator issued the new executive bylaws by way of Law No. 7 of 2010 Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities and its Amendments ('Executive Bylaws'), which define treasury shares as a company's shares which the issuing company re-purchases or buys back or otherwise makes use of. At this time, the legislator devoted a full chapter clarifying and regulating treasury shares and stipulated that such provisions shall apply to public and closed shareholding companies, except that units subject to the supervision of the Central Bank shall be excluded.

The Executive Bylaws limit the use of treasury shares to the following cases:

1. Maintaining stability of the company's share price;
2. Reduction of the company's paid-up capital;
3. Settlement of a company's account receivables;
4. Repayment of a company's outstanding debt;
5. Distribution of bonus shares to shareholders without an increase of the capital or the number of shares issued;
6. Swap deals in the event of merger with or an acquisition offer of other companies;
7. Distribution of all or some of the treasury shares to the company's workers in the context of the employees' share option plans conditional upon the general assembly's approval, and in accordance with the regulatory rules approved by the general assembly of the company; and
8. Other cases determined by the Capital Markets Authority (CMA).

Furthermore, the Executive Bylaws stipulate that unlisted companies may not dispose of shares in the circumstances set out at (1), (3) and (4) above.

One of the most significant issues in this regard is that the percentage of shares owned by the company and its subsidiaries may not exceed 10% of the total of the number of shares issued by the company. Moreover, the Executive Bylaws set out the guidelines, procedures and accounting treatment of treasury shares and provide that the constitutional documents of the company shall state that, at most, 10% of the issued shares of the company may be purchased at their market value and that partners may not purchase or sell the company's shares unless they obtain the written approval of the CMA, which is given pursuant to an application submitted to the CMA.

In addition to the above, the Executive Bylaws include obligations on companies listed with the Kuwait Stock Exchange and stipulate that listed companies may not deal in shares thereof through financial derivatives. Any deals in shares must take place in accordance with the rules applicable on the exchange. Cases specified at (3), (4), (5), (6) and (7) above, and other cases approved by the CMA, shall be excluded. Furthermore, listed companies shall disclose the CMA's approval for purchasing or selling treasury shares upon issuance and in accordance with the provisions and procedures stated in Module No. 10 (Disclosure and Transparency) of the Executive Bylaws and a listed company shall not deal in shares for 10 business days before disclosing its financial statements (reviewed quarterly financial statement or audited annual financial statements) or any other significant information that may affect the value of the company's shares.

In conclusion, treasury shares do not have voting rights or dividend rights. In addition, a company may only acquire the number of shares which equals or is less than 10% of its issued share capital according to the market value of the company's shares and it may acquire its shares only if the company's memorandum and articles of association provide that it may do so. Furthermore, a company wishing to buy or sell treasury shares must seek and obtain the approval of the CMA. It is worth noting that a sale or purchase by the company of its treasury shares can only be effective upon approval by the company's general assembly and, in the event



Raj Pahuja

Head of Corporate Commercial, Bahrain

Manama, Bahrain

r.pahuja@tamimi.com

UAE's Adoption of FIFA's Regulations for Football Intermediaries

In April 2015, FIFA undertook a complete overhaul of the rules governing football agents (now called intermediaries). The FIFA Players' Agents regulations were replaced with the FIFA Regulations on Working with Intermediaries. FIFA removed a system that was primarily based on the qualification, recognition and registration of a certain limited number of agents and replaced it with a system whereby the barriers to entry were lowered but the scrutiny on specific transactions conducted using intermediaries was increased. The new regulation issued a set of guidelines to be implemented at the national level by football associations across the globe. Whilst these regulations proved controversial at the time, it attempted to bring about a uniform set of minimum standards to be applied across the board, with particular focus on disclosure and transparency in transactions and dealing with conflicts of interest.

UAE FA Guidelines

The UAE Football Association ("UAE FA") adopted the guidelines on 30th June 2015 ("Guidelines") and a summary of the key points of the Guidelines relating to the UAE are described below:

Article 1 – Definition of an Intermediary

Article 1 broadly defines an intermediary as a person (natural or corporate) who (i) represents players or clubs in negotiations with the goal of signing an employment contract between them, or (ii) represents clubs in relation to discussions with the goal of entering into transfer or loan agreements.

Article 2 - Implementation of the Regulation

The Regulations apply to the clubs and players using the intermediary's services.

Article 2 goes on to state that the implementation of the Regulations or any amendment shall not prejudice the validity of an employment contract or Transfer or Loan agreement.

Generally, in terms of the employment contract, FIFA's Professional Football Player Contract Minimum Requirements should be taken into account although these are subject to mandatory local law provisions. In relation to player contracts in the UAE, they are in fact subject to UAE Labour Law.

Article 3 – General Principles

Article 3 of the Regulations sets out general principles which include a requirement that an intermediary must be registered in accordance with the Guidelines and that players and clubs, when choosing their intermediaries must show 'best effort attempts', which means that clubs and players must use their best efforts to make sure that the intermediary engaged signs a representation agreement between them.

Article 4 – Registration of Intermediaries

This article states that the intermediary is required to record every transaction and that the clubs or players using intermediaries must submit the intermediary's registration

and any other documents in relation to every transaction carried out using the intermediary. Therefore, the UAE FA is required to implement a registration system for intermediaries, who must be registered for each transaction that they are involved in. This attempts to allow for increased tracking of intermediary activities.

Article 5 - Requirements and Conditions for Registration

Even though no formal qualification is now required for an individual to be an intermediary, there are still minimum conditions in force which need to be met before an intermediary can be registered in the UAE and registration would still be subject to the UAE FA's approval.

To be registered the applicant must:

1. present a Good Conduct Certificate
2. have a license to be an intermediary and must have permanent residence.
3. be a national, except for non-national intermediaries who must be registered with their local federations.
4. have at least 5 years experience in the sport.
5. adhere to signing all document required by these rules
6. not have any affiliation with the national federation or regional federations since this would lead to a conflict of interest.

Article 6 – Fees

These fees are not set out in FIFAs regulations and are left to national federations to determine.

In relation the UAE, the Regulations deals with fees to be paid to the UAE FA, which states that the intermediary must:

1. pay a fee of AED 20,000 annually.
2. pay 5% of their fee for each transaction to the UAE FA if they have a local office, otherwise they must pay 10%.

Article 7 – Conditions of the Agreement

This article addresses the minimum conditions relating to the scope of the intermediary's services and which must be included in the representation agreement between the intermediary and the club or player. These conditions include:

1. setting out the legal nature of parties relationship;
2. setting out details of the contract which, at a minimum must contain the names of the parties, description of the intermediary's services, the term, fees, general terms for payment, date of the agreement and termination provisions. The agreement must also be properly signed by the parties; and
3. The intermediary must disclose his contract for every transaction.

Article 8 – Disclosure of Information

In general:

1. players and clubs must declare to the UAE FA all details of fees or payments paid or to be paid to the intermediary.
2. players and clubs must, at the request of the UAE FA provide all contracts and agreements signed with the intermediary, for investigation purposes.
3. all contracts stated in paragraph 2 above must be provided together with the employment contract or transfer contract, for the player's registration.
4. all employment contracts and transfer agreements must contain the name and signature of the intermediary, in addition to a statement if there is no intermediary.
5. The UAE FA shall at the end of May each year via its electronic platform, tally all the names of registered agents and transactions participated in. Then it will announce the total fees and payments made to them.
6. The UAE FA must look into all transactions that are not in adherence with these rules.

It is interesting to note that there is a requirement that a player and a club using an intermediary report that fact to the UAE FA on a transaction-by-transaction basis, along with all financial details. This attempts to deal with FIFA's concern regarding transparency of transactions.

Prior to the implementation of the FIFA rules it was believed that at an international level (not necessarily relating to the UAE), there had long been an under-reporting of agent involvement in international transfers. This has occurred for reasons of confidentiality, to disguise side-agreements and incentives, to avoid administrative compliance, to reduce timelines for deal-making and numerous additional reasons.

Article 9 – Payments to Intermediaries

This important article deals with intermediaries' remuneration. The Regulations state that:

1. the fee collected by the intermediary for a player or club shall not exceed 3% of the total monthly salary of the player for the entire term of the employment contract.
2. the intermediary's fee where it represents a club in a transfer or loan shall not exceed 3% of total salary of a player for the entire period of the employment contract.
3. the intermediary who represents a club is entitled to an advance fee prior to completion of the service, which shall be incorporated and taken into account into the total 3% to be collected.
4. the clubs shall not make player transfer payments or loan payments via the intermediaries or to them and must not ask that payments relating to players are made to the intermediary.
5. in accordance with paragraph 6 of Article 9 and subject to Article 10, the intermediary must be paid immediately after the performance of its service.
6. after completion of a contract between the club and player and if incorporated into the terms agreed between the player and its intermediary, a payment may be made via the intermediary.
7. directors/managers are not permitted to receive any payment from the intermediary and any such breach will lead to disciplinary measures.
8. clubs and player shall not pay any fees to the intermediary if the player is incapacitated in some way as per the rules of transfer of players.

It is interesting to note that when adopting the FIFA guidelines the UAE FA went a step further in relation to commission fees earned by an intermediary. The FIFA guidelines made a recommendation that fees paid to intermediaries are limited to 3% of the player's basic gross income or of the transfer compensation. The UAE FA's Regulations however, made it a mandatory requirement to limit intermediaries to 3% commission on the fixed salary of a player. Compliance with the Regulations is at odds with the previous practice (a default 3% unless otherwise specified in the contract) and a broadly accepted international expectation that agents could anticipate a commission between 5%-10% as well as a percentage of transfer fees.

It is important to note that the FIFA guidelines clearly state that any payments made to intermediaries acting on behalf of minor players are strictly prohibited.

Article 10: Conflict of Interest

FIFA had a significant concern that on an international basis there were increased conflict of interest issues with player transfers. The UAE Guidelines state that:

1. players and clubs must ensure there is no conflict of interest before using an intermediary.
2. there shall be no conflict of interest where an intermediary has beforehand declared his actual or potential conflict, and the other parties have agreed in writing to let him proceed in the negotiations.
3. if the player or club wants to complete a transaction in line with Article 2 above, they must state in writing their consent beforehand and disclose the identity of the party that will be paying the fee to the intermediary. The parties must also inform the UAE FA and submit all written documents during registration in accordance with the Regulations.

Article 11: Disciplinary Measures

Disciplinary measures can apply to the following offences by an intermediary:

- if any false information is presented to the UAE FA in breach of the Regulations or if there are any breach of the Regulations;
- breach of obligations under the contract;
- inducement of a player to end the contract or breach it; and
- breach of the provisions of the Regulations or articles of association of the UAE FA or regulations of the UAE FA or its circulars, or the non-fulfilment of obligations in relation to decisions made.

The sanctions against an intermediary include one or a combination of the following:

1. written warning;
2. fine of AED 20,000 - AED 100,000;
3. temporary cancellation of a license;
4. permanent cancellation of a license; and
5. ban from participating in any football activity.

In addition, each player or club in violation of the Regulations will be disciplined in accordance with the Regulations of the UAE FA. The Regulations provide for a committee to be set up to look into any alleged breaches.

Overview

With the Intermediaries Regulations, FIFA has delegated responsibility for managing the regulations and increasing transparency of matters relating to intermediaries to over 200 national associations. FIFA has attempted to implement a uniform set of standards across the different federations, as in the past there were differing standards and qualifications relating to football agents. The range of enthusiasm, resources and motivations for implementing the regulations across those national associations varies widely. While the electronic transfer management system (“TMS”) provides a platform for transparency, only fully declared and disclosed agent activity and documentation is entered and only keen management, oversight and enforcement by national associations can make the system work effectively. By adoption and implementation, the UAE FA has implemented the Regulations but the new system is just a year in process. To date there are only six registered intermediaries on the UAE FA website and the level of reported transfer activity is unclear. It therefore remains to be seen over the next few years how the Regulations are adopted and administered.

Raj Pahuja (r.pahuja@tamimi.com) is Head of Corporate Commercial in the firm's Bahrain office (previously working with the firm in the UAE) and a key member of Al Tamimi's dedicated Sports and Events Management practice. He has previously acted for the Bahrain International Circuit for several years advising on various aspects, including the F1 Grand Prix. Raj has also advised on the inaugural and subsequent Dubai Tours Cycle Race and in relation to a T20 cricket tournament.



Arina Gidwani
Associate
Dubai, UAE
a.gidwani@tamimi.com

Fund Regulation in the UAE

The UAE Securities and Commodities Authority (“SCA”) has recently released Chairman Resolution No. 9 R.M. of 2016 (Concerning the Regulation on Mutual Funds) (“New Fund Regulations”). The New Fund Regulations have been long-awaited and have replaced both the Board of Directors Resolution No. 37 of 2012 (Concerning the Regulation of Mutual Funds) (“2012 Fund Regulations”) and the Board of Directors Resolution No. 13 of 2013 (on Amending the Regulation of Investment Funds) (the “Private Placement Exceptions” and together with the 2012 Fund Regulations, the “Former Regulations”). The New Fund Regulations were published in the UAE Federal Gazette dated 31 July 2016 and are currently in force. We note that SCA has also recently circulated certain draft regulations for review and comment which will also be of relevance to fund regulation in the UAE. Accordingly, we note that the New Fund Regulations will need to be read in conjunction with any applicable resolution, regulation, directive or circular issued by SCA from time to time, including those in relation to the arranging and promoting of financial products and securities.

Similar to the 2012 Fund Regulations, the New Fund Regulations include provisions on licensing, management, offer document requirements, subscription, and issuance and listing of fund units. However, the New Fund Regulations also feature some changes to the Former Regulations, including the introduction of provisions for specialized categories of funds, such as umbrella and feeder funds. While the majority of these changes will largely affect UAE domiciled funds, there are new provisions that will also affect foreign funds. This article covers some of the key aspects of the New Fund Regulations.

Foreign Funds

The New Fund Regulations greatly simplify the requirements for the promotion of foreign funds in the UAE. The seven articles (containing twenty-two clauses) under the

2012 Fund Regulation have been pared down to just one article (of five clauses), perhaps reflecting that most foreign funds are currently promoted on a cross-border basis or under the private placement exceptions. Both the 2012 Fund Regulations and the New Fund Regulations only relate to the promotion of a foreign fund in the UAE through a local distributor who has a duty to register the fund with the SCA and comply with certain requirements. The New Fund Regulations essentially pare the requirements down to requiring registration of a foreign fund and annual renewal of registration where a local distributor is used.

That said, promoters of foreign funds should note that the private placement exceptions under the New Fund Regulations have been narrowed in scope. Under the Former Regulations, the 2012 Fund Regulations did not apply in respect of the private promotion of foreign funds targeting:

- federal or local government financial portfolios;
- companies, institutions or entities trading on their own account whose main purpose, or one of their main purposes, is to invest in securities; and
- investment managers who have a discretionary investment mandate.

This position has changed as the exception to promotion of foreign funds is now limited only to federal or local government authorities. It is also important to note that where the Former Regulations are silent on reverse solicitation, the New Fund Regulations explicitly provide that the New Fund Regulations shall not apply to reverse solicitations. While the New Fund Regulations do not grant express permission for short marketing visits to the UAE in relation to such reverse solicitations, the current understanding is that such visits will be tolerated. However, care should still be taken over activities while physically in the UAE so as to avoid being deemed to be “conducting business” in the UAE, which would itself require licensing.



Legal Form

The New Fund Regulations have eliminated the ambiguity and uncertainty that has been associated with the legal form of a fund. Under the 2012 Fund Regulations, there are certain provisions which imply that the governance of the fund will be subject to similar rules as a corporate entity (i.e. meetings of unit holders, liquidation etc.). The New Fund Regulations go further and clarify that investment funds are to be treated as corporate persons and this also includes provisions setting out the terms of expiry of such corporate personality. This is further supported by UAE Federal Law No 2 of 2015 (governing commercial companies in the UAE) which, unlike its predecessor, specifically provides for the establishment of investment funds under the rules and regulations of SCA and recognises such funds as a separate legal entity.

The New Fund Regulations also contain express provisions in relation to the assets of investment funds. In particular, the New Fund Regulations provides that the assets of investment funds will guarantee the rights of the unit owners and that such assets cannot be mortgaged, lent, attached or disposed of for the fulfilment of any obligations to a third party. This coupled with the clarification on the legal form should provide some comfort for investors in such funds as it supports the notion that the assets of such investment funds are separate from the assets of its fund managers. Accordingly, the assets of an investment fund, and the associated rights of unit owners, should not be jeopardised by the insolvency of its fund manager.

Regulatory Oversight

The UAE financial regulatory landscape has undergone some changes since 2010 when the UAE Central Bank (“Central Bank”) and SCA entered into an arrangement to determine the responsibilities of each regulator relating to particular financial activities. The changing dynamics between the Central Bank and SCA were made apparent in the 2012 Fund Regulations which delineated the roles of

each regulator and a handover of funds regulation in the UAE from the Central Bank to SCA. However, under the 2012 Fund Regulations the Central Bank continues to play a regulatory role in the oversight and inspection of local funds in relation to their financial position which has not been adopted in the New Fund Regulations. In this regard, the New Fund Regulations appears to reflect the culmination of the changing relationship between the Central Bank and SCA as full responsibility for the control and inspection of funds now rests with SCA.

Other Highlights

The New Fund Regulations introduce the concepts of feeder funds and umbrella funds. Under the New Fund Regulations, a feeder fund is a public investment fund or part of a group of funds for an umbrella fund which invests at least 85% of its assets in the units of a public master fund or foreign public fund and is excluded from investing in negotiable securities and certain other investments determined by SCA. An umbrella fund is also a public investment fund but one whose investment policy is represented in establishing affiliate sub-funds.

SCA has also released Chairman Resolution No. 10 R.M. of 2016 (Concerning the Fees of Mutual Fund Regulation) (“Fees Resolution”) which is also now in force. The Fees Resolution sets out the fees payable for both registration and licensing of investment funds and for the annual renewal of such registration and licensing.

Conclusion

The New Fund Regulations will certainly have an impact on both the establishment of local investment funds and the marketing and promotion of foreign funds in the UAE. Such institutions will need to re-evaluate their current practices in order to ensure compliance with the New Fund Regulations, noting that the penalties for non-compliance include suspension or cancellation of the relevant license, registration or approval.



Nick O'Connell
Partner
Dubai, UAE
n.oconnell@tamimi.com

A New Electronic Transactions Law in the DIFC

Subject to the issuance of the formal enactment notice, the Dubai International Financial Centre (“DIFC”) will soon have a new electronic transactions law, DIFC Law No. 2 of 2016, the DIFC Electronic Transactions Law.

The DIFC Electronic Transactions Law is primarily focussed on electronic contracts, electronic records, and electronic signatures. The purpose of the law is expressed as:

- to facilitate electronic transactions in DIFC;
- to eliminate barriers to electronic transactions resulting from uncertainties over writing and signature requirements;
- to promote the development of the legal and business infrastructure necessary to implement

secure electronic transactions in DIFC; and

- to help to establish uniformity of rules, regulations and standards in DIFC regarding the authentication and integrity of electronic records.

In its July 2016 public consultation paper, the DIFC Authority explained that it wanted to clarify that, from a DIFC law perspective, electronic signatures are enforceable, electronic records are of the same effect as hard copies, and references to writing include writing by electronic means. Agreements made electronically would be as valid as those signed with ‘wet ink’ signatures, and electronic documentation would be treated as equivalent to paper documentation.

Electronic dealings, including dealings with the DIFC Authority, are already fairly common in the DIFC. By way of example, much of the DIFC company registration process, and associated licence renewal process, can be done on-line via the DIFC Authority's portal. The DIFC Authority acknowledges that there is little benefit in insisting on paper when parties are comfortable dealing electronically, and technology can bring with it similar, or greater, certainty than paper and wet ink.

With regard to electronic records, the DIFC Electronic Transactions Law provides that where any other DIFC law requires any record to be retained (or provides for certain consequences if it is not retained), that requirement is met by retaining the record electronically if certain conditions are satisfied. These conditions include: that the information contained in such record be preserved and capable of being reproduced in tangible form; that the record to be retained in the format in which it was originally created, generated, sent or received (or in a format that can be demonstrated to accurately replicate the information originally created, generated, sent or received); and that any details relating to the date and time, origin and destination and any sender or receiver be retained. Additionally, the law contemplates situations where authorities within the DIFC may specify compliance with certain other requirements relating to the retention of specific types of electronic records within their own areas of responsibility.

