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AL TAMIMI & CO.

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LAW UPDATE

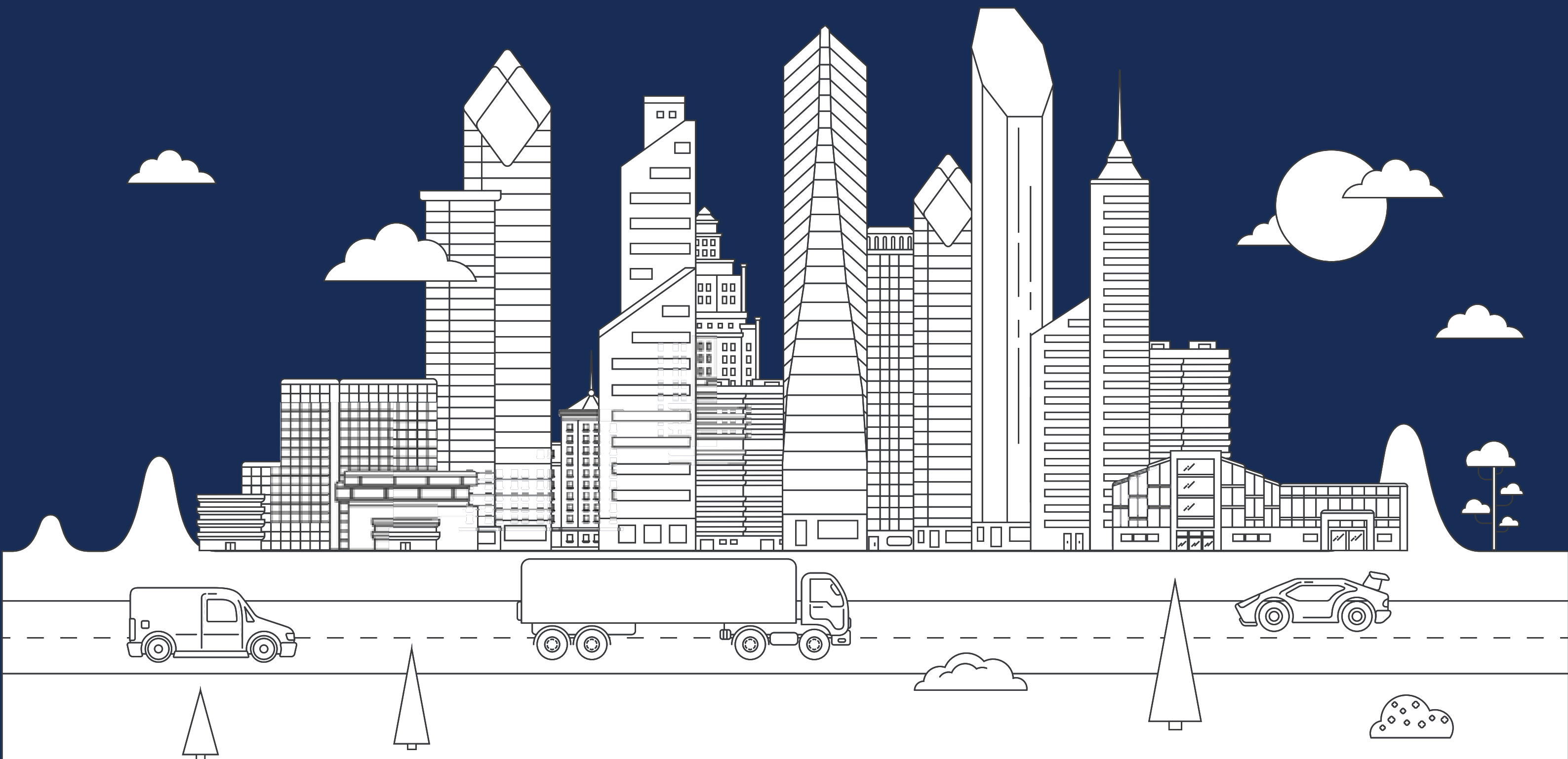
Latest Legal News and Developments from the MENA Region

Brokers 101: What Every Property Purchaser Must Know about Real Estate Agents in Dubai

Foreigners Right to Own Real Estate in Iraq

UAE Introduces New Public Prosecution focussing on Cyber Crime

Update on Labour Bans in Qatar



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In this Issue

Welcome to the March edition of Law Update, in this issue we shine the spotlight on real estate and hospitality.

This feature is very timely as we prepare to launch our real estate guide 'Know Your Rights for Real Estate Investors in Dubai' which we have very proudly published with the Dubai Land Department. The guide provides companies and individuals with the vital information they need when considering investing in real estate in Dubai and seeks to answer some of the most important questions that investors have regarding their real estate investments and dealings with government authorities, developers and other relevant parties. The guide also provides a checklist of the key aspects that an investor needs to be aware of when buying real estate off-plan in Dubai. A copy of this publication can be found on our website.

There is much talk about the economic outlook for 2017 and it is very reassuring to see that the real estate, hotel and leisure sectors continue to remain strong. We are seeing increasing activity from private investment sources, including funds and REITs, which is both exciting and encouraging.

This month, we pay particular attention to foreign ownership rights in key jurisdictions such as Saudi Arabia, Qatar and Oman. Our team also reflect on the Abu Dhabi Real Estate Law and the implementation of the Law one year later. Our special feature includes some key insights on the new regime for mortgaging of granted land in Dubai (page 46) and what every property purchaser must know about real estate agents in Dubai (page 38).

We have some interesting articles from our Technology, Media and Telecommunications team who discuss the role of technology in altering delivery of education (page 24) and Dubai's blockchain strategy (page 22). Our litigation practice also provides an introduction to the UAE's new public prosecution for cyber crime.

Beyond this, we travel around the region for our regular jurisdiction updates, talk due-diligence and risk assessment in supply chain management and hear from our Construction and Infrastructure team on the New FIDIC 2017 Yellow Book.

We hope you enjoy this edition of Law Update and find it as in depth and informative as ever.

For further information on any of these articles please do not hesitate to contact us.

All the best

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LAW UPDATE Judgments

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

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Dubai Court Rules on Liability of Banks in Relation to Faxed Authorizations

It is well established that the responsibility and liability of a bank towards its customer is governed by the applicable law and the relevant contract entered into between the two parties. This contract also determines how the services will be provided and sets out the obligations of each party. In the event of a breach of an express or implied term of a contract, three elements a be satisfied in order to establish liability: proof of breach by the bank against the aggrieved, damages and the causation between the fault and the damage suffered by the aggrieved.

This article discusses Dubai Court of Cassation judgment 562 of 2016 that specifically addresses the enforceability of a fax indemnity documents signed by the bank's customers and whether a bank will be held liable for any damage sustained by the customer as a result of an incorrect bank transfer sent via facsimile.

In this case, we successfully represented a bank (the Bank/Defendant) against the bank's customer (the Claimant) who alleged that the Defendant wrongfully transferred a sum of money from the Claimant's account based on a forged letter instructing the Bank to make the transfer that was sent by facsimile. The Claimant argued that it did not issue or send instructions to the Defendant requesting such transfer. The Claimant argued that the Defendant should have, prior to approving the transfer, verified the signature, as required by UAE Central Bank regulations, by making a call to the Claimant's signatory as a safeguard against fraud, which the Defendant failed to do. In this case, the court held that the indemnity contained in the fax indemnity document (signed by the customer) could be applied because the Bank had not committed fraud or gross error. In order to invalidate an indemnity or limitation of liability, it must be established that there was an act (by the other party) of fraud or gross mistake. In this case, there was no fraud or gross negligence giving rise to liability.

Court of First Instance

The Claimant brought commercial action 430 of 2016 against the Defendant (the Bank) before the Dubai Court of First Instance seeking judgment against it for damages incurred due to the Defendant's breach of the banking customary practice. The Claimant also sought for the appointment of a Forensic Laboratory to perform forensic analysis of the signature of the wire transfer request based on the specimen signature the Claimant had given the Bank for their records.

The Court of First Instance dismissed the Claimant's claim on 14 March 2016 on the basis that the Bank did not act negligently in processing the transfer and that the Bank acted on the instructions they received from the Claimant via facsimile, and that the Claimant's authorization included a bank disclaimer. The Court of First Instance found no proof of any fraud or gross error as to engage the Bank's liability and accordingly dismissed the claim.

Court of Appeal

The Claimant appealed in Commercial Appeal 430 of 2016 and on 14 June 2016, the Court of Appeal dismissed the appeal and upheld the ruling of the Court of First Instance. The Claimant appealed further against the judgment to the Dubai Court of Cassation.

Court of Cassation

In the appeal filed by the Claimant against the Court of Appeal judgment, the Claimant argued that the purported fax letter pursuant to which the transfer was made was fake and was not issued by its authorized signatory and that the Claimant's authorization to the Bank does not dispense with the verification procedure. The fact that the bank processed the transfer without verifying the fax and its source constituted (they argued) gross error giving rise to liability.

The Court of Cassation dismissed the Claimant's appeal, explaining that:

1. Three elements are necessary to engage a bank's liability in relation to its banking activity: a proven case of negligence (breach of contract) against the bank in relation to the aggrieved; damage; and a causal link between the two. A contractual disclaimer may be applied unless the debtor has committed fraud or gross error. A bank may, in a banking services contract, agree that it shall be excluded, during the term of the contract, from liability for error. The burden is upon the bank to prove that the customer had accepted the disclaimer.
2. According to the fax indemnity document signed by the Claimant, the latter agreed to bear all risks and damages arising as a consequence of the Defendant acting on any instruction received by the Defendant via facsimile. The Defendant had sent the Claimant a notification advice to their email once the transfer was sent on 19 August 2013. The particulars entered on the wire transfer request were accurate details pertaining to the Claimant's account which they must maintain and protect as confidential information. The passport number of the Claimant's authorized signatory was entered as given in the declaration of acceptance of facsimile instruction and the account number, the account holder and all other fields were entered accurately. There was no error in the information provided to the Defendant and the request was signed inside the box marked "Authorized Signatory". Hence, there was no fraud or gross negligence giving rise to liability and the entire contention was baseless. Based on the foregoing, the appeal was dismissed accordingly.

Comment

This Court of Cassation's judgment provides an assurance to banks who still accept wire transfer instructions via facsimile. In the past, we have seen a number of judgments where the Dubai Courts held that banks are liable for potential fraud or forged fax instruction especially if the Claimant establishes that the facsimile was not sent from the Claimant's facsimile machine. However, banks need to make sure that all the information contained in the fax instructions are accurate and match its records. In addition, for the avoidance of any doubt, banks' employees need to verify the signature to the best of their ability based on the specimen signature of their customers. It is pertinent to note that the Dubai Court in this judgment did not deal with the slight mismatch between the signature in the fax instruction letter and the specimen signature form as this is normally done with cheque related cases. In this case, the bank did not have the original of such fax instruction letter.

In summary, the Court of Cassation will uphold these types of limitation of liability clauses when it comes to banking transactions as long as it is not contrary to public policy, specific statutory mandatory provisions or excludes liability for fraud, gross error or deliberate misconduct.

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The Role of Experts in Patent-infringement Cases in the UAE

This is the first patent infringement dispute of this nature filed in the UAE. The patent is in the field of technical telecommunication "mobile TV" which was introduced into the UAE in July 2007. The Abu Dhabi Judicial department did not have an expert specialised in the field of telecommunication "mobile TV" registered with them who could review the parties' documents. As a result, the appointment of a committee of international and local experts was necessary and was an important and rare aspect of the case.

In this case, the Claimant requested an expert to determine whether his invention was protected by the patent in question and determine the extent of the Defendant's use of the invention and the profits made as a result of the alleged patent infringement. Compensation for moral damages as well as profits gained by the First Defendant was also claimed by the Claimant.

It is important to note in this case that the Claimant challenged the integrity of the committee of experts appointed by the court and raised allegations that the experts appointed by the court were not impartial (the Claimant argued that one of the experts worked for a patent and trademark law firm that had a close business relationship with the Second Respondent); however, the Claimant's appeal was rejected. It is well established by the Court of Cassation that the trial court has full discretion to find facts and weigh evidence, adopting and discarding evidence to the extent that it finds it persuasive. The court need only explain the truth of which it is convinced with supporting evidence. The trial court may adopt the report of a court-appointed expert over the report of a consultative expert (in this case the consultative expert was appointed by the Claimant) if it considers his analysis of the points at issue to be sufficient.

The Claimant's claim for infringement and request for the Defendants to cease using the patent was not successful and therefore the Claimant was not entitled to any remedies.

Background

The action was brought before the Abu Dhabi courts by an inventor (the Claimant) against a telecommunications corporation (the First Defendant). During the proceedings, the First Defendant joined the Second Defendant. The Second Defendant was joined on the basis that they were the owner of the system which the First Respondent had purchased. The patent related to a service, the "Mobile TV service", which allows subscribers to view selected TV channels using live streaming of satellite TV programming.

The dispute revolved around purely technical issues and therefore experts were needed. It is common practice for UAE courts to adopt experts' report as part of its reasoning in its decision.

The Claimant challenged the integrity of the committee of experts appointed in this case by raising allegations that the experts appointed were not impartial.

Court of First Instance

The Court of First Instance issued its judgment in favour of the Claimant, ordered the First Defendant

to pay compensation in the amount of AED 30 million for the patent infringement and ordered the First Defendant to cease using the mobile TV system. The Court of First Instance based its decision on a consultative experts' report which the Claimant had commissioned.

Both parties appealed the Court of First Instance judgment. The Claimant appealed to amend the compensation to AED 100 million and the First Defendant argued that the Court of First Instance had misapplied the law by relying on a consultant's report prepared at the request of the Claimant, from a consultant whose background was unknown, was not a sworn expert and without the Defendants involvement. The Second Defendant joined the First Defendant in its appeal and requested the same remedies.

Court of Appeal

The Court of Appeal rejected the Claimant's appeal on the basis that his objections were without merit.

The Court of Appeal issued a preliminary decision to appoint a tripartite panel of experts consisting of a telecommunications expert, a patent expert, and an accounts expert. The Experts Division at the Judicial Department, Abu Dhabi, nominated a patent expert and accounts expert from among its own experts but nominated an international expert in telecommunications engineering from among the experts put forward by the Second Respondent from this area of specialty (given the lack of experts practicing within this area at the Judicial Department).

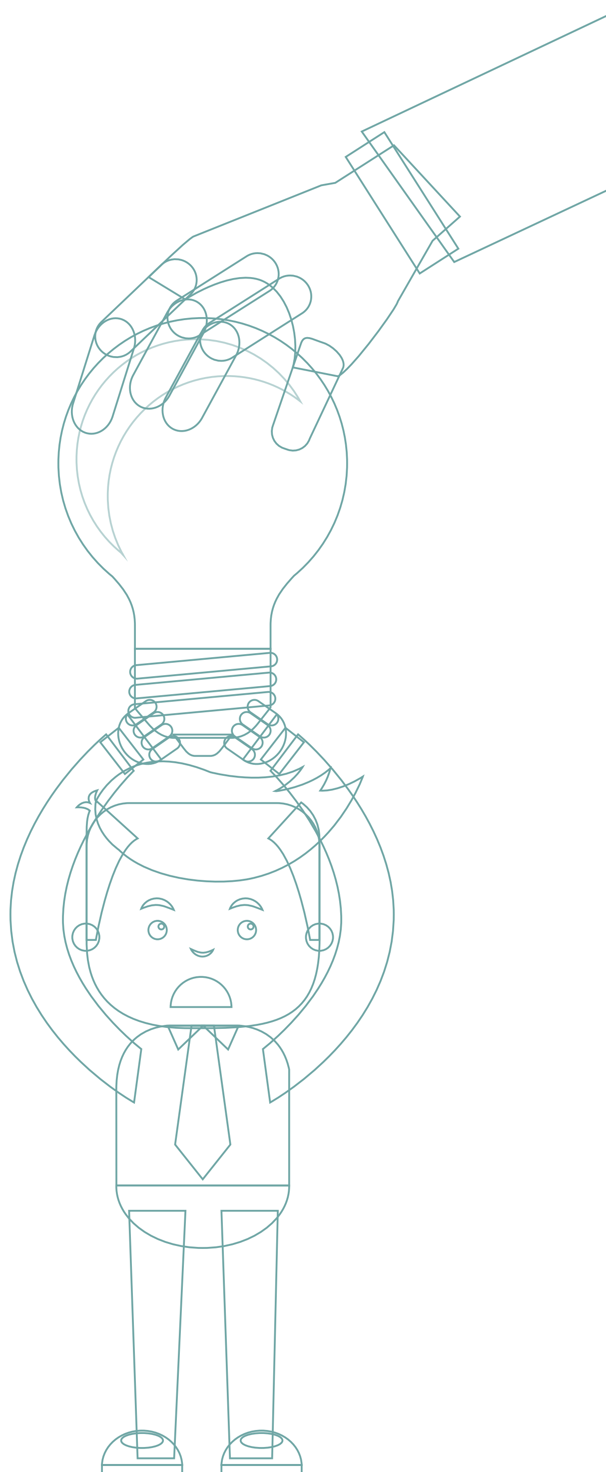
The Court of Appeal held that it was clear from the report of the tripartite panel of experts that the First Defendant did not infringe the Claimant's patent, and issued its judgment overruling the Court of First Instance judgment and rejecting the claim of the Claimant.

Court of Cassation

The Court of Cassation (in Civil Appeal 81 of 2016) upheld the Court of Appeal's decision and held that it was clear from the report of the panel of experts that there was no infringement and the system used by the First Defendant and integrated by the Second Defendant was different to the Claimant's patent. In addition, the First Defendant had purchased the system they implemented from the Second Defendant pursuant to a letter of intent which predates the filing of the Claimant's patent.

Comment

This case confirms the general rule that the court may rely on an expert report if it has not seen any grounds on the challenges against it. In this case, the committee of experts produced a report that was very clear and the committee had complied with its assignment.



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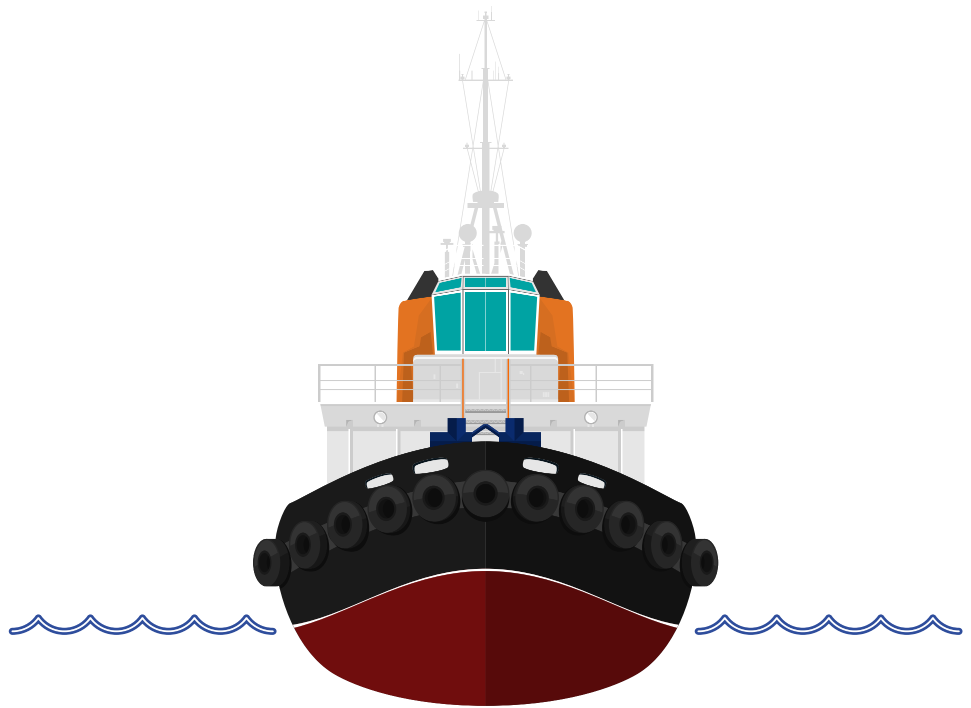

UAE Court Dismisses Physical Bunker Supplier Claim Against Ship Owner

This article is a brief review of a recent Fujairah Court of Appeal judgment (appeal numbers 264, 268 and 269 for the year 2015/Commercial) in relation to a bunkering matter. The case deals with issues faced when a contractual bunker supplier becomes insolvent, and whether the physical supplier of bunkers (or bunkering company) can recover the unpaid cost of bunkers against ship owners or whether the claim is limited to recovery against the insolvent contractual supplier. The rights of the bank in intervention proceedings are also addressed as is the concept of assignment to the bank under UAE law. Al Tamimi and Co represented the Ship Owners in this matter.