In its public consultation paper, the DIFC Authority noted that the draft law does not differentiate between different standards of secure and non-secure electronic signatures. It observed that most international legislation that includes such differentiation tends to attribute a higher evidential weight to electronic signatures that apply specified security procedures implemented by designated third party providers. In taking this approach, the DIFC Authority has avoided unnecessarily complicating the issue and negated the need to become involved in assessing and regulating a 'higher level' of electronic signatures.

In practical terms, prospective users of electronic signatures will, where circumstances require, be drawn towards electronic signatures that can be shown to utilise a higher level of technical security. Having a legislated certification process for 'secure electronic signatures' (as is the approach taken in the UAE Federal Electronic Transactions Law) would not change this. (In our experience, the 'deemed reliability' outcome of the approach contained in the UAE Federal Electronic Transactions Law does not have particularly strong

From a DIFC law perspective, electronic signatures are enforceable, electronic records are of the same effect as hard copies, and references to writing include writing by electronic means.

appeal in the market, particularly where international technology providers offering electronic signature solutions with a very high level of technical security have been reluctant to have themselves licensed as Certification Service Providers in the UAE.)

It should be noted that the DIFC Electronic Transactions Law contains significant exclusions in respect of the use of electronic records, electronic contracts and electronic signatures in the context of powers of attorney, wills and trusts, affidavits or affirmations and sale, purchase or long term lease of real property.

The DIFC Electronic Transactions Law is intended to be a framework for the recognition of electronic transactions, so it does not provide for penalties or sanctions. Other laws, such as the UAE Cyber Crimes Law and the UAE Penal Code, provide for penalties in respect of cybercrime type issues that may arise in the context of electronic transactions, and the DIFC Contract Law 2004 provides for remedies in the case of a breach of contract.

Al Tamimi & Company's Technology, Media & Telecommunications team regularly advises on electronic contracting, e-signatures, certification service provider issues, and other e-commerce related issues throughout the Middle East. For further information please contact Nick O'Connell (n.oconnell@tamimi.com) or Sana Saleem (s.saleem@tamimi.com).



Nick O'Connell
Partner
Dubai, UAE
n.oconnell@tamimi.com

Supervisory Visits by the DIFC Commissioner of Data Protection

Recent activity by the Dubai International Financial Centre (“DIFC”) Commissioner of Data Protection (the “DIFC Commissioner”) has attracted attention and caused DIFC licensed entities to review their own personal data processing operations and revisit their DIFC data protection compliance obligations.

Amongst various responsibilities, the DIFC Commissioner is charged with promoting, amongst data controllers in the DIFC, good practices and observance of the requirements of the DIFC Data Protection Law, and promoting greater awareness and public understanding of data protection. These activities can broadly be understood as the supervisory role of the DIFC Commissioner.

In performing its supervisory role, the DIFC Commissioner balances the need to educate the DIFC community about data protection compliance with the practical reality of limited personnel and resources. Over the last few years, the DIFC Commissioner has performed this aspect of its role by way of various relatively low-profile exercises, including ‘supervisory visits’ and ‘notices to produce’.

The ‘supervisory visit’ scenario typically involves the DIFC Commissioner approaching entities licensed in the DIFC in order to arrange for a meeting at an appointed date. These meetings provide an opportunity for the review of documentation and processes relating to the processing of personal data, and appear more likely to be about ensuring a culture of awareness and compliance than being deeply forensic or judicial in nature.

The types of topics that the DIFC Commissioner might expect to address during a supervisory visit include:

- a general description of the entity, the number of staff, locations in which it operates, and its area of business;
- details of the class of personal data the entity processes,

the types of data subjects to which such data relates, and the purposes for which it is processed;

- details of the entity’s data protection policies and procedures (including aspects such as the level of security applied, whether disclosure is consistent with the purpose for which personal data was collected, and whether there are procedures for keeping personal data up-to-date);
- an explanation of any data protection training given to personnel, along with information on training materials and records of training conducted;
- details of any periodic reviews and audits of personal data held, to assist in complying with obligations under the DIFC Data Protection Law;
- details relating to the transfer of personal data to other jurisdictions outside the DIFC, and the grounds upon which such transfers are based; and
- any other background material that might be appropriate to demonstrate the entity’s compliance with the DIFC Data Protection Law.

In contrast to the supervisory visit approach, the ‘notice to produce’ scenario involves the DIFC Commissioner approaching entities licensed in the DIFC and directing them to provide greater detail on the substance of their data processing activities. In the past, this has involved what could broadly be described as a ‘bulk mail out’, whereby a significant number of entities (anecdotal reports indicate more than 100 in February 2016) received such letters, specifying a deadline by which they were required to provide a substantive response.

In both the supervisory visit scenario, and the notice to produce scenario, entities approached by the DIFC Commissioner often wonder why they have been singled out for attention. While we cannot be certain how the DIFC

Commissioner identifies appropriate targets, the most obvious explanation appears to be irregularities with the content of the notifications previously filed by such entities with the DIFC Commissioner. (The filing of a notification of personal data processing activities is a requirement of all entities licensed in the DIFC, and this needs to occur at the time of initial licensing and at the time of each subsequent renewal, as well as at any time in the interim when the manner of processing changes from that already notified.)

Anecdotally, it would seem that the entities that received ‘notices to produce’ were entities that had previously advised the DIFC Commissioner, via their annual data processing notifications, that they were not processing any personal data in the course of their activities. (The likelihood of an entity not processing any personal data is very limited, so a ‘negative’ notification would likely benefit from closer scrutiny.) In the case of entities who were the targets of ‘supervisory visits’ by the DIFC Commissioner, such entities also appear to have had discrepancies in the content of their notifications that resulted in greater scrutiny being applied.

There is a legal obligation on entities licensed in the DIFC to comply with the DIFC Data Protection Law. The ‘risk’ of coming to the attention of the DIFC Commissioner should not be the driver for compliance with the law, but in practical terms the DIFC Commissioner’s supervisory activities may well be a catalyst for many DIFC entities to review their data protection compliance obligations and make sure that everything is in order. The reality is that DIFC data protection notifications are, in many instances, not given appropriate attention and treated simply as a ‘box ticking’ exercise. We are aware of instances where poorly considered notifications have simply been renewed annually without any further thought.

To ensure compliance, we recommend that all entities operating in the DIFC undertake a full audit of their own personal data processing operations so as to ensure that they are compliant with DIFC Data Protection Law requirements, including with regard to the substance of their activities and with regard to the official notification that needs to be filed with the DIFC Commissioner.

The DIFC Data Protection Law provides for significant penalties for non-compliance. While the DIFC Commissioner appears, to date, to have been generous in focussing on developing a culture of awareness, there can be no guarantees that failure to comply will not result in penalties in appropriate circumstances.

The Abu Dhabi Global Market (“ADGM”) has only recently been established, and the ADGM Data Protection Regulations only came into effect in October 2015. In this context, the ADGM Registrar is still at a very early stage in establishing processes, but in due course we would expect that it will also become active in ensuring that ADGM licensees comply with the data protection obligations imposed on them pursuant to the ADGM Data Protection Regulations.

Al Tamimi & Company’s Technology, Media & Telecommunications team regularly advises on data and data protection issues throughout the Middle East, including in the Dubai International Financial Centre, the Abu Dhabi Global Market and Dubai Healthcare City. For further information please contact Nick O’Connell (n.oconnell@tamimi.com) or Sana Saleem (s.saleem@tamimi.com).





Yousef Al Amly
Associate
Dubai, UAE
y.alamly@tamimi.com

An Overview of the New Governance Rules in the UAE: Part I

The Chairman of the Securities and Commodities Authority of the United Arab Emirates (SCA) issued on 28 April 2016 the Resolution No. (7/R.M) of 2016 Concerning Corporate Discipline and Governance Standards of Public Joint Stock Companies (New Governance Rules) in order to:

- list a set of new corporate governance rules in accordance with, and to adhere to, the Federal Law No. (2) of 2015 on Commercial Companies (CCL); and
- repeal the UAE Ministerial Resolution No. (518) of 2009 Concerning Governance Rules and Corporate Discipline Standards (Repealed Governance Rules).

New provisions were also introduced under the New Governance Rules, that did not exist under the Repealed Governance Rules, such as the provisions related to Insiders Register, Confidentiality of Data & Information, Conflict of Interest, Register of Related Parties, General Assembly Meetings, Capital Increase, Dividends Distribution, Investors Relation, and Obligations of the Auditor.

The purpose of this article is to compare the New and Repealed Governance Rules and highlight some of the provisions that we consider would benefit from clarification from SCA in relation to the following:

- Definitions;
- Scope of Application and Enforcement; and
- Parent, Subsidiary and Allied Companies.

It is worth mentioning that any capitalised terms shall have the same meaning to those mentioned in the New Governance Rules.

Definitions

In addition to the reference of the CCL, the New Governance Rules introduced the following new definitions that were not defined under the Repealed Governance Rules:

“State”: *The United Arab Emirates*

“Government”: *The Federal Government or any of UAE’s governments member to the federation in addition to any authority, entity, council, institution, body or public company wholly owned by any of them whether directly or indirectly.*

“Senior Executive Management”: *The company’s executive management, including the general manager, executive director, chief executive officer, and managing director authorized by the Board Members to manage the Company, and their delegates.*

“Deals”: *Transactions, contracts or agreements entered into by a public joint stock company that is listed in the market and do not fall under the main activity of such company or by way of including preferential terms that are not usually granted by the company to its clients, in addition to any other deals to be specified by SCA from time to time by virtue of a resolution, instruction or circulation issued thereby.*

“Remuneration”: *The amounts received by the Company’s staff, employees or Board Members from the Company; i.e. salaries, bonuses, attendance bonus, transportation allowance, or any other allowances, benefits, and the like.*



Other definitions had some amendments such as:

“Executive Board Member”: *Even though it may seem that the difference between the old and new definitions is immaterial, the new definition requires the Board Member to hold a position at the Company and to receive a monthly or annual salary from the Company to be considered as an Executive Board Member while the old definition requires either of them. Practically speaking, a Board Member shall not receive a salary from the Company unless he holds an executive position within the company to manage it.*

“Independent Board Member”: *The new definition removed any reference to the disclosure obligations on the relatives of a Board Member towards the Company. The new definition has also referred the conditions under which a Board Member shall not be construed as an Independent Board Member to a separate article (Article 45) in the New Governance Rules while in the Repealed Governance Rules such conditions were listed in the definition itself.*

“Relatives”: *The new definition added brothers and sisters to the definition of relatives.*

On a further note, the definitions of “Parent Company”, “Subsidiary” and “Allied Company” were significantly amended as illustrated later in this article.

As for the remaining definitions, they either have exactly the same meaning given to the terms defined under the Repealed Governance Rules or the meaning is substantially similar.

Scope of Application and Enforcement

The New Governance Rules made it clear under Article 2 that the rules are subject to the provisions of the:

- i. the CCL;
- ii. Federal Law No. 10 of 1992 on Evidence in Civil and Commercial Transactions (“Evidence Law”); and
- iii. Federal Law No. 11 of 1992 on Civil Procedure (“Civil Procedure Law”).

Although the Repealed Governance Rules are subject to same laws mentioned above by way of default, this was not explicitly mentioned.

The important difference in the scope of application and enforcement between the two rules is that the Repealed Governance Rules exempt banks and financing, investment, banking and financial intermediation companies that are subject to the control of the UAE Central Bank from the scope of its rules. The New Governance Rules on the other hand made the provisions of Part 1 - Corporate Discipline Standards (Articles 3 to 39) and Part 3 - General Provisions (Articles 53 to 55) applicable to the said companies but exempted them from the provisions of Part 2 - Corporate Governance (Articles 40 to 52).

Exemption of foreign listed companies from the scope of application and enforcement continues to apply in the New Governance Rules.

Parent, Subsidiary and Allied Companies

When comparing the definitions of “Parent Company” under the New and Repealed Governance Rules, it is notable that the new definition uses the term “juristic person” to expand the reach to all types of entities whether it is a company or not. The reason for using such term can be attributed to the fact that parent companies can be located in any jurisdiction worldwide which some of them will allow for different types of entities such as governmental entities or NGOs to carry out commercial activities and incorporate commercial companies permitting them to have control on other companies. It is worth mentioning that the new definition excludes natural persons from the scope of the definition.

Another difference is that the old definition defines parent companies as companies that own 50% of another company. This definition raised confusion as to whether or not such shareholding is only limited to direct ownership. Another issue with the old definition is that some companies may own less than 50% of a listed company’s shares and yet have indirect control over that company (for example by getting its Subsidiaries to own shares of the listed company in which it control whereby each Subsidiary will own less than 50% of the controlled company yet together directly/indirectly own more than 50% in aggregate). The new definition resolved this confusion by considering a Parent Company to be the juristic person who have control to pass a resolution in a general assembly.

Nevertheless, the new definition is not clear on whether the power to pass the resolution is limited or unlimited; i.e. is it enough in order to be considered as a Parent Company to have the power to pass a resolution in most general assemblies with restriction to some matters (such as liquidation) or it has to be an unlimited power to pass any resolution whatsoever. The articles of association of some companies may stipulate that some matters are reserved and have to be taken unanimously even though one partner may be controlling more than 90% of the shares whilst in other companies you will find that one shareholder will indirectly hold an unlimited power to pass any resolution whatsoever in a general assembly (whether directly or indirectly) even though his/her shareholding can sometimes be less than 50%. Our interpretation is that the new definition considers Parent Companies to be the companies that hold the power to pass a resolution in a general assembly in a majority of the matters discussed as the purpose of the New Governance Rules is to restrict the powers of those who have influence on a publicly listed company.

As for “Subsidiary”, the new definition includes the power to appoint the board of directors. Therefore, a company can still be considered to be a subsidiary even it is not more than 50% owned by another company only if the other company

has the power, whether directly or indirectly, to appoint all of its board of directors. Furthermore, and even though this is not mentioned in the definition, we believe that “the ownership of more than 50%” can be either direct or indirect since indirect ownership will still grant the owning company the power to act as a shareholder subject to one condition, namely; it must have full control over the company that directly own the shares thus enabling the indirect owner to have full powers to appoint the board of directors of the owned company.

Regarding the definition of “Allied Company”, we consider that the new definition is a better definition since the terms “cooperation” and “coordination” used under the Repealed Governance Rules does not promote a company to be allied with another company unless one company owns shares of the other. It should be noted that the New Governance Rules defines an “Allied Company” as being “the company owned by another company by more than 25% and less than 50% of its capital”. We consider that restricting the minimum shareholding threshold to more than 25% in order to consider a company as an allied company is valid since 25% or less can be considered to be merely an investment with no actual control over the owned company.

However, there is one area of confusion that arises in terms of whether owning just 50% still promotes the owning company to be an allied company or not. The new definition is vague on this point since the wordings consider Allied Companies as companies that are less than 50% owned by another company, while owning more than 50% will consider the owned company to be a Subsidiary. We believe that a company owning 50% of the shares of another company means that the owning company falls under the definition of an ‘Allied Company’ since the owning company has some control over the other company yet such control is not sufficient to pass a resolution at a general assembly meeting.

Another question that may rise is whether or not to consider the company that owns only 25% of another company is an ‘Allied Company’ or not. Unfortunately, the current wordings of the new definition excludes such a company from the definition of ‘Allied Companies’ and it cannot be implied that it falls within the scope of such definition.

In addition, as mentioned above in the paragraph related to the “Subsidiary”, the ownership can be either direct or indirect since indirect ownership will still grant the owning company the power to act as a shareholder subject to one condition which is to have full control over the company that directly own the shares.

This article is part one of a series of four articles with the other articles being published in subsequent editions of Law Update.



Alyzeh Zahid
Associate
Dubai, UAE
a.zahid@tamimi.com

UAE Companies Law: Ministry of Economy Acts to Clarify its Scope

Although the new Commercial Companies Law (Federal Law no. 2 of 2015 on Commercial Companies) (“CCL”) was highly anticipated, the changes were considered by many to be less sweeping than expected. In addition, some provisions of the law served to create uncertainty in the minds of lawyers.

One such provision was Article 104 which states: *“In respect of matters not specifically provided herein, the provisions concerning Joint Stock Companies shall apply to the Limited Liability Company; and the words “Competent Authority” shall replace the term “Authority” wherever it appears.”*

The precise operation of this provision was not spelled out in the CCL. Therefore, confusion developed in determining which provisions concerning public joint stock

companies (“PJSCs”) may or may not apply in respect of limited liability companies (“LLCs”). Even expert legal practitioners disagreed on the best and most feasible interpretations.

In order to assist the business and legal community the UAE Ministry of Economy recently issued Ministerial Resolution No. (272) of 2016 entitled ‘Application of Some Provisions of Public Shareholding Companies to Limited Liability Companies’ (“Resolution”). This Resolution serves to clarify the precise scope of operation of Article 104.

In this article, we have addressed key points the Resolution covers.



Which CCL provisions affecting PJSCs now apply to LLCs?

The following PJSC provisions are now confirmed as applying to LLC's:

- The Articles of Association shall: (i) appoint the company directors and the Board members; (ii) fill vacant positions in the Board; and (iii) set the number, powers and term of office of directors. The General Meeting shall be in charge of any of these matters, if the Articles of Association remain silent (Article 4).
- A majority of votes by the Board is needed for a resolution to be passed. Before calling a General Meeting, the Board must hold its meeting at least 30 days earlier and must send all shareholders a notice with all relevant information of the General Meeting. Details of the General Meeting shall be noted in meeting minutes, which shall be signed by members attending the meeting and the rapporteur (Article 5).
- The Board and all relevant directors must put the interest of the company first and must act in line with what is authorized to them. The functions of the Board and executive management must be set in the Articles of Association (Article 6).
- The company shall appoint one or more auditors who shall comply with the CCL. These auditors shall be appointed for one renewable year. The auditors have the right of access to all Company books, registers and documents etc. and if the company's directors or management fail to enable the auditor to perform its duties, the auditor is required to send a copy of the report to the competent authority (Articles 7 & 8).
- The auditors shall present an annual report to the General Meeting, and shall be responsible for the correctness of all information presented (Article 9).
- The company shall prepare regular accounts in accordance with the international accounting principles and standards (Article 10).
- A shareholder holding 50% or more of the capital of the company may submit an offer to acquire the remaining shares of the company, which may be accepted or rejected by the shareholders (Article 11).
- Any shareholder holding more than 20% of the company capital may submit an application for the calling of the General Meeting, which must be called within 5 days. Any shareholder holding 10% of the company shares may submit an application

for the calling of the General Meeting to an urgent meeting and shall accompany the application by supporting documents (Article 12).

- The company must deposit the cash dividends of the shareholders within 30 days from the date of issuance of a resolution approving the profit distribution (Article 13).
- The inclusion of an issue during the General Meeting must be made through an inclusion application, which must be made in writing, signed by shareholders representing 10% of the company and submitted to the chairperson who shall approve or reject it. The inclusion of an issue before the General Meeting can be made by shareholders holding 5% of the company profit within 5 business days from the date they are notified about the General Meeting. The issuance must include relevant documents and must be approved by the competent authority (Article 14).
- Under certain cases, such as an increase or decrease of the company capital, the General Meeting must issue a special resolution (Article 15).
- Any breach of the provisions shall be subject to penalties (Article 16).

Which provisions affecting PJSCs do not apply to LLC's?

The key provisions affecting PJSCs which do not operate in the running of LLCs are provisions concerning the election of Board members, the number of members (minimum and maximum), or nationalities of the Board Chairman and members and their annual remuneration (Articles 143, 144, 145, 147, 149, 151 and 169), provisions governing related party transactions (Article 152) and restrictions concerning financial assistance (Article 222).

How has the Resolution served stakeholders in the UAE?

The Resolution has provided the legal and business community with some much needed clarity particularly in clarifying that the restriction on companies providing financial assistance connected to the purchase of their own shares applies only to PJSC's and not to LLC's. This major clarification alone is a welcome development in resolving a key question in construing Article 104 of the new Law.



Ahmad Zaza
Senior Associate
Dubai, UAE
a.zaza@tamimi.com



Dubai Department of Economic Development launches IP Gateway

The Dubai Department of Economic Development (the “DDED”) has recently implemented an online system for registering IP complaints. This new online system allows brand owners and lawyers to pursue their complaints electronically.

Earlier this year, extensive meetings took place at the DDED to review strategy and discuss new ways of improving the current IP system in Dubai, including adopting best practice methods to enforce IP and trademark rights for both the DDED and brand owners.

The IP Gateway, which was implemented by the Commercial Compliance and Consumer Protection (“CCCP”) Department of the DDED, is the first of its kind in the world. It allows complaints relating to trademark infringement to be received via the department’s website.