Background

A contractual bunker supplier (the "Contractual Supplier") sent a purchase order for bunkers to a bunkering company ("Physical Supplier") requesting the latter to supply a ship (which was owned by a shipping company (the "Ship Owners")) with marine fuel oil and marine gas oil (the "Bunkers"). The Physical Supplier then supplied the ship with the ordered Bunkers and the ship's Master/Chief Engineer signed and stamped the bunker delivery note confirming receipt of the Bunkers.

As is normal practice, a commercial invoice detailing the Bunkers value was sent by the Physical Supplier to the Contractual Supplier; however the invoice was not paid by the Contractual Supplier.

Unfortunately, in the intervening period, the Contractual Supplier became insolvent, but it had assigned all its rights to a bank (the "Assignee") in relation to its bunker supply contracts including the purchase order by virtue of a Security Agreement. Consequently this transaction became the subject matter of a dispute in Fujairah, UAE.

The Nature of the Claim

On 19 May 2015, the Physical Supplier bunkering company obtained an arrest order from Fujairah Court against the supplied ship's sister ship (the "Arrested Ship") which was at Fujairah Port at the time. The Physical Supplier based the arrest order request on the purchase order, the bunker delivery notes and the commercial invoices. On 26 May 2015 the Physical Supplier filed a substantive claim before Fujairah Court of First Instance against the Arrested Ship, the Ship Owners, the managers of the Arrested Ship and the insolvent Contractual Supplier (the "Defendants"). The claim was for USD 175,196 for to the unpaid cost of the supplied Bunkers and also to validate the arrest order against the Arrested Ship.

On 27 May 2015, the Ship Owners deposited counter-security in the sum of USD 175,196 with

Fujairah Court's Treasury in order to release the Arrested Ship and substituted the arrest order with a bond/counter security to allow the Arrested Ship to be released. The Court subsequently decided to release the Arrested Ship.

On 24 June 2015, the Assignee bank filed an intervention application and joined the proceedings by bringing an action against the Defendants, seeking the cost of the unpaid Bunkers (USD 175,196) based on the Security Agreement.

Fujairah Court of First Instance

On 25 October 2015, Fujairah Court of First Instance rendered its judgment by holding the Ship Owners, the managers of the Arrested Ship and the Contractual Supplier jointly liable to pay the Physical Supplier the sum of USD 175,196 plus interest 26 May 2015 until the full payment is made. The Court also confirmed the attachment over the counter security which was deposited by the Ship Owners to release the Arrested Ship. Furthermore, the Court decided to dismiss the Assignee bank's intervention application.

Fujairah Court of Appeal

In November 2015, the Ship Owners and the Contractual Supplier (the "Appellants") as well as the Assignee bank challenged the Court of First Instance's judgment by filling appeals before the Fujairah Court of Appeal. The Appellants argued that the Ship Owners did not have the capacity to be sued in this claim as it was evidenced by the case file that there was no contractual relationship between the Ship Owners and the Physical Supplier with respect to the Bunkers. Furthermore, it is argued that the contractual relationship in relation to the Bunkers was between the Contractual Supplier and the Physical Supplier. Therefore, the Physical Supplier's claim should be dismissed against the Ship Owners based on Article 252 of the Civil Transactions Law which states that:

"A contract may not impose an obligation upon a third party but it may create a right in him."

In relation to the Assignee bank's appeal, the Ship Owners argued the Court of First Instance was in compliance with UAE law in relation to refusing the Assignee's intervention application. Alternatively, the Ship Owners argued that the Security Agreement did not meet the requirements for an assignment set out under Articles 1109, 1110 and 1116 of the Civil Transactions Law, as the Contractual Supplier did not inform the Ship Owners of the Security Agreement and the Ship Owners did not accept such Agreement.

Fujairah Court of Appeal Decision

On 9 November 2016, Fujairah Court of Appeal handed down its judgment and decided to revoke the Court of First Instance's judgment and to dismiss the Physical Supplier's claim against the Ship Owners, as there was no contractual relationship between the Ship Owners and the Physical Supplier with respect to the Bunkers. The Court of Appeal based its judgment on the abovementioned Article 252 of the Civil Transactions Law. Moreover, the Court held that the insolvent Contractual Supplier should be liable for the cost of the unpaid Bunkers, as the contractual relationship in relation to the Bunkers was established between the Ship Owners and the insolvent Contractual Supplier. The Court of Appeal also dismissed the Contractual Supplier's appeal.

Furthermore, the Court of Appeal dismissed the Assignee bank's appeal and ruled that the supplying bunkers did not fall within the scope of the Security Agreement as well as holding that the assignment of rights relied on by the Assignee bank did not meet the requirements of UAE law.

Comment

This is another judgment in which the UAE Courts have dismissed the Physical Supplier's claim against the Ship Owners based on Article 252 of the Civil Transactions Law. However, the judgment does not examine the liability of the ship in relation to the Bunkers.

The importance of this judgment is the fact that the Court of Appeal examined the Security Agreement and the Assignee bank's application and decided that the Security Agreement did not include the bunkers supply contracts of the Contractual Supplier, as well as holding that the same does not meet the requirements of the assignment of rights under UAE Law. Therefore, any further claim filed by the Assignee in the UAE based on the Security Agreement against the ship owners regarding bunker supply claims may be dismissed by the UAE Courts in the future, if the Court of Appeal judgment is upheld by the Federal Supreme Court.

Lastly, It should be noted that the Court of Appeal judgment is not a final order, and it has been challenged and we await final determination from the Federal Supreme Court.

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UAE Introduces New Public Prosecution Focussing on Cyber Crime

On 12 March 2017, Ministerial Resolution No. 220 of 2017 established a Federal Public Prosecution specialized in Information Technology crimes. The Resolution affirms the UAE's ongoing strategy to combat new crimes arising from fast paced technological development, and the continuous development of the criminal justice system.

Prior to the establishment of this new body, to be based in Abu Dhabi, all crimes committed using information technology tools were reviewed by the ordinary Public Prosecution offices. Now, with the establishment of this specialised Public Prosecution, such crimes will generally be reviewed exclusively by the new entity – except where the Attorney General directs otherwise.

Specialist Focus

Generally speaking, Federal Law No. 5 of 2012 (the "Cyber Crimes Law") is the main legislation governing crimes committed using the internet and technological platforms. The crimes tackled by the Cyber Crimes Law include internet fraud and forgery, unlawful access and disclosure of information, impersonating others, using fake IP address to mask the commission of a crime, and other such offences, and the penalties set out in the law are severe. Other laws (such as the UAE Penal Code) govern many of these crimes, but the Cyber Law specifically focuses on those committed through technology platforms, such as fraud committed through emails.

Article 2 of the new Resolution provides that the new Public Prosecution office will investigate the crimes referred to in Articles 17, 19, 23, 25, 27, 31, 32, 35, 36 and 37 of the Cyber Crimes Law. These Articles include the following:

- Promotion of illegal drugs and narcotics;
- Crimes involving pornographic materials or gambling activities and other acts that may prejudice public morals;
- Incitement or tempting others to commit prostitution or debauchery;
- Acquiring or using illegal funds or concealing the origins of any illegal funds;
- Trade or promoting weapons, ammunitions or explosives;
- Calling for or promoting the collection of donations without a license;
- Calling for the evasion from the UAE Laws and regulations;
- Planning, organizing or calling for unlicensed demonstrations or protests or similar acts;
- Human trafficking or human organs trafficking; and
- Offences to Islam, divine religions and their rituals.

Apart from the above, the Attorney General may further transfer to the new Public Prosecution any other acts penalized by the UAE's applicable laws, whenever such acts are committed using technological tools.

Expected Effectiveness and Successful Results:

A variety of cyber crime cases have been brought before the ordinary Public Prosecution offices including:

- Cases involving fraudsters or impersonators who are unknown and anonymous. (The investigation process usually reveals their identities quite quickly by tracing many leads they leave behind.)
- Obtaining orders to block illegal websites on an urgent basis.
- Obtaining arrest orders and travel bans, enabling offenders to be arrested when entering or departing the country.

(For more details, please see our previous Law Update Article "Fighting Unlawful Imitation and Fraudulent Schemes" – September 2015 issue: - http://www.tamimi.com/en/magazine/law-update/section-11/september-5/cyber-crimes-fighting-unlawful-immitation-and-fraudulent-schemes.html .)

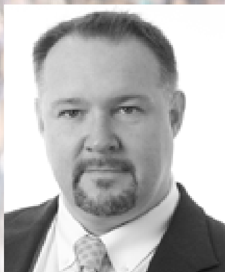
> "Specialist Prosecutors, experienced with these types of crimes and the technologies involved, will be better equipped to serve the needs of the community."

With the establishment of the new Public Prosecution, the criminal justice system will be further improved. Specialist Prosecutors, experienced with these types of crimes and the technologies involved, and with specialist resources and training, will be better equipped to serve the needs of the community.

Conclusion

Whilst the ordinary Public Prosecution offices were very effective in addressing and deterring such criminal acts, the establishment of a specialized Public Prosecution office will further ensure suitable outcomes in a practical and timely manner. This approach signifies the UAE's continuous development to seek excellence and eminence. It also indicates the UAE's constant determination to safeguard individuals, the community and the State from these types of crimes, and to seek to prevent the misuse of technology.

As we always recommend, once there is a discovery of an illegal act committed through technological platforms, early legal assistance is important to ensure compliance with the applicable laws and that the correct strategy is in place.



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Major Events Security Considerations in the UAE

The type and range of major events being successfully hosted across the GCC region over the past several years provide an impressive roll call. Headline sports events already include world class golf, tennis, horseracing, swimming, and rugby tournaments to Formula 1™ races, rally racing, and UCI cycling events mixed liberally with a growing array of concerts and cultural events as well as the much anticipated Asian Football Cup 2019, the FIFA World Cup 2022, and Expo 2020 events. This dynamic growth plays an important role in providing public entertainment, encouraging the business and leisure sector to drive employment, tourism, community development, as well as gains in other, related sectors.

While this rapid expansion, which includes hard and soft infrastructure, is very positive for both government and private enterprise, industry growth cannot be sustained without parallel development in regulatory structures and services that take into account some of the practical concerns of increased safety and security threats. Specifically, there need to be comprehensive strategic and safety plans to take into account the potential impact of risks manifested by major events, from fire and traffic congestion through cyber or terror attacks. A significant amount of the development and investment in the major events sector is founded on the requirement for safety and security.

Who Is Responsible for Ensuring Security?

It is important to note that, in addition to governmental entities such as tourism departments and sports councils, event rights holders, host facilities or venues, event organisers, broadcasters, sponsors, and a range of third party contractors will likely be involved in one or more stages of major event delivery. Even where stakeholder coordination is exemplary, there may be competing commercial interests and an imperfect flow of information and oversight as to all levels of potential risk. At one or more of these levels, commercial decisions may be taken to contract out of or to insure against certain identifiable risks. While this is often sound commercial practice, it may not necessarily prioritise risk identification and reduction. For this reason, the role the authorities – most notably the police – is paramount in coordinating an appropriate balance between hospitality and security.

The UAE Sports Law

In 2015, the Security of Sports Facilities and Events Resolution (Cabinet Resolution No. 31, concerning the Executive Regulations of Federal Law No. 8 of 2014) (the 'Resolution') was issued. It provides guidance around the scope of legal obligations affecting those involved in the organisation and hosting of sports events. The background and main objectives of the Resolution are to outline obligations concerning sports facility organisers, fan conduct, and tackling corruption. The guidelines are welcome at a time when the UAE has firmly established its credentials as a host for events across a broad spectrum of sports and looks to build on its strong record as a destination for sports and events tourism.

The Resolution is the primary vehicle through which the Ministry of Interior will oversee elements of safety and security

at sports events in the UAE, leveraging the police (in Dubai for example, under the General Department of Protective Security and Emergency at Dubai Police), civil defence, and other relevant authorities as necessary. This is a cornerstone law for the UAE sports industry, so it is critical that people and companies operating within it – including event organisers, authorised private security firms, sporting regulatory bodies, fans, teams, and other participants – fully understand their obligations to avoid falling foul of the law, which, at its most punitive, can carry serious criminal charges.

Some of the initial headline-grabbing elements of the Resolution relate to unruly fan behaviour, but it actually has a wide-ranging impact, from the planning, coordination, and safety behind event organisation through to on-pitch, court, or track conduct, as well as in the stands. The Resolution's target impact can loosely be grouped under three target areas in terms of application and addressing safety and security at sporting events through: (i) facility/venue and organiser practices; (ii) fan conduct; and (iii) anti-corruption.

Sports Facilities & Organisers

The bulk of the Resolution relates to sports facilities and organisers, with organisers and venue managers subject to specific new compliance requirements and oversight, aimed at ensuring the UAE is aligned with or setting global best practice. Most notably, all sporting events should have a flexible administrative and organisational guide, including necessary measures relevant to the nature and scope of the event (e.g., detailing proposed access/egress routes, safety procedures, security plans, communications, etc.), as well as specifics on the venue. This guide is subject to approval by a designated police contact.

For a number of sophisticated annual event organisers, designing, submitting, and ultimately implementing their event management plans, in accordance with their approved guide, will essentially cement and perhaps reformulate some elements of best practices they have previously established. This could, however, mean substantial change for some. These requirements are welcome, such as the need for a designated and qualified Event Security Officer to coordinate with a Police Observer, as defined in the Resolution. And the use of the latest technology in communications and crowd management, effectively mandating a blend of common sense with modern capabilities, to increase safety and security as appropriate for modern day sporting entertainment.

Fan Conduct

Sports fans face tougher fines for criminal actions conducted at events or venues. The Resolution does not replace the existing Penal Code in such circumstances, but it does complement it. This means that committing any Penal Code offence at a sporting event will now be considered an aggravating factor, so it would be likely to attract greater punishment than if it had been committed elsewhere. There will also now be formalised crowd restrictions on entering the field of play, bringing prohibited or dangerous materials into a venue, taking to or acquiring weapons inside a venue, violent conduct, throwing materials, insulting or racially abusing or gesturing at other people, disregarding facility rules, and using a venue for political purposes.

Anti-Corruption

Given what is unfolding in global sport at present – with various recognised international sporting bodies facing intense scrutiny around their actions – this aspect of the Resolution is not only timely but, in some ways, pioneering. In essence, it removes a significant chunk of self-regulation from sporting bodies and brings it under federal law. Cheating, fraud, or corruption in gaining rights to host a sporting event can now be punishable by a fine of up to AED 1 million, plus liability for certain costs and potential suspension of relevant activities for a minimum of two years.

Event Risk Management Plans

We would note that it is important to comply with the law and that doing so requires prompt application to the police with details of the proposed event. The initial application must include the time/date of the event, type of sport, details of the organisers and promoters, insurance policies, if any, security and safety plan(s), and the anticipated number of attendees. Depending on the size and type of event, the police may ask for further documents and details, but in all cases there is a risk of initial rejection and, consequently, delay. As always, compliance will be aided by a solid internal corporate governance structure and culture, a prudent and comprehensive event risk management strategy, and good communications with the relevant authorities.

The full implementation and impact of the Resolution is yet to be seen, but they are potentially far reaching in their scope. However, it should be welcomed in terms of trying to ensure that the UAE, which already hosts some of the world's most popular sporting events and may have aspirations to host the Olympics, remains at the forefront of the global sporting events sector. Nonetheless, the rules need to be properly understood for companies and individuals to act within their boundaries. Getting this right will take time and significant effort, but it is a matter of compliance that cannot be avoided and should be pursued as a move towards best practices.

Steve Bainbridge will be discussing these issues at the Major Events Safety & Security Summit to be held on 25-27 April 2017 at Sofitel the Palm – Dubai. Register at http://www.majoreventssafetyandsecuritysummit.com.

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The Revision of Article 257 of the Penal Code: A Problem also for Party-Appointed Experts?

Federal Law No. 7 of 2016 recently amended Article 257 of the UAE Penal Code to impose criminal liability on arbitrators, experts and translators who issue decisions and opinions contrary to the duties of impartiality and neutrality. The amendment became effective on 18 October 2016. As we have seen in the last few months, the international arbitration community has expressed its understandable concerns and criticisms in relation to the revision of Article 257, especially as regards its implications for arbitrators in the UAE.

What may have gone unnoticed, however, are the implications of the revision to Article 257 for party-appointed experts in arbitration proceedings. This may be because it is assumed that prior to its revision, Article 257 applied to all experts. This is not so. The former version of Article 257 applied only to court-appointed experts.

Article 257 previously stated that "*[t]he expert, who, appointed by the judicial authority in a civil or criminal proceeding, asserts a fact that is contrary to the truth or gives knowingly a false interpretation thereof, shall be punishable by confinement for a minimum period of one year." In its revised form, Article 257 now stipulates that "anyone who [...] submits a report [...] in favour of or against a person, in contravention of the requirements of the duty of neutrality and integrity, while acting in his capacity [...] [as an expert] [...] selected by the parties, shall be punished by temporary imprisonment*".

Hence, party-appointed experts in arbitration proceedings may be held criminally liable for any alleged failure to comply with the duty of neutrality and integrity stipulated in the revised Article 257. This is problematic. Generally, parties appoint experts to submit reports in order to support their claims. Thus, the recent revision to Article 257 may expose party-appointed experts more readily to criminal charges, since an obstructive party may claim that the payment by a party to that expert necessarily implies that the expert's report will be biased in favor of that party.

Indeed, it may be argued that prima facie the payment by any party to its appointed expert in an arbitral proceeding would give rise to that expert issuing a "report [...] in favor of or against a person, in contravention of the requirements of the duty of neutrality and integrity," since party-appointed expert reports tend to favor the position of their party and contradict the position of the other party. The fact that an expert is appointed and remunerated by a party does not necessarily mean that the expert lacks independence, but the retainer of an expert may give rise to a presumption that the resulting report would contravene Article 257, which obviously would be an unintended consequence of the revision.

Moreover, the scope of the expert's duties has been extended from not "assert[ing] a fact that is contrary to the truth or giv[ing] knowingly a false interpretation" to not contravening the "the duty of neutrality and integrity" of the expert. UAE law does not define what "integrity" and "neutrality" actually mean. The absence of a definition in the UAE law thus may make it easier for an expert to be wrongly accused of acting of bias in preparing a report for the party that appointed him, even where the expert conscientiously endeavoured to exercise independence in preparing his report. The revision of Article 257, thus, may be abused as an additional ground to disrupt the proceedings. This would also be regrettable.

If the recent revision of Article 257 is to be modified, as urged by the international arbitration community, it is respectfully submitted that not only should arbitrators be excluded from its scope, but also party-appointed experts.

This article was first published on the Kluwer Arbitration Blog on 10 March 2017.

Al Tamimi & Company's Arbitration team regularly represent clients in UAE, regional, and international arbitration proceedings. For further information please contact John Gaffney (j.gaffney@tamimi.com) .

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New FIDIC 2017 Yellow Book – A New Claims Procedure

The pre-release second edition of the FIDIC Yellow Book ("Second Edition") was provided to delegates at the FIDIC International Contract Users Conference in London late last year.

Although FIDIC confirmed that it is intended for the Second Edition to be in the market later this year, the official release date has yet to be confirmed (and it is possible that FIDIC may make further amendments to the pre-release version). In addition to the Second Edition, FIDIC is scheduled to release new editions of the Red Book and the Silver Book this year, and publish some other new forms of contract.

FIDIC have taken the opportunity to update the first edition of FIDIC Yellow Book (published in 1999) ("First Edition") to reflect how the internatiaonal construction industry has evolved over the past 17 years. In particular, the Second Edition significantly bolsters the contract administration procedures (which makes the Second Editions about 50% longer than the First Edition) and seeks to rebalance some of the risk allocation under the First Edition, with the objective of creating a more collaborative approach.

Throughout 2017, we will keep you informed of key changes made to the contract suite and of new contracts that are published.

One of the key changes is the new claims/dispute resolution procedure under the Second Edition, which focuses on effectively managing claims from the outset so that they do not evolve into disputes.

Advance Warning

Sub-clause 8.4 of the Second Edition sets out a new 'early warning' mechanism requiring either party to inform the Engineer of any event (known or probable) which may, among other things, adversely affect the Works, increase the Contract Price or cause a delay. This type of procedure is found in other forms of standard contracts, is an industry norm and is consistent with acting in good faith.

Upon receipt of an advance warning, the Engineer may instruct the Contractor to submit a proposal to avoid or mitigate the effects of the event in question and this may give rise to a variation. This drafting is consistent with the dispute avoidance theme which runs throughout the Second Edition and is a sensible addition.

Claims/Dispute Resolution

The distinction between Employer claims and Contractor claims has been removed. All claims are now made under Sub-Clause 20.1 of the Second Edition. The Sub-Clause divides claims into two categories; claims for payment and extensions of time on one hand and 'other claims' on the other.

This is noticeable departure from Sub-Clause 20.1 of the First Edition, which concerned only Contractor's claims and did not make any distinction regarding the nature of the claim. Sub-Clause 2.5 of the First Edition (which addressed Employer's claims) has been deleted from the Second Edition.

Having both party's claims determined under the same provision is indicative of FIDIC's intention for the Second Edition to deal with both the Employer and the Contractor in a consistent and even-handed way.

Claims not for payment/EOT

Sub-Clause 20.1 of the Second Edition provides that if either party (i.e. the Employer or the Contractor) considers that it has a claim which relates to any matter other than to payment or an

extension of time, the claiming party shall notify the Engineer of the claim "*as soon as practicable after the claiming Party becomes aware of the other Party's disagreement with the requested entitlement*".

It is important to note that this time frame is not from when the party becomes aware of the claim but is from when they become aware that the other party disputes the claim.

The Engineer is then to make a determination under Sub-Clause 3.7. This Sub-Clause is significantly more detailed than Sub-Clause 3.5 of the First Edition and contains some key new features.

Among the new features is that the Engineer is to act neutrally under Sub-Cause 3.7. "*Neutrally*" has not been defined but can probably be taken to require the Engineer to act impartially. This interpretation is strengthened by the fact that Sub-Clause 3.2 states that the Engineer may issue determinations under Sub-Clause 3.7 without reference to the Employer. This is a significant change from Sub-Clause 3.1 of the First Edition which provided that the Engineer is deemed to act as the agent of the Employer.

Sub-Clause 3.7 of the Second Edition encourages the parties, over a period of 42 days, to seek an amicable settlement of the claim and the drafting of clause 3.7.1 envisages that the Engineer is required to play a far more 'hands on' role in achieving this than was previously the case.

Under Sub-Clause 3.5 of the First Edition, it was envisaged that the Engineer would liaise with each party individually but the drafting of Sub-Clause 3.7 of the Second Edition expressly refers to the Engineer consulting with the parties "*jointly*" while the Engineer is required to "*encourage discussion between the Parties in an endeavour to reach an agreement*". The intention of greater involvement from the Engineer (particularly in the context of encouraging dialogue between the parties) is to prevent claims from developing into disputes.

If no agreement can be reached between the parties (notwithstanding the Engineer's efforts to reach an amicable settlement), the Engineer is required to make "*a fair determination*". This is consistent with the terminology of Sub-Clause 3.5 of the First Edition.

As with the First Edition, the Engineer's determination will be binding on the parties unless either party issues a Notice of Dissatisfaction within 28 days. This is the first of several time bars to the claims and disputes procedure under the Second Edition.

Payment/EOT claims

Claims regarding payment and extension of time are addressed under Sub-Clause 20.2 and are subject to a more prescriptive procedure (no doubt on account of the complexity and volume of documents that typically concern claims of this nature).

If either party has a claim, it shall notify the Engineer of this within 28 days. Failure to comply with this timeframe will result in the claiming party losing its entitlement to compensation.

In accordance with the new focus on effective contract/claims management in the Second Edition, sub-clause 20.2.3 imposes a new express obligation on the claiming party to "*keep such contemporaneous records as may be necessary to substantiate the Claim*". The sub-clause also entitles the Engineer to monitor the Contractor's record keeping and to even instruct the Contractor to keep additional records (but does not extend to the Employer's records).

Within 42 days of a party becoming aware of a claim (or 14 days after the last date for making an initial notification), the claiming party is required to provide the Engineer with a "*fully detailed Claim*". This shall set out a description of the factual events giving rise to the claim, the contractual basis of the claim, the contemporaneous records upon which the claiming party relies as well as details of the relief sought. As with the initial notification, a time bar applies if the claiming party fails to submit the detailed claim within the prescribed timeframe of 42 days., being that the initial notification is deemed to have lapsed.

For late claims for payment and extensions of time (but not 'other claims'), the Second Edition departs from the strict position under the First Edition regarding time bars and allows the claiming party to apply, within 14 days of receiving the relevant notice from the Engineer, to the Dispute Avoidance/Adjudication Board ("DAB") for a waiver of the time limits for either the notification of the claim or for the provision of details regarding the claim. The DAB shall, within 28 days, determine whether a waiver should be granted in the relevant circumstances.

This right only applies where you have been given an Engineer's notice within the required time frame. If this notice is not received then the party does not have a right to seek a waiver of the time bar. This right will also be extinguished where the DAB is deleted from the contract.

Upon receipt of the detailed claim, the Engineer shall make a determination under Sub-Clause 3.7 (as discussed above) regarding the claiming party's entitlement to payment or to an extension of time.

Disagreement with the Engineer's Determination

If either party disagrees with the Engineer's determination (whether regarding a claim for an extension of time/payment or an 'other claim'), it is, within 28 days, entitled to issue a Notice of Dissatisfaction (which is called an "NOD") to the other party (with a copy to the Engineer) setting out its reasons for disagreement.

The disputed claim shall be referred to the dispute resolution procedure under Clause 21. However and as with the First Edition, the Engineer's determination shall remain binding on the parties until the dispute resolution process has run its course.

In terms of the formal dispute resolution procedure, the Second Edition provides for disputes to be referred to a DAB, which may consist of either one member or three members (which is the default position).

As with the First Edition, the Second Edition does not include prescribed rules regarding the DAB. Procedural rules regarding the DAB are throughout Clause 21, including the requirement for the DAB to give its decision within 84 days after receiving its reference. The DAB's decision shall be binding unless disputed by either party within 28 days. If no DAB is in place, any disputes are directly referred to arbitration.

Any disputed decisions of the DAB (which has not been amicably settled within 28 days following issue of a notice by a party of dissatisfaction with the DAB's decision) may be finally settled by arbitration.

As is the case with the First Edition, the Second Edition refers to the Rules of Arbitration of the International Chamber of Commerce as the default arbitral rules and the Tribunal has full power to review and revise the determinations of the Engineer and the DAB.

Position Regarding Timebars

In the UAE the contractual time bars in the Second Edition are vulnerable to challenge. We recommend that the Second Edition is subject to certain amendments so that it is compatible with UAE law.

Notwithstanding the question on the enforceability of time bars, we recommend that the parties seek to adhere to such time periods. Time bars encourage efficient contract administration (meaning that potential disputes are addressed early and do not fester) and this is in the interest of both parties. Further, failure to adhere to a contractual time bar constitutes a breach of contract (which could potentially give rise to a damages claim) while any application to have a time bar set aside incurs cost as well as time which would be best avoided.

Concluding Thoughts

There is a clear focus in the Second Edition on dispute avoidance, with the Engineer being required to take a more proactive approach in seeking to facilitate the resolution of disputes as early (and therefore as cost effectively) as possible. This is a positive development. Given the pivotal role of the Engineer, it is also important that Engineers take note of and fully embrace the obligation to take the lead on seeking an amicable resolution to disputes in their initial stage (and typically before positions have become entrenched). This is in the clear interests of all stakeholders and it will be interesting to see whether this drafting will have an impact on Engineers' fees.

Finally, the Second Edition contains key changes which both Employer's and Contractor's will need to know and manage or risk losing entitlements to claim.

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Labeling of Foodstuff in Dubai

The quality and variation of foodstuff products in a cosmopolitan city like Dubai is an important factor in a city's success, and requires the government to enact modern legislation to ensure it is properly controlled.

The government of Dubai has assigned the duty of allowing the importation of foodstuff, and monitoring the labeling and testing of the products, to Dubai Municipality (DM) at the first instance while DM liaises with the Emirates Authority for Standardization and Metrology (ESMA) in relation of the adopted relevant standardization in the UAE. In this article we will shed a light on the labelling information which food companies need to know.

The consignee of foodstuff products should, in the first place, be registered at DM as an authorized foodstuff consignee through its electronic system, which is called the 'Food Import and Re-Export System (FIRS program)'. The consignee should be a registered local company in the UAE trading under food trading activity or general trading activity.

The consignee should process the importation approval through the FIRS program before importing the products or shipping the same to the UAE. The following is a list of the procedures that need to be followed:

Registration of the Packaging Barcode

DM requires that each foodstuff package have a barcode and all packages of the same product should have identical barcodes, as the registered barcode can be used for multiple consignments and each product should receive only one unique barcode.

Laboratory Test

FIRS program requires that all registered foodstuff products are tested by a laboratory. DM refers samples of the substances in question to Dubai Central Laboratory at the first instance, and if the lab cannot test the product then they refer it to an accredited lab in the UAE. If the UAE lab cannot conduct the required test then DM may request that the applicant conduct the test at a specific accredited lab abroad.

Registration for Foodstuff and Label Assessment

Foodstuff products which are new to the FIRS program should be registered through this program. This requires a description of the packaging type (carton containers or plastic or metal etc.) and a clear image of the label and the food item itself (the size of the image should not exceed 10 MB). The labeling information should be present on the wrapper as a minimum requirement. The following labeling information should be considered for all foodstuff products:

1. Details of the foodstuff products in question
   a. Commercial Name/brand name of the foodstuff: The name shall be specific and not generic, and shall indicate the true nature of the foodstuff.
   b. Production & expiration dates: foodstuff products with a shelf-life not exceeding 18 months shall carry the date of minimum durability using words such as "will keep at least until ....".
   c. Ingredients to be arranged in a descending order according to the weight or volume.
   d. Highlight any ingredients which may cause hypersensitivity.

2. Instructions on storage and use.
3. The net weight of the contents.
4. Manufacturer Name and address:

   The name and address of the manifacturer or the packer can be declared in case the packer is not the same as the manifacturer. Only one name and address is required as a mimimum requirement.
5. Country of origin:

   EU is not a country of origin and the exact country should be specified.
6. Lot identification: Each pack/container shall be marked in code or in a clear way to identify the producing factory and the lot.
7. Product's barcode number.
8. The nutritional information. The authorities in the UAE require the amounts of nutrients present on the label (the nutritional information and the net content) as percentage by weight only or by amount of food serving.

   The following sample chart represents the best practice of listing the amounts of nutrients and we have included fat, sodium and protein as examples for nutrition facts:

Nutrition Facts	Percentage (%)	معلومات تغذوية
Fat	0%	دهون
Sodium	7%	صوديوم
Protein	1%	بروتين
Nutrition Facts	**Amount (g)**	**معلومات تغذوية**
Fat	0 g	دهون
Sodium	7 g	صوديوم
Protein	1.1 g	بروتين

9. Halal marking

10. Genetically modified (GMO) products should be marked as (Genetically modified + the name of the product) or (product from genetically modified + the name of the product) while those products which contain GMO should be marked as (contain genetically modified + the name of the product).

General Mandatory Labelling Information

The labels for packed foodstuff products should be clear, easy to read and difficult to remove in the normal conditions of handling and use. Information should not be obscured by designs or by other written, printed or graphic matter and shall be on contrasting ground to that of the background. The letters of the name of the products shall be in a size reasonably related to other prominent printed matter on the label.

Where the container is covered by a wrapper, the wrapper must carry the necessary information, or the label on the container shall be readily legible through the outer wrapper or not obscured by it. In general the name and net contents of the foodstuff products must appear on that portion of the label normally intended to be presented to the consumer at the time of sale.

Labelling Language

Arabic is the official language for verifying the information on the label. Other languages on the label are considered as translation. The language used on packaging labels of foodstuff must be in Arabic and/or English.

When the labelling information includes details other than the mandatory information, the label should include in Arabic at least the mandatory information.

Companies may use stickers to translate the food labels into the Arabic Language. It is admissible that the labeling information on the wrapper is given in all languages, save for Hebrew due to the commercial boycott to Israel.

Possible Reasons for Rejection

The FIRS program may reject the registration of foodstuff products for the following common reasons:

1. Banned ingredients such as poppy seeds and alcohol
2. Difficult to read the label information
3. Duplicated barcodes in the FIRS program.
4. Ingredients are not declared
5. Ingredients in foreign language neither Arabic nor English
6. Non conformity with applicable laws, such having religious signs or inappropriate pictures.

In conclusion, producers of foodstuff products should keep in mind the requirements of the FIRS program at Dubai Municipality. Most importantly they should remember that only a registered local company in the UAE trading under food trading activity or general trading activity can be a legitimate importer of foodstuff products into Dubai. Foodstuff products should comply with the general rules of standard GSO 9/2019 for labeling pre-packaged foodstuff, in addition to other complementary standards such as Halal standards and the GMO standards.

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New Tech on the Block: Dubai's Blockchain Strategy and Why it Matters

The Dubai Blockchain Strategy, that was launched by His Highness Sheikh Hamdan Bin Mohammad Bin Rashid Al Maktoum in October 2016, establishes a roadmap for the introduction of Blockchain technology for Dubai and the creation of an open platform to share the technology with cities across the globe.

What is a Blockchain?

Technically speaking a "Blockchain" is a distributed ledger of records, arranged in data batches called "blocks", that use cryptographic validation to link themselves together into an unbroken "chain". The encryption process, known as "hashing" is carried out by multiple computers. If they all agree on the answer, each block receives a unique digital signature.

What is attractive about Blockchains are that they are secure by design, as the distributed nature means it is very hard for anyone to tamper with the data – as a hacker would have to get access to every copy of the database contemporaneously to be successful.

Old transactions are preserved forever in a Blockchain and new transactions are added to the ledger irreversibly. Anyone using the network can check the ledger and see the same transaction history. That means the ledger cannot be altered, only added to, and it is updated for everyone on the network at the same time.

While the concept of mutual distributed ledgers is not new, the Blockchain has gained more recent prominence as the technology underpinning the Bitcoin cryptocurrency.

What Blockchain technology enables is a way to validate transactions through little or no human intervention.

Instead of requiring the involvement of middlemen and manual processing, a potentially huge amount of transactions could be validated automatically using Blockchain technologies.

If banks and other financial institutions can increase the speed of transactions and reduce costs in the banking system, it should mean cheaper and more efficient services for consumers. For example, sending money overseas could become nearly instantaneous.

Blockchains also have wider potential beyond financial services. Blockchains are suitable for recording events, medical records, identity management and other records management activities.

Smart Contracts

Blockchain ledger technology could be used not only for decentralised transactions but also for smart (i.e. automated and computable) transactions and smart (computable and self-executing) contracts that can take advantage of smart transactions.

To be clear, the term "smart contract" does not refer to a true contract in legal terms. Essentially, a smart contract is a piece of software code that two or more parties program to cause certain actions to happen in response to the occurrence of specific conditions.

From a UAE perspective, Article 12 of Federal Law No.1 of 2006 on Electronic Commerce and Transactions appears to have anticipated "smart contracts" as it provides that valid and enforceable contracts can be formed by computer programs (defined as "automated electronic agents") that include two or more electronic information systems preset and pre-programmed to carry out the transaction, even if no individual is directly involved.

Dubai Blockchain Strategy

The Dubai government has clearly recognised the potential of Blockchains and through the introduction of the Dubai Blockchain Strategy (the "Strategy") it is pioneering the application of new Blockchain based technology. If the Strategy is successfully implemented, Dubai should have the first Blockchain powered government.

The Strategy is a result of a collaboration between the Smart Dubai Office and the Dubai Future Foundation. Going forward the Dubai Future Foundation will oversee the implementation of the Strategy and the Smart Dubai Office has been tasked with its execution.

The Strategy is built on the three pillars of:

- government efficiency;
- industry creation; and
- international leadership.

Under the first pillar of "Government Efficiency", the Strategy is intended to contribute to increased government efficiency by enabling a paperless digital layer for all city transactions, supporting Smart Dubai initiatives in the public and private sector.

Documentation, such as visa applications, bill payments and license renewals, which the Dubai government estimates currently account for over 100 million documents each year, will be transacted digitally under the Strategy. It has been estimated that the use of Blockchain technology could contribute savings of up to 114 MTons CO_2 emissions from trip reductions, and redistribute up to 25.1 million hours of economic productivity in saved document processing time.

Under the second pillar of "Industry Creation" the Strategy will introduce a system for enabling the creation of new businesses using Blockchain technology (the Dubai government in its announcement of the Strategy expected the volume of the Blockchain market to hit US$300 million over the next five years). Industries that would likely benefit from Blockchain technology include: real estate, fin-tech and banking, healthcare, transportation, urban planning, smart energy, digital commerce and tourism.

The third pillar of the Strategy is "International Leadership". Under this pillar, Dubai will open its Blockchain platform for global counterparts to enhance safety, security, and convenience for international travellers to Dubai.

Under the Strategy, international travellers will benefit from faster entry with pre-approved passport and security clearance and visas; easier mobility within Dubai due to approved drivers licenses and car rental; guaranteed wireless connectivity; enhanced tourism and pre-authenticated temporary digital wallets and payments.

The third pillar of the Strategy is to be delivered through a Global Trust Network with partners in Europe, North America and Asia.

"The Dubai Blockchain Strategy establishes a roadmap for the introduction of Blockchain technology for Dubai for the public and private sector and positions Duabi as a leading center for Blockchain development and innovation."

Prior to the launch of the Strategy the Dubai Future Foundation had already founded the Global Blockchain Council, an initiative that includes 42 government entities and private companies to discuss the best applications in Blockchain technologies.

As a distributed ledger Blockchain based systems have the potential to reduce or eliminate many categories of validation and verification issues for simple transactions. There is no need for trusted third parties such as banks to complete transactions.

Consequently, Blockchains could become the norm for data records sooner rather than later.

Through the Strategy, the Dubai Government is recognizing Blockchiain as the next step in digital transformation of the public and private sector and positions Dubai as a leading center for Blockchain development and innovation.

Al-Tamimi & Company's Technology, Media & Telecommunications team regularly advises on technology related issues including encryption and electronic contracting, and telecommunications and media related transactions. For further information please contact Andrew Fawcett (a.fawcett@tamimi.com).

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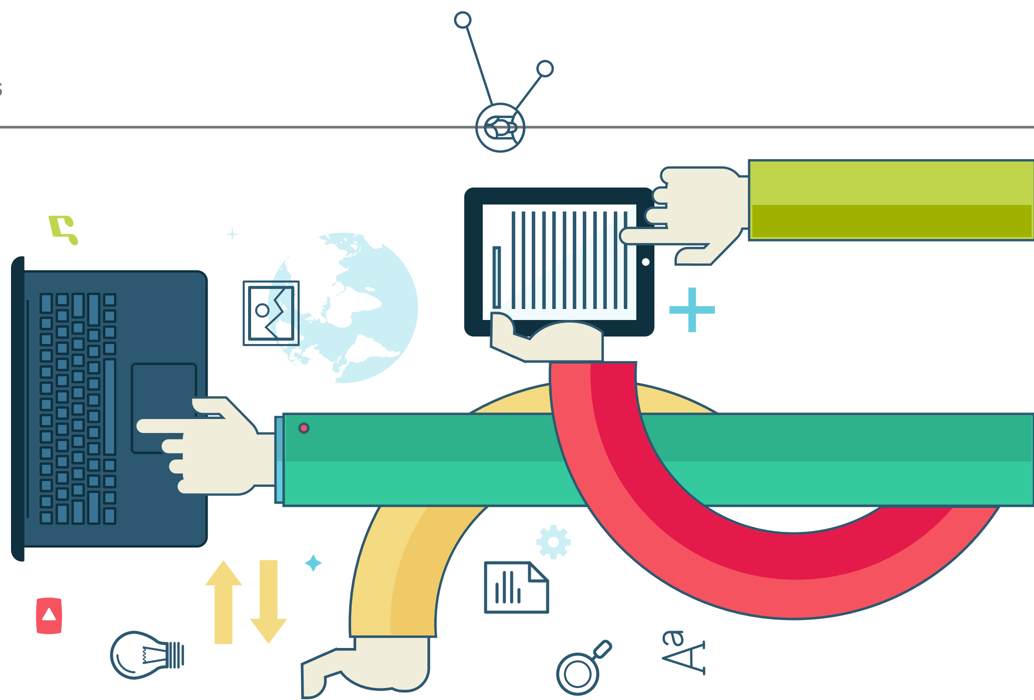

Disruptive Education: The Role of Technology in Altering Delivery of Education

Disruptive technology (i.e. technology which disrupts a traditional way of doing business) is making obvious strides in a variety of sectors. The biggest taxi operator doesn't have a fleet of cars whilst the largest room provider doesn't own a single hotel room. But what about the education sector? And what are the practical legal considerations for education providers?