The IP Gateway first started receiving complaints in September 2016 and its main function is to automate all procedures relating to IP issues, from receiving complaints and opening files, to receiving reports from field officers and submitting them to trademark owners. The IP Gateway also allows lawyers to track cases and complaints electronically on behalf of brand owners.

The launch of the IP Gateway is a key objective and part of the DDED’s strategy to strengthen the business sector through:

- sustainable economic development;
- building trust between the public and private sectors; and
- protecting the economic interests of dealers, suppliers and trademark owners.

With the launch of the IP Gateway, the DDED is seeking to implement government guidance to transition from manual to electronic/smart procedures and to provide a platform to achieve sustainable economic development at the highest levels of global competitiveness.

Mohammed Ali Rashed Lootah, CEO of the CCCP Department, said that the:

‘IP Gateway will help achieve the goal of reducing government auditors in Dubai by 80 per cent by the year 2018, as the smart system can completely eliminate the need for review visits from law firms and brand owners.’

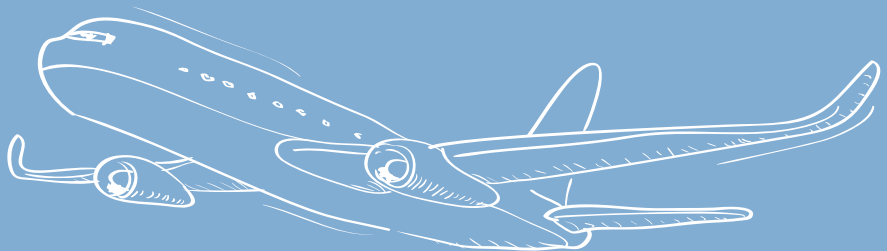
One of the positive new features of the IP Gateway is that brand owners’ legal representatives can be notified electronically of goods/products which have been seized by the DDED based on regular investigations conducted by its inspectors. Legal representatives will have the opportunity to enquire about the temporarily-seized goods/products and obtain further information from the DDED should the brand owner wish to pursue a case and file a complaint against the trader which was in possession of the infringing goods/products.

Adoption of the new IP Gateway is hoped will provide a reliable and efficient online service which reduces paperwork and provides a streamlined process for lodging and completing IP and trademark applications by brand owners and for policing their infringement.

A version of this article has been previously published in *World Trademark Review* on 15 September 2016.

Transport Supplement

- 40 Aircraft Repossession Under Cape Town Convention in the UAE
- 46 A Landmark Federal Supreme Court's Judgment on Ship Arrests Under UAE Law
- 49 The Regulation of Insurance Brokers in UAE
- 50 False Information in Company Documents May Lead to Jail
- 52 Passenger Rights Under EU Regulation 261/2004: New Guidelines for Gulf Airlines Flights Departing the EU
- 56 Securing Ship Finance Transactions in the UAE
- 60 Ship Arrest in Iran
- 62 Demurrage Payments Under Kuwaiti Law
- 65 Procedures of Arrest in Egypt
- 70 Ship Arrest in Saudi Arabia (Introduction to the Domestic Practice)
- 74 New Qatari Law on Small Vessels Registration



A Focus on Transport and Insurance

In this month's special feature of Law Update we focus on Transport & Insurance covering a wide spectrum of subjects including current market issues and key court rulings.

Despite the stressful economic outlook, the GCC remains a very strong shipping hub, not only for neighbouring countries but also, for Africa and many other places. Through our dedicated regional Transport & Insurance practice, which spans 9 countries, we have always kept you updated on the hot topics in aviation, shipping and insurance through our client alerts and seminars in different jurisdictions.

In this month's special feature of Law Update, we focus on our Transport & Insurance Department. This regional practice consists of 18 lawyers from a number of different civil and common law jurisdictions, based in all the GCC Countries and Iraq, Jordan and Egypt in providing you with this spotlight, we have drawn upon the experience of lawyers in our regional offices where necessary. We trust you will agree that it covers a wide range of interesting, challenging and complex topics including vessel arrest, aircraft repossession under the Cape Town Convention, insurance, demurrage, and vessel finance. Our team acts for local, regional and international clients in a full spectrum of transport & insurance related matters, both contentious and non-contentious in nature. We also collaborate with law firms from other jurisdictions in cross-border cases requiring us to regularly work with lawyers in Europe and the United States and occasionally in other jurisdictions including India and Australia.

We hope you find this supplement engaging and informative. Please contact us for any queries relating to Transport & Insurance matters.



Yazan Saoudi
Partner
Regional Head of Transport & Insurance
Dubai, UAE
y.saoudi@tamimi.com



Omar Omar
Partner
UAE Head of Transport & Insurance
Dubai, UAE
o.omar@tamimi.com



Yazan Saoudi
Partner
Dubai, UAE
y.saoudi@tamimi.com



Vincent Coppinger
Senior Associate
Dubai, UAE
v.coppinger@tamimi.com



Malek Zreiqat
Senior Associate
Dubai, UAE
m.zreiqat@tamimi.com

Aircraft Repossession Under Cape Town Convention in the UAE

Repossession of aircraft in the United Arab Emirates is a rare event. Gulf Carriers invariably are ‘clean-sheet business plan’ model airlines with modern fleets, supported by sound aircraft financing, leasing, and ownership structures, and the necessity for a creditor to repossess an aircraft is extremely rare. Nevertheless, in circumstances where an airline operator fails in its obligations to pay rent under an aircraft finance lease or continues to default in its obligations to an aircraft lessor or owner of the aircraft, the question arises as to whether there is recourse and remedy in the UAE jurisdiction. It is fair to say that the UAE courts have been reluctant in the past to grant repossession relief to lessors, but a recent case dealt with by Al Tamimi has demonstrated that UAE courts will grant such relief in certain circumstances.

Aircraft Leasing –Premier Finance Structure

Aircraft leasing is the most popular transaction structure in the aviation industry and it is important at the outset of any transaction to establish the rights and remedies available to

aircraft lessors in the event of default. On an economic level, if there is certainty for aircraft lessors or creditors in being able to recover aircraft in the event of continued default on the part of a lessee operator, then there is a corresponding ability to predict and plan for the provision of finance. Lessors are able to reduce their costs to account for risk and are able to make greater amounts of financing available to airlines on more attractive terms. Lessees or operators benefit too as these reduced costs will be reflected in fleet leasing rates. Ultimately if a country is a sophisticated jurisdiction with rights and remedies clearly defined, and the country is a party to the relevant international treaties, the airline is in a better position to attract the provision of finance and has the ability to grow its aircraft fleet size. Also, the airline may qualify for other forms of finance. For instance, countries with a significant manufacturing base for aircraft may provide Export Credit Agency (ECA) backed financing, whereby a quasi-governmental or private nominated institution (the ECA) acts as an intermediary between state governments and exporters to provide finance to the airline to purchase aircraft.

Brief History and Reasons for the Cape Town Convention 2001

Because aircraft are constantly flying between borders and landing in different jurisdictions, there has always been a requirement for an international system to codify the rights which the lessor and operator may have in the aircraft, and the Geneva Convention on the International Recognition of Rights in Aircraft 1948 ('Geneva Convention') went some way to developing an international system providing for the international recognition of rights in aircraft and for protecting property interests, defining orders of priority, and protection of consensual liens and mortgages. However, the Geneva Convention had a number of flaws which mainly centered on the fact that in many instances lessors were unable to repossess their aircraft after a consistent failure on the part of the lessee to pay lease rent because the laws of the relevant country in which the aircraft was based were inadequate, and relying on procedures regarding the exercise of rights for repossession of aircraft to domestic law of a state produced great uncertainty. As a general consensus, there was a need for a uniform system regarding protection of international interests in aircraft. As a result The Convention on International Interests in Mobile Equipment (2001) ('Cape Town Convention') and its Protocol to the Convention in Mobile Equipment on Matters Specific to Aircraft Equipment (2001) ('Aircraft Protocol') was concluded at a diplomatic conference organised and promoted by two sponsoring organisations, UNIDROIT, the UN Agency dealing with Private Law Conventions, and the International Civil Aviation Organisation (ICAO).

Brief Overview of Cape Town Convention 2001

The Cape Town Convention supersedes the Geneva Convention with regards to aircraft and aircraft objects, and supersedes the Rome Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft 1933.

The Cape Town Convention is designed as a multi-equipment treaty with protocols for aircraft equipment, railway rolling stock and space assets, but the only protocol to be adopted so far is the Aircraft Protocol and it applies to airframes, aircraft engines and helicopters: airframes which can carry at least eight persons or goods in excess of 2750 kg; all aircraft engines which have at least 1750 lbs of thrust (if jet powered) or 550 HP (if turbine powered); and helicopters carrying 5 or more passengers. At the time of writing, the Cape Town Convention has been ratified by 64 contracting states, including the UAE, as well as the European Union.

The main aim of the Cape Town Convention is to reduce the cost of raising finance for large high value mobile assets (such as aircraft) which regularly cross borders, and the main mechanism is to provide for the creation of 'international interests' such as a mortgage or an aircraft finance lease which is capable of being recognised in all contracting states, and to provide for international remedies available to creditors should an airline or operator default on repayments relating to an international interest. Additionally the Cape Town Convention creates an electronic international register for the registration of 'international interests'.

The Cape Town Convention provides standard remedies in the event of default by a debtor including the ability to:

- take possession or control of an object;
- sell or grant a lease of an object;
- collect or receive income or profits arising from the management or use of an object; and
- vest an object in satisfaction or redemption.

There are also remedies available for conditional sellers or lessors and interim relief pending final determination of a claim.

In addition the Aircraft Protocol provides remedies including :

- the ability to require the removal of an aircraft from the national civil aircraft register; and
- the ability to export the aircraft.



Chapter III, Articles 8 to 15 of the Cape Town Convention provide a lessor or financier with a set of remedies in the event of a debtor's default, and these remedies include taking possession of the equipment. The Aircraft Protocol Article IX (1) expands those remedies to include deregistration, export and physical transfer of the aircraft from the territory in which it is situated, together with a subsequent re-registration of the aircraft. Article 13 of the Cape Town Convention (as modified by Article IX of the Aircraft Protocol) provides the mechanism to make an application to court, and the lessor's entitlement to request court relief stems from the contractual agreement within the aviation finance lease documentation agreed between the lessor and lessee so that the provisions of the Cape Town Convention and Aircraft Protocol and its remedies will apply, and are agreed in accordance with Article IX of the Aircraft Protocol.

Cape Town Convention in the UAE

The Cape Town Convention was ratified by the UAE and came into effect in the UAE on 1 August 2009. The benefits to the UAE have been that leasing and finance structures drafted in relation to the UAE have habitually incorporated the rights and remedies available under the Convention, and in turn lessors and financiers have been able to reduce risk and to reflect that in the cost of credit supply.

However, when ratifying the Cape Town Convention, the UAE made a number of Declarations under the convention, one of which is that where Cape Town Convention remedies are available to the lessor without the need for an application to court (so called self-help remedies); such remedy may only be exercised by application to court. Thus in the UAE a court application will always be required in a contentious situation where a lessee is in default and is refusing to return the aircraft.

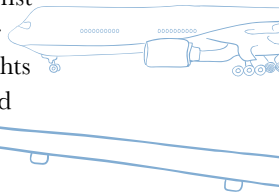
Other points to note specific to the Cape Town Convention in the UAE are that if interests are registered on the international register and create international interests (as defined in the Cape Town Convention) over the aircraft and engines, no other filing, registration, submission or governmental

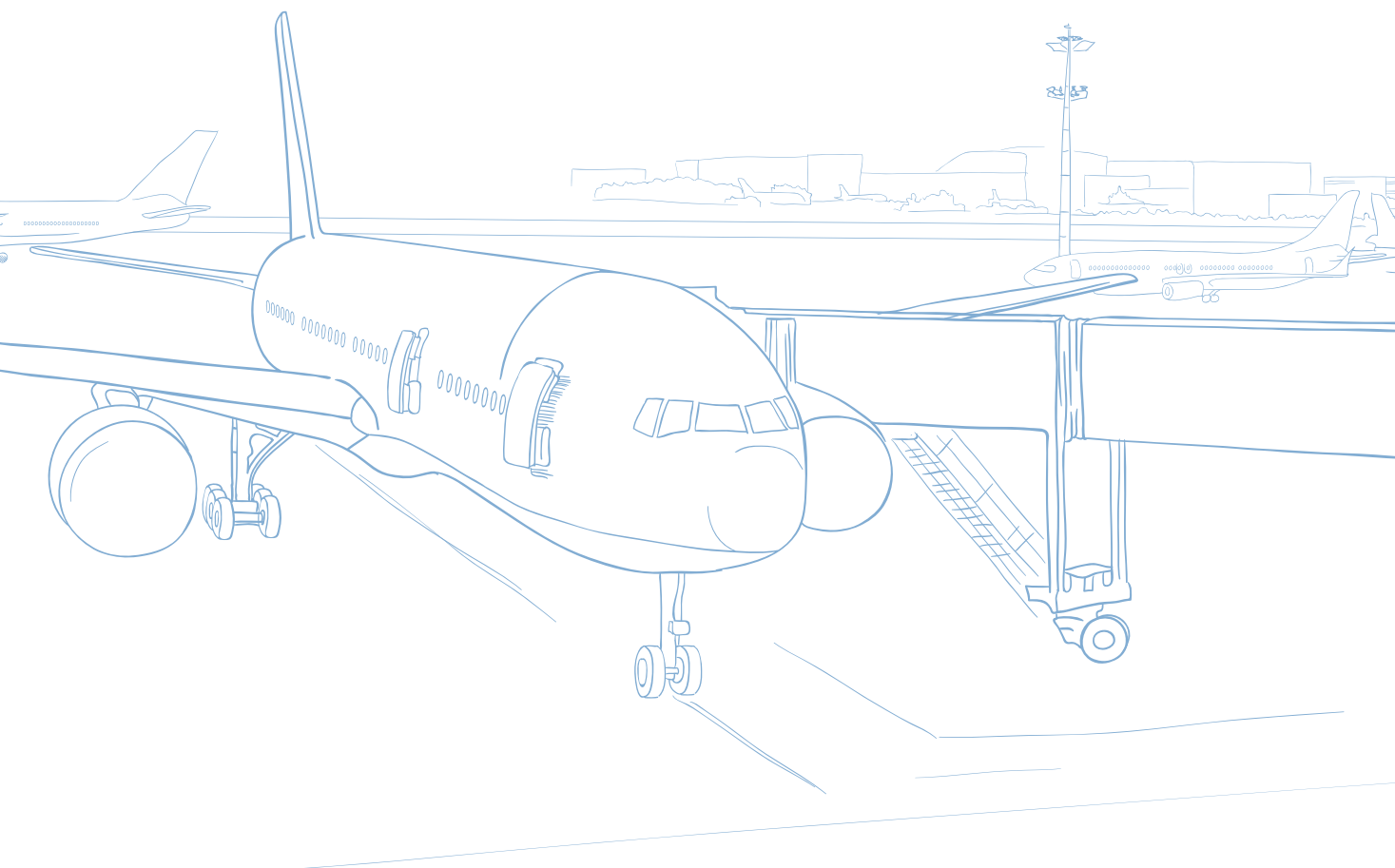
approval is necessary to perfect or protect the rights of the lessor and lessee to the aircraft, and such international interests will be effective against third parties in the UAE. Accordingly the lessor under an aviation finance lease will have the rights and remedies available to a holder of a registered international interest under the Cape Town Convention. The Gulf Civil Aviation Authority (GCAA) recognises the concept of the Irrevocable De-registration and Export Power of Attorney (or IDERA) which allows the person (usually the lessor) in whose favour the document is issued to exercise those rights and remedies contemplated by the Cape Town Convention, as adopted and implemented in the UAE.

The GCAA maintains a national aircraft register in accordance with Article 28(2) of UAE Law regarding Civil Aviation Law (Federal Law no 20 of 1991) (the 'Aviation Law'), and an aircraft is to be registered according to defined conditions and procedures. According to Article 5(2) of the Aviation Law, no aircraft registered on the aircraft register may be legally disposed of in any way without the prior written consent of the GCAA. Upon the cancellation or termination of an aviation finance lease and subject to the filing of the IDERA with the international register there will be a right, subject to an application to court, (i) to repossess the aircraft, (ii) to de-register the aircraft from the aircraft register and international register and (iii) to export the aircraft from Dubai and the UAE, all without requiring any further consents, approvals or licenses from the GCAA.

Retrieval Proceedings in the UAE-General Procedure

Although the UAE is a party to the Cape Town Convention and a court application is required in respect of the remedies contained in the Cape Town Convention, it is fair to say that it is extremely rare to make an application for repossession of aircraft in the UAE. Although it is a common procedure in the UAE courts for a creditor to issue an ex parte application and to request the court to attach the assets of the defaulting debtors in contractual disputes, an application for an order for repossession of an aircraft has remained relatively untested.





The UAE Law of Civil Procedures (Federal Law No 11 of 1992) ('Civil Procedures Law') allows a creditor, or an owner of an asset or a plaintiff with a valid claim against a defendant to attach an asset in possession of the other party. Therefore in the event of a dispute over the right to possession of the aircraft, in theory the lessor may pursue attachment of the aircraft by court proceedings in the UAE, and in any Emirate of the UAE where the aircraft is situated afterwards to physically retrieve the aircraft. The lessor will have to file the substantive action before the competent court within eight days as of the date of filing the attachment proceedings, and will then have to litigate the matter until a final and conclusive judgment is issued to the effect of returning possession of the aircraft to the lessor. Such proceedings against the aircraft are called retrieval proceedings, and from the lessor's perspective are usually based on proving that it is the rightful owner claiming ownership of the aircraft from another party who is in actual possession.

The basic procedure for an attachment application is to draw up an application and file it in the appropriate UAE court. This is an ex-parte application to a duty judge who makes a prompt decision on the merits of the proposed attachment. The grant of an attachment order is based solely on the documents provided as evidence. There is no scope for affidavits or witnesses. If the attachment application is successful, an attachment order is granted by the judge and sent by the court bailiff for attachment of the aircraft. Within eight days of any successful attachment application, a substantive action needs to be filed in support of the attachment proceedings. Failing this, the attachment order will be considered void. If the substantive action is successful, and all the appeal stages have been exhausted, the lessor can then proceed with the execution of the judgment through the relevant court execution department. In summary, it may be said that the retrieval proceedings based on the Civil Procedures Law is time consuming and it may take years before an executable judgment is rendered and subsequently enforced through the execution department.



Recent Case Grounding Repossession and Delivery Up in Sharjah Court

In a recent client case a lessee operator of an aircraft had failed to pay substantial monies owing to the lessor, composed primarily of unpaid aircraft rental arrears and maintenance reserves, and this default had been ongoing for a considerable period of time. The aircraft was not registered in the UAE, but was registered in a foreign jurisdiction, but the lessee operator of the aircraft had a place of business and assets in the UAE. The aircraft was due to land in Sharjah on a certain date known to the lessors, primarily to undertake repair works and was due to enter a workshop for maintenance with a Maintenance Repair and Overhaul (MRO) provider.

Given the sustained and continuing default on the part of lessee, instructions were issued to attempt to ground and repossess the aircraft and secure deregistration and onward release of the aircraft to the lessor in accordance with the terms of the lease agreement between the parties, in addition to attaching the assets of the lessee towards securing the unpaid rent and maintenance charges.

A draft application to the Sharjah Court was prepared on an ex parte basis. The application was firstly for the grounding and repossession of the aircraft, and secondly for the attachment of the UAE assets of the lessee. The application was premised on the provisions of the Cape Town Convention in addition to the provisional attachment provisions available under the Civil Procedures Law. In the first part of the application (grounding/repossession), the relevant provisions under the lease agreement which incorporated available remedies under the Convention were highlighted and exhibited. The several default notices issued by the lessor were explained and the court was taken through the remedies set out under Article 13 of the Cape Town Convention for delivery up, repossession, procurement of de-registration of the aircraft from its home jurisdiction, and the procurement of export of the aircraft once the order was perfected.

The second part of the application included a request to the Sharjah Court to issue a provisional attachment order against the UAE assets of the

Repossession of aircraft in the United Arab Emirates is a rare event. Gulf Carriers invariably are ‘clean-sheet business plan ‘ model airlines with modern fleets, supported by sound aircraft financing, leasing, and ownership structures, and the necessity for a creditor to repossess an aircraft is extremely rare. Nevertheless, in circumstances where an airline operator fails in its obligations to pay rent under an aircraft finance lease or continues to default in its obligations to an aircraft lessor or owner of the aircraft, the question arises as to whether there is recourse and remedy in the UAE jurisdiction.

aircraft operator for the outstanding amounts in default in the payment of the applicable rent and maintenance arrears and exhibited and explained the several notices and demands issued in relation to the relevant aircraft.

An order was granted by the Sharjah court and served on all relevant parties including the debtor, Sharjah Airport, the Sharjah Civil Aviation Department, the GCAA, the MRO provider, the banks and properties identified in the attachment application and the order was also served in relation to all identifiable assets subject to the application. The aircraft was secured and moved to a facility within Sharjah Airport pending finalisation of the deregistration of the aircraft from its home civil aircraft register and re-registration in a new national civil aircraft register arranged by the lessor of the aircraft.

In this instance the order was successfully granted and the eventual outcome has been that the aircraft has been flown from the UAE and re-registered on another country's civil aviation authority aircraft register and the aircraft has been repossessed by the lessor.

Nevertheless, a number of factors combined to enable success: the lessee operator's default in nonpayment of rental payments and maintenance reserves was abundantly clear and prolonged; the ex-parte application to the judge made full and frank disclosure and demonstrated the continuing default; the appended lease documentation was properly drafted so as to incorporate Cape Town Convention remedies; the Sharjah court was fully appraised and had competence in dealing with Cape Town Convention remedies; the lessor was in a position to offer a bond or guarantee if required (albeit this was not required); the application for de-registration of the aircraft from its home civil aircraft register and jurisdiction was made at the same time as the Sharjah court application; the assets for the attachment section of the application were properly researched and identified; the lessor client had made provision for the safe retention of the aircraft with a local MRO and had made provision for onward ferry flights and ultimate re-registration on another country's register; the defaulting lessee to a

certain extent did not contest the substance of the application and, again to a certain extent, entered into negotiation with the lessor.

Conclusion and Policy

Policy-wise, UAE courts are not in the habit of regularly granting orders for repossession of aircraft, and UAE courts will deal with applications on a case by case basis. In this instance an order was successfully secured, and in practical terms made sure that the aircraft was re-possessed, de-registered from its own jurisdiction, re-registered in another jurisdiction and returned to the lessor.

However, there are very few recalcitrant lessees in the UAE region and it is important to note that the overwhelming intention of the Cape Town Convention is to provide certainty in protecting international interests, and to enable the reduction in cost of raising finance for large high value assets such as aircraft, and in turn to promote an environment where airline businesses can grow and increase fleet size. Gulf Carriers have demonstrated that growth in abundance and have utilised the aircraft finance market to achieve this, and such success is a superb example of the commercial benefits which may be obtained by signatory States to the Convention.

Correspondingly, on the rare occasion in which a lessor must enforce its remedies under the Convention, it is of comfort to note that the UAE jurisdiction will grant the necessary court order if the case is properly argued and the Cape Town Convention remedy is appropriate in the circumstances.





Omar Omar
Partner
Dubai, UAE
o.omar@tamimi.com



Tariq Idais
Associate
Dubai, UAE
t.idais@tamimi.com



Sakher Alaqaileh
Associate
Dubai, UAE
s.alaqaileh@tamimi.com

A Landmark Federal Supreme Court's Judgment on Ship Arrests Under UAE Law

This article is a review of a landmark Federal Supreme Court judgment (Appeal number 304/2016 (Commercial)) regarding ship arrests by virtue of the UAE Law. This judgment overruled the judgments of the Court of First Instance and the Court of Appeal, as the claim was filed in a procedurally unlawful way.

Nature of the Claim

On 18 June 2015, a ship agency ('Claimant') obtained an arrest order over a ship ('Ship') which was at Khorfakkan Port at the time. The Claimant based the arrest order application on an agency agreement. On 1 July 2015, the Claimant brought a claim before the Khorfakkan Court of First Instance against the Ship ('Defendant') seeking the sum of USD5,323,869 (or its equivalent, being

AED19,565,219) and legal interest at the rate of 9% as of the date the claim was made until full payment. Interestingly, the Claimant did not include the Ship's owners in the claim.

The Claimant claimed that in mid-2013, the Ship was in peril (at risk) while it was at sea in the territorial waters of the UAE. The Ship's master requested the Claimant to rescue the Ship and guide it into Khorfakkan Port and allow her to enter Khorfakkan Port. Therefore, the Claimant did whatever it could do to rescue the Ship as per the agreement, as well as tugged her into Khorfakkan. Moreover, the Claimant claimed that on 20 January 2014 a ship agent agreement was signed between the Ship's master and the Claimant, where the Claimant was obliged to provide the Ship with support, food, supplies, medication, bunker, oil, money advances, port dues and any other

fees and charges concerning the port authority. Although the Claimant carried out all the required support works for the Ship and her marine crew, and paid all the necessary fees and charges (which amounted to USD5,323,869), the Defendant has still not paid back the said amount to the Claimant.

The Court of First Instance

The Ship's owners did not appear before the Khorfakkan Court of First Instance. On 31 August 2015, the Court handed down its judgment by holding the Defendant liable to pay the Claimant the sum of USD5,323,869 (or its equivalent, being AED 19,565,219) for the all support work that was carried out for the Ship, as well as AED500,000 as damages for breaching obligations and validating the arrest order over the Ship.

The Court of Appeal

On 29 September 2015, the Ship's owners challenged the judgment of the Court of First Instance before the Khorfakkan Court of Appeal. The Ship's owners argued that since a ship is deemed to be moveable property according to Article 12 of UAE Federal Law No. 26 of 1981 (Maritime Commercial Law) ('Law'), the Ship does not have a legal capacity to be sued and the Claimant should have filed the claim against the Ship's owners rather than the Ship herself. Accordingly, the Claimant's claim should be dismissed.

In addition, the Ship's owners contended that the documents that were filed at Court by the Claimant were either photocopies and or produced by the Claimant, as a result they should not be used as evidence in this claim according to Article 45 of Federal Law No. 11 of 1992 (Civil Procedures Law). Therefore, the Ship's owners argued, the Claim should be rejected for lack of evidence.

Alternatively, the Ship's owners argued, the claimed amount was exaggerated and did not

The Supreme Court in Abu Dhabi issued its judgment and decided to dismiss the Claimant's claim, as it was filed against the Ship and not the Ship's owners, and it was not filed in the required form under Articles 119 and 120 of the Law.

reflect the true value of the support work that was carried out for the Ship. Accordingly, the amount awarded should be reduced.

On 14 March 2016, the Khorfakkan Court of Appeal rendered its judgment and amended the judgment of the Court of First Instance by holding the Defendant liable to pay the Claimant the sum of AED12,223,158 for the support work that was carried out for the Ship. Apart from the amendment of the amount, the judgment of the Court of First Instance was upheld.

The Federal Supreme Court

On 12 May 2016, the Ship's owners filed an appeal before the Federal Supreme Court in Abu Dhabi. The Ship's owners argued that the Claimant's claim should be dismissed on the following grounds:

1. The claim was not filed against the Ship's owners but rather filed unlawfully against the Ship herself, notwithstanding that she does not have legal capacity to be sued according to Article (12) of the Law; and
2. The Claimant did not file the claim in the required form under Articles 119 and 120 of the Law.



Article 12 of the Law states:

A vessel shall be deemed to be moveable property, to which the provisions pertaining to moveable property shall apply, save insofar as there is any stipulation in this Law making any provisions relating to real property applicable thereto.

Article 119 of the Law states:

1. Copies of the notice of arrest shall be delivered to the master of the vessel or his deputy thereon, a second copy to the relevant maritime authority in the port in which the arrest is effected to prevent the vessel from sailing, and a third copy to the Registration Bureau in the said port.

2. If the vessel is registered in the State, the Registration Bureau of the port in which the arrest is effected, whether within the State or abroad, shall notify the vessels Registration Bureau of the arrest for endorsement thereof on the register.

Article 120 of the Law states:

1. The notice of arrest shall contain a summons to attend before the relevant civil court in the area of which the arrest is effected for adjudication on the validity of the debt, of whatever amount.

2. A time shall be fixed for the hearing not later than thirty days from the date of the notice of arrest. The court shall speedily enquire into the claim, and the time shall not be further extended.

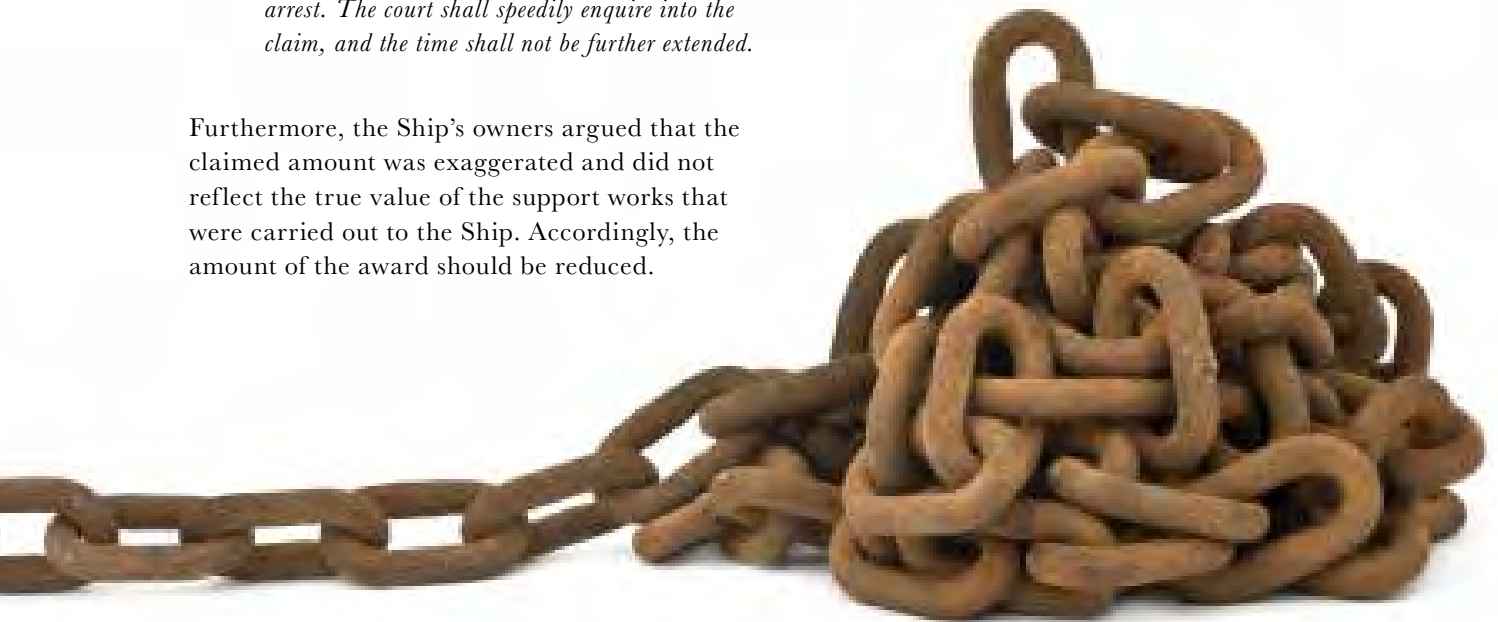
Furthermore, the Ship's owners argued that the claimed amount was exaggerated and did not reflect the true value of the support works that were carried out to the Ship. Accordingly, the amount of the award should be reduced.

On 29 June 2016, the Supreme Court in Abu Dhabi issued its judgment and decided to dismiss the Claimant's claim, as it was filed against the Ship (the Defendant) and not the Ship's owners, and it was not filed in the required form under Articles 119 and 120 of the Law.

Comment

It is established that any claim arising out of or in connection with a ship must be filed against the ship's registered owners and not against the ship itself, otherwise the claim will be dismissed, as ships do not have legal capacity to be sued.

Furthermore, the procedures set out in Articles 119 and 120 of the Law have not been followed by the UAE Courts previously. However, this Supreme Court judgment suggests that there has been a change in approach and the procedures set out in Articles 119 and 120 of the Law will start to be applied from now on.





Yazan Saoudi
Partner
Dubai, UAE
y.saoudi@tamimi.com



Siri Hashem
Senior Associate
Dubai, UAE
s.hashem@tamimi.com

The Regulation of Insurance Brokers in UAE

In the United Arab Emirates the insurance brokerage profession is regulated by Insurance Authority Board of Directors resolution No. 15 of 2013 (as amended by resolution No. 20 of 2014) (the “Regulations”) and resolution No. 58 of 2015 in respect of the execution of resolution No. 15 of 2013 (the “Execution Rules”).

A company may not practice insurance brokerage in the UAE without obtaining a license from the Insurance Authority. A license is valid for one year and renewable on a yearly basis. It expires at the end of December each year. Companies wishing to obtain a license from the Insurance Authority must meet certain requirements set by the Regulations. Among those requirements, the applicant must be a company incorporated in the UAE under the Commercial Companies Law or a branch of a company incorporated in a foreign country or in a financial free zone in the UAE provided that it is licensed to practice the same types of insurance brokerage. It should also be subject to the same level of regulatory authority and have been in practice for a period not less than five years. The Insurance Authority under the regulations has the power to set additional requirements beside those stipulated in the regulations.

The technical staff of the insurance broker should also meet certain requirements set by the Regulations. The insurance Broker must have

at least a general manager, operation manager, internal auditor and at least one specialized employee for each type of insurance. The Execution Rules further stipulates specific requirements for each of the said employees and the person responsible for the branch.

The insurance broker is required to submit an unconditional bank guarantee payable on demand to the Insurance Authority chairman of the board of directors. This may be liquidated fully or partially at any time in order to guarantee the settlement of the broker’s transactions and obligations arising from his practice toward the insurance companies and his customers.

The insurance broker must obtain an insurance policy in favour of the Insurance Authority chairman of the board of directors covering the broker’s professional liability. The value of this policy must be at least AED 2 million for companies incorporated in UAE and AED 3 million for a branch of a company incorporated in a foreign country or in a financial free zone in the UAE.

The Regulations set certain obligations which the insurance broker must comply with towards the Insurance Authority, the insurance companies and the broker’s customers. The insurance broker should follow up and collect the premiums on behalf of the insurance companies except those related to life insurance and funds accumulation operation,





group health insurance, marine and air transport insurance, vessels hull and petroleum insurances.

Federal Law No. 6 of 2007 (in respect of the establishment of the Insurance Authority and Regulating the Insurance Practice) (the “Law”) defines an insurance broker as:

“The person mediating independently in insurance or reinsurance operations between the insurance/reinsurance applicant on one hand and the insurance/reinsurance company on the other, and charging, for his services, a commission from the insurance/reinsurance company with which the insurance/reinsurance policy is concluded.”

The role of the insurance broker in UAE is not different from that practiced in other jurisdictions. Insurance brokers are not responsible for the default of either the insurance companies or the customers in meeting their financial obligations. The insurance broker is only liable if the broker fails to deliver premiums paid by the customers to the insurance companies, or fails to deliver recoveries paid by the insurance companies to the customers.

Despite the fact that the laws in the UAE have defined the role of insurance brokers, in a recent case which Al Tamimi was not involved but which has come to our notice, the Dubai courts held that

an insurance broker in a reinsurance brokerage transaction was liable to pay recoveries due to an insurance company from a reinsurance company. The facts of the case, as we understand them, were as follows:

1. An Insurance company (the “Insurer”) reinsured the risks which it covers under its motor insurance policies through an insurance broker (the “Broker”) with a reinsurance company (the “Reinsurer”) which signed a cover note issued by the Broker. The Broker issued a second cover note to the Insurer with the same terms of the cover note issued to the Reinsurer and stating the name of the Reinsurer.
2. During the currency of the reinsurance cover, the Insurer paid the due reinsurance premiums through the Broker who was transferring the said payments to the Reinsurer without delay. The Insurer also made claims to the Reinsurer through the Broker for recoveries they had paid to their insured.
3. The Broker did follow up the recovery claims of the Reinsured with the Reinsurer, but the

Reinsurer ignored all the claims and failed to meet its obligation to pay any indemnity to the Reinsured.

4. The Reinsured filed a court case against the Reinsurer and the Broker before Dubai Court of First Instance and requested the court to oblige both companies to jointly pay to the Reinsured the amount of the indemnities due under the reinsurance contract.

The court of First instance appointed an accounting expert who examined the documents including the correspondence exchanged between the Broker and the Reinsured, the accounts and the cover notes.

The appointed expert concluded that:

- The reinsurance contract (second cover note) was concluded between the Broker and the Reinsured;
- The exchanged correspondences prove that the Broker admitted the amount owed to the Reinsured;
- The Reinsurer is not liable to pay such amount to the Reinsured jointly with the Broker as the Reinsurer signed the first cover note but did not sign the reinsurance contract (second cover note).

The Broker argued that:

- It met all its obligations as a broker by following up the claims in a timely manner and with due diligence;
- It is not obliged by the law to indemnify the Reinsured for any claim as long as it did not receive any payment from the Reinsurer in respect of such claims.
- The Broker may not insure or reinsure any risk as this does not comply with its license and thus it cannot be held liable to pay any indemnity payable under the reinsurance cover.

The Court of First Instance adopted the findings of the expert and held that the Broker was liable to pay to the Reinsured the recoveries claimed under the reinsurance contract.

The Broker filed an appeal before the Appeal Court and raised the same arguments. The court appointed an insurance expert who concluded that:

- The relation between the Reinsured and the Reinsurer was a pure reinsurance relation.
- The Broker was merely acting as a broker through whom the reinsurance contract was concluded between the parties. The Broker followed up all the claims of the Reinsured but the Reinsurer failed to fulfil its obligations.
- It was the duty of the Reinsurer to pay the claimed amount.

However the Appeal Court rejected the findings of the expert and upheld the Court of First Instance judgement, adopting the same reasons as those detailed in the Court of First Instance's expert's report.

The Broker appealed the judgement before the Cassation court. The court rejected the appeal and confirmed the Appeal Court judgment. The reinsurance contract (second cover note) was concluded between the Broker and the Reinsured. Although the Reinsurer had signed the first cover note, it was the Broker who was liable since he issued the second cover note and the signature of the Reinsurer on the first cover note did not constitute an acceptance of coverage of the insured risks.

Conclusion

The findings of the Dubai Courts in this case are surprising. It is likely that the court applied general rules of contract and did not take into account the nature of the reinsurance practice followed by the brokers where cover is made by virtue of a cover note. This case is the first of its kind in the UAE and so its conclusions cannot be said to have a lot of weight. Several cases of the same kind have to be heard before the UAE courts to establish a rule on the liability of the insurance brokers for reinsurance claims where reinsurance cover is made through issuing two separate cover notes. It is hoped that future decisions will depart from the findings in this case and uphold the industry practice.





Vincent Coppinger
 Senior Associate
 Dubai, UAE
 v.coppinger@tamimi.com

Passenger Rights Under EU Regulation 261/2004: New Guidelines for Gulf Airlines Flights Departing the EU

Whilst all eyes were on the UK this summer regarding the outcome of its forthcoming 'Brexit' referendum on whether to remain within the European Union (EU), the implementation of EU aviation law designed to protect air passenger rights has continued apace.

On 10 June 2016, the European Commission (EC) published new guidelines aimed at providing EU National Enforcement Bodies (invariably the Civil Aviation Authority of each EU country) with a blueprint document with the intention of tackling issues most frequently raised by passengers, and in an attempt to give clarity to the enforcement of existing passenger rights legislation.

All Gulf-based airlines departing from airports within the EU are subject to a wide body of EU air passenger rights legislation, the purpose of which

is stated to be to offer a high degree of protection against unforeseen circumstances to people travelling by air to and from the EU. This legislation consists of a series of EC Regulations dealing with subjects such as the rights of persons with reduced mobility, the protection of air passengers, aviation safety and 'black lists' of high risk airlines. As part of this body of rules, EC Regulation 261/2004 (EC 261) deals with the denied boarding of passengers, cancellations, delays and subsequent rules on compensation and assistance to passengers.

The Interpretive Guidelines on EC 261 (The Guidelines) have been welcomed by International Air Transport Association (IATA) as an important stop gap until crucial reform of the passenger rights legislation is implemented, and the International Air Carrier Association (IACA) has called the initiative

'the right step towards legal clarity for both airlines and passengers awaiting the adoption of a balance new legislation by the European institutions.'