The "ed-tech" sector is growing at a significant rate. Indeed some commentators are predicting the demise of the traditional delivery of education, and a complete replacement of that system by online platforms. But most appear to consider the introduction of technology into classrooms as augmenting rather than replacing current teaching methods, in a positive manner for both educators and students.

Either way, education providers are now at a point where they can no longer ignore the technology that is creeping into their businesses. And with those changing business models comes new legal implications – some small and some very large.

Content Production

It is argued by some that institutions that only licence content from third parties are going to find that they are not able to compete alongside those that create their own content. Creating content means that the institutions can create branded content that promotes their brand. They will also not have to pay licence fees for quality content as they can use their own materials. But in addition, and most importantly, institutions will be able to use this content in ways that will generate income without any restriction from a licensee.

In some cases, the creation of content may mean simply taking the students to an appropriate wiki site, as an example, and having them upload their own materials into the site. These can range from having a school-wide Wikispace to contributing to a student driven global information sharing platform. Legally, it is important to ensure that both the teachers and the students understand that, in doing this, they are creating this content for common usage (usually under a Creative Commons licence). As the creator of that content, the author must specifically agree to the use of the content on those terms.

For educational institutions with bigger goals, the creation of complete sets of materials for students will become more desirable, and more commonplace. Whilst, on initial review, it may appear that the institutions are creating materials that could ultimately make them redundant as educators, in fact the interaction between the student and the institution will have increasing importance to those that are going to be assessing the value of the qualification. The institutions ultimately control the qualification that is provided to the students and, in controlling the content itself, they control the quality (and therefore the reputation) of that qualification. A Harvard Masters Degree will not lose the cache that it currently enjoys for as long as Harvard continues to insist on a quality curriculum, tough criteria for passing and the world's most respected professors.

We know that teachers already create their own materials within the confines of the established curriculum but the addition of scripts and filmed materials is a new development. What controls do the teachers have over these new materials – will they need to be approved by a senior member of staff before use? How long can they be used for? Must the teacher recreate them for the next year or are they able to be used repeatedly? Can the teacher use them elsewhere or is this an exclusive use contract? Does the institution in fact own the materials that are created in this manner? These terms that govern the creation of the content must be clear and unambiguous and each time a new component is added to their scope of work, then the employment contract may need to be revisited to ensure that it addresses all issues that the institution requires.

In this regard, it is interesting to note the existence of the UNESCO 2012 OER Declaration (also known as the "Paris Declaration on Open Educational Resources") which was drafted to promote OER but also calls for all publicly funded educational materials to be released in a freely reusable form.

Online Content Distribution – Non Synchronous Content

One of the earliest trends in digital education delivery systems was the MOOCs: massive open online classes. Anyone with an internet connection can now access materials and instructor videos as well as interacting with other students. In this scenario, your professor becomes a content producer, not only analyzing and researching the subject, but also writing the scripts and then delivering the content so that the institution can exploit it.

In addition, traditional educators are now also creating courses without physical class sessions. There are two types of online classes: those that have no synchronous interaction among faculty and students and those that use videoconferencing software to hold a real-time, synchronous class. Online programs with synchronous classes are the most expensive and labour-intensive to offer, but arguably provide the best online experience for the students themselves.

Whilst many institutions concentrate on the student terms of enrolment when they move to an online model, they may overlook this fundamental legal point within the contract with the creator of the content. The institution must own (or at least have an exclusive licence over) the content in order to legally exploit it. Similarly, the institution must maintain total control over the awarding of qualifications arising from the use of the materials. So whilst, for example, an online contract law course may be provided to all members of the public, it must be clear that this will not be readily credited towards the awarding of a degree.

Licensing of Content from Third Parties for use by Students and/or Teachers

It is common for larger institutions to have procurement or accounts requirements that are tailored to the bricks-and-mortar education model. The licensing of technology is often not factored into the model or, if it is factored into the procurement model is it not done well, with no understanding of the usual licence fees or knowledge of common and reasonable licence terms.

Technology licensing terms are far too often driven by the suppliers themselves, which is not common in any other industry. Practically, this may not always end in a one-sided license for the institution, but on a realistic risk analysis, it is very likely to do so. Just a few key issues that have, anecdotally, often been overlooked in the past in contracts include:

- content updating schedules, leaving students with outdated content
- curriculum warranties, to ensure that content will continue to match curriculum
- current and ongoing ability for the software/content to interact with purchased hardware
- short licence periods meaning complete re-negotiation needed in a few years
- adequate training in the use of the technology and service
- ‘uptime’ minimums

Of course this will generally be completely overlooked for free technology and free interactive apps. Do remember however that these do come with terms of use that should not be exceeded. As they are usually provided on an ‘as is’ basis, then it is important that they are properly audited for suitability before they are provided to students. There is no legal recourse if this is not done.

Privacy and Data

Interaction online means the potential for extraordinary collection of data on the institution and its staff and students. This is now commonplace in the online environment and is something that needs to be understood and managed properly by institutions. Alongside this, we know that the providers of ed-tech want to secure more data so that they can drive the development of their products in the appropriate manner. The collection of data can have a positive outcome. This can range from the ‘big picture’ of real time tracking of a student’s progress from the first day to last year, with the ability to statistically see when and if a student is struggling when compared against her former standards, down to a simple knowledge of whether the student actually opened the book within the e-reader or not.

However this may be done by the institution, openness is vital. It is important to know the laws applicable to the collection, storing and moving of such data in each country in which you operate. It is also important to let students know, by way of a data and privacy policy, what data is being collected and what it is being used for. It is extremely important to ensure that, no matter the strength or otherwise of the privacy legislation that applies in the jurisdiction, third parties that are providing content to your students are also complying with your data and privacy policy as well. In this region, data privacy laws are not as stringent as they are in, for example, USA or Europe. This may mean that institutions can take a more lenient approach to the collection, storing and moving of data but each must then determine the effect that this may have on their reputation with potential students within the international education market.

Conclusion

We are still in the early stages of the transformation that technology is bringing to schools and universities around the world and the ultimate destination is still unclear. The 10-year olds of today, already receiving lessons on iPads each day, will expect the highest levels of well-curated educational content to be available to them on every device, as and when they require it. Competition for students will increase. Some institutions may not survive, others will change dramatically, however it seems clear that those that embrace and adapt to the new technology, and promote their use of that technology to potential students will be in the strongest position to lead the education sector in ten years time.

Al Tamimi & Company’s Technology, Media & Telecommunications team regularly advises on content matters both on-line and in traditional media, acting for producers, creative agencies and broadcasters. For further information, please contact Fiona Robertson (f.robertson@tamimi.com).

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Due-Diligence and Risk Assessment in Supply Chain Management

Companies are often exposed to complex global third party risks making it increasingly important for them to have effective procedures in place to evaluate, monitor and manage those risks. Hence supply-chain risk management has become an important part of a wider company risk management process. Effective due diligence procedures form a central component of that process for all organisations.

This article will discuss the key elements that should be included in a due diligence process which underpins a corporate risk management assessment, and the consequences of not managing risks or putting appropriate control measures in place. We have focussed on the position in the UAE however the same issues arise across the region. We also examine the extent to which technology can be used as a useful tool in assisting to identify and control supply-chain risks.

Key elements in a supply-chain risk assessment and diligence process:

There are five key elements that should be considered when seeking to understand supply-chain risk, and in respect of which, due diligence should be undertaken:

1. Know your partners in the supply-chain:

   The typical starting point when establishing the identity details of a potential partner (agent/distributor) is to obtain and review the partner's trade licence. This document is available by public record, such as from a UAE Emirate Department of Economic Development register. It provides basic information, including the legal activities that the partner may carry out, and

the shareholder information. However, this document provides no clarity as to the ultimate beneficial owner. Obtaining evidence of beneficiary interests in an important factor in assessing partner risk but is not usually easy to obtain, particularly in the Gulf states, where there are many family owned businesses, often third generation with multiple shareholders, and names which are not easy to trace via public records (which in any event often do not exist). It is important however, to dig deep and not rely on a superficial level of investigation of beneficial ownership information. There could be many hidden risks in doing business with unidentified partners, for instance those who may engage in corrupt behaviour, have a criminal history, be blacklisted from tendering for government contracts, or worse-case-scenario, suspected of financing terrorism.

2. Corporate diligence:

   In Gulf states the requirement to lodge certain corporate documents with a ministry or department is commonplace, and it is often the case that those documents must be legalized, attested and perfected before a Notary Public. Failure to properly complete this process can increase a risk profile. When undertaking diligence in supply-chain management, a company should ask a number of questions before signing documents or entering into agreements. Examples include, being aware of what corporate and commercial documents are signed, who has the power of attorney and what happens to those documents (eg. whether they are required to be submitted to a regulator). A signed document which ends up in the wrong hands, could be misused by a third party. Certain types of agreement if lodged with a ministry may then confer additional legal rights on an agent or distributor, and it may then prove very difficult to terminate relationships with those parties, and any future disputes can be time consuming and costly.

3. Commercial diligence:

   Commercial agreements between parties in a supply-chain relationship often contain clauses which requires a services provider to 'comply with all applicable law'. The party securing the services of the provider (whether agent or distributor) could be forgiven for believing that such clauses act as a shield, protecting it from the non-compliant acts of their partners. Not so. Whist contractual risk can be controlled in this way, not all risk passes and such clauses are not, by themselves, a sufficient protector. Best practice principles should be built into the due diligence process to enable a continued level of scrutiny on the behaviour and compliance of all third party partners. A company and their suppliers form close relationships and both parties are inextricably affected by each others' actions, and the risks associated with working together are varied, and in some cases, complex.

"The risk of terrorist financing, bribery and corruption and money laundering is on the rise. Thus, a supply-chain due diligence process should encourage companies to keep themselves abreast of changes which might impact on the supply-chain payment regime and be rigorous as to what services are expected in return for payments made."

4. Payment regime:

   In the ordinary course of business, payments are made to the supply-chain for services rendered. Historically, a foreign producer of goods may have relied heavily on the local partner to ensure that the route to market was clear, all promotional marketing materials prepared and distributed, and sales teams working to achieve volume growth. In terms of what the supply-chain payments were actually used for, very little thought was given as to whether the behaviour of the supply-chain was compliant, corrupt or fraudulent. In recent times, the Gulf states have been active in implementing legislation which has impacted upon the behaviour culture of the supply-chain. The risk of terrorist financing, bribery and corruption and money laundering is on the rise. Thus, a supply-chain due diligence process should encourage companies to keep themselves abreast of changes which might impact on the supply-chain payment regime and be rigorous as to what services are expected in return for payments made. What used to be common industry practice in the past might now be banned. For example, in a UAE context, a party in the supply chain may have historically paid 'commission' payments to a third party or government official in order to attract a new order or with a view to winning a procurement tender, such behaviour would violate the Penal Code and procurement laws. In a further illustration, the UAE Ministry of Health and Prevention has issued a Circular concerning the payment

of bonuses and lawfulness of discounting schemes for certain pharmaceuticals, and further policy standards which prohibit payments being made between healthcare professionals for referring a patient if insurance reimbursement is to be sought.

Furthermore, UAE laws are strict when it comes to corporate fundraising activities, which are intended to be for charitable purposes, but where there is a risk that funds may be siphoned-off and used for illegal purposes (such as financing terrorism), and the law now requires such activities (and any social-media content) to be pre-approved by the relevant regulator, and the activities conducted alongside licensed charitable institutions in accordance with Federal Resolution number 8 of 1974, the Executive Council Resolution number 26 of 2013 . A breach of these laws can be penalised by imprisonment and a fine.

5. Trade risk:

   This risk covers all the legal aspects of getting a company's products to the market. A checklist could include questions as to whether local suppliers have the correct licenses to import and clear products from customs or whether there are legal or regulatory restrictions. For instance, some products such as fire safety equipment can only be imported into the UAE by 100% locally owned businesses, and many products need specific pre-approvals before entering into the UAE or GCC region. Certain products may even be prohibited from being imported under the GCC Common Customs Law.

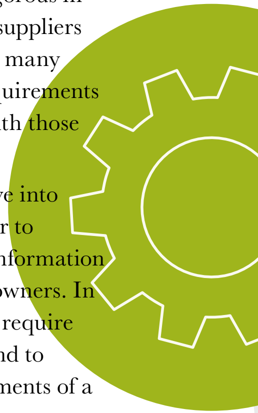
Consequences of not sufficiently managing third party risks

The repercussions for legal non-compliance or not sufficiently managing third party risks are significant and can be detrimental to any business, and the individuals running the business. Companies can be fined, goods confiscated or delayed at the ports and directors risk imprisonment. The revocation of a work visa, and deportation protocols may also be triggered depending upon the circumstances.

There are a number of laws and regulations in the UAE which are relevant to supply-chain risk, for instance money laundering, terrorist financing and/or breach of financial/trade sanctions include: Anti-Money Laundering (AML) Law (Federal Law No. 4 of 2002); Federal Law No. 7 of 2014 on combating terrorism crimes; Penal Law No. 3 of 1987 and the Penal Procedures Law. A breach of the AML law, for instance, can lead to imprisonment of up to ten years and fines up to AED 1 million (about $272,000). For trafficking counterfeit goods in the supply-chain, penalties are imprisonment for up to two years and/or a fine of up to AED 1 million (about $272,000). In 2016, the UAE consumer protection authority confiscated counterfeit goods worth over Dh1.6 billion.

Suppliers and due diligence

Given that the consequences of non-compliance are severe, an increasing number of companies have become more rigorous in their due diligence processes and are now asking their suppliers to disclose information and be transparent. As a result, many suppliers have become more aware of due diligence requirements and have adapted their business processes to comply with those requirements.



Some US multinationals, when undertaking a deep-dive into partner beneficial ownership issues, require the supplier to answer detailed questionnaires as to beneficial owner information and will require personal undertakings from ultimate owners. In the global supply-chain, international companies often require suppliers to be familiar with US import/export rules and to confirm that they comply with the compliance requirements of a foreign jurisdiction supplier.

In the healthcare sector, pharmaceutical distribution agreements require suppliers to agree to a thorough process of pharmacovigilance (monitoring the effects of medical drugs after they have been licensed for use) and governance requirements (for public listed companies) which are then incorporated into the supply-chain risk assessment.

Risk Assessment Tools

There are a multitude of useful tools available to assist companies when assessing supply-chain risk, such as, detailed risk matrices and risk assessment tools, which analyse all factors affecting the supply-chain such as political, cultural, economy, markets, risks of natural disaster, terrorism, and cyber security.

The use of technology and artificial intelligence will play an increasing role in the due diligence process. There are a number of tools already on the market that can analyse documents quickly and populate a risk assessment and provide an indication of risk-level. Technology may never be able to entirely replace the expertise of trained compliance professionals when it comes to due diligence, but it can certainly help to make the process far more efficient.

Conclusion

Good business practice looks like this: having the processes and tools in place to manage risks before they become a problem. Once the culture of compliance is fully integrated into the whole supply-chain, opportunities for growth will emerge through being compliant, efficient and competitive, and by doing what is right.

Al Tamimi & Company's Regulatory team regularly advises on regulatory compliance. For further information please contact Andrea Tithecott (a.tithecott@tamimi.com).

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Key Considerations: Appointing a Distributor in the UAE

As we have highlighted in past editions of Law Update, a popular method of doing business in the UAE is through distribution arrangements entered into with local, appropriately licensed, distributors. These types of arrangements can give a principal immediate access to valuable local knowledge and resources, allowing a principal to establish its products in this region relatively quickly.

Our Commercial Advisory group are often asked to review a principal's standard form distribution agreement and we in this article we will highlight some of the key issues that should be considered in the context of such agreements under UAE law.

Commercial Agency Law

A foreign based principal should always consider the potential application of local laws to an agreement. The UAE, and the wider GCC for that matter, have specific commercial agency laws which can afford local distributors significant legal protections. In respect of the UAE, Federal Law No. 18 of 1981 on commercial agencies, as amended by Federal Law No. 14 of 1988, Federal Law No. 13 of 2006 and Federal Law No. 2 of 2010 ("Agency Law") has application in the event that a local distributor is a UAE national or a company wholly owned by UAE nationals and the local distributor was appointed on an exclusive basis (in respect of one or more of the Emirates). The impact of this certainly needs to be considered by a principal and these issues have been addressed in detail in previous articles.

Taxes and duties

In respect of the UAE, the products subject to a distribution agreement will generally be coming from overseas, so the parties should make it clear who is responsible for the associated import and export costs. A short form way to address this is by reference to a specific incoterm, which are a set of globally recognised standard terms that prescribe the respective responsibilities of a supplier and buyer, with regard to the delivery, importation and insurance obligations and so on.

Thought must also be given to the impact of any local taxes. Most standard form distribution agreements, especially those from principals which are subject to a tax regime in their home country, will already have provisions dealing with tax and the effect on any payments due under the agreement. Obviously, a principal needs to ensure that the price they expect to receive from the local distributor for the products supplied is not adversely effected by tax (i.e. by the local distributor deducting any tax payable and remitting the product price net of any applicable taxes). In the context of the UAE, whilst there is currently no withholding tax, which is implemented by some other GGC countries, it has been announced that VAT will be introduced on 1 January 2018. Therefore, a foreign based principal needs to ensure there are appropriate provisions dealing with the impact of VAT in the UAE.

Governing law and dispute resolution

Often a foreign based principal will be comfortable with, and will want to ensure that, the governing law of its home country is that which governs their relationship with a local distributor. However, generally speaking, the position in the UAE is that parties cannot agree on foreign courts to have jurisdiction if the UAE courts have original jurisdiction (e.g. in cases where the agreement is entered into or partially performed in UAE). This would be the case in respect of a distribution arrangement relating to the UAE. Further, where the UAE courts do assert jurisdiction and hear a dispute they will be likely to apply UAE law to that dispute even where a foreign governing law is provided for in the agreement itself. However, one method to try to ensure that the choice of a foreign governing law is recognised, is for the distribution agreement to refer to arbitration as the sole method of dispute resolution and not foreign courts. The UAE has formally acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and under the terms of this convention, broadly speaking, the local UAE courts should refuse to hear any dispute where the parties have agreed to arbitration as the sole means of dispute resolution. An arbitrator will then recognise the choice of a foreign governing law to govern disputes in the agreement. Of course, this will not work with arrangements registered under the Agency Law as, pursuant to that law, the Commercial Agencies Committee and, on appeal, the UAE Courts will automatically have jurisdiction to hear disputes.

Termination

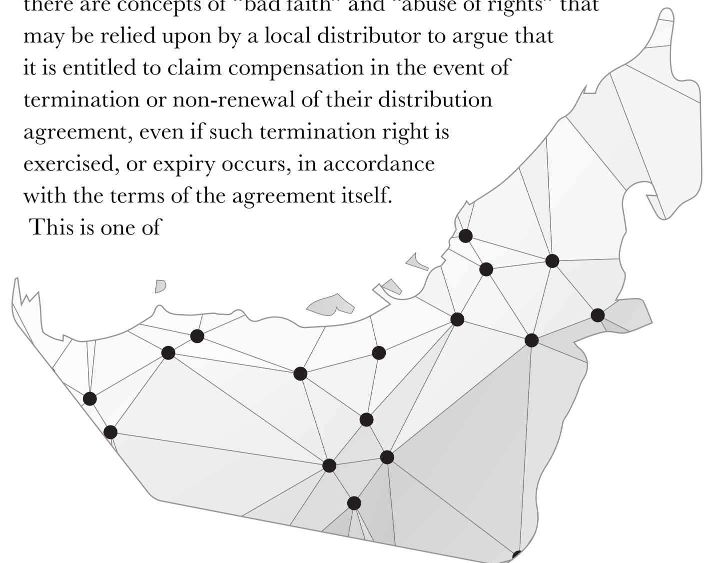
Obviously, parties at the outset of a business relationship are keen to collaborate and anticipate a profitable working relationship. Of course, things do not always go as expected and it is important for a principal to be aware of issues that may arise in the context of termination of an arrangement. Under UAE law, being a civil law jurisdiction, if an agreement is valid and binding, parties cannot resile from it, nor vary or rescind it, unless by mutual consent, an order of the court, or by operation of law. Consequently, a foreign principal wishing to terminate a local distributor may find that, in the absence of the local distributor's agreement to terminate, it needs to approach the court for a court order that the termination is effective. This is particularly relevant where the principal may need to prove to local authorities that the termination is valid. Practically speaking, not every agreement is subject to the termination by court order but there is a risk that if reliance is placed solely on a contractual right to terminate and no court order is obtained then a local distributor could, potentially, try and raise an argument that a contract still exists between it and the foreign based principal. While a court will not force a principal and agent to carry on their relationship in the absence of an agreement between the parties to do so, the distributor may refuse to implement any consequences of the termination unless and until ordered by a court to do so.