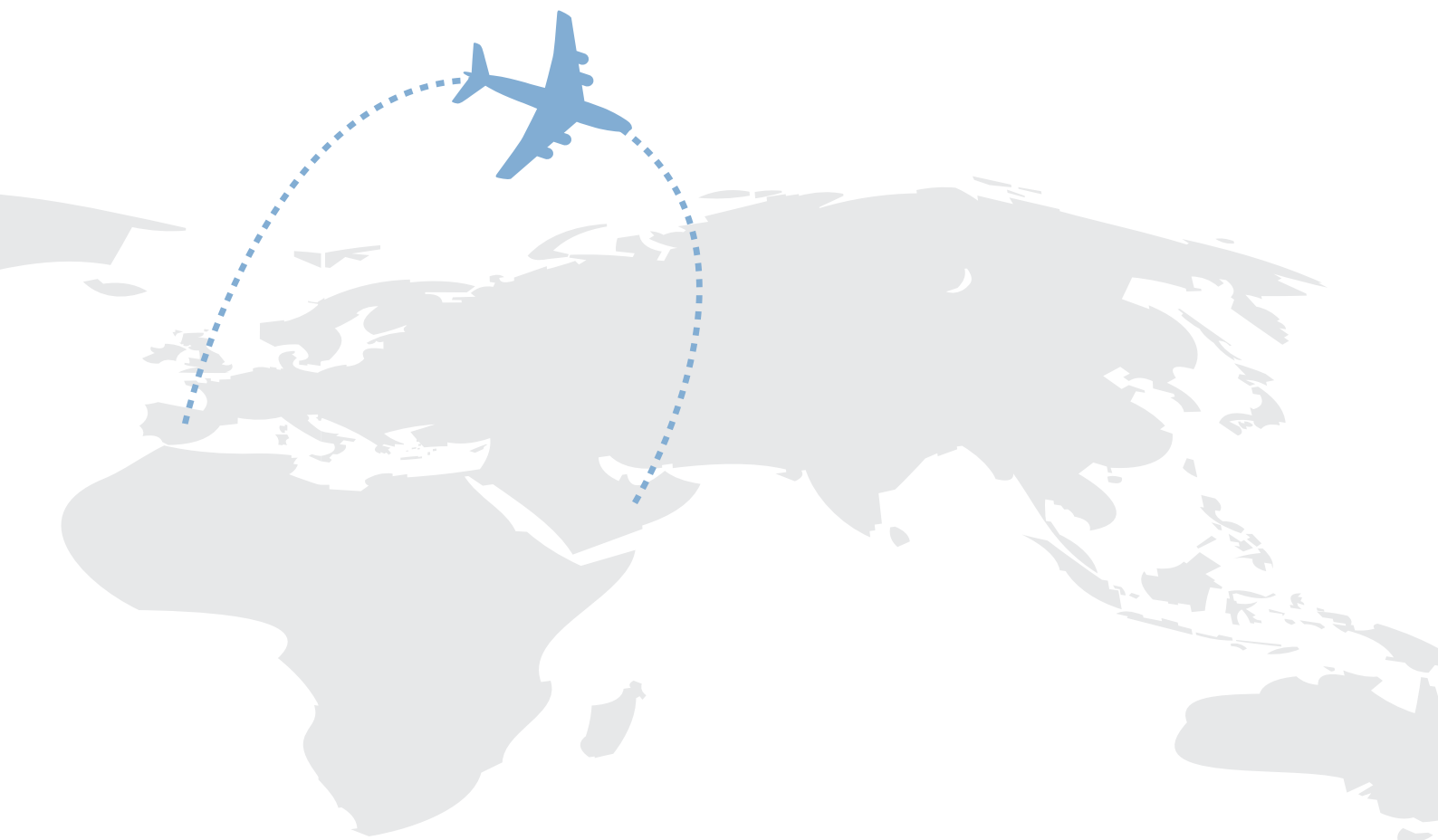
The Guidelines are available for all to download from the EC website, and they make important clarifications on interpreting EC 261, and reprise the many case law decisions made by the European Court of Justice (ECJ) over the years since the Regulation has been in force.

EC 261 has now been in place for more than a decade and, since the date of implementation, there have been inconsistencies and ambiguities in how it has been applied. The Regulation was originally designed to protect passengers who were denied boarding and for cancelled flights, but not specifically delays to the passenger's flight. However, the scope of EC 261 was extended in 2011 by the European Court of Justice judgment in Case C-402/7 and C-432/7 *Sturgeon v Condor* [2011] ECR, so that a passenger who suffers a delay in excess of three hours is entitled to compensation under Article 7 of EU 261. A passenger may therefore claim:

- *For cancelled flights, denied boarding, and flights delayed by three hours or more at the point of destination, compensation of:*
 - 250 Euros for flights of 1500 kms or less
 - 400 Euros for all other intra EU flights, and all other flights between 1500-3500 kms
 - 600 Euros for all other flights over 3500 kms
- *For cancelled flights and flights delayed by five hours or more, rights to reimbursement or re-routing*
- *For cancelled flights and flights delayed by two hours or more (depending on the distance), rights to care (refreshments, meals, accommodation)*

By Article 7.2 of EC 261, if the carrier offers re-routing in the event of a cancellation, denied boarding or delay then the above amounts can be discounted by 50%.

The right to compensation is subject to an 'extraordinary circumstances' defence, so that the carriers are not obliged to pay compensation if



Whilst all eyes were on the UK this summer regarding the outcome of its forthcoming 'Brexit' referendum on whether to remain within the European Union, the implementation of EU aviation law designed to protect air passenger rights has continued apace.

they can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. The Guidelines throw further light on the interpretation of 'extraordinary circumstances' and should be read by all airlines operating from EU airports.

'Extraordinary circumstances' are not defined comprehensively within the legislation, and again, a body of case law has developed to restrict the carrier's defences, such as there being no defence for the airline for complex engine defects unless they stem from events which are not in adherence to the normal exercise of the activity of the air carrier and beyond its control, such as hidden manufacturing defects (Case C-549/07 Wallentin - Herrmann v Al Italia [2008] ECR).

Other examples of 'extraordinary circumstances' may include sabotage/terrorism, strikes, air traffic control problems and freak weather conditions such as the 2010 Icelandic ash cloud. However, even a technical problem that occurs unexpectedly and that is not attributable to poor maintenance and that was also not detected during routine maintenance

checks, does not fall within the definition of 'extraordinary circumstances' (Case C-257/14 Van der Lans v KLM [2015] ECR).

For all the above reasons, as far as Gulf-based carriers are concerned (and indeed any non-EC carriers), it is important to look at the scope of EC 261 and when it will apply to the carrier. This is set out in Article 3.1, which states:

This Regulation shall apply:

- *To passengers departing from an airport located in the territory of a Member State to which the [EC] treaty applies*
- *To passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the [EC] treaty applies, unless they received benefits or compensation and were given assistance in that third country if the operating air carrier of the flight concerned is a community carrier.*

Thus, Gulf-based carriers are potentially liable under EC 261 if a flight is delayed or cancelled, or passengers are denied boarding, when leaving any EU airport. Conversely, Gulf-based carriers are not 'community carriers' under Article 3.1(b) and therefore they are not liable for flights delayed when the flight starts from a country outside of the EU.

But what about connecting flights where the flight starts from an EU airport?

Many operators within the Gulf region are successful, highly organized, new clean sheet business plan model airlines with hub routes providing a worldwide network of connecting flights. Logic would say that, if there is a delay on a flight that starts in the EU and that delay is compensated by the airline in accordance with the EU legislation within the EU, there should not be any consequential effect to connecting flights.

It is not unusual for a journey starting in the EU and operated by a Gulf carrier to comprise of two or more flights, the first from any EU member state to a non member state (eg London to UAE) and then there is a connecting flight between two non member states (eg UAE to India). Using the example London-UAE-India, it may be the case that a first flight is delayed at the EU airport for long enough for the passenger to miss their connection

to India in the UAE, but for a shorter period than their requisite three-hour delay to engage a right to compensation. However, when the passenger eventually reaches the ultimate destination in India, it may be the case that the knock on effect of the original delay gives a delay in the arrival at the final destination of more than three hours.

Gulf carriers have tended to argue that each flight is a separate unit of their transport and needs to be considered separately for the purposes of compensation under EC 261, whereas the claimant often argues that their journey at all times departed from the Member State in question and that the Regulation applies to the entire journey.

Case C-173/07 *Emirates Airlines, Direktion für Deutschland v Schenkel* [2009] 1 Lloyd's Rep.1 CJEU and *Sanghvi v Cathay Pacific Airways* [2012] 1 Lloyd's Rep 46 ChD support the view that the non EU carrier should only be responsible for the sector which is delayed and which leaves from an EU airport, and is not liable for any subsequent knock-on effect delay at destination. However, there is conflicting case law on this approach and there have been many cases (particularly in the UK) which take the opposite view.

The Guidelines now address the question of connecting flights specifically, and state that compensation under EC 261 does apply in case of a passenger missing a connection outside the EU with a flight departing from an airport situated within the EU, and where the passengers arrive at their final destination more than three hours late.

In the Guidelines there is a section entitled 'Compensation for late arrival in the case of connecting flights'. The Guidelines indicate that the Regulation must apply to the whole journey including connecting flights and set out the following:

the Court takes the view that a delay must be assessed for the purposes of the compensation provided for under Article 7 of the regulation, in relation to the scheduled time of arrival the passenger's final destination as defined in Article 2 [h] of the regulation which in the case of directly connecting flights must be understood as the destination of the last flight taken by the passenger.

In accordance with Article 3[1] [a] EC 261, passengers who missed the connection within the EU, or outside the EU with a flight coming from an airport situated in the territory of a Member State, should be entitled to compensation if they arrived at final destination with the delay of more than three hours. Whether the carrier operating the connecting flight is an EU carrier or a non EU carrier is not relevant.

Clearly, the interpretation as set out in the Guidelines is a concern for Gulf-based airlines operating connecting flights, and the EC view is that compensation does apply in case of a passenger missing a connection outside the EU when the original flight departs from an airport situated within the EU, and the passenger arrives at their final destination more than three hours late.

Thus whilst the Guidelines provide helpful clarification on many issues, for delay claims airlines need to be aware of the fact that it is being suggested that connecting flights and accumulated journey delay may be compensatable under EC 261. This could mean a spate of claims by delayed passengers for Euro 600 per passenger in the event of an 'accumulated delay' at the final destination if the journey commences in the EU.

The status of the Guidelines is really to assist National Enforcement bodies interpret the legislation. They are not intended to substitute the role of the national and EU court systems, but are there to give guidance. They are viewed as persuasive to the interpretation of EC 261 and should be read accordingly.

Although the Guidelines have been welcomed by aviation industry bodies, they are seen as a stop gap measure and it is important to note that a new Regulation to replace EC 261 was proposed by the EC in 2013 in order to address both industry and passenger concerns. We await implementation of that new substitutive Regulation in due course but, in the meantime, Gulf carriers should be aware of the new developments. Given that many of the reported cases on EC 261 emanate from the UK, all parties await the practical implications of the 'Brexit' vote by the UK, and whether, as a result, the UK will continue to be bound by EU court decisions in the future. Gulf carriers will await developments with interest.





Omar Omar
Partner
Dubai, UAE
o.omar@tamimi.com



Mamoon Khan
Partner
Dubai, UAE
m.khan@tamimi.com



James Newdigate
Associate
Dubai, UAE
j.newdigate@tamimi.com

Securing Ship Finance Transactions in the UAE

Bank financing of new and second-hand ships remains the leading source of finance for shipowners. This traditional source of finance has been forced to adjust to a new era of shipping over the last several years. The current market is characterised by increasingly volatile (and generally depressed) freight rates, increased sources of finance coupled with an excess of available capital, and consequent oversupply of tonnage. Market conditions have placed tremendous pressure on many owners, and lenders routinely find themselves consumed with tending to defaults and restructurings.

The current state of affairs has encouraged lenders to more carefully assess how they secure the facilities they provide. Lenders are becoming increasingly aware, and concerned, about the effectiveness of their standard securities. Here the authors consider ship finance in an UAE context, with a focus on securing debt financing transactions.

Registration of Vessels

Vessel registration is largely governed by the UAE Commercial Maritime Law No. 26 of 1981 as amended (the 'Maritime Code'). The UAE maintains a closed register. Only vessels owned by UAE nationals, or majority UAE owned corporate entities,

are eligible for registration. The Federal Transport Authority - Land & Maritime (the 'FTA') is the body charged with overseeing, and administering, the national ship register. There is continued debate in the UAE surrounding the desirability of establishing of a separate open ship registry, catering to vessels with foreign owners, and bearing features of a convenience registry. At date of publishing this article, such registry had not been established.

Certain vessels are exempt from federal registration. These include fishing boats, pleasure boats, vessels less than ten tons in total weight, lighters, barges, tugs, cranes, dredgers and diving boats. The Maritime Code further prohibits the registration of oil and gas tankers older than ten years at date of sought registration.

Ship Mortgages

The ship mortgage is arguably the most effective, and robust, security available to lenders. It provides a lender with an in rem right directly against the vessel, granting it priority over unsecured creditors of the vessel and its owner. A lender is afforded powerful rights in the event of any default by the borrower, including; pursuing the sale of the vessel to recover any indebtedness.

Mortgages registered against UAE flagged vessels are widely accepted and enforced in UAE and foreign courts. Parties are generally free to agree on the structure and contents of the mortgage agreement, and underlying instruments, with relatively intricate and complex arrangements secured through a registered mortgage. Lenders are also permitted to utilise security agents to hold and administer a mortgage.

The Maritime Code does however require a ship mortgage to adhere to certain basic confines. A mortgage must be recorded through an official deed, failing which, it will be considered void. Practically, this requires a mortgage to be in writing, in Arabic, and notarised before a Notary Public. Generally a dual English/Arabic text is filed. Parties should be aware that if enforced before UAE Courts, the Arabic text will prevail over the English text. A good quality translation is accordingly essential. The mortgage must also indicate the following details:

- Amount of debt. If against more than one vessel, details of debts related to each vessel. If against a vessel and other property, it must indicate the amount secured by the vessel;
- Date and type of contract and details of borrower and lender;
- Maximum mortgage amount (which should be fixed);
- Any conditions relating to the debt;
- Description of mortgaged vessel and confirmation that the vessel is over ten tons (as required);
- Details of any possible interest.

The underlying debt instrument does not need to be registered or filed with the mortgage, although it is customary to do so. Parties are required to file any substantive amendments to the mortgage as may arise from time to time.



A mortgage may be registered against a vessel under construction. A further declaration in this context is required from a local FTA office with jurisdiction over the port where the vessel is being built. Such declaration must provide details of the vessel, including; its length and dimensions, approximate tonnage and details of the yard under which it is being built.

Assignment of Earnings or Charterparty Contracts

In addition to the vessel mortgage, lenders may also take security over the cash flows generated by the mortgaged vessel by way of assignment of earnings or charterparty contracts.

Under UAE law assignment of earnings is considered an assignment of rights or otherwise known as assignment of receivables. The jurisprudence on assignment of rights and receivables has been developed by the judicial decisions of the courts of various Emirates of the UAE including the Emirates of Dubai and Abu Dhabi. It is important to note that the underlying right or receivable needs to be in existence at the time of the assignment. In other words, UAE law may not recognise assignment of future rights or receivables or an assignment of a charterparty contract that will be executed at a later date.

It is customary for the lender and borrower to enter into a formal assignment agreement which outlines the relevant perfection requirements and would also reflect the details of the charterparty contract being assigned. The assignment can be perfected by the borrower (as assignor) issuing a notice of assignment to the third party debtor. The mode of delivery of notice can be by registered post, courier and very recently notices by fax and email have been accepted as necessary evidence of delivery of the notice. Whilst the evidence of delivery of notice of assignment is sufficient, cautious lenders generally require the borrower to procure a formal acknowledgment of the assignment from the third party debtor.

The current market is characterised by increasingly volatile (and generally depressed) freight rates, increased sources of finance coupled with an excess of available capital, and consequent oversupply of tonnage. Market conditions have placed tremendous pressure on many owners, and lenders routinely find themselves consumed with tending to defaults and restructurings.

Pledge over Bank Accounts

The assignment by way of security over earnings is supported by a pledge or security over the bank account where such earnings are deposited by the third party debtor.

The notice of assignment discussed above generally directs the third party debtor to pay the charter income into a designated bank account. This bank account is ordinarily the borrower's account, as held with the relevant branch of the lender and is subject to a pledge or security allowing the lender to exert a certain level of control over the charter income.

If the charter income or receivables is also the mode of repayment of the loan availed from

the lender then such lender may also prescribe a payment waterfall mechanism either in the facility agreement or the account security document. It is also important to note that it is difficult to create security or pledge under UAE law over an account with a fluctuating balance. This is due to the absence of specific law on creating security over fungibles and the application of the law on pledge over movable assets - which requires the underlying assets to be fixed and identifiable. Therefore lenders mostly rely on the set-off clauses in the account pledge agreements which may be considered independent of the pledge by the UAE courts in enforcement. Due to this uncertainty some foreign lenders may also stipulate offshore accounts where such floating security would be recognized.

Assignment of Insurances

In mid market transactions, particularly in the financing of offshore support vessels, lenders usually rely on 'loss payee' provisions in the hull and war risk insurances and other insurance policies customarily linked to the financed vessel. It has been observed that lenders generally do not enter into or perfect assignment of insurances discussed above. In the absence of a formal assignment the lender would not be able to 'step in' and enforce its rights against the insurer and would have to wait for a claim to be lodged by the insured under the policy. Therefore it is recommended that in addition to the lender being named as loss payee in the policy the borrower should formally assign the policy in favour of the lender. However such assignment may oblige the lender to pay the premium under such policy if the insured fails to fulfill its payment obligations.

Guarantees

It is common to obtain personal and corporate guarantees from the borrower's shareholders or affiliates respectively. When preparing guarantees it is important to ensure that the guarantee instrument clearly reflects the details of loan availed by the borrower or details of the relevant facility agreement. The absence of the loan or facility

details in the guarantee may render it as an 'all monies guarantee' which may not be recognized by UAE courts. Further, any claim under guarantee provided by a guarantor needs to be made within six (6) months from the date of default by the borrower under the facility agreement, otherwise such guarantor may rely on the above six (6) month rule provided for in the UAE Civil Code (Federal Law No. 5 of 1985) and exclude its liability on account the above time bar.

Share Pledges

The new UAE Company Code (Federal Law No. 2 of 2015) now recognizes pledges over shares of a limited liability company ('LLC'). Therefore, as most UAE flagged vessels are owned by LLCs, lenders now have the option to extend their security coverage by taking security / pledge over the shares of the LLC borrower. The parties (i.e. the shareholders of the borrower) and the lender need to enter a bilingual (Arabic/English) share pledge agreement after obtaining initial approval from the relevant Department of Economic Development. The share pledge agreement is signed in the presence of a local notary public and subsequently registered with the Department of Economic Development.

Conclusion

Even though the UAE maintains a closed ship registry, it is a jurisdiction that offers relatively wide-ranging security options to lenders, which are on par with many popular international registries. Despite the poor shipping market conditions, there appears to be an increasing appetite amongst several local, and foreign, banks in the regional ship finance market. It is important that lenders in the region take careful note of the available securities, and their respective requirements, in order to best tailor an efficient security package.





Omar Omar
Partner
Dubai, UAE
o.omar@tamimi.com



Adam Gray
Associate
Dubai, UAE
a.gray@tamimi.com

Ship Arrest in Iran

Until recently, Iran has not been considered as a potential jurisdiction for maritime arrests due to the applicability of the international sanctions and the complexities those sanctions entailed. Now that Iran is beginning to open up for international business, coupled with a sharp downturn in the regional shipping market, the ability to arrest ships to secure maritime claims is a frequent topic of enquiry in the shipping industry once again. This article gives an introductory overview of how a claimant can obtain a vessel arrest in Iran and the procedures to which it must adhere.

The Two Ways to Arrest a Ship in Iran

Surprisingly, Iran's Maritime Code does not contain any specific provisions governing the arrest of vessels to secure maritime claims. Furthermore, Iran is not a signatory to the International Convention Relating to the Arrest of Sea-Going Ships 1952 nor the International Convention on the Arrest of Ships 1999 (together the 'Arrest Conventions'), which offer a uniform set of laws and procedural rules on all aspects of ship arrests for contracting States. For example, the Arrest Conventions list the nature of debts which a vessel can be arrested against, referred to as 'maritime debts'.

Whilst Iran is a party to the International Convention for the Unification of Certain Rules of Law Relating to Maritime Lien and Mortgages, Brussels 1926, in practice, a legal framework for the enforcement of maritime liens has not been implemented in Iran.

In the absence of incorporated international law, and the omission from the Iranian Maritime Code of arrest provisions, the Iranian Courts will grant a claimant an arrest order pursuant to two civil law procedural applications, as follows.