Again, if the agreement is registered under the Agency Law then there are a number of separate issues to be considered in the context of termination of that arrangement and these have been discussed in detail in previous articles.

In the context of unregistered agreements, the inclusion of a specific reference to a foreign principal's right to terminate being able to be exercised "without the need for a court order or further notice" may be helpful in allowing that party to argue that any reliance on the relevant termination provision without seeking a court order or providing any further notice (other than any notice that may be provided for in the agreement itself) was specifically contemplated by the parties at the outset and should be upheld. Of course, the distributor may still choose to resist termination and not comply with any consequences of termination which would leave the principal with no choice but to pursue a court case or arbitration, as the case may be.

Potential right to compensation

In the event that UAE law applies to a distribution agreement, there are concepts of "bad faith" and "abuse of rights" that may be relied upon by a local distributor to argue that it is entitled to claim compensation in the event of termination or non-renewal of their distribution agreement, even if such termination right is exercised, or expiry occurs, in accordance with the terms of the agreement itself. This is one of



the main reasons why a foreign based principal will often seek to exclude UAE law from governing the terms of their distribution agreement. The circumstances giving rise to the termination or non-renewal would need to be considered on a case by case basis when assessing whether any compensation may be payable to a distributor. Further, whether the arrangement was exclusive or non-exclusive would impact the assessment as to the amount of any compensation that may be payable. While the inclusion of a waiver by the distributor of any right to seek compensation may assist a principal in resisting any claims for compensation by a local distributor it will not, as mentioned above, necessarily guarantee this.

In the event that a distribution agreement is registered then the Agency Law applies and, as mentioned above, the Commercial Agency Committee and, on appeal, the UAE courts, will hear any disputes regardless of any express choice of governing law or dispute resolution forum specified in the distribution agreement.

Execution

In the context of trying to ensure that a foreign governing law is upheld by the inclusion of an arbitration clause, a foreign based principal should ensure that the individual signing on behalf of the distributor is specifically authorised to bind that entity to arbitration. If a signatory is not appropriately authorised, then there is a chance that any arbitration clause would be considered void and, as a result, the UAE court would assert jurisdiction and apply UAE law. Usually, the authority of the distributor's signatory is evidenced in the Memorandum of Association or a separate POA, though there is a general assumption that a general manager of a local UAE based entity has the implied authority to bind an entity to arbitration. Notwithstanding this, we recommend that a principal obtain a copy of any relevant document that expressly confirms the signatory's authority.

Save for in respect of an agreement registered pursuant to the Agency Law, there is no need for a distribution agreement to be notarised or be in Arabic.

Structuring issues

In order for any person or entity to undertake distribution activities in the UAE they must be appropriately licensed to do so by the relevant governmental authority. For example, in respect of Dubai, a locally based distributor would only be able to distribute products onshore (i.e. mainland Dubai) if licensed to do so by the Dubai Economic Department. If the intended distributor was a UAE free zone company then it would, in respect of the UAE, only be able distribute the products within its relevant free zone and not onshore (and would need to appoint an appropriately licensed onshore distributor).

Similarly, in the event a foreign based principal is appointing a UAE based distributor in respect of a wider territory, say the GCC, then these countries' licensing requirements must be considered. In general terms foreign entities cannot directly undertake economic activities in these countries but need to appoint appropriately licensed third parties or establish appropriately licensed entities itself to undertake such activities.

> "A popular method of doing business in the UAE is through distribution arrangements entered into with local, appropriately licensed, distributors. These types of arrangements can give a principal immediate access to valuable local knowledge and resource, allowing a principal to establish a products presence in this region, relatively quickly..."

As a result, provisions relating to assignment and the appointment of sub-distributors must be carefully considered in distribution agreements, even where a local distributor intends to use affiliates as its distribution network throughout a region. It is recommended that the master distribution agreement specifically make the granting of any assignment or sub-distribution rights conditional upon receiving the principal's written consent (in order for a principal to maintain an element of control and have transparency of arrangements concerning the distribution of their products).

We have highlighted some of the areas that a foreign based principal should consider when contemplating appointing a UAE based distributor. It goes without saying that it is vitally important for a principal to carefully identify the most suitable distributor and take into consideration the various legal implications including those set out in this article.

Al Tamimi & Company's Commercial Advisory team regularly advises on Distribution Agreements (for principals and distributors). For further information please contact Willem Steenkamp (w.steenkamp@tamimi.com or Robert Roberts (r.roberts@tamimi.com).

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English Law Marine Insurance Clauses: Will the UAE Courts Recognise and Apply Them?

Marine insurance policies issued in the UAE typically incorporate marine insurance clauses that have been drafted to comply with English law and practice. These clauses are designed to be interpreted and applied by the English courts in the event of a dispute. They are therefore perceived by insurers as having a degree of predictability in their legal outcomes which assist insurers in assessing and underwriting marine risks.

But how effective are English marine insurance clauses in a UAE litigation context? Are they likely to work as intended?

Before addressing these questions, it is useful to provide a brief overview of the main sources of marine insurance law in the UAE on the one hand and in England and Wales on the other.

UAE Marine Insurance Law

Insurance contracts in the UAE are governed by UAE Federal Law No. 5 of 1985 (the Civil Code) and UAE Federal Law No. 6 of 2007 (the Insurance Law). Also relevant is the Insurance Authority Board of Directors' Resolution No. 3 of 2010 (the 2010 IA Directive).

In addition, Federal Law No. 26 of 1981 (the Maritime Code) includes provisions specifically applicable to marine insurance policies (together UAE Insurance Law).

Except in rare instances where the law expressly provides for contrary agreement by the parties to an insurance contract, UAE Insurance Law applies regardless of contractual agreement.

English Marine Insurance Law

English-law marine insurance policies are principally governed by the Marine Insurance Act 1906 (MIA) and the Insurance Act 2015 (the IA and together English Insurance Law).

Examples of Potential Conflict

Many will be familiar with the INSTITUTE CARGO CLAUSES (A) CL382 01/01/2009 (ICCs). The ICC is a cargo cover designed to indemnify the insured against all risks of loss of or damage to the insured cargo.

The ICCs have been subject to a lot of judicial interpretation by the courts of England and Wales. This has resulted in a high degree of legal certainty for insurers wishing to incorporate the ICCs into their policies. However, incorporation of these clauses into a policy that is governed by UAE law will not benefit from English judicial precedent when they are construed by the UAE Courts. Instead, the UAE Courts will construe the English clauses by reference to the UAE judicial understanding of UAE Insurance Law, not by reference to English case-law. We examine three ICC clauses below and how they may be construed differently by the English and UAE Courts in litigation.

Clause 11.11.1 - Insurable Interest:

ICC clause 11.11.1 provides that "*[i]n order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss*".

English law defines "insurable interest" under section 5 of the MIA as follows:

1. *Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.*
2. *In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.*

This definition has received substantial consideration before the English courts and the tendency has been to widen its definition.

In *Sharp v Sphere Drake Insurance Plc (The Moonacre)* [1992] 2 Lloyd's Rep. 501 the court held that where the insured owes a duty of reasonable care in respect to the property, the insured has an insurable interest in that property. Subsequently in *Deepak Fertilisers & Petrochemical Corp Ltd v Davy McKee (UK) London Ltd* [1999] the Court of Appeal decided that "insurable interest" extends to a sub-contractor's interest during the construction phase of a plant because loss of the project would deny the subcontractor the entitlement to be remunerated. However, the courts have been reluctant to include a pecuniary interest under the definition of insurable interest.

Under UAE Insurance Law, by contrast, Article 368 of the Maritime Code provides that "[n]*o one may benefit from insurance unless he has a legal interest in the non-occurrence of the peril*". One effect of this clause is that an insurable interest under UAE Insurance Law is defined as an interest in the peril insured against not occurring.

The English courts have developed the definition of insurable interest over many years and at the time of writing the definition is under consideration for possible reform. Insurers hoping to rely on a defence to cover based on insurable interest in a subject-matter based on English law definitions and concepts may be surprised at how divergent the UAE Court's interpretation can be.

Clause 5.1.1 – Exclusions: Unseaworthiness

The ICC clause excludes cover for loss, damage or expense arising from "*unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness of unfitness, at the time the subject-matter insured is loaded therein.*"

In the English case of *F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd.* (1925) 22 Ll. L. Rep. 424 seaworthiness was defined as a standard by which a "*ship must have the degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it*".

Additional case law has established that seaworthiness includes fitness to carry the concerned cargo, competence of crew, cargo holds free of residue, operative heating coils where oil is being carried, functioning machinery and structural soundness. A number of variables will influence the standard of seaworthiness to be applied, such as age of the ship, the cargo to be carried or the type of vessel.

Be that as it may, the English courts have heard many cases on the question of seaworthiness and have refined and extrapolated its definition through a myriad of factual scenarios. A consequence of this is that the insured can have a reasonable degree of confidence that cover will attach if the insured ensures his cargo is carried on a vessel that fulfils certain criteria of seaworthiness for a given shipment.It is against this background that clause 5.1.1 would be construed. Furthermore, it permits insurers to legitimately deny cover where carrying vessels fall short of this criteria and insurers are better better placed to assess the prospects of success of defending a cover position in English litigation.

This position can be contrasted with UAE Insurance Law which does not rely on precedent case law and each case will be considered on its own facts. The UAE court will decide, on a case-by-case basis and usually with the assistance of a court-appointed maritime expert, on whether the carrier of the insured cargo was seaworthy or not. Since insurance cover does not attach in the instance of unseaworthiness, insurers could be incentivised to deny cover on the ground of unseaworthiness where the facts allow for some support to the argument in the hope that a court would rule in their favour. Insurers do not have precedent to guide them and there is a lack of publicly accessible case precedent to identify a preferred court definition. Therefore, since insurers would not be penalised with a cost order, any hint of unseaworthiness may be worth litigating where insurers seek to deny cover.

Clause 13 – Constructive Total Loss (CTL) & Abandonment

Clause 13 of the ICCs outlines the circumstances in which cover will attach where a cargo is deemed a constructive total loss (CTL). Clause 13 provides that:

"*No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account*

of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival".

This provision largely reflects section 60 of the MIA. The courts of England and Wales have commented on and refined the section 60 definition in a number of cases. For example, on the construction of the word "abandoned" the court commented in *Masefield AG v Amlin Corporate Member* [2011] EWCA Civ 24 that abandonment was not simply a notice of abandonment but "*the abandonment of any hope of recovery*".

Further, the abandonment process is elaborated on by sections 61 and 62 of the MIA. These sections flesh out and give contextual guidance to clause 13 of the ICC. This position can be contrasted with UAE Insurance Law because the UAE Court will not consider the MIA for guidance on the procedural steps required for abandoning a cargo.

UAE Insurance Law provides that "*the insured may abandon goods to the insurer in the following circumstances:*

a. *Should news not be heard of the ship for a period of three months from the date of the last news thereof, the goods shall be presumed lost upon the date of the last news.*
b. *Should the vessel become unseaworthy and operations to transport the goods by any means of transport to the destination have not commenced within a period of three months from the date of notification of the insurer by the insured of the unseaworthiness of the vessel.*
c. *Should the goods be lost or damaged to the extent that three quarters at least the value thereof."*

It follows that under UAE Insurance law an insured can abandon cargo if a vessel goes missing for three months or the goods are not transported for a period of three months due to carrier unseaworthiness or where the value of the goods has depreciated by 75% due to damage. This is a significant departure from the English law definition and interpretation of abandonment and demonstrates how Insurers seeking to rely on English definitions of abandonment and CTL would be well advised to re-assess the risk that they are assuming when binding marine policies.

There is also a big difference between abandoning a damaged cargo because of 75% loss of value and abandoning a cargo which cannot be saved for a cost less than its value. The threshold for CTL abandonment is mathematically lower under UAE Insurance Law and thus represents a higher risk to insurers.

Clause 16 – Duty to Mitigate the Insurer's Losses

Insureds under the law of England and under UAE Insurance Law have a duty to mitigate their losses once loss or damage occurs due to an insured event.

Clause 16 of the ICC provides that it is"the duty of the Assured and their employees and agents in respect of loss recoverable hereunder

i. *to take such measures as may be reasonable for the purpose of averting or minimizing such loss, and*
ii. *to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties."*

Clause 16 closely corresponds with section 78 of the MIA, although with an added obligation upon the insured to ensure that rights to claim against carriers and other third parties are reserved.

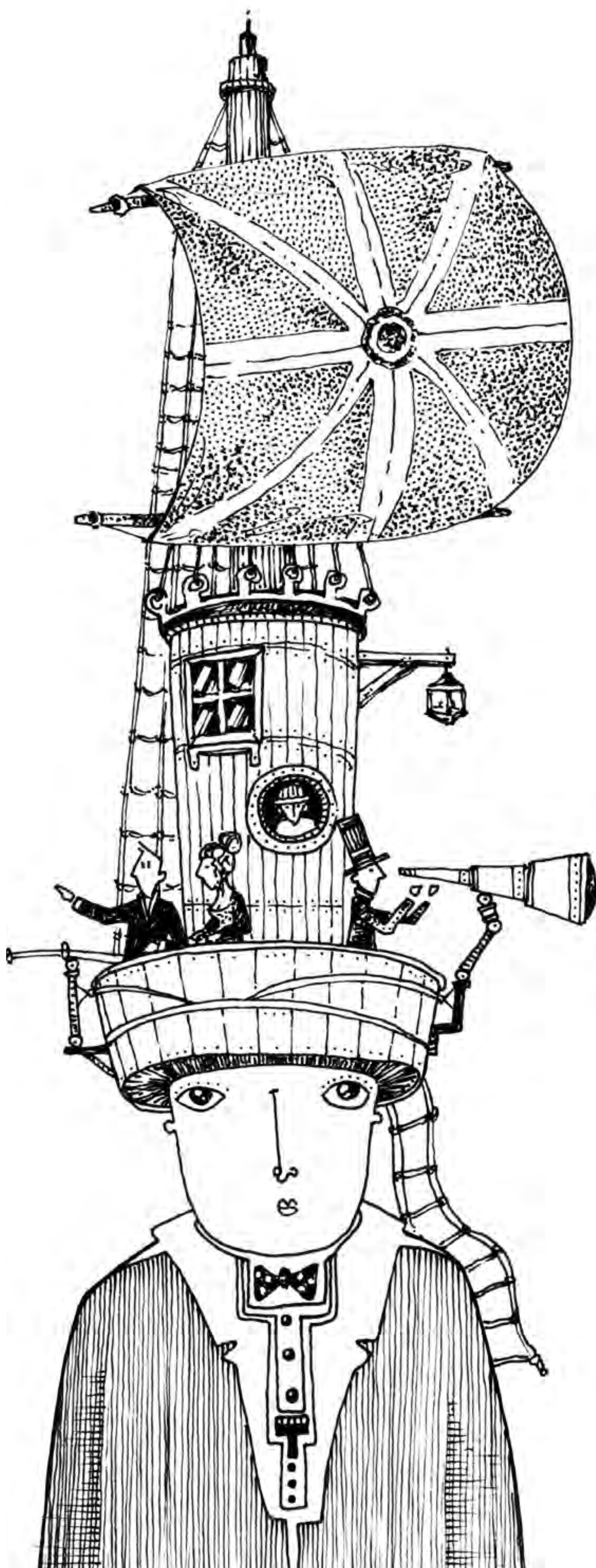
The leading English authority in respect of breach of this clause is *Noble Resources v Greenwood (The Vasso)* [1993] 2 Lloyd's Rep. 309. In that case, the Court held that, where there has been a failure to preserve a right of recovery against a third party, the loss to the insurer will be equivalent to the value of that lost right. However, the insurer was only entitled to claim for the equivalent of that loss in damages. It was was not entitled to fully deny cover. In the same ruling, the English Court held that to comply with Clause 16 of the ICC, an insured would be expected to take reasonable steps to obtain security for a cargo claim.

If, by contrast, the UAE Courts were construing Clause 16 of the ICC in UAE litigation, it is uncertain how the clause would be applied and, specifically, what steps the insured would be expected to take to minimize the insurer's losses and to preserve the insurer's rights against third parties.

Article 378(3) of the UAE Maritime Code is similar to ICC Clause 16(1) which stipulates that "*the insurer shall be also liable for costs spent due to an insured risk incurred in avoiding or limiting the loss.*" Article 391(1) also contains a provision similar to Clause 16(2) obligating the insured to "*take all the necessary measures to preserve the rights against liable third parties*".

Nevertheless, it is not certain whether the UAE Court would consider a breach of Clause 16 as a ground for the insured to avoid the policy. While the clause would likely be read by the UAE court with reference to the two cited Maritime Code articles, it is important to note that Article 391(2) indicates that, where an insured breaches Article 391(1), the insured shall be liable to damages, without specifying whether the insurer will also be entitled to avoid the policy.

Overall, where there is an allegation by the insurer against the insured for failure mitigate losses, it is unclear what criteria the UAE Courts will apply to uphold such an allegation or what the consequence of a breach of Clause 16 of the incorporated ICC would be for the insured's cover. Whilst it could be argued that there is some overlap between the UAE Insurance Law and English Insurance Law on the available remedy to an insurer in the event of a breach of Clause 16 of the ICCs (i.e. limited to damages), it remains to be seen whether the application of the UAE Insurance Law would yield a materially different outcome than by the application of English Insurance Law on the same facts.



Additional food for thought

A further word of caution is warranted. The practice and approach of the UAE Courts is not always apparent regarding incorporated clauses that have not been included in the policy itself. For example, we question whether the UAE Court would take notice of a policy wording which provides "*INSTITUTE CARGO CLAUSES (A) CL382 01/01/2009 to apply*". Indeed, it is an open question whether the UAE Courts would even consider it necessary to obtain a copy of the ICCs for review. Our view is that in practice the UAE Courts will apply the UAE Insurance Law without consulting the ICCs at all or any other incorporated standard marine clauses which are not presented, in full wording, in the body of the policy itself.

Lessons to be learned

In our view, insurers would be well advised to:

1. include an English law governed arbitration clause to protect the incorporation of the ICC clauses contained in the policy; or, alternatively
2. adjust their policy terms to accommodate for the application of UAE law and assess the risk accordingly.

The effect of adopting an English law governed arbitration clause is that, while the dispute resolution mechanism can become more expensive than resolving the matter through the local UAE courts, an English arbitration is likely to ensure that incorporated clauses are applied in a manner consistent with established precedent.

The effect of adopting the alternative approach and applying UAE law to the policy is that risks will be better priced by allowing for legal outcomes that are more likely to result under UAE law than under the law of England and Wales when applied to ICC clauses.

As for insureds, it is important to remember that cover may not always be what it seems. For instance, the obligation to disclose material information under English Insurance Law is less stringent than under UAE Insurance Law For that reason, insureds would do well to have in place a proper UAE document management system to ensure full disclosure is made to insurers when placing risks. Additionally, an insured should be aware of the law that is likely to govern a coverage dispute under the policy and should conduct itself in a manner that is compliant with that law.

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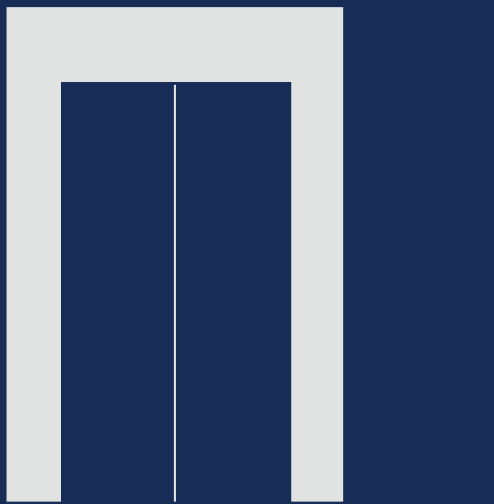

In this month's special feature of Law Update we focus on Real Estate and Hospitality across the region, covering a wide spectrum of subjects.