The first method of making an arrest application in Iran is to issue a claim pursuant to Article 108 of the Iranian Civil Procedure Act, which reads as follows:

[In a civil action] the Claimant, either prior to the commencement of an action and the submission of a statement of claim, or at any time during the proceeding, but prior to a final judgment, may, on the satisfaction of the conditions below, ask the Court for security for judgment and the Court is obligated to order same;

a) The subject matter of the dispute is pursuant to an official document [dispute of title ownership of property where there is a title deed etc],

b) The Respondent may dilute or divert his assets,

c) In respect of commercial documents or such deed of commercial value against which the Court must issue an Order for security,

d) The Claimant must deposit with the Court an amount equal to an estimate of the damages that the Respondent may suffer.

The Court of competent jurisdiction will be responsible to determine the value of the estimate of damages referenced above.

At a high-level view, a claimant can petition the court at any time for an attachment order over a debtor's assets, including a vessel registered in the debtor's name, where the debtor owes a sum of money to the claimant. The nature of debt against which the vessel can be arrested is widely construed by the court to include any debt and is not limited to 'maritime debts'. Under Article 108, if an attachment order is granted by the judge, counter-security must be paid into the court, the

sum of which shall be at least 10% of the claim value but determined by the judge in his discretion. The judge will then issue a letter to the relevant port authority where the vessel is located ordering its seizure. The claimant will then have 10 days from the service of the order on the vessel to file its substantive claim against the vessel owner.

Although under Article 108 the claimant can apply for an attachment order over the vessel during the course of the main claim itself, as per normal practice, the claimant will most likely seek to secure the attachment prior to filing the main claim.

The second manner in which an arrest can be obtained is pursuant to Article 310 & 316 of the Iranian Civil Procedure Code, set out below:

Section 310 - In circumstance where there is an urgency in rendering an expedited interim judgment, at the request of the interested party to the proceeding, the Court may issue an interim Order in an expedited manner.



Section 316 – The Interim Order pursuant to Section 310 can be made in respect of seizure of assets, order to undertake a deed or action, or against a deed or action.

This method involves an ex parte application to the court on an 'urgent' basis, which must evidence to the court that there is a risk that 1) the movable asset (vessel) will leave the jurisdiction and 2) there is no alternative asset available which can secure the claimant's claim. If convinced, the court will issue a provisional attachment order over the ship preventing it from leaving the jurisdiction. As with the Article 108 procedure outlined above, counter-security will be required. From the date of service of the arrest order, the claimant will have 20 days to file its substantive claim, failing which the arrest order will be lifted.

Other Considerations for Arresting Parties

Sister-ship arrests are possible under the Iranian legal system but only where the debtor is the legally registered owner of the sister-ship. The courts will not be prepared to lift the corporate veil and order the arrest of a vessel which is group owned, beneficially owned, chartered, managed or operated by the registered owner of the offending ship. For example, if Ship A has not paid for its bunkers and the registered owner is Owner A, the bunker supplier cannot arrest Ship B because it is beneficially owned by Owner A but the registered owner is a shell company called Owner B.

In a similar vein, a claimant cannot arrest a ship as security for charterer debts because the Iranian courts view the debt as a third party debt and will not permit attachment of property under the civil code if not owned by the debtor charterers.

Counter-security must be in the form of cash or an acceptable bank guarantee and will usually be in an amount ranging between 10-20% of the claimed sum. The court will not accept a Club Letter of

Undertaking (LOU) although there is nothing preventing the claimant accepting a Club LOU and then requesting the court to release the vessel. The vessel can be released on the same day as the counter-security is deposited with the court.

If a claimant wishes to arrest a vessel in Iran, it should allow a few days for preparation of the documents. In theory, an arrest could be granted on the same day as the application but in practice it usually takes between 1-3 days before an arrest order is actually served on the vessel.

Restrictions and Risks

In both Article 108 and 310 actions, the claimant's claim must be equal to or greater than IR200,000 (approximately USD65,000) in order to obtain a provisional attachment.

In some instances, defendant ship owners are able to raise a wrongful arrest petition. Usually, the court deals with the merits of the wrongful arrest petition at the end of the case. Where the court dismisses the claimant's claim and the defendant ship owner can prove that damages arose from the arrest, the defendant ship owner shall be entitled to wrongful arrest compensation. Unlike neighbouring jurisdictions in the Gulf region, there is no requirement for the defendant ship owner to prove malicious intent on the part of the claimant. This represents quite a serious risk to claimants and means that they should be convinced of the validity of their claim before proceeding with an arrest application or otherwise risk having to pay wrongful arrest compensation.

Costs

Within a period of 10 days from obtaining an attachment order, the claimant must file its submissions on the merits of the claim and at such time a fixed fee of 3.5% of the claim amount is payable. There is no ceiling to the fee payable and it can, therefore, be quite high where large claims are concerned.

The successful party is able to recover the court filing fees and any expert fees incurred. There is, however, a general reluctance by the Iranian courts to allow recovery of professional legal fees.

Conclusion: Can you arrest?

Yes, it is possible to arrest a vessel in Iran to secure a claim against the vessel owners. Whilst there is no specific provision in the Iran Maritime Code, attachment of debtor property is routinely achieved to secure claims. These methods are extended to attachment of vessels to secure claims, regardless of whether such claims are 'maritime debts'. We believe that members of the shipping community will increasingly explore arresting vessels in Iran as trade opens up more with the country, particularly by those who supply services to vessels in the Gulf region. However, arresting parties should be confident that their claims are well supported and valid because of the increased risk of ship owners succeeding in wrongful arrest claims. This, in our view, is positive to the extent that it should filter out spurious claims.

Al Tamimi & Company partners with an experienced maritime organisation in Iran on arrest instructions and has exclusivity for Iran in the Shiparrested.com membership.





Omar Omar
Partner
Dubai, UAE
o.omar@tamimi.com



Karim Marouny
Senior Associate
Kuwait, Kuwait
k.marouny@tamimi.com

Demurrage Payments Under Kuwaiti Law

In modern, global trade, sea-going ships are the foremost mode of transportation because they are a cost-effective and safe way to transport cargo around the world. Shipping carriers achieve their profits on the services presented in handling the containers in which cargo is shipped.

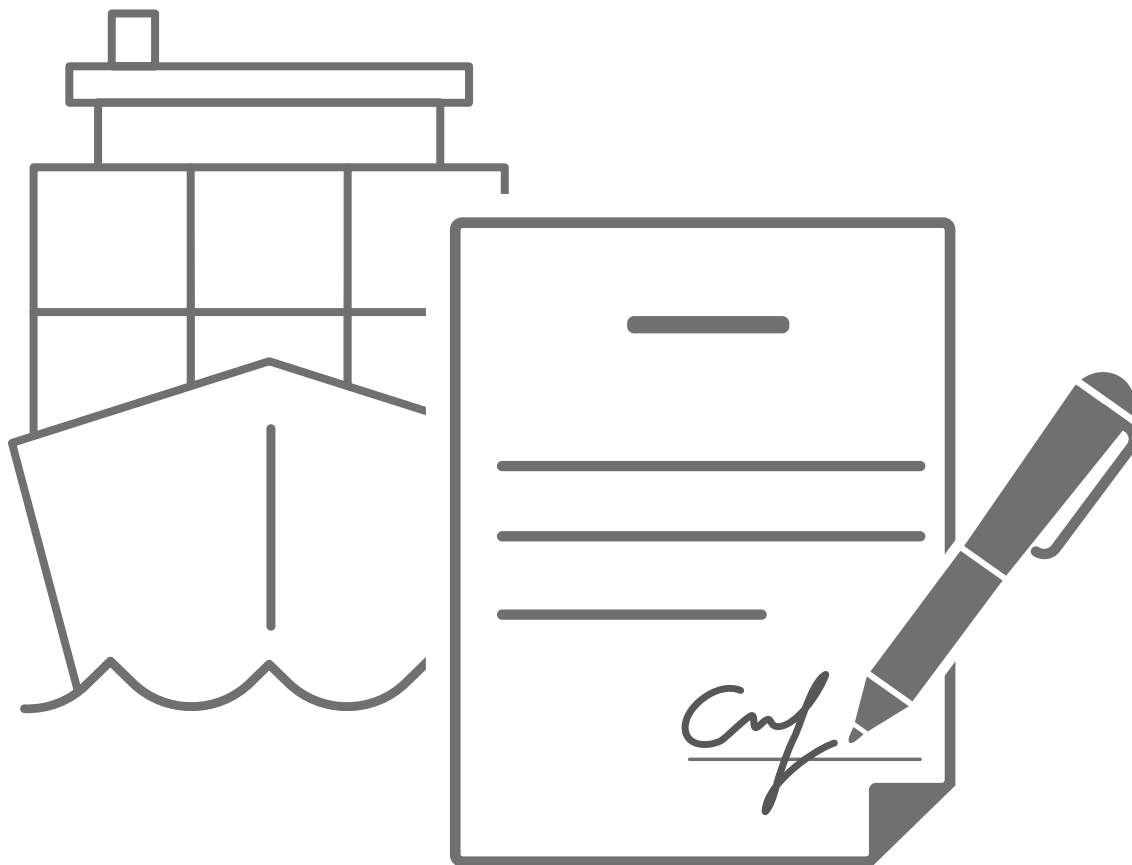
Due to the risk of the shipper or the consignee failing to return containers back to the shipping carrier empty, all shipping lines have stipulated in their bills of lading (B/L) (which govern the relation between the shipper, carrier, and the consignee) a specific condition concerning demurrage. This condition applies to the merchant (shipper/consignee) and stipulates who shall be charged fees arising from fault or negligence in not returning the containers back empty to the carrier. Shipping lines are keen to impose such a condition because such malpractice by the merchant results in enormous losses to the carrier who will be unable to exploit its containers.

The essential role of the bill of lading

The B/L is a contract of carriage which prescribes the obligations between the shipper, the carrier and the consignee. It is also the document to which the port and the customs authorities refer in their inspections of cargoes.

If a dispute arises out of transportation of goods by sea, the terms and conditions of the B/L shall apply to all the parties to the contract for the purposes of determining the responsibility and liability of the parties.

According to Kuwaiti Law No. 28 of 1980 (Maritime Law), the B/L shall be in writing and has three functions used to prove a shipment's contents: as evidence of the transportation, as a representation of the goods to which it relates, and as evidence of the information included therein, among the carrier, the consignee and in respect of third parties.



Furthermore, Kuwait has ratified the Brussels Treaty of 1924 for the Unification of Certain Special Rules Relating to Bills of Lading (Hague Rules). Consequently, the Hague Rules are applicable as part of Kuwaiti law and apply to maritime cargo claim disputes.

The responsibility of the shipper to pay demurrage

The shipper is the party who starts the route of transportation by the submission of a shipping order (S/O) to the carrier for transportation of consignments to a determined destination. According to Article 176 of the Maritime Law, the carrier issues a B/L upon receipt of the information provided by the shipper, including the consignee's details. However, in some cases,

the shipper shall be obliged to pay the demurrage stipulated by the shipping line when the consignee does not appear at the port of discharge (POD) to take delivery, for the reasons outlined below.

The transfer process is based on the shipper's S/O in accordance with Article 179(2) of the Maritime Law, which stipulates that '*The shipper shall be responsible before the carrier for compensation of detriment resulting from inaccuracy of the submitted information in respect of commodities. The carrier, may not adhere to inaccuracy of the information stated in the bill of lading before anyone other than the shipper*'.

Also, Article 4.3 of the Hague Rules stipulates that '*The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants*'.

Consequently, the shipper is liable to compensate the carrier for damages arising due to inaccurate



information relating to the consignment provided by the shipper, or to his and his agents' fault or negligence. According to the same principle, the shipper will also be responsible for the information related to the consignee at the POD.

The responsibility of the consignee to pay the demurrage

The consignee is the party who shall attend the shipping carrier or its agents to accomplish the procedures required to deliver the cargo. However, in some cases when the consignee accepts consignments and obtains the delivery order (D/O) from the carrier/carrier's agents, the consignee may delay returning the containers back empty to the carrier, or suddenly stop the customs procedures and leave the consignments inside the container without continuing the procedures required to deliver the cargo. There is no doubt that both actions change the nature of the container from a valuable piece of equipment in the transport operation into just storage for the consignee's cargo, which potentially causes huge losses to shipping carrier.

The Kuwaiti legislator has counteracted such indecent action in Article 175(2) of the Maritime Law, which declares the rights and obligations of the consignee, who committed to the terms of the B/L as owner of the consignments, and confirmed that once the consignee attends to the carrier holding the B/L, the consignee shall be obliged by the conditions of the B/L. This concept has been clearly stated by the explanatory memorandum of the Maritime Law, which state that the consignee shall bear the obligations arising from the contract of carriage if accepted explicitly or implicitly.

The consignee who attends to the carrier/ carrier's agents and obtains the D/O will, therefore, be liable to pay demurrage if he delays in returning the containers back empty or does not complete the procedure of delivering the cargo from the containers.

The legal recommendation

Having regard to our experience before the courts in the Middle East and North Africa, and due to the specific nature of maritime transportation, it is recommended not only to rely on the demurrage condition stated on the back page of the B/L or through advertising the same on the carrier's website, but also to mention this clause clearly on the front page of the B/L, by which the merchant (neither shipper nor consignee) will be liable for the demurrage. Calculations of charges should also be stated clearly on the B/L. This will make it easier to convince the court of the carrier's right to collect the demurrage from the merchant and its exact amount. In addition, it will minimise the number of documents submitted before the court to prove the carrier's rights, which will surely lead to obtaining the court's judgment more quickly.



Yazan Saoudi
Partner
Dubai, UAE
y.saoudi@tamimi.com



Karim Marouny
Senior Associate
Kuwait, Kuwait
k.marouny@tamimi.com

Procedures of Arrest in Egypt

Arrest of a vessel is an extraordinary process, which gives a creditor the ability to execute a conservatory arrest order on the debtor's vessel in order to settle his debt. However, due to the specific nature of maritime law, the type of debt which will be accepted by a court granting an arrest order must be classed as a 'marine debt'. The order will only be applied to the vessel that has caused the debt or on a sister vessel, which should belong to the same owner. With major ports along the Red Sea and the Mediterranean Sea, Egypt is an attractive location for creditors seeking to arrest vessels calling at Egyptian ports.

Conservatory arrest procedure under Egyptian Law

A creditor has the right to apply before the Chief of the Court of First Instance in his capacity as a judge of urgent matters (Competent Judge) for an order to arrest a vessel for security, if such claim is considered to be a 'Maritime Claim'.

The creditor's application should contain a brief explanation of the debt and reasons why he is applying for security. Furthermore, he must prove that the liabilities giving rise to the claim come within the definition of 'Maritime Claims'



as defined in the Egyptian Maritime Law and the 1952 Brussels Convention. To do so, the applicant must support his application with sufficient documents to validate his claim.

'Maritime Claims' are defined in the Egyptian Maritime law by Article 60, which stipulates that no conservatory arrests may take place unless for settlement of a marine debt. The debt is to be considered as a marine debt if it arises out of one or more of the following reasons:

1. Ports and sea channels duties.
2. Expenses concerning removal, picking up, or lifting the ship wrecks and cargo.
3. Damage caused by the ship caused either by collision or pollution or other similar marine casualties.
4. Loss of life or personal injury caused by the ship or occurring in connection with her operation.
5. Contracts related to the use or hire of the ship.
6. Insurance on the ship.
7. Contracts related to the carriage of goods by means of a charterparty or bill of lading.
8. Loss of or damage to goods and baggage carried on the ship.
9. Salvage.
10. General average.
11. Ship's towage.
12. Pilotage.
13. Supply of goods or materials whether supplied to the ship for her operation or for her maintenance; whichever maybe the source of such supply.
14. Construction, repair or equipment of the ship or dock charges and dues.
15. Wages of Masters, Officers, or crew.
16. Master's disbursements, and disbursements made by shippers, charterers or agent on behalf of a ship or her owner.
17. Disputes as to the ownership of the ship.
18. Disputes over the common ownership of the ship or her possession, employment, or

in common earnings of that ship, resulting from her exploitation.

19. Marine mortgage.

This enumeration, as mentioned in the law, is made on an exclusive and exhaustive basis, and appears to be modelled closely on the list of maritime debts set out in the 1952 Brussels Convention.

The Court's decision and its effect

The Competent Judge who is reviewing the application and its accompanying documents has the right to carry out a brief investigation into the grounds upon which the application is made. At his own discretion, he is entitled to allow or reject the order without specifying reasons for his decision.

If the application is accepted

No counter-security is required. The applicant is entitled to enforce the conservatory arrest order by arresting the debtor's assets/vessel as specified in the court order and he is required to file a substantive case within 8 days from affirmation of the conservatory arrest order, otherwise the order will be considered null and void.

In response to an arrest, the debtor shipowner may take the following action:

1. Submit an application for the lifting of the arrest against a suitable guarantee, in order to replace the vessel as the form of security with such guarantee. The Egyptian courts do not accept a letter of undertaking in order to release the vessel. They do, however, accept the submission of a bank letter of guarantee, which shall not be cancelled unless a final judgment is issued or a settlement between the parties to the dispute is agreed.
2. File an objection (within 10 days) against the conservatory arrest order. This, in and of itself would, not stop the arrest proceedings and it is important to note that



this procedure is lengthy and the matter will be treated as a normal court procedure, which normally takes years to obtain a final judgment from the Court.

If the application is rejected

The applicant would be entitled to proceed as follows:

1. Submit a new application. The further application will be heard again in absence of the parties and the judge may again reject or accept the application but, in the latter case the judge must state the reasons that the application was accepted after the initial application was rejected.
2. File an opposition before the Court of First Instance. This would result in a full hearing with the attendance of all parties and the Court will issue a judgment either confirming or reversing the decision given by the sole judge.

This procedure follows the normal procedures of filing a lawsuit, namely that the judgment rendered from the Court of First Instance is subject to appeal before the Court of Appeal and before the Court of Cassation.

Conclusion

Legally speaking, the application for an arrest order is heard by the Competent Judge in the absence of the parties and the decision is given on the documents. The question of whether to accept or reject the application is left to the discretion of the Competent Judge and no reasons are required to be given in either case.

Consequently, and according to our experience before the Egyptian courts, an application to obtain an arrest order should be supported with sufficient documents, which must be original and official; otherwise the chances of success in obtaining an arrest order will be low.





Omar Omar
Partner
Dubai, UAE
o.omar@tamimi.com



Wisam Sindi
Associate
Jeddah, Saudi Arabia
w.sindi@tamimi.com

Ship Arrest in Saudi Arabia (Introduction to the Domestic Practice)

The Kingdom of Saudi Arabia ('KSA') enjoys a strategic geographical position on the global sea trade map as reflected by the fact that Jeddah Islamic Port was ranked 33rd on Lloyd's global list of the busiest ports running bulk docks.

By contrast, the KSA domestic maritime practice has ensured that the arrest of ships in KSA is somewhat of an enigma for many international carriers, insurers, and traders. This article considers, the complex maritime practice for ship arrest in KSA.

Background

The basic tenets of KSA maritime practice rest on section two of the 1931 Commercial Court Law ('CCL'). The CCL has been amended over the years most notably by the newly enacted Enforcement Regulations ('ER') that now govern the procedure for arresting ships.

Further, amendments by the 2007 promulgated Judiciary Regulations have rendered the Kingdom without a devoted maritime court. Instead the commercial courts (circuits) are delegated with reviewing the merits of substantive maritime claims and ship arrest measures, while the enforcement courts oversee the interlocutory sale of arrested ships. Furthermore, all vessels sailing a predetermined course to KSA, whilst anchored in its territorial waters, are subject to the national jurisdiction of the KSA domestic courts, regardless of the ship's nationality or flag. However, not all sea going ships are arrested in the same way. Military and official ships, governmental owned vessels and vessels used in port support services are excluded from the subject matter jurisdiction of the KSA commercial and enforcement courts.

Although the kingdom is a signatory party to multiple international conventions on regional and international maritime and admiralty law, it



has not ratified the 1952 International Convention Relating the Arrest of Seagoing Ships, the 1999 International Convention on the Arrest of Ships, or the International Convention on Maritime Liens and Mortgages of 1993. In abstract the lack of similar safe-harbour laws may be alarming to some, but in reality many of the industry's safeguards are put in-check either by domestic law as we demonstrate below, or in private practice as financiers and businessmen would be aware of.

Treatment and Ranking of Maritime Debts

There are two categories for liens; one for the threshold liability that may extend to cover all of the debtor's sea going assets, the other is for the hiked liability that attaches the debt or lien to a certain pre-determined asset. Under the general rules of KSA civil liability, debtors are presumed to be personally liable for their own private assets. This concept creates the threshold or minimum



standard for securing debt obligations that are naked or fully exposed, namely; lacking backup collateral. By the same token maritime debtors are also presumed liable for debts connected to their ongoing sea trade; however, the standard for treating a lien varies accordingly.

Creditors holding naked or exposed lines may direct arrest actions in-personam against all of their debtor's sea going assets irrespective of whether they are the owners or charters of the vessel. However, in case of a registered mortgage the standard is elevated to premium collateral in the form of an attached in-rem lien that grants creditors supremacy over the mortgaged vessel itself, without having to establish a personal connection with the debtors or holders of the vessel. Quasi-mortgage liens - liens that are in a position of a mortgage by rule of law - also warrant debtors with an in-rem right on the vessel. Bareboat and time charterer agreements are two extreme examples of quasi mortgage liens that entitle the owners of a ship with a direct claim over their vessel, its machinery, its equipment, its freight allowance and its cargo, ahead of other debtors.

The main advantage of establishing in-rem jurisdiction is that it renders creditors immune to subsequent transactions that may produce adverse affects to the value of the underlying vessel, such as taking another mortgage or selling the vessel unless stringent conditions and certain disclosures and procedures are met. For example, creditors holding real mortgages are required to officially register their debts with the Ministry of Transport in order to be benefit from such protection against subsequent creditors.

Overall, there are eleven different liens specified in article 154 of CCL in the following order: 1) claim expenses as well as the expenses resulting from the interlocutory sale of the vessel, 2) pilot, anchorage, and docking fees, 3) watchman and custodian charges, 4) storage expenses, 5) expenses for safekeeping, 6) registration and administrative fees and crew charges, 7) pre-voyage resupply loans, 8) the sale price for the vessel as well as monies owed

to foreign creditors, 9) in-voyage resupply loans, 10) insurance premium; and 11) salvage and insurance charges for the general average.

Arrest and Re-arrest

The court will serve its orders upon a certain ship through delegating the pertinent authorities, i.e. the port director or the coast guard.

Since the arrest procedure is unusually expedited the ER has a number of counter checks and balances that equalise between the claimant's positions and limit frivolous claims. First, the underlying right should be connected to a maritime debt that is both mature and prima facie credible. Second, creditors should be acting in good faith and are expected to file following substantive claims within a maximum of 10 working days (averaging two weeks) from the date of obtaining the arrest order. Third, creditors are required to deposit a monetary security in the form of a rectified cheque or a bank guarantee with the court. The court enjoys full discretionary powers to determine whether an arrest is possible and the level of security by considering a number of factors. These factors often include one or more of the following: the amount of the debt owed, the ratio of the debt with the value of the vessel, the cost for arresting and maintaining the vessel and/or its cargo in port and the practicality and risk for the arrest.

Re-arrest of a ship directly depends on the cause for foregoing the prior action. Re-arresting a ship is not possible when the arrest action was removed by force of law, i.e. neglecting to follow it with a substantive action. That being said, the court will consider re-arresting a ship and even sympathise with the creditor he were to drop his prior action in goodwill with an obvious example being where settlement negotiations have commenced but were unsuccessful.

Arresting sister ships reverses the in-rem jurisdiction back to in-personam under exceptional circumstances. If so, then the arrest of a sister ship might be possible (without being guaranteed) providing that both ships are owned

by the same debtor, there are valid concerns that the transaction would jeopardise the rights and position of the creditor and that the ship is at real threat of diminishing in value.

Release and Wrongful Arrest

Release of a ship can occur in one of three stages; the initial stage, the Court of First Instance stage, and the Court of Appeal stage. Debtors are urged to promptly respond to arrest actions, particularly during the earlier stages of an arrest while they have the better chance for diffusing the action with minimum casualties.

The risk of an arrest in the initial stage can be mitigated by making diligent efforts to verify the threat of arrest by obtaining legal advice followed by efforts to negotiate with the arresting party. However if the ship was in fact arrested, then debtors would be required to seek its release along with personal indemnity from the claim. Prudent debtors are expected to respond within the abovementioned 10 day window as failing to do so would only increase their losses. In order to release the vessel from arrest, debtors should first provide a counter security and then dispute the arrest. The counter security would also be determined by the court, but most likely it would be of an equal amount to that of the arrest security and issued in a similar fashion. If the release was unsuccessful, debtor may contest the court order for arrest by appealing to the Court of Appeal within 30 days from the order of arrest.

In general, debtors may defend against an arrest by disputing the lack of jurisdictions, lack of conditions to maritime debts, impracticality of an arrest or expiration of the time bar. Intuitively, the better approach is to prevent an arrest action from occurring in the first place by providing creditors with alternative options or collateral to cover the underlying debt. Personal guarantees, such as escrow accounts and Letters of Undertaking ('LOU'), are not accepted by the court at the moment; however this does not completely rule them out of practice. Escrow accounts are widely used in substantive law suits,

rendering it an available recourse at the disposal and mutual agreement of the parties outside the courts scope of review.

Wrongful arrests are rarely compensated by courts due to the principle of judicial immunity and the prudency assumption on the end of debtors. However, it would be possible for debtors to recover actual and direct damages if they can prove for certain that the arresting creditor has acted in bad faith and falsified the information or documentation submitted with the request for arrest.

In conclusion, in our view KSA maritime practice is healthy and functioning well but there are many nuances that need to be understood by all stakeholders. Going forward we anticipate the potential for further legislative changes and we shall provide an update as they occur and when such changes are effective. In the meantime, we hope this article has unravelled some of the ambiguity shrouding the practice of ship arrest on Saudi shores.





Yazan Saoudi
Partner
Dubai, UAE
y.saoudi@tamimi.com



Roy Georgiades
Senior Associate
Doha, Qatar
r.georgiades@tamimi.com

New Qatari Law on Small Vessels Registration

His Highness, Sheikh Tamim bin Hamad Al Thani, Emir of Qatar, issued on 23 August 2016 Law regarding Small Vessels Registration (Law No. 8 of 2016). The new law was issued after 36 years of operation of the old law (No. 19 of 1980) and it introduced new conditions and penalties that small vessel owners will have to comply with. The law is not yet into force. It is expected to be published in the Official Gazette in the next couple of months and will come into force one month after being published in the Official Gazette.

This article highlights some key points introduced by the new law and signposts the new and impending regulations that companies and individuals need to be aware of when registering or operating small vessels.

Vessels subject to the new law

The new law defines a 'Vessel' as 'every floating vehicle operating in maritime navigation or sports or prepared for the same, of which the cargo is less than (200) two hundred tons, even if it does not aim to achieve profit'.

New conditions

In order for a vessel to be registered with the relevant Department in Qatar, the vessel must meet the following conditions:

1. to be provided with navigational devices, communication devices, colors, lights, distress signals, equipment and tools necessary to achieve safety and security conditions as determined and issued in the competent Minister's decision;
2. to pass the technical inspection necessary; and
3. to be insured, the vessel's owner must provide the competent department with an insurance policy issued by a national insurance company guaranteeing third-parties' compensation for damage incurred.

The law permits the competent Minister to add other conditions for the registration or to exclude some vessels from the application of some conditions on a permanent or temporary basis.

If the owner of the vessel is non-Qatari, the owner is required to have a valid residence permit in Qatar. If a vessel is manufactured or is owned by a foreigner, the owner or the importer may be granted a temporary registration certificate to enable him to enter into Qatar and to inspect it, after perusal of the necessary documents.

The registration of the vessel will be cancelled should the vessel perish or is no longer available in any way for its intended use.

The law also prohibits any vessel from operating unless it is registered and has obtained a valid license for its operation. The law further requires the person operating the vessel to hold a valid licence to do so.

Government vessels are exempted from such registration and the competent Minister has authority to exclude scientific research vessels from registration.

Penalties

The law provides for financial and criminal penalties for breach. The breaching person will be subject to imprisonment for a period not exceeding three months and/or a fine not exceeding QR 50,000 if that person uses, deliberately facilitates, or participates in the use of any vessel without registration or operates a vessel without obtaining a valid license. The penalties can double in case of repetition.

The competent Minister may decide the crimes amicably at anytime during the legal procedures so long as there is no final judgment issued on the breach. The competent Minister is empowered to accept in consideration for settlement a financial amount equal to half of the maximum limit of the fine prescribed per breach. In the event of settlement the case would be dismissed.

New Implementing Regulations

The draft implementing the necessary regulations ('Implementing Regulations') for the application of new law is ongoing. The final version is expected to be issued in the next few months. We will comment further on the Implementing Regulations when issued.

Interim Period

Article 29 of the new law gives the owners of the vessels 6 months from the law's effective date to bring their affairs into compliance with the new law. The law would become effective after one month from the date it is issued in the Official Gazette. The competent Minister may extend the 6 months for one or more similar periods.

Next Steps

The new law (once in force) will repeal and replace the old Law No. 19 of 1980. The competent Minister will issue the decisions necessary for the implementation of the provisions of the new law. Until issuance of such decisions, the decisions currently in force remain valid to the extent they do not contradict the provisions of the new Law.

Conclusion

With the numerous new and impending regulations, penalties and conditional changes affecting the owners of the vessels, it is vital that the owners of the vessels make themselves fully aware of the changes introduced by this law. Vessel owners are advised to reconsider the way their vessels are operating and registered in order to bring them in line with the new law.

We also hope that Maritime Law No. 15 of 1980 will be amended soon.





Francis Patalong
Senior Associate
Riyadh, Saudi Arabia
f.patalong@tamimi.com

Saudi Arabia's Vision 2030: Black Swans for Saudi Arabia's Power Sector

During the global financial crisis it became fashionable to identify so-called “Black Swans” – events that apparently came from nowhere often with devastating effect, although in retrospect they were hiding in plain sight.

There are two “Black Swans” which have implications for Vision 2030, Saudi Arabia's fifteen year plan to wean itself from its current dependency on oil revenues. These have forced the country's socio-economic and climate change policies to be interwoven, creating significant, but not insurmountable challenges for the country's power sector.

Black Swan 1 – The Oil Paradox

The title of the 2011 Chatham House report “Burning Oil to Keep Cool” captures the essence of a basic problem. It estimates that Saudi Arabia's consumption of its *own* oil and gas is growing at around 7% per year and demand for power is especially high during the summer months, as air conditioning units run at maximum capacity for extended periods. Desalinated water production is also a very significant domestic consumer of hydrocarbons.



Heavily subsidized power and water have been part of the social compact in Saudi Arabia for decades. Both cool air and potable water are funded by exporting a resource (oil) which is the Kingdom's primary source of revenue. Those abroad who fill their tanks with Saudi oil have therefore, albeit indirectly, been funding this compact. At the same time, those oil-importing countries have enjoyed the significant benefit of exporting into the Saudi market. The downside of that position is a lack of private sector employment in the Kingdom itself – one of the key challenges which the Vision is intended to address, with a planned 6 million additional jobs by 2030 and a particular emphasis on education reform.

Moving to anything approaching cost-reflective tariffs for electricity and water is likely to be a painful, but ultimately necessary adjustment, if the value in the primary asset of the Kingdom is to be realised and invested (and not dissipated in its own domestic market). Achieving that goal will require a gradual shift in pricing and subsidy strategy across many sectors (not just power and water). You cannot invest premium oil revenues to pay for future pensions if you burn the oil at a discount to chill air and desalinate water.

The advent of shale technology has prompted a return to longer term price trends in the international hydro-carbon markets and opened almost boundless seams of carbon resource to countries which have hitherto lacked energy security.

In 2010, after the financial crisis but before the period of sustained prices above the US\$100 per barrel mark, the price per barrel of oil was around US\$80. However, if analyzed over 150 years or so of the global oil industry, even the current US\$50 would be high. Given that shale technology is only going to become more efficient, renewable energy technology will enjoy similar advances and political prioritization, that downward pressure on price is unlikely to lessen.

The problem is further exacerbated by the low cost labour model on which many regional/emerging economies have been built. The model assumes that basic technologies will remain labour-cost driven, but the emerging global growth story is all about the automated application of information technologies to manufacturing and services, and hence a move from labour to digitalised capital. The new technologies will compete more on skills and intellectual capital, and less on manual labour, and are electric, not oil based. This is a particular challenge for a country with 70% of its population aged below 30, most of whom have no private sector experience.

“...You cannot invest premium oil revenues to pay for future pensions if you burn the oil at a discount to chill air and desalinate water.”

Black Swan 2 – Climate Change

The global temperature for February 2016 was far above the long-term average, causing shock amongst climate observers. March 2016 set a new record temperature for that time of year, according to NASA's Goddard Institute for Space Studies. The global temperature was 1.28C warmer than the average for March from 1951 to 1980, which is used as a baseline. The world's two biggest-emitting nations have recently formally ratified the UN Paris Agreement on climate change, making it likely that the treaty – which will establish a new international carbon trading mechanism after 2020 – will enter into force this year.

The clear message is that the longer we wait, the more expensive it will be to mitigate the effects of climate change. The next landmark report from the UN climate science panel – due to come out in three stages between 2020 and 2022 – will look more closely at policies for managing this challenge, and will have profound implications for Saudi Arabia.

The Intended Nationally Determined Contribution (“INDC”) of Saudi Arabia under the United Nations Framework Convention on Climate Change (“UNFCCC”) identifies two development baseline scenarios – one reliant on heavy industrialization, which seems less likely; and the other envisaging economic diversification with a robust contribution from oil and its derivatives with revenues channelled into investments in high value-added sectors such as financial services, medical services, tourism, education, renewable energy and energy efficiency technologies to enhance economic growth.

Thus, in relation to Vision 2030, climate change is a Black Swan, because its acceleration (in terms of temperature increase and also in terms of political imperatives) is rapidly narrowing the goalposts for a sector already balancing rising domestic demand with reduced oil prices.

Job Creation

It should be apparent from all this that subsidy reductions are dependent both on private sector job creation, the public's ability to pay more for their electricity and measures in energy efficiency. This is by no means easy – one solution could be outsourcing these risks to distribution companies. The climate agenda may itself provide at least some scope for job creation. One proposed solution is to retro-fit existing infrastructure with environmentally sustainable measures. Morocco has set a welcome precedent here – with plans to create 600 “green mosques” by 2019. We have seen recently a move to Saudise the telecoms industry – thousands of young Saudis are being trained to perform functions which were previously the preserve of foreign workers. If a similar approach can also be adopted for the building of new housing stock, and if that build program is based around a zero carbon design criteria, the rate of increase in domestic demand will slow and new skills will have been developed for future generations.

Investor Issues

Consideration will also have to be given to large energy users who demand secure, consistent supply as a fundamental part of their business platform. In this context there is probably space for developer originated IPPs with a wide range of scaling – from small energy parks in economic cities or even the new resorts intended on the Red Sea through to larger scale schemes for specific industrial plant or natural resource projects. It should be noted that the Kingdom is replete with mineral resources other than oil but their extraction also requires power and water.

Successful future investment is likely to have certain characteristics. First, high quality job creation and training is likely to be fundamental. Second, if the investment relates to reducing the overall burden of energy consumption directly or indirectly, this is likely to be encouraged and made a priority. Thirdly, if the investment brings with it manufacturing or construction capacity then this will also be treated as a priority, especially where the business plan incorporates energy efficiency or renewable generation. Other businesses (for instance in the hotel sector) will have to consider their energy and water needs especially carefully. Education itself, which is fundamental to solving the challenges faced by Saudi Arabia, will also have to incorporate energy efficiency in the fabric of its buildings as much as in any revised curriculum.

In the Saudi context, the Saudi Electricity Company has a fundamental role on the supply side. There have been indications that the government (the 80% shareholder) is considering restructuring it – into generation, transmission and distribution companies. This is a relatively well-trodden path globally and many good lessons can be applied.

As regards renewables, a new wave of technology is being developed with enhanced generation and storage features. The Kingdom is actively participating in this already. Last year it was announced that hot sand concentrated solar power – which does not suffer the degradation issues existing solar technologies encounter in conditions of extreme heat and dust - is set to become a commercial reality. This will bring significant environmental and cost benefits, especially as regards rural power generation.

Conclusion

Globally we are faced with the consequences of our failure to wean ourselves from our “addiction to oil”. The young people of the Kingdom, and their peer group across the world, will inhabit that new reality. But, as will be gleaned from the above, there are many “moving parts”, each of which, to greater or a lesser extent, depends on the others. Sooner rather than later some hard choices will have to be made, based on a critical, iterative analysis of what is a fluid, developing and complex situation. The correct combination of educational and energy policies therefore represents the single most important element of Vision 2030.

For the full length version of this article please refer to www.tamimi.com.





Salma Kebeich
Associate
Cairo, Egypt
s.kebeich@tamimi.com

Dispute Resolution: An Overview of Document Production in Egypt

This article provides an overview of the principle of document production from an Egyptian Law perspective and also offers a comparison as against the International Bar Association Rules on the Taking of Evidence in International Arbitration.

Background

In common law jurisdictions, parties to a dispute disclose the documents or information in their possession that are relevant to the dispute in hand (the specific requirements differ from one jurisdiction to another). Contrary to the common law legal system, civil law jurisdictions do not normally recognise the disclosure and discovery of documents as an element of the pre trial fact-finding process.

The civil legal system approach mainly entails that each party to a dispute shall submit the proof supporting the position set out in the claim or defence (as applicable).

However, the development of international arbitration as a mechanism for dispute resolution complicated matters as it frequently involved parties from different legal systems. This drove the international arbitration community to find a common ground for the taking of evidence. Therefore, the International Bar Association Rules on the Taking of Evidence in International Arbitration were adopted in 1999 and revised in 2010 as guidelines for the evidentiary aspect of arbitration proceedings (“IBA Rules”). Although Egypt does not fall far from other civil law countries with relation to the evidence rules,

the Egyptian Law No. 25 of Year 1968 on Evidence in Civil and Commercial Procedures (the “Evidence Law”) recognizes “Production of Documents” as an instrument of discovery that exists in the common legal system.

In order to compare the Egyptian principle of document production as against the IBA Rules, it is necessary to first consider the former in some detail.

Production of Documents under the Evidence Law

As constitutionally established, one shall not be compelled to provide an evidence against himself under Egyptian law. Notwithstanding the aforesaid legal principle, Article 20 of the Evidence Law permits the party to a dispute to request that the opposing party produce documents in his possession that may assist the former to evidence his case. With this respect, the Article provides three grounds under which the request for the production of documents may be granted:

1. If the law permits the request for providing or delivery of a document (eg. the Egyptian Trade Law entitles the court to order the trader, even at its own initiative, to produce its commercial books).
2. If the requested document is common between the parties. In other words, if the document is in the interest of the parties or serves as a proof of their obligations and their mutual rights.

3. If the document subject to request was relied on by the opposing party at any stage of the proceedings.

Furthermore, Article 21 of the Evidence Law sets out the following requirements to be satisfied in order for any request for document production to be considered before the Court:

1. The description of the requested document.
2. The subject of the requested documents in detail.
3. The fact that is alleged to be proved by the requested document.
4. The circumstances which prove that the requested document is under the possession of the opposing party.
5. The reason for which the opposing party shall produce the requested document.

The judge does not have a discretionary power with relation to a production of documents request and is obliged to order the immediate production of documents in the following three cases: (i) if the requesting party proves that the requested documents do exist under the possession of the counterparty; (ii) if the party requested to produce the documents acknowledges possession; or (iii) the party requested to produce the documents is silent in response to the request and provided that the requested document(s) are specified, detailed, relevant and material. Conversely, if the party requesting production did not provide sufficient proof that the documents were indeed in the counterpart's possession or if the counterparty denied the possession of such documents he would be ordered to take an oath to the effect that the requested documents do not exist nor he is aware of their existence.

The judge may, upon failure of a party to produce the ordered documents or taking of the oath (as set out above), consider a copy of the requested document as evidence that it exists, or establish his decision based on the formality and content description provided by the requesting party.

Article 27 of the Evidence Law has established a wider spectrum for the production of documents that are under the possession of the opponent or a third party, which applies if the circumstances under Article 20 are not satisfied in the production of documents request.

Under this Article, the Evidence Law widens the scope to include a third party or parties who are in possession

The standards for production of documents under Article 27 of the Evidence Law are somewhat similar to their homologue under the IBA Rules which are specificity, materiality and relevance.

of the requested documents. To elaborate, Article 27 compels the production of documents provided it meets it is material to the claim before the court and sufficiently specific. In essence, the requesting party must demonstrate that the document(s) sought would have an impact on the outcome of the case albeit that it does not necessarily have to be constitute absolute proof of the issue at hand. This Article has a broad scope and includes all types of evidence including documents, paintings, pictures etc.