Despite the uncertain economic outlook generally across the region, the real estate, hotel and leisure sectors remain strong. The level of activity varies from country to country, and within the United Arab Emirates, from emirate to emirate, but generally, key players in these markets remain buoyant.

Funding for new development remains challenging, but with challenge comes opportunity. We are seeing increasing activity from private investment sources, including funds and REITs, which is both exciting and encouraging, and provides evidence of the continued growth and importance of the real estate sector generally for the region, and the levels of confidence over the longer term.

The real estate legislative framework across the region continues to mature also, and laws, regulations and procedures continue to be amended and issued. We have had the privilege to advise and work with many of the region's government authorities on these changes, and their desire to embrace and implement best practice is encouraging, as this is key for long-term sustainability and maturity.

Our award-winning Real Estate Practice has been established since 2003 and provides a comprehensive range of legal services across the Middle East region, covering all areas relevant to the real estate industry with particular specialism in the Hospitality, Leisure, Education and Healthcare sectors. Our team of 11 lawyers are an impressive blend of western common law qualified lawyers, together with regionally qualified bilingual lawyers, many of whom have advised on real estate matters across the region for well over 10 years.

Our Hospitality practice also operates on a regional basis across our network of 17 offices, 9 countries. Given the amount of new real estate development within the Middle East, there is inevitable synergy between the real estate, hotel and leisure markets, and our Hospitality and Real Estate lawyers work together to ensure that industry knowledge is combined with legal expertise, to provide commercially focused advice and assistance to our clients.

Our Hospitality practice extends beyond real estate matters however. Our regional team of over 20 lawyers, who are all specialists in their own legal fields, have in-depth knowledge of the hospitality, food & beverage and leisure industries and our expertise therefore covers all aspects, whether you may wish to roll-out or franchise a new restaurant brand, appoint an operator to manage your hotel resort, develop and sell branded apartments, or protect your intellectual property. Our Hospitality lawyers can assist you.

We hope you find this supplement engaging and informative. Should you require any further information, need any assistance or have any queries relating to real estate, hotel, restaurant or leisure related matters, please do not hesitate to get in touch.

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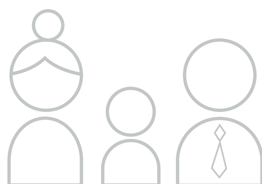


Brokers 101: What Every Property Purchaser must know about Real Estate Agents in Dubai

The recent annual report published by Dubai Land Department reported that the total value of property transactions that took place in 2016 exceeded AED 259 billion. The report also recorded that the number of brokers have increased to a total of 5,933 in 2016, and out of which around 2,285 brokers' offices were active in 2016.

The above statistics demonstrate the prominent space occupied by the real estate sector in the Dubai economy. There is a huge demand for investments in completed properties as well as off-plan units and real estate agents are usually responsible for bringing the buyer and seller together. This article aims to provide a brief summary of the current brokerage laws and DLD policies about brokers' responsibility.

Bylaw 85 of 2006

Real estate brokers in Dubai are governed by RERA pursuant to 'Bylaw 85 of 2006 regulating the real estate brokers register in the Emirate of Dubai' ("Bylaw 85"). Bylaw 85 prohibits brokers from engaging in real estate brokerage activities unless they are duly licensed and registered in the broker register maintained by RERA. It also set out the types of license categories and list of requirements which must be met by every individual or company in order to operate as a broker in Dubai.

Every registered brokerage company is required to maintain a RERA registration certificate containing the brokerage license number, validity period of the registration, and approved brokerage activities. Similarly, each individual broker must be registered with RERA and must possess a broker identity card containing its registration number, validity period, and name of the employer brokerage company.

The primary list of obligations to be met by the brokers are the following:

a. To verify the validity of the property title deed of the client (as stated in RERA circular number 8/2016 dated 3 August 2016);

b. To maintain a private record of all transactions conducted by the broker together with supporting documentation (Article 15);

c. To disclose all negotiation details, details of the brokerage process and all transaction details to his client (Article 17);

d. To not facilitate any property transaction which is deemed in violation of the applicable laws and regulations in Dubai (Article 18);

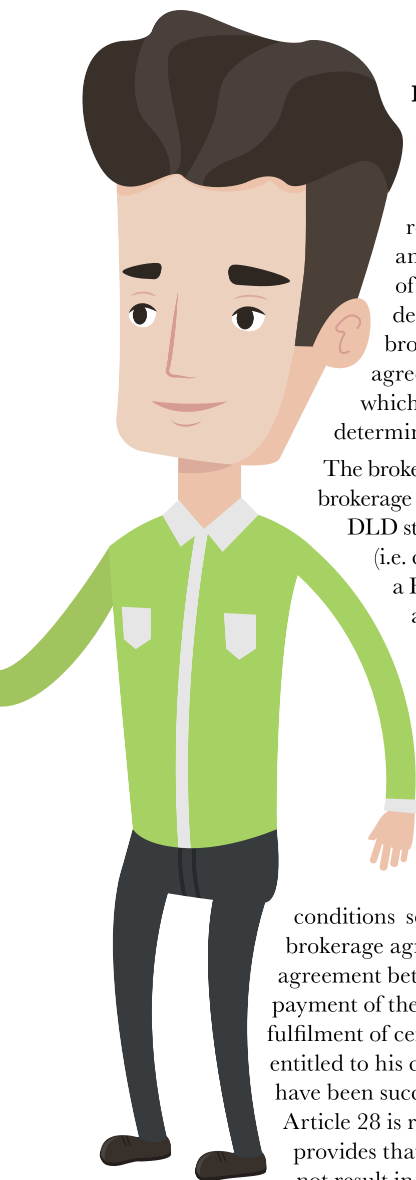
e. To disclose details of the transaction and conditions to the best of broker's knowledge and in good faith (Article 19);

f. To not hold himself out to the other party without express authorisation (failing which the broker will not be entitled to any remuneration) (Article 20);

g. To act as trustee of any amounts, securities, bonds or other items received from a party for either safekeeping or delivery to the other party subject to applicable trusteeship rules (Article 21);

h. To forfeit right to claim fees or refund of expenses incurred in case of breach of contract committed by the broker towards its client or failure to act in good faith (Article 23);

i. To remain jointly liable if more than one broker is engaged in a transaction unless expressly authorised to act severally (Article 24).



Brokerage Agreement and Remuneration

The brokerage agreement must be recorded in writing between the broker and the client and must record details of the contracting parties, property details and terms of the agreement. The brokerage commission amount must be agreed and stated in the agreement failing which the commission amount shall be determined pursuant to market practice.

The broker is required to register the signed brokerage agreement along with execution of the DLD standard form contract i.e. a Form A (i.e. contract between broker and seller) or a Form B (i.e. a contract between broker and buyer) and register the same with Dubai Land Department. For further information about the DLD standard forms, we refer to our Law Update article in July-August 2014 (which can be found on the Al Tamimi website).

Article 28 of the Bylaw 85 clearly stipulates that any payment of commission to a broker becomes payable subject to the terms and conditions set out in the duly registered and signed brokerage agreement. If the sale and purchase agreement between buyer and seller provides that payment of the broker commission is subject to fulfilment of certain conditions, then the broker is entitled to his commission once such pre-conditions have been successfully met. It is also imperative that Article 28 is read with Article 30 of Bylaw 85 which provides that if the negotiations of the broker does not result in conclusion of a contract between buyer and seller, then the broker is not entitled to claim any compensation or expenses unless agreed otherwise in the brokerage agreement. Considering the above, we recommend to always record the brokerage amount payable to the broker and the timing of such payment within the brokerage agreement or in the sale and purchase agreement to avoid any potential payment disputes.

Furthermore, if several brokers are appointed for a potential property transaction by the client, it is only the broker who can successfully conclude the transaction that becomes exclusively entitled to receive the full brokerage fees as per Article 32 of the Bylaw 85. However, if the same broker is appointed by both the potential buyer and seller for the same transaction, in that case both buyer and seller become severally liable to pay his share of the brokerage fees even if one party agrees that the other party shall bear the entire fees by virtue of Article 33 of Bylaw 85.

Cancellation of Brokerage License

Every registered broker must observe the RERA code of conduct failing which the broker shall become liable for any loss caused by either buyer or seller because of its fraudulent act or a result of failure to follow the rules of the Bylaw 85 or the code of professional ethics.

Article 39 of Bylaw 85 relates to the Permanent Real Estate Brokerage Committee (“Committee”) which has the authority to settle disputes and cancel or suspend the brokerage license in the event of failure to comply with the Bylaw 85 or any related resolutions of instructions by the broker. The Committee has the authority to issue caution to the broker by way of notice or warning or suspend its activities for a period up to six months or blacklist. Cancellation of the broker license is effected by a resolution of the Director General of the DLD in discussion with the Committee.

In addition, Article 41 of the Bylaw 85 also sets out grounds for loss of broker status and registration upon the happening of either of the followings events, (a) closure of the brokerage business and notification of the closure to DLD; (b) suspension of the brokerage business for more than 12 successive months without a valid reason; (c) failure to comply with the requirements of Bylaw 85 and its related regulations and instructions; (d) the registration of the broker is proven to be granted on the basis of false information supplied to DLD; (e) cancellation of the brokerage license resolution issued by the Committee due to violation of the code of professional ethics or any applicable laws and regulations in Dubai.

Conclusion

Prior to engaging services of a broker, every property investor must verify if the broker is duly registered with RERA by inspecting their broker ID and registration certificate of the brokerage firm. The investor must also verify the authorised signatory of the brokerage firm who has the authority to sign the brokerage agreement. In conclusion, the property investor should conduct proper due diligence on the broker and agree on key terms in the brokerage agreement, to safeguard his interest.

Additionally, the broker must protect its own interests by always ensuring to agree on its commission amount in writing within the terms of the brokerage agreement. The broker should keep themselves up to date with the prevailing DLD policies and practices. Lastly, we always recommend the broker to avoid incorporating its duties and payments within the sale and purchase agreement (between buyer and seller) and contract separately in the brokerage agreement. By following the separate agreements approach, the broker can avoid becoming a party to any dispute that may arise between the potential buyer and seller.

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Fractional Ownership of Real Estate in the Dubai Hospitality Sector

Fractional ownership is a form of investment scheme whereby a number of different persons can share in the ownership of a high value asset, with each person having the right to exclusively use such asset for a prescribed time period each year.

The concept has been adapted to a number of different types of assets, such as executive jet aircraft, luxury yachts, classic cars, racehorses, and works of art. However, the fractional ownership of real estate as a product did not come to prominence until the 1990s in luxury ski resorts in the USA, where the cost of property was high and in short supply. Since then, the model has spread to other areas of the world, such as the Caribbean and Southern Europe, as a more economical alternative to outright second home ownership.

Although containing many similarities, it differs from typical 'timeshare' schemes (which in some countries has had somewhat of a tarnished reputation), in that it involves part ownership of a property, rather than just a right to use it at certain times of the year. Annual usage allowances with fractionally owned property also tend to be longer than with timeshare, and the size and quality of fractional ownership properties may generally be better, with superior access to facilities and services, than those of timeshare properties.

Fractional ownership of real estate typically involves multiple co-owners (usually four to six), either each acquiring an undivided share in the property itself or separate shares in a special purpose vehicle ('SPV') that owns the title to the whole of the relevant property. Fractional shares are usually bought by investors in cash, due to the inherent difficulties in securing a mortgage or other types of financing for such arrangements, although some developers in some jurisdictions do offer financing options.

The allocation of usage time for each co-owner typically works by each co-owner having an exclusive right to use the property for a specified number of days, weeks, or months each year. Such periods can be fixed (usually adopted in locations where there is less evident seasonality), floating (often seen where seasonality is more of an issue and where a co-owner's use allocation rotates around the calendar year between peak and off-season), or a mixture of both.

This model has been adopted by the hospitality industry in various forms, including the concept of private residence clubs, which usually involves the fractional ownership of a hotel apartment or villa located at a premier resort destination that is managed by a high end hotel operator. These are aimed at affluent investors that, although could perhaps afford to buy a second home outright, prefer not to invest in a whole property given its likely infrequent use.

There is a very wide array of structures adopted for such schemes. However, a typical arrangement might involve:

- the investors each entering into a sale and purchase agreement with the developer relating to the acquisition of a proprietary share in the property itself or shares in an SPV established to own the property;

- the rights and obligations of the various co-owners being set out in a co-owners agreement or, where applicable, the property owning SPV's constitutional documents.
- a leaseback of the property to the developer, in order for it to be placed into the hotel rental pool to be managed by the hotel operator in accordance with its brand standards, subject to the co-owners' usage rights. Rental income can then be used to off-set against the shared costs of the operating expenses and other costs such as furniture, fixtures, and equipment ('FF&E') reserve contributions, marketing fees, and the operator's fees. Such leaseback agreement will usually also contain the relevant fractional owner's acknowledgment of the branded operator's management of the property and may, if there is a strata model of ownership adopted for the hotel development, provide the developer with certain voting rights on behalf of the fractional co-owners, which allows the developer to maintain control of management decisions (and which may also be maintained through the retention of shares and the form of the company's constitutional documents if the purchasers are investing in an SPV).

There are many potential benefits for investors, developers, and hotel operators with such schemes.

For the investor, through owning a part share of a property, such schemes offer a relatively hassle-free option of a luxury second home with the back-up, security, and facilities of a five star resort. It also provides a proportional saving on property expenses and saves time on dealing with maintenance issues and managing the accommodation of guests. Placing the property into the hotel rental pool may also generate an annual net profit. There is also the possibility of capital appreciation upon resale of the fractional share (although investors are usually locked in for a certain time period).

For the developer, if such fractional interests are being sold off-plan, this gives it access to a different group of investors and source of financing, which may be particularly useful in a depressed market when sales of whole units are slow. It may also assist with obtaining other development finance. Fractional ownership is also likely to generally increase the usage of the hotel and increase sales of goods and a la carte services.

For the operator, it increases the overall revenue stream, and thus, ultimately, the level of its remuneration relating to the particular hotel development.

Dubai, given its increasing growth as a global tourist and key business destination, is well aligned to take advantage of the benefits of fractional ownership. However, in terms of current real estate law and practice in Dubai, there are a number of difficulties in seeking to introduce such schemes. Although there are some limited provisions in the UAE Civil Code relating to co-ownership and time usage, there are no specific laws relating to the fractional ownership of property or similar structures.

There are also a number of inherent difficulties in implementing such schemes at the present time. Firstly, any such schemes are likely to be targeted at both GCC and international investors resulting in, at least an element of, foreign ownership of the relevant asset or property owning SPV. Therefore, foreign ownership restrictions need to be considered, with such schemes likely to be limited to those areas designated for foreign freehold investment. In addition, in relation to a shared title, it is likely to be problematic registering multiple co-owners with specified percentages of ownership on the relevant title deed. Investment in shares in a property owning SPV is also likely to pose difficulties – primarily because each and every change in shareholding of a company owning property in one of the designated foreign freehold areas would, under current practice, trigger a transfer fee liability. This transfer fee liability would be four per cent of the value of the property prorated in accordance with the relevant change in shareholding. This means that fractional owners may be restricted from selling their respective individual shares until the property, as a whole, is sold. Such illiquidity is likely to be a turn-off for investors.

There has been an understandable wariness by the Dubai authorities to date of putting a legal framework in place that would promote the implementation of such fractional ownership schemes. Indeed, a designated property timeshare law, which may reference fractional ownership models, has long been mooted but has not, as yet, materialised. It is essential, in terms of consumer protection, that such schemes are properly regulated through carefully considered legislation.

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Liquor Licenses in Dubai

Q&A: What operators in the hospitality sector need to know about liquor licences in Dubai

Businesses operating in the hospitality sector often face practical challenges with regard to obtaining and preserving their liquor licences in Dubai. The purpose of this Q&A is to provide such businesses with a brief overview on an issue of substantial impact on their operations.

What is the legal framework governing liquor licensing in Dubai?

The principle law is Law No. 999 of 1972 (the 'Liquor Control Law'). There are also a number of provisions namely relating to the consumption, advertisement, and sale of alcohol in Dubai (e.g. Penal Code, advertisement laws, taxes and tariffs laws, etc.)

Which authority is responsible for liquor licensing in Dubai?

Liquor licences in Dubai are issued by the Dubai Police General Headquarter ('DPGH').

What are the types of liquor licences?

There are 4 types of liquor licenses.

1. Type A: Licence to import liquor.
2. Type B: Licence to sell liquor to third parties from a shop or warehouse.
3. Type C: Licence to serve liquor within a hotel, club, or restaurant.
4. Type D: Licence to purchase liquor.

In addition to the above licence types, Article 2 of the Liquor Control Law states that the DPGH may, on the basis of an application, grant a person a licence to export liquor outside the Emirate, subject to a specific quota restraint.

What are the permissible activities under a Type C liquor licence?

Under a licence to serve liquor at a hotel, club, or restaurant, the licensee is allowed to do the following, either personally or through its employees:

a. purchase liquor from the warehouse of a person holding a liquor import licence (or a person holding a licence to sell liquor from a warehouse) upon presentation of the licence;
b. transport liquor from the locations mentioned in the previous paragraph directly to the hotel, club, or restaurant licensed to serve liquor, and store it there;
c. serve liquor for immediate consumption at licensed establishments such as hotels, clubs, and restaurants, subject to the Penal Code and other regulations in force in Dubai, and in accordance with the directives issued by the Chief Commander of the Dubai Police.

What are the rules of conduct in respect of Type C liquor licences?

Pursuant to the Liquor Control Law, the following are the main rules of conduct that must be observed by a licensee under a Type C liquor licence:

a. with the exception of wine, all liquor served at hotels, clubs, and restaurants must be served in a glass;
b. liquor served must be consumed on the premises; and
c. the licensee must maintain records of all documentation pertaining to the quantities and movement of liquor stock.

In addition to the above rules of conduct, the DPGH issued the following directives that must be observed by hotels, clubs, and restaurants under a Type C licence:

a. liquor may be sold or served at any bar, or in any lounge, coffee shop attached to or adjacent to any bar;
b. liquor may not be sold or served to persons under the age of 21 years;
c. liquor may only be served in the restaurant to persons about to partake of, partaking of, or having recently partaken of a full meal;
d. the licensee must keep a liquor stock register and allow such stock to be available at all times for inspection by police officers in uniform;
e. liquor may be served outside licensing hours to bona fide hotel guests in their rooms;
f. the Type C licence and rules of conduct, together with a comprehensive list of prices of alcoholic drinks, must be permanently displayed on the premises;
g. with the exception of beer and wine, liquor may only be served in measures to a maximum of one fluid ounce;
h. sale of liquor for consumption off the premises is strictly forbidden;
i. serving liquor in the foyer of the hotel or any other part of the hotel that is not specifically licensed for this purpose is strictly forbidden;
j. the hotel management is directly responsible for controlling the use of the Type C licence, so as to prevent any unauthorised use of such licence;
k. the hotel is required to notify the nearest police station (or police headquarter) in the event of any disturbance.

What are the information and documents generally required from a person applying for a Type C liquor licence?

A person applying for a Type C liquor license must submit a written request to the DPGH, which would include:

a. details of the applicant, including the name of the physical person who shall be named in the licence;
b. description of the premises where liquor is expected to be sold;
c. description of the security storage arrangement in respect of the liquor stock;
d. description of the fire precautions; and
e. cost amount of monthly liquor required.

How long does a Type C licence typically takes to be issued by the DPGH?

The licence is usually issued within seven to ten working days from the date of inspection of the relevant premises by the DPGH officers.

Is there a limit on the amount of alcohol purchased by an establishment licensed under Type C licence?

Yes. The DPGH ensures that each Type C licence is subject to a quota for the purchase of liquor, which cannot be exceeded. This quota depends on the type of outlet, its size, and the number of expected guests (e.g. the quota applicable to a restaurant would be generally less than the one applicable to a lounge).