However, Article 27 is limited where it may prejudice a legitimate interest of the party to whom the request has been issued such as the right to confidentiality. Nevertheless, the judge may reconcile between the right to gather evidence and the right to confidentiality through ordering the production of a specific part of the requested document. The judge may also order a party to produce a document that would solely be reviewed by the Court.

Although outside the scope of the Evidence Law, it is also worth mentioning that the Rules of the Cairo Regional for International Commercial Arbitration ("CRCICA") have provided for the issue of production of documents. The CRCICA does not require the production of documents of documents upon a party's request. However, Article 27/1 of CRCICA has left the power to order the production of documents to the Arbitral Tribunal whenever it considers it necessary to adjudicate the subject matter. Pursuant to Article 30.4, if the party requested to produce the document(s) does not comply with the order of the Arbitral Tribunal, the latter would be at liberty to make any necessary inferences.

The IBA Rules

The IBA Rules has empowered Arbitral Tribunals to order a party to a dispute to produce documents or take reasonable steps to obtain such documents whether upon the request of the counterparty or according to its own discretion. The Rules have established three requirements for ordering production of documents, namely;

Specificity, the party requesting production shall provide a sufficient description of the requested document(s). The party shall also provide the reasons that make him assume that such documents are under the possession of the counterparty.

Materiality and Relevance, the party requesting production shall clarify why the requested document(s) are relevant to the dispute and how they would be material to the outcome of the case.

Finally, the party requesting the documents production shall demonstrate why he believes that such documents are under the possession, custody or control of the counterparty; and why production would not constitute a burden upon on the latter.

Moreover, the IBA Rules allow the Arbitral Tribunal to order third party to produce documents in accordance with the aforementioned requirements.

In a nutshell, the standards for production of documents under Article 27 of the Evidence Law are somewhat similar to their homologue under the IBA Rules which are specificity, materiality and relevance. Similar to Article 30.4 of the CRCICA Rules, as a deterrent, if the party ordered to produce document fails to produce this document or did not raise an adequate objection, the Arbitral Tribunal may draw an adverse inference.

Conclusion

The Evidence Law provides for diverse situations where documents require to be produced. Articles 20 and 21 have set an exhaustive list of fairly stringent conditions and standards before a judge is entitled to order a party to produce a specific document(s). However, Article 27 sets out a broader scope whereby production of documents may be ordered to include a third party or parties in possession of the requested documents. Moreover, the wide-ranging scope of Article 27 encompasses any form of evidence that is deemed necessary in order to allow the courts to establish the existence and extent of a claim.

There is a significant resemblance and cross over between Article 27 and the IBA Rules. There are no legal impediments preventing the parties in Egyptian arbitration in agreeing to rely upon the IBA Rules. Further, it is not uncommon in international arbitral proceedings seated in Egypt that Arbitral Tribunals order that it shall seek guidance from the IBA Rules when the issue of document production arises.





Ahmed Elklatawy
Associate
Kuwait City, Kuwait
A.Elklatawy@tamimi.com



Karim Marouny
Senior Associate
Kuwait City, Kuwait
k.marouny@tamimi.com

New Copyright Law in Kuwait

In 2014 Kuwait ratified the Berne Convention for the Protection of Literary and Artistic Works. In the same year the Council of Ministers issued Resolution No. 1070 transferring the dependency copyright administration from the Ministry of Trade and Industry to the National Library of Kuwait. The National Library provides services in the area of depository, preservation, and protection of intellectual property rights of authors through the application of the depository System, where the author or publisher registers and deposits the author's artistic works in the National Library to ensure the conservation of the author's intellectual property.

And now Kuwait has issued a new copyright law, Law no. 22 of 2016 (On Copyrights and Related Rights). The new law covers the copyright and related rights of natural and legal entities; Kuwaitis and foreigners permanently resident in the State of Kuwait; and foreign nationals belonging to one of the member States of the Convention or the Organisation and those under their auspices. The old law (No. 64 of 1999 on Intellectual Property Rights) has been revoked.

The protection established by the new law is conferred upon the copyright of original works of literature, arts, sciences, or knowledge, whatever the type of work or the means of its expression, its importance, or the purpose of its authoring or composition.

Protection of author's moral and financial rights

The author and the author's heir shall enjoy perpetual, inalienable and imprescriptibly moral rights over the work. Also, performance artists, their heirs and successors shall enjoy perpetual, inalienable and imprescriptibly moral rights.

The author, and their heirs and successors are to enjoy the exclusive right to permit or prevent any form of use or exploitation of the work, and for those authors who not have heirs or successors, the Kuwaiti National Council for Culture, Arts & Letters will be responsible to protect the authors' interests against any infringement. Also, performance artists enjoy some financial rights as per the new law.

For the first time in Kuwait, the new law protects the author's works, in particular from unauthorised publication, reproduction, public broadcast or rebroadcast, public communication, translation, adaptation, rental, or the making available of the work to the public including via computer, the internet, information networks, communications networks or other means.

The duration of protection endures for the period of the author's lifetime and fifty years following the author's death. Also, the duration of protection with regards to audio, visual, audio-visual works and films, collective



works of a legal entity, and computer programs shall be fifty years as of the date of the first showing or legitimate publication of the work, regardless of republication.

Enforcement

The new law gives an important role to the National Library of Kuwait, as for the library's staff (who are designated by the competent minister (i.e. the Minister of Information)) have the right to monitor the implementation of the Law by inspecting presses, libraries, publishing houses and public places. If any potential infringement is detected, they are to forward details of this to the relevant authority for further investigation. They have the right to request police assistance in the performance of their duties if needed.

Furthermore, by a reasoned administrative decision from the competent Minister, any establishment in violation of the law may be closed temporarily for a maximum period of three months and, in case of repetition, may have its license withdrawn and be closed permanently.

The Public Prosecution have the exclusive authority to investigate, act and make prosecutions in relation to all crimes resulting from the application of the provisions of the new law.

Any infringement of the moral or financial copyright of the author may incur a prison sentence of between six months and two years, and/or a fine of KWD 500 to KWD 50,000. This also applies to anyone found guilty of distributing equipment designed to circumvent the technical protection employed by copyright owners, for which the fine may be as much as KWD 100,000.

Conclusion

The new law is a significant step forward for the protection of copyright in Kuwait, and a reflection of how important the subject is to the government. It is hoped that Kuwait will be strong in enforcing compliance with the new law, and that it will continue to revise it to keep pace with technological advancements.

Ahmed ElKlatawy sadly passed away in September 2016

News & Events

19
SEPT

IBA Cocktail
Reception 2016





**19
SEPT**

C&I Welcome Back Lunch

The Construction and Infrastructure team hosted a boardroom lunch on 19 September in Gaucho Restaurant, Dubai. The lunch was a success and gave attendees the opportunity review this year and discuss the year ahead and topical issues for construction. Thank you to all those who have attended and helped make this a great networking opportunity.



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

**19
SEPT**

The Litigation Clinic: Board of Directors: An Overview

Al Tamimi & Company in collaboration with the GCC Board Directors Institute, was delighted to host its fourth in the Litigation Clinics series on 19 September in its DIFC offices. The clinic will be facilitated by Jane Valls, Executive Director, GCC Board of Directors Institute, Gary Watts, Partner & Regional Head of Corporate Commercial and Ayen Biar, Senior Associate, Litigation.

The seminar addressed the duties and liabilities of the Board of Directors from the litigation and corporate point of view. Jane Valls, the Executive Director of the GCC Board of Directors Institute discussed the corporate governance and the effectiveness of the board.

This initiative aims to introduce an informal discussion with our clients. Its objective was to identify common and important litigation issues and to shed some light on the concerns faced during the litigation process, and the court application of the law; and most importantly, how litigation works.



Ayen Biar
Senior Associate
Litigation
a.biar@tamimi.com

22
SEPT

Doing Business in the Middle East: Legal Considerations & Successful Strategies – Washington D.C.

On the 22nd of September we held an informative seminar in collaboration with the IIEL - Georgetown University Law School titled *Doing Business in the Middle East: Legal Considerations & Successful Strategies*.

With the current global business interest in the Middle East, particularly from the U.S., the seminar was a timely opportunity to hear from senior industry experts who provided valuable insight into the legal considerations and successful strategies that are top-of-mind for those doing business in the Middle East.

The panel sessions addressed key topics such as the legal framework, the foreign investment landscape and operational considerations. David Hamod, President & CEO of the National U.S.-Arab Chamber of Commerce, Washington delivered the keynote address where he gave an overview on the region and the current opportunities. Speakers also included:

- Ross Leckow, Deputy General Counsel, Legal Department - International Monetary Fund
- Dr. Andrei Mikhnev, Head of Trade and Competitiveness, Middle East – World Bank Group
- Andrew Keller, Deputy Assistant Secretary for Counter Threat Finance and Sanctions, Bureau of Economic and Business Affairs, U.S. Department of State
- Al Larson, Senior International Policy Advisor, Covington
- Alex Perkins, International Government Affairs – Fiat Chrysler Group, LLC

We were fortunate to have William Treanor, Executive Vice President and Dean of Georgetown in attendance where he expressed that the seminar was one of the best events they have held at the Law School. Essam Al Tamimi also gave a macro overview on the Middle East and shared his thoughts on doing business in the region. Al Tamimi panelists Samer Qudah and Ibtissem Lassoued discussed opportunities, success stories and key considerations.

The seminar brought together senior representatives from the business community including H.E. Salah Sarhan - Arab League Ambassador to the United States. The event was a great success and reinforced the vast amount of business interest in the Middle East.



27
SEPT

Technology, Media & Telecommunications

On Tuesday the 27th of September, Al Tamimi & Company's *Technology, Media & Telecommunications* team held a workshop for UAE based advertising and marketing specialists. The workshop covered a number of topics on which the TMT team frequently advises on, including issues such as the **advertising regulatory environment**, **native advertising** and **licensing**. The workshop provided a great opportunity to gain **insight** into law relating to these, and other issues, as well as insight into the TMT team's own practical experience.



Nick O'Connell
Partner
Technology, Media &
Telecommunication
n.oconnell@tamimi.com

28
SEPT

Emirates NBD Business Banking - The Multaqa



3
OCT

Capital Club Dubai Breakfast Seminar

In another legal step that moves the UAE forward, the country has recently passed an amendment to its federal bankruptcy laws. Essam Al Tamimi, Senior Partner and Founder was invited to speak and share his thoughts on the importance of the New UAE Bankruptcy Law and what the new law means.



**5
OCT**

Legal 500 GC Powerlist
Middle East Teams
Reception – Sponsored
by Al Tamimi & Company



FEDERAL DECREE-LAWS

- 4 of 2016 On medical liability.
- 5 of 2016 On the regulation of human organ and tissue transplantation.

FEDERAL DECREES

- 116 of 2016 On reshuffling the Board of Directors of Etihad Rail.
- 117 of 2016 On establishing a UAE embassy in the Republic of Chad.
- 118 of 2016 On appointing a UAE non-resident ambassador to the Kingdom of Bhutan.
- 119 of 2016 On establishing a UAE embassy in the Republic of Ghana.
- 120 of 2016 On appointing the Chairman of the President's Private Department.
- 123 of 2016 On appointing the Assistant Minister of Foreign Affairs and International Cooperation.
- 124 of 2016 On appointing the Assistant Minister of Foreign Affairs and International Cooperation for Economic Affairs.

MINISTERIAL DECISIONS

- From the Ministry of Human Resources and Emiratisation:

711 of 2016 On occupational health and safety officers in the construction and industrial sectors.

- From the Ministry of Economy:

- 369 of 2016 On announcing a revision of the Articles of Association of Abu Dhabi National Industrial Projects Company PSC.
- 406 of 2016 On announcing the incorporation of Nawah Energy Company PSC.
- 424 of 2016 On announcing a revision of the Articles of Association of Reem Investments PSC.
- 425 of 2016 On announcing a revision of the Articles of Association of Aabar Investments PJS.
- 445 of 2016 On announcing a revision of the Articles of Association of BMW Albatha Finance PSC.

REGULATORY DECISIONS OF THE CABINET

- | | |
|------------|--|
| 29 of 2016 | Amending Cabinet Decision No. (16) of 2014 promulgating the implementing regulations of Federal Law No. (6) of 2010 on credit information. |
| 30 of 2016 | Amending Cabinet Decision No. (27) of 2008 establishing the Health Council. |
| 31 of 2016 | Amending Cabinet Decision No. (15) of 2007 establishing the National Human Trafficking Committee. |
| 32 of 2016 | Establishing the National Counter-Terrorism Committee. |
| 33 of 2016 | Promulgating the implementing regulations of Law No. (14) of 2014 on communicable disease control. |
| 34 of 2016 | Amending Cabinet Decision No. (4) of 2016 on the fees for e-Dirham services. |

MINISTERIAL DECISIONS

- From the Ministry of Economy:

- | | |
|-------------|--|
| 446 of 2016 | On announcing the conversion of Tricolor Values Investments from a limited liability company to a private joint stock company. |
|-------------|--|

ADMINISTRATIVE DECISIONS

- From the Emirates Standardization and Metrology Authority:

- | | |
|------------|--|
| 75 of 2016 | Approving the Regulation on the Application of Legal Metrology. |
| 76 of 2016 | Approving UAE standard specifications. |
| 77 of 2016 | Approving the areas where accreditation is mandatory. |
| 78 of 2016 | Approving the technical requirements for registration of testing/calibration laboratories. |

- From the Federal Authority for Land and Maritime Transport:

- | | |
|-------------|---|
| 133 of 2015 | On the requirements for issuing small marine craft operator certificates and the addition of an occupational designation to licenses for the crews of national merchant vessels, pleasure craft, and foreign vessels operating in UAE territorial waters. |
| 60 of 2016 | On the implementation of the container weight verification requirement of Chapter VI, Part A, Regulation 2 of the International Convention for the Safety of Life at Sea 1974, as amended. |

- From the Securities and Commodities Authority:

- | | |
|----------------|--|
| 22/T.M of 2016 | On the regulation of the activities of the Central Clearing Company. |
| - | Certificate of amendment of the Articles of Association of Abu Dhabi Ship Building Company PJSC. |

- Certificate of amendment of the Articles of Association of National General Insurance Company PJSC.
- Certificate of amendment of the Articles of Association of National Cement Company PJSC.
- Certificate of amendment of the Articles of Association of Al Dhafra Insurance Company PJSC.
- Certificate of amendment of the Articles of Association of Insurance House PJSC.
- Certificate of approval of amendment of the Articles of Association of Ajman Bank PJSC.
- Certificate of amendment of the Articles of Association of Abu Dhabi National Hotels Company PJSC.
- Certificate of amendment of the Articles of Association of Dubai Islamic Bank PJSC.
- Certificate of amendment of the Articles of Association of Dubai Parks and Resorts PJSC.
- Certificate of amendment of the Articles of Association of Amanat Holdings PJSC.

About Us

Al Tamimi & Company is the largest law firm in the Middle East with 17 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.

17
offices



9
countries



57
partners



330
lawyers



670
staff



46
nationalities



Our Accolades



Our Practices

Arbitration

Banking & Finance

Capital Markets

Commercial

Construction & Infrastructure

Corporate

Corporate Structuring

Education

Employment

Family Business & Governance

Financial Crime & Sanctions

Financial Services

Regulation & Enforcement

Healthcare

Hospitality

Insurance

Intellectual Property

Litigation

Mergers & Acquisitions

Projects

Real Estate

Regulatory

Sports & Events Management

Technology, Media & Telecommunications

Transport

SENIOR PARTNER

Essam Al Tamimi
e.tamimi@tamimi.com

UAE

ABU DHABI
Stephen Forster
s.forster@tamimi.com

DIC, DUBAI

Samer Qudah
s.qudah@tamimi.com

DIFC, DUBAI

Husam Hourani
h.hourani@tamimi.com

THE MAZE TOWER, DUBAI

Bassem El Dine
b.dine@tamimi.com

RAS AL KHAIMAH

Ammar Haykal
a.haykal@tamimi.com

SHARJAH

Zafer Oghli
z.oghli@tamimi.com

BAHRAIN

MANAMA
Fotoun Hajjar
f.hajjar@tamimi.com

ARBITRATION

Paul Turner
p.turner@tamimi.com

BANKING & FINANCE

Jody Waugh
j.waugh@tamimi.com

CAPITAL MARKETS

Ahmed Ibrahim
a.ibrahim@tamimi.com

COMMERCIAL

Marcus Wallman
m.wallman@tamimi.com

CONSTRUCTION & INFRASTRUCTURE

Scott Lambert
s.lambert@tamimi.com

CORPORATE

Gary Watts
g.watts@tamimi.com

CORPORATE STRUCTURING

Samer Qudah
s.qudah@tamimi.com

EDUCATION

Ivor McGettigan
i.mcGettigan@tamimi.com

EMPLOYMENT

Samir Kantaria
s.kantaria@tamimi.com

MANAGING PARTNER

Husam Hourani
h.hourani@tamimi.com

EGYPT

CAIRO
Ayman Nour
a.nour@tamimi.com

IRAQ

BAGHDAD
Mohammed Norri
m.norri@tamimi.com

ERBIL

Khaled Saqqaf
k.saqqaf@tamimi.com

JORDAN

AMMAN
Khaled Saqqaf
k.saqqaf@tamimi.com

KUWAIT

KUWAIT CITY
Alex Saleh
alex.saleh@tamimi.com

Philip Kotsis

p.kotsis@tamimi.com

FAMILY BUSINESS & GOVERNANCE

Gary Watts
g.watts@tamimi.com

FINANCIAL CRIME & SANCTIONS

Khalid Al Hamrani
k.hamrani@tamimi.com

FINANCIAL SERVICES

REGULATORY & ENFORCEMENT
Rita Jaballah
r.jaballah@tamimi.com

HEALTHCARE

James MacCallum
j.maccallum@tamimi.com

HOSPITALITY

Tara Marlow
t.marlow@tamimi.com

INSURANCE

Yazan Al Saoudi
y.saoudi@tamimi.com

INTELLECTUAL PROPERTY

Omar Obeidat
o.obeidat@tamimi.com

LITIGATION

Hussain Eisa
h.shiri@tamimi.com

MERGERS & ACQUISITIONS

Gary Watts
g.watts@tamimi.com

DEPUTY MANAGING PARTNER

Hassan Arab
h.arab@tamimi.com

OMAN

MUSCAT
Ahmed Al Barwani
a.albarwani@tamimi.com

QATAR

DOHA
Hani Al Naddaf
h.alnaddaf@tamimi.com

SAUDI ARABIA

AL KHOBAR
Jonathan Reardon
j.reardon@tamimi.com

JEDDAH

Grahame Nelson
g.nelson@tamimi.com

RIYADH

Grahame Nelson
g.nelson@tamimi.com

PROJECTS

Alex Saleh
alex.saleh@tamimi.com

REAL ESTATE

Tara Marlow
t.marlow@tamimi.com

REGULATORY

Andrea Tithecott
a.tithecott@tamimi.com

SPORTS & EVENTS MANAGEMENT

Steve Bainbridge
s.bainbridge@tamimi.com

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

Nick O'Connell
n.oconnell@tamimi.com

TRANSPORT

Yazan Al Saoudi
y.saoudi@tamimi.com

CHINA GROUP

Yi Long Wong
y.wong@tamimi.com

IRAN GROUP

Hamid Mojtahedi
h.mojtahedi@tamimi.com

KOREA GROUP

Jongeun (Christina) Lee
j.lee@tamimi.com

Monday, 14 November 2016

ARBITRALWOMEN BREAKFAST AND SPEEDNET

During the Dubai Arbitration Week 2016

Join us to hear from leading experts who will provide tips on the art of networking and how to advance in your career as a successful female arbitrator.

This event is the perfect opportunity to network with female arbitration practitioners of all ages and stages in their career.

SPONSORED BY:

التميمي و شركاه
AL TAMIMI & CO.

Agenda:

09.00am – 09.30am: Registration and light breakfast

09.30am – 09.40am: Welcome

09.40am – 10.00am: Panel session – tips on the art of networking and how to advance in your career as a successful female arbitrator

10.00am – 11.00am: Speed networking

11.00am – 11.15am: Round up and close

Venue:

Al Tamimi & Company Dubai Office, 6th Floor, Building 4 East
Dubai International Financial Centre (DIFC)

Audience:

Networking event for women in arbitration

RSVP:

events@tamimi.com

Spaces are limited and will be allocated on a first registered basis