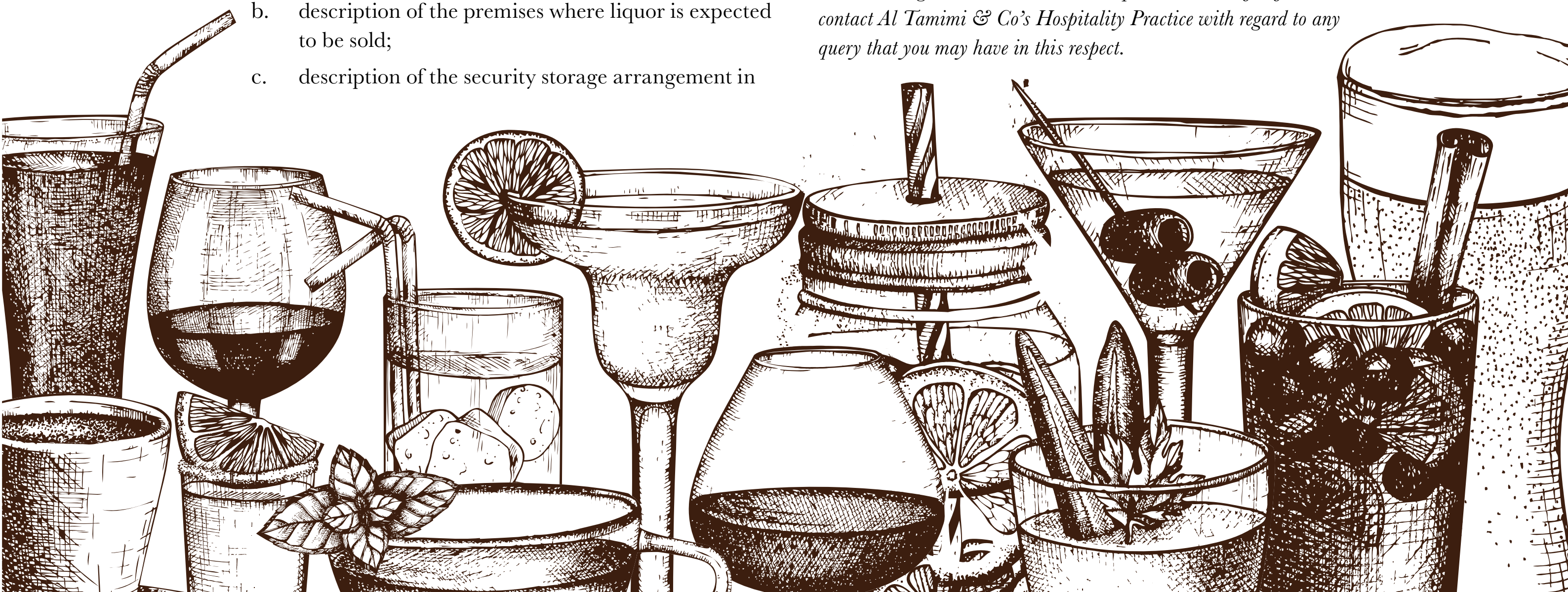
Are there restrictions on the opening hours of an establishment licensed to sell liquor under a Type C liquor licence?

Yes. A licensed establishment may only sell liquor to its customers within permitted operating hours. The permitted operating hours are set by the governmental authorities and differ subject to where the licensed establishment is located. Please note also that there may be different restrictions on opening hours, dependent on the licensed activity of the establishment, i.e., a restaurant versus a bar.

Can a licensee advertise alcohol in Dubai?

It is illegal to advertise the sale of alcohol beverages in Dubai. However, the practice on the ground indicates a certain degree of pragmatism that would warrant seeking legal advice on case by case basis.

Al Tamimi & Co has considerable experience in advising and assisting operators in the hospitality sector on establishing a presence in Dubai and obtaining the relevant licenses and permits. Please feel free to contact Al Tamimi & Co's Hospitality Practice with regard to any query that you may have in this respect.



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Abu Dhabi Real Estate Law: One Year Later

Law No. 3 of 2015 on the Regulation of Real Estate Sector in the Emirate of Abu Dhabi and its implementing regulations (the "Property Law") have been in effect from 1 January 2016. The Property Law addresses many issues of concern to developers, buyers, property financiers and mortgagees within the Abu Dhabi market. It also establishes Abu Dhabi's Department of Municipal Affairs & Transport (the "DMAT") as the regulator for real estate in Abu Dhabi. The relevant municipalities in the Emirate, namely the Abu Dhabi Municipality, Al Ain Municipality and the Western Region Municipality ("Relevant Municipalities") are charged with implementing the Property Law and supervision and control of all aspects related to real estate in Abu Dhabi, including issuing licences, controlling escrow accounts and cancelling real estate development projects.

This article will provide an update on the implementation of the Property Law.

Registration

As a means to safeguard the interests of the various parties to a property transaction, such as the developers, property financiers and buyers, the Property Law introduced certain registration requirements. The Property Law creates three new registers: the Real Estate Development Register, the Real Estate Register (for units in completed developments) and the Initial Real Estate Register (for units sold off plan). These registers are administered by the Relevant Municipalities.

The Property Law requires that all developers, real estate development projects and escrow agents are registered in the Real Estate Development Register.

The procedures for licensing and registering developers on the Real Estate Development Register have been fully established and implemented by the Relevant Municipalities. To our knowledge, during the first quarter of 2016, most developers operating in the Emirate of Abu Dhabi have been licensed and registered with the Abu Dhabi Municipality ("ADM").

The registration of real estate development projects commenced in the second half of 2016. Discussions between the ADM and certain developers in relation to the application of the Appendix to Resolution Number 233 of 2015 on the Unified Method of Measuring and Calculating the Area of Buildings, Villas and Residential Units in the Emirate of Abu Dhabi have delayed the registration of some projects. This has now been resolved and the registration of real estate development projects is underway with many major projects of leading developers already being registered. Developers will receive a project registration certificate for each project that is successfully registered.

Due to the ongoing discussions between the ADM and certain developers, the registration of properties in the Real Estate Register and Initial Real Estate Register has been delayed. Accordingly, most disposals relating to off plan sales have not been entered into the Initial Real Estate Register and consequently, off plan sales are still being registered with the developer. For this reason, financiers should still include registration with the developer as a

condition precedent to the funding of an off plan sale, with an obligation on the borrower and undertaking from the developer to register the off plan sale as soon as it is practicable to do so in the Initial Real Estate Register.

A large number of banks licensed by the Central Bank of the United Arab Emirates (the "Central Bank") have also signed agreements with the DMAT formally authorising such banks to open escrow accounts and provide escrow services. In accordance with the Property Law, the DMAT has also been registering escrow account agreements, broker agreements and other agreements relating to a real estate development project.

Title deeds & Initial Sales Certificates

The registration of real estate units in the Real Estate Register and Initial Real Estate Register is currently underway. It is expected that the issuance of title deeds and initial sale certificates will further progress as more real estate development projects are registered with ADM. Until disposals relating to off plan sales are entered on the Initial Real Estate Register, it is expected that developers will maintain records of sales and other transactions in respect of off plan and completed units in their internal registers. The deadline set by the Property Law for the registration of off-plan units on the Initial Real Estate Register and the registration of completed units on the Real Estate Register was on 31 December 2016. While the Relevant Municipalities are still working to establish the relevant registration procedures, the obligation on developers to meet their registration requirements on the specified deadline pursuant to the Property Law remains. Accordingly, developers are expected to closely follow-up with the Relevant Municipalities and promptly comply with the registration procedures as soon as they are issued. Article 27 of the Property Law provides that any disposition shall not be binding on any of the parties involved or towards third parties unless they are registered in the Initial Real Estate Register in accordance with this Law.

Mortgages

The Property Law requires that banks or financial institutions acting as mortgagee must be duly licensed by the Central Bank to engage in real estate financing in Abu Dhabi, but does not stipulate that a mortgagee must strictly be a bank or a financial institution.

The Property Law allows for the creation of mortgages over musataha, usufruct as well as mortgages over long term leases which extend to a period of 25 years or more. This aspect has been implemented and the Relevant Municipalities are registering such mortgages in accordance with the Property Law.

It is also important to note that pursuant to Article 37 of the Property Law, mortgages created over real estate units which have not been registered in the Initial Real Estate Register or the Real Estate Register, as applicable, shall be considered invalid. The risk to mortgagees is that such mortgages could become void if the registration from the Real Estate Development Register to the Initial Real Estate Register or the Real Estate Register does not occur. Accordingly, it is still important to have an undertaking from the developer to ensure this is completed and for the fees to be available so there is no barrier to registration.

The Relevant Municipalities also allow for searches of the Real Estate Register and Initial Real Estate Register. For owners initiating a search, this is a straight forward process which can be completed by the Relevant Municipalities for a nominal fee. The Relevant Municipalities issue a search certificate which provides the details of the owner, the type of interest in the property, the permitted use of the property (i.e. residential or commercial) and how the interest was acquired. The owner's consent for obtaining search certificates is a prerequisite for the Relevant Municipalities. It is important to note, however, that where there is government ownership of a property to which a musataha, usufruct or long term lease relates, the Relevant Municipalities do not currently issue search certificates in relation to such properties. Interested parties may, however, apply for an issuance of a statement of the property records.

Conclusion

The Relevant Municipalities are progressing with the implementation of the Property Law. While certain procedures require fine tuning, which we expect will come in time as the Relevant Municipalities become more confident in their new function, the Property Law is a boon for investors and financiers alike.

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A New Regime for Mortgaging of Granted Land in Dubai

The issuing of Dubai Decree on Mortgaging Granted Lands in the Emirate of Dubai (Decree No. 31 of 2016) ('Decree'), expands upon the existing framework for the registration of mortgages over granted land in Dubai and should provide beneficiaries with greater flexibility to procure development or operational funding in respect of such land.

In particular, the establishment of a clearer mechanism for the enforcement of lenders' rights under registered mortgages over granted land is a key step to creating a more robust and attractive regime for lenders.

Background

Prior to the issuance of the Decree, the ability for beneficiaries of granted land in Dubai to use such land as security to procure development funding was governed by The Order Issued on 14 May 1996 (the 'Order') and The Instructions Issued on 5 June 1996 (the 'Instructions').

The Order and the Instructions permitted the registration of mortgages over land granted for residential or commercial purposes, provided that certain conditions were met. These conditions included, that the lender must be a bank licensed to operate in Dubai, that the purpose of the mortgage must be to fund the construction of a building on the land, and that the method for drawing down on the loan reflect that restriction.

The Order and the Instructions were silent on land granted for industrial purposes. The express exclusion of commercial and residential granted land from the application of the Dubai law concerning Mortgages in the Emirate of Dubai (Law No. 14 of 2008) (the 'Mortgage Law'), also created uncertainty with regard to lenders' ability to enforce security over granted lands. In particular, until recently, the Dubai Courts had been reluctant to allow enforcement of such mortgages.

The Decree, which takes effect from 1 November 2016, repeals the Order and the Instructions, installs a more developed framework going forward, and provides clarity on these and other issues.

> "The stipulation of a clear enforcement regime should result in increased confidence amongst both borrowers and lenders, and further facilitate the development and use of such granted land."

Common elements that continue to apply under the Decree

Despite their repeal, a number of the elements applicable under the Order and the Instructions continue to apply under the Decree. Such elements include:

- the lender must be a bank or financial institution licensed to operate in Dubai;
- the Dubai Land Department remains charged with ensuring that the terms of any proposed mortgage satisfy these relevant funding conditions; and
- mortgages which do not satisfy the relevant conditions must not be registered (and are deemed by the Decree to be null and void).

Mortgages registered under the prior framework are also deemed by the Decree to be valid and effective under the operation of the Decree.

Broader application of the Decree

The Decree relates to government land granted to individuals (natural or legal) for residential, commercial, or industrial purposes. The Decree makes a number of important expansions or clarifications, beyond the scope of the prior framework. These include:

- granted industrial land is now expressly included within the scope of the Decree, providing clarity that such land may be mortgaged;
- funds advanced in respect of granted residential land may be utilised for the construction, maintenance, expansion, or replacement of the improvements on the land;
- funds advanced in respect of granted commercial or industrial land may be applied to the use of such land for the purpose for which it was granted;
- the income of commercial and industrial granted land may be separately mortgaged from the land itself (permitting the mortgagee to manage the operation of the land and receive the income from the use of the land until the debt is repaid);
- mortgages are to be registered in accordance with the procedures applicable under the Mortgage Law (noting that the Mortgage Law is otherwise not applicable to land granted for commercial and residential purposes); and
- stipulating an enforcement regime, giving lenders clarity on the process for enforcement of a mortgage over granted lands (discussed below).

To procure registration, the borrower must now submit to the Land Department a copy of the applicable building permit issued by a competent authority. The Land Department also has the discretion to require any other documents or information it deems necessary to assess whether a mortgage meets the criteria for registration. Typically, this would include providing a copy of the loan agreement illustrating the purpose of the loan.

Enforcement

Without detracting from the greater clarity that the Decree provides on various matters, perhaps the most import aspect of the Decree is the inclusion of a clearer regime for the enforcement of mortgages registered over granted land. Not only will that regime address uncertainties with enforcement, giving lenders greater confidence in advancing funds for the development of granted lands, but it also provides clarity that granted lands are a legitimate form of security that may be offered by borrowers or relied upon by lenders.

The default and enforcement procedures applicable under the Decree align closely with the corresponding provisions of the Mortgage Law, requiring the mortgagee to serve notice of default by the notary public and to allow

at least thirty days for the mortgagor to cure any breach, prior to seeking an order for sale from the execution department of the Courts. If the mortgagor fails to cure the breach, then the Court may order the sale of the property in accordance with the Land Department's applicable procedures.

One requirement specific to the Decree is that the granted residential lands may not be sold without the prior approval of the Board of the Mohammed Bin Rashid Housing Establishment ('Establishment'). It is not clear, at this stage, on what basis such approval will or will not be forthcoming.

The Decree also stipulates the priority of entitlements to repayment, following the sale of the mortgaged property as follows:

- judicial fees and expenses;
- fees arising from the sale of the mortgaged property;
- the fees of ownership of the commercial or industrial lands (due under Law No. 4 of 2010 Concerning the Ownership of Industrial and Commercial Lands) ('Transfer Fee'), unless this was paid at the time of registering the mortgage;
- repayment of the secured debt; and
- in respect of commercial or industrial land, the balance to the mortgagor; or
- in respect of residential land, the balance shall devolve to the purchase of accommodation in the name of the mortgagor or such other housing arrangement as the Establishment deems appropriate. If the balance is not sufficient to procure alternate accommodation, it will be paid to the mortgagor.

The Transfer Fee applicable to any transfer of ownership of granted land by a beneficiary is equal to 30 per cent of the market value at the time of the sale as designated by the Land Department. Where the land holder is not the original beneficiary of the grant (e.g. due to a subsequent transfer), the applicable fee is equal to 50 per cent of that market value.

While the enforcement process and the priority regime (detailed above) will be familiar to lenders, the potential imposition of the Transfer Fee (if applicable) will be a key due diligence issue for lenders. Where the original beneficiary of the grant is the mortgagor, the payment of the Transfer Fee that would be applicable on an enforced sale. It is likely lenders will insist on such fees being paid up front, or reduce the loan accordingly.

Conversely, where a landholder (who is not the original beneficiary of the grant) is the mortgagor, payment of the applicable Transfer Fee may be required in order to procure registration of the mortgage. Again, this will be a due diligence issue for lenders.

Finally, it is timely to reiterate that registration of the mortgage, as a critical pre-requisite to enforcement, should also be a pre-requisite to the advance of funds.

Government agencies and real estate developers

Two additional matters are covered by the Decree:

- first, land granted to government agencies, or to companies in which the government (or government agencies) own at least 50 per cent of the shares, may be mortgaged unconditionally; and
- second, land granted to real estate developers are deemed to be freehold land and may be unconditionally mortgaged and disposed of.

While the application of the first point is clear, the implications of the second point are less so. While the language is broad, we consider that this must be read having regard to the existing law in relation to real property rights in Dubai and, in particular, restrictions on foreign ownership of land (other than in designated areas). Practically speaking, we also anticipate that the grant of any large development sites would be limited to government, or government related real estate developers.

Conclusion

Readers will appreciate that the Decree establishes a much more developed regime for the mortgaging of granted lands and provides clarity on a number of issues. Providing a broader scope for the permitted application of borrowed funds and, in particular, establishing a clearer mechanism for the enforcement of security over granted lands, should result in increased confidence amongst both borrowers and lenders, and further facilitate the development and use of such granted land.

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Tenancy Disputes in Dubai

In Dubai, the landlord and tenant relationship is regulated by Law No. 26 of 2007 as amended by Law No. 33 of 2008 'Regulating Relationship Between Landlords and Tenants in the Emirate of Dubai' ("Tenancy Law"), and in the event of a tenancy dispute, the Rental Disputes Settlement Centre ("RDSC") is the competent authority to hear claims or applications related to the tenancy and adjudicate the dispute. The RDSC was established in 18 September 2013 by Decree No. 26 of 2013 'Concerning Rent Disputes Resolution Centre in the Emirate of Dubai' ("the Decree").

Article 3 of the Decree explains that the RDSC is a special judicial system that has exclusive jurisdiction in hearing rental disputes in the Emirate of Dubai, operating on a fast and simple mechanism in order to achieve social and economic stability in Dubai for all those concerned with property leasing. Article 5 specifies that the head quarters of the RDSC is located at the Dubai Land Department, and other offices may be opened in Dubai.

Jurisdiction of the RDSC

Article 6 of the Decree identifies the jurisdiction of the RDSC, and states that it has exclusive jurisdiction in hearing all rental disputes arising between landlords and tenants in Dubai or inside free zones in Dubai except free zones that have special judicial committees or courts competent to settle rental disputes, such as the Dubai International Financial Centre. It further excludes disputes arising from finance lease contracts, and long term lease agreements; the Dubai Courts has jurisdiction to hear and decide in these disputes.

Furthermore, Article 6 of the Decree grants the RDSC the jurisdiction to decide on appeals and the enforcement

of judgments issued by the RDSC on matters that fall within its jurisdiction. The RDSC also has jurisdiction for requests to take temporary or summary procedures, such as depositing rent cheques or the keys of the premises by the tenant where the landlord refuses to take them.

While it is not expressly stated in the Tenancy Law, our view is that short term stays at hotels and hotel apartments should fall within the jurisdiction of the RDSC, and Tenancy Law should be applied. However, in practice we do not see disputes in such arrangements considering that the establishment would have received all dues up front for the short term stay, which minimizes the risks of claiming any outstanding dues from the guests. We have seen cases related to hotel apartments which the RDSC has adjudicated.

Documents Required for Filing a Case at the RDSC

If one of the landlord or the tenant wishes to file a claim related to the tenancy relationship, the claimant has to provide the RDSC with a statement of claim that has the following documents attached:

1. Passport and Emirates ID of the claimant or commercial license of the company.
2. Passport and Emirates ID of the defendant or commercial license of the company.
3. Documental evidence supporting the claims, e.g. Statement of Account.
4. Copy of the lease agreement.
5. Copy of the Dubai Municipality Affection plan or Dubai Land Department Title Deed pertaining to the leased premises.
6. DEWA Premise Number or Ejari Registration Number.

Article 4(2) of the Tenancy Law requires the landlord and tenant to register the lease agreement in Ejari, however, it is not a mandatory requirement for filing a case at the RDSC, and alternatively, a DEWA Premise Number will suffice for filing the case. Please note that all documents submitted must be in Arabic, or translated into Arabic by a certified legal translator.

Litigation Before the RDSC

Article 10 of the Decree introduces the Reconciliation Department, which is an optional step prior to litigation before the First Instance Circuit. The Reconciliation Department examines all rental disputes presented by landlords and tenants or their legal representatives, and examines all relevant documents, instruments and evidence submitted, and suggests reconciliation in order to reach an amicable settlement for the dispute within a maximum period of fifteen days. Such period may extended for a similar periods by a decision of the supervising judge.

In the event that landlord and tenant agree on settlement terms, such settlement will be documented and signed by the landlord and tenant, and further approved by the judge supervising the Reconciliation Department.

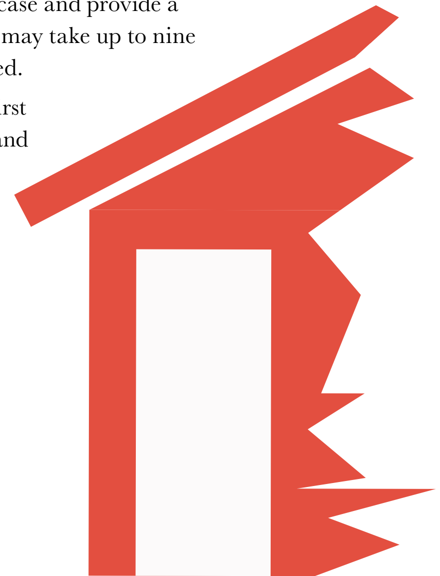
In the event that amicable settlement is not achieved before the Reconciliation Department, the dispute file will be forwarded by the Reconciliation Department to the First Instance Circuit.

Fees for Filing a Case at the RDSC

The fees for registering a case at the RDSC are 3.5% of the annual rent of the leased premises, and in any event the registration fees must be at least AED 500 and not exceed AED 15,000 for financial claims. In the event of an eviction claim or renewal of tenancy contract, then the maximum registration fees would be AED 20,000. In cases where both a financial claim is made and eviction is requested, the maximum filing fee would be AED 35,000.

Claims at the First Instance Circuit usually take from one to three months before a judgment is issued. However, in complicated and technical cases where the RDSC tribunal decides to mandate finance or engineering experts to study the case and provide a technical report on the matter, it may take up to nine months before a judgment is issued.

The RDSC judgment at the First Instance Circuit will be effective and executable unless an appeal is made. In the event that the annual rent value of the lease agreement is more than AED 100,000 the concerned party may file for an appeal. If the appealing party was ordered to pay a specified sum by the First Instance Circuit, that party is required to pay 50% of the award issued against it as determined for the appeal to be accepted. Waivers from this



requirement can be requested and awarded based on the discretion of the RSDC.

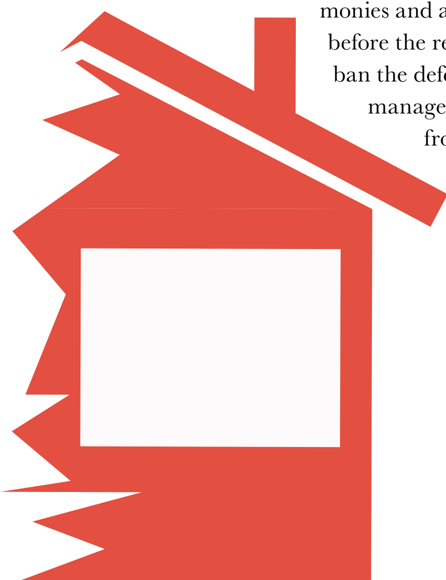
Execution and Appeal at the RDSC

The judgment of the First Instance Circuit may be appealed within 15 calendar days from the date of issuance or the date the defendant was notified of the judgment; otherwise, the First Instance Circuit judgment becomes final and executable. In the event that the First Instance Circuit judgement is appealed, litigation before the Appeal Circuit usually takes one to two months. The Appeal Circuit judgment is final and executable.

Following the issuance of an executable judgment, the claimant may proceed to open an execution file at execution department at the RDSC. The defendant will be notified with the execution of the judgment, and will be granted a grace period of 15 days from the date of being notified with the execution to willingly comply with the judgment.

The enforcement procedures of the judgment, including eviction procedures, will commence following the lapse of 15 days from the date the tenant is notified with the judgement. Following the lapse of the notification period, the eviction date will be scheduled by the RDSC for the bailiff to visit the premises and carry out the handover process.

Following the eviction, the landlord must file an application before the execution department of the RDSC to claim rent and other charges against the tenant until the eviction date. The RDSC will subsequently carry out an asset search to identify and locate monies and assets owned by the tenant before the relevant authorities, and even ban the defendant or the defendant's manager (in the case of a company) from travel until the judgment is complied with. Furthermore, Article 22 of the Decree provides the RDSC the right to use assistance from the execution department of Dubai Courts.



Summary Judgments and Measures

The RDSC provides summary judgements in certain disputes between landlords and tenants, specifically in matters relating to handing over of the leased premises and the payment of rent.

> "The party who is in possession of the keys to the premises may proceed to the RDSC and lodge the keys at the RDSC treasury, and notify the other party that the keys are available for collection."

In practice, in the event that the landlord refuses to receive the rent from the tenant for any reason, the tenant may proceed to the RDSC and deposit the rent amount in the RDSC treasury so that the tenant would not be in default of the contractual obligation to pay the rent. The tenant should notify the landlord that the money owed is available for collection by the landlord or his legal representative.

Similarly, in the event that the landlord refuses to receive the keys to the leased premises at the time of lease agreement expiry or termination, or in the event that the tenant refuses to receive the keys from the landlord at the time for rent commencement date, the party who is in possession of the keys to the premises may proceed to the RDSC and lodge the keys at the RDSC treasury, and notify the other party that the keys are available for collection.

By providing such measures, the RDSC provides swift service that guarantees that each party to the lease agreement will not be held responsible for the omissions and actions of the other party.

We believe that the real estate market has dramatically evolved in Dubai, and the RDSC is making strides towards matching the requirements of the current real estate market by bringing swift and consistent judgments which bring stability in landlord and tenant matters. In our opinion, the stability brought by the RDCS to the real estate market helps investors in the property leasing sector to not hesitate in property leasing activities.

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Foreign Ownership of Real Estate in Egypt

Foreigners (individuals and companies) are entitled to own real estate in Egypt subject to certain conditions and some restrictions. The regulation of foreign ownership of real estate is spread across several laws and regulations. The nature of the real estate (e.g., residential, investment, agricultural) and its location (e.g., the proximity of the property to Egypt's borders) determines the scope of the ownership rights and any applicable restrictions.

Residential Property

Law No. 230 of 1996 on the Regulation of Ownership of Built Properties and Vacant Land by Non-Egyptians ("Law No. 230 of 1996") governs the ownership by foreigners of property for residential purposes. Foreign ownership of property for non-residential purposes (i.e., commercial, offices or agricultural purposes) is regulated by other separate laws and regulations.

In applying Law No. 230 of 1996, a company is deemed a foreign company if the majority of its capital is not owned by Egyptians, regardless of whether the company is incorporated and registered in Egypt or elsewhere. Law No. 230 of 1996 applies to all kinds of real property disposals by foreigners except inheritance. For purposes of this law, ownership rights include freehold ownership and usufruct rights.

Pursuant to Article 2 of Law No. 230 of 1996, the number of lands or built properties which a foreigner may own must not exceed two properties for residential purposes (for the owner and his immediate family) and the area of each real estate must not exceed 4,000 square meters. Once acquired, a foreigner must hold on the residential real property for 5 years before he is able to dispose of it to others, unless otherwise permitted by virtue of a special resolution issued by the Prime Minister (Article 5 of Law No. 230 of 1996). Any disposal or acquisition in contravention with any of the conditions set by Law No. 230 of 1996 would be considered null and void.

The Council of Ministers has the authority to relax these restrictions and issue special conditions on the

ownership of real estate located within touristic areas and master communities it designates from time to time. Accordingly, Prime Minister Resolution No. 548 of 2005 states that foreigners shall enjoy equal rights with Egyptians for acquiring freehold title to units in Sidi Abd El Rahman, Ras El Hekma, Hurghada and the Red Sea and usufruct rights for up to 99 years in Sharm El Sheik for residency purposes, subject to obtaining the approval of the Ministry of Defense, Ministry of Interior and the National Security Authority. Units acquired in the areas above-mentioned governed by Prime Minister Resolution No. 548 of 2005 are exempted from the 5-years restriction on disposal and accordingly may be disposed of at any time after their acquisition.

In addition, ownership of residential lands is conditional to the development of the land. Pursuant to Article 4 of Law No. 230 of 1996, a foreigner who acquires a residential land must start construction works to develop the land within 5 years from the month in which registration of such land with the Notary Public is recorded. In the event the five-years period lapses without commencing construction works, the prohibition to dispose of the vacant land would be extended to a period to the delay period in commencing construction works.

Desert Land & Agricultural Land

Law No. 143 of 1981 on Desert Lands regulates ownership of desert land in Egypt. This law restricts ownership of desert land to Egyptian nationals and to Egyptian companies owned by at least 51% of Egyptians.

Agricultural lands are exclusively reserved to Egyptians. Law No. 15 of 1963 on the Prohibition of Foreign Ownership of Agricultural lands prohibits the acquisition of agricultural lands by foreigners (both individuals and companies), whether by way of freehold ownership, usufruct or any other type of real property right.

Limitations on Ownership in Some Restricted Areas

The ownership of real estate property in some areas in Egypt is restricted regardless of the nationality of the proposed owner. Ownership of land in these areas is limited to the State for public security reasons.

For example, Law No. 68 of 2015 as amended by the Council of Ministers Resolution No. 215 of 2017 prohibits the ownership of real estate in Sinai to Egyptians individuals and companies entirely owned by Egyptians. Subject to obtaining a number of governmental approvals, foreign individuals and companies may acquire usufruct rights over lands for term of up to 75 years for investment or economic development purposes.

> "The regulatory regime for foreign ownership of real estate in Egypt offers opportunities for investment, particularly in key touristic and high-end residential communities."

Companies entitled to such usufruct rights must be joint-stock companies owned by at least 55% of Egyptians.

Real Estate for Foreign Investment Projects

Law No. 8 of 1997 of Investment Guarantees and Incentives as revised by Law No 17 of 2015 ("Investment Law") provides that foreign companies and establishment which investment projects fall within the list of commercial activities defined by the Investment Law and its executive regulations, may own land buildings and develop real estate as necessary for the purposes of establishing and expanding their commercial activities, except lands and properties in areas designated by the Council of Ministers from time to time. The list of activities mentioned in the Investment Law and the executive regulations issued by the Council of Ministers is quite exhaustive.

For the purposes of the Investment Law, a company must be incorporated in Egypt in the form of a joint stock company, limited liability company or limited partnership (excluding any other form of companies). However, there are no restrictions on the nationality of the shareholders, their residence and their shareholding percentage in the company (Article 12 of the Investment Law). Foreign companies may also apply to obtain real estate rights over state-owned lands and properties which the Government accepts to designate for foreign investment projects pursuant to the procedures and requirements set out in Articles 5, 6 and 73 of the Investment Law.

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Foreigners Right to Own Real Estate in Iraq

This article considers the rights of non Iraqi nationals to own real estate in Iraq.

What was the law previously?

The Real Estate Registration Law Number 43 of 1971 as amended (the "Real Estate Registration Law"), provided that the right to acquire real estate is restricted to Iraqi nationals only and does not extend to foreigners save where the following exceptions apply:

1. there must be reciprocity in treatment between Iraq and the country of the relevant foreigner who is seeking to acquire the real estate;
2. there must be no administrative or military impediment in respect of the acquisition;
3. the property must not be less than 30 kilometers from Iraq's borders; and
4. the Iraqi Ministry of Interior must approve the relevant acquisition.

Additionally, Kuwaiti nationals were allowed to acquire real estate pursuant to Law Number 19 of 1952 and other Arab nationals pursuant to Law Number 5 of 1955. This has resulted in many prime locations in Iraq being owned by Kuwaitis and other Arab nationals. Corporate entities, including foreign entities, may acquire real estate pursuant to Articles 152 and 153 of the Real Estate Registration Law subject to the following:

1. the company's registration must be attested in Iraq;
2. the articles of association of such company must allow the acquisition of real estate;
3. the Minister of Interior must approve the registration of the property; and
4. the property must be located within the borders of a city or kasbah.

Since this time, a number of laws have been issued to allow the acquisition by foreigners of real estate in Iraq in particular situations.

What is the updated position?

Non Iraqi nationals were permitted to own real estate until 1994 (as set out above) when the situation was dramatically reversed with the issuance of a decision by the now dissolved Revolutionary Command Council which suspended all laws and decrees that allowed the ownership of real estate by foreign nationals.

Thereafter, in 2005 the permanent constitution of Iraq was introduced which granted Iraqi nationals the right to own properties anywhere in Iraq and denied foreigners the right to own immoveable properties except as provided under the law . We consider the laws that have been introduced since this date and their effect.

Article 10 of the amended Iraq Investment Law Number 13 of 2006 (the "Iraq Investment Law")

provides that an Iraqi or foreign investor shall enjoy all of the privileges, benefits and guarantees set out in the aforementioned law. Furthermore, the Investment Law provides that an Iraqi or foreign investor shall have the right to acquire land reserved for residential projects and owned by the state or public sector, as well as land owned by the private sector solely or in partnership with the public sector provided that the use of the same shall not conflict with the principally intended purpose. It is also worth noting that an Iraqi investor is allowed to acquire land reserved for agriculture or industrial use and to enter into a partnership agreement with a foreign investor for financing and management purposes.

When an Iraqi or foreign investor acquires a property, a lien shall be inscribed for the purpose of preventing any disposal of the property until the Iraqi or foreign investor satisfies its obligations as verified by the Investment Authority and the investor shall be required to use the property as intended and refrain from entering into any speculative activity with respect to such property. In the event that the investor fails in performing its obligations within the relevant period, the real estate registration department shall, upon request from the Investment Authority, cancel the registration of the property and return the property to its previous owner, provided that the investor shall receive back the previously paid purchase price less the equivalent rent in respect of the occupancy period.

The foreign investor is obligated to build residential units and to sell or lease such units to Iraqi nationals but shall have the right to dispose of the non-residential parts of the project during the entire licensing term in accordance with the conditions stated in the agreement executed with such investor. While the investor may transfer part of the investment project after completion of 40% of the project, it shall not be allowed to transfer the ownership of the project unless it is entirely completed. We also note that the Iraq Investment Law has prohibited the expropriation or nationalization of an investment project or the revocation of its ownership, whether in part or in whole, except for public interest, and in which case, the investor shall be entitled to a fair compensation. The Iraq Investment Law further states that any future amendment shall not operate retroactively so as not to affect the guarantees and benefits afforded under such law.

The Iraq Investment Law allows the foreign investor to rent, lease and acquire Musataha rights from the government and the private sector for the purpose of constructing investment projects for a period not exceeding 50 years subject to renewal.

What is the position in Kurdistan?

Article 3 of the Investment Law of Kurdistan Region Number 4 of 2006 (the "Kurdistan Investment Law") states that the foreign investor shall be treated in the same manner as the national investor. The Investment Law further provides that, subject to the other provisions of the Investment Law, the foreign investor is entitled to purchase and lease lands and real estate as required for establishing, expanding, diversifying and developing a project. The foreign investor is entitled to purchase and rent for the benefit its investment project such residential properties and vehicles as required in the context of the investment project. Moreover, the foreign investor is entitled to assign its investment, in part or in whole, to a foreign investor or to a national investor or to assign the project to its partner, provided that the investor obtains the approval of the Investment Authority. In the event of assignment, the new investor shall substitute the previous investor in all of its rights and obligations ensuing from the project. A lien shall be inscribed on the property by the relevant real estate registration authority for the purpose of preventing any disposal affecting a property which is dedicated for an investment project. The lien shall not be lifted unless the Investment Authority approves and provided that the investor satisfied all of its obligations.

Any other relevant laws?

The Iraqi Companies Law Number 21 of 1997 (the "Companies Law") prohibited foreigners from participating in Iraqi companies. However, an amendment to the aforementioned law was introduced in 2004 to allow foreigners to participate in and entirely own Iraqi companies, except in specific cases such as commercial agencies which must still be Iraqi owned. Given that companies incorporated in Iraq are considered Iraqi pursuant to Article 23 of the Companies Law and have a distinct legal personality and financial position irrespective of the nationality of its shareholders, these companies may acquire properties in Iraq. This has been confirmed in decision number 54/2010 issued by the State Council on 5 May 2010 (the "State Council Decision") at the request of the Minister of Justice who wished clarity as to whether banks and companies owned directly or indirectly by foreign shareholders are allowed to acquire real estate in Iraq. The decision expressly states that, notwithstanding the existence of foreign shareholders in Iraqi banks, these banks are allowed to acquire real estate in a manner consistent with their objectives as

set out in their memorandums of association. The State Council Decision also provides that Iraqi banks owned by foreigners are allowed to acquire real estate on the basis of Paragraph 2 of Article 33 of the Banks Law Number 94 of 2004 which allows the acquisition of property when required in the context of undertaking their operations, including for staff and workers' accommodation.

It is worth mentioning that, despite the clear provision of the Companies Law which considers a company Iraqi notwithstanding the nationality of its founders, as well as the State Council Decision, and the absence of any legal impediment, the practice remains different on the ground. As a matter of fact, and save for companies that are subject to the Kurdistan Investment Law, it is challenging to transfer properties to Iraqi companies who have foreign shareholders. Although challenging, such transfers are not impossible to achieve on case by case basis. As at the date of this article, the issue remains of critical importance. A number of companies owned by foreigners have succeeded in registering properties under the respective company name in Iraq, while other companies were denied this request despite the clear provisions of the law and the absence of any legal impediment.

In relation to branches of foreign companies and their relevant offices established in Iraq, in accordance with Law Number 5 of 1989, we note that they are considered as an extension of the parent company under the applicable laws and therefore are not allowed to acquire real estate in Iraq. The same treatment applies with regard to branches of foreign banks that are licensed in Iraq and which are not allowed to own real estate. However, subject to obtaining the approval of the Central Bank of Iraq, it is possible for these branches to register mortgages under their names.

In conclusion, the acquisition of property in Iraq is possible for foreign investors in particular situations as highlighted in this article. Care requires to be taken in navigating local laws and it is important to understand the practical approach of the local Iraqi authorities.

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Foreign Ownership of Real Property in Jordan

The real estate market has long been the backbone and main driver of the Jordanian economy. Historically, foreign investors, during the waves of immigration into Jordan, have played a vital role in shaping the real estate prices and market stability. Today, the global economic slowdown led many countries to revise their foreign ownership regulations in order to attract foreign investment and boost their economies. This article sheds light on Jordan's current legal framework in relation to foreign ownership of real property.

Generally, it is permissible for foreigners to own real property in Jordan, subject to the provisions set out in Leasing and Selling Immovable Assets to Non-Jordanians and Juristic Persons Law (Law No. 47 of 2006) (the 'Law'), the Economic Boycott Law (Law No. 11 of 1995) (the 'Economic Boycott Law'), and the Disposal of Immovable Assets by Juristic Persons Law (No. 61 of 1953) (the 'Disposal of Immovable Assets by Juristic Persons Law').

The Law sets out the requirements for foreign individuals and juristic persons to own real properties in Jordan.

1. Non-Jordanian Individuals

   The Law differentiates between ownership by foreign individuals for residential purposes and for business purposes. Each purpose has a different approval requirement, either from the General Manager of the Department of Lands and Survey ('DLS'), the Minister of Finance, or ultimately the Council of Ministers. The Law further sets limits on the number of properties and size of property that the foreign individual can own for each purpose.

   Ownership by foreign individuals is also subject to a reciprocity condition. The Law, however, excludes fellow Arab nationals from this reciprocity condition. Having said that, individuals holding dual nationalities are obliged to disclose their nationalities and reciprocity then applies to both nationalities that they hold.

   Foreign individuals may lease real property for residential or business purposes. There are also limits on the size and term of such lease, exceeding these limits requires certain local approvals.

2. Juristic Persons

   The Law defines 'Juristic Person' as the entity having legal personality in accordance with the legislation of its country of incorporation and registration, whether Jordanian or foreign.

   There are no requirements as to the legal type of the Juristic Person (LLC, PSC, PLC, etc.). However, Juristic Persons shall only be permitted to own property subject to their constitutional documents and for purposes of conducting their business operations. In other words, the company's activities and objectives must allow for ownership and disposal of real property.

   The Law further sets out approval mechanisms for Juristic Persons to own property based on the location (within or outside the zoning areas) and size of the property. These approvals are either issued by the Minister of Finance or the Council of Ministers.

   Generally, an application is submitted to the DLS for the requisite approvals sought. The

approvals set out in the Law are discretionary and are usually studied on a case-by-case basis.

Additionally, the Economic Boycott stipulates further conditions on foreign, non-Arab individuals and companies wishing to own or lease, directly or indirectly, any real property in Jordan. These conditions include reciprocity, timeline for completion of investments, and that the ownership, lease, or any related activity will not affect national security.

3. Transfer of Companies' Shares

   When a company owns property in Jordan, the transfer of such company's shares is not considered a sale of the property that it owns. As such, payment of what is sometimes hefty registration or transfer fees is not triggered upon the transfer of the company's shares. However, other matters relating to the evaluation of the company's assets in certain cases, including merger, should be considered.

4. Timeline for Completing Projects

   Whoever owns property pursuant to the provisions of the Law shall complete their project within three years, if the property was acquired for residential or business purposes, and within five years, if the property was acquired for any other reason. The Minister of Finance may renew such timeline for one time only. Failure to comply with the timeline exposes the owner of the property to payment of annual penalty fees to the DLS at the rate of five per cent of the market value of the property for a period of 10 years. After the lapse of these 10 years, the Minister of Finance may issue a decision to sell the property via public auction to the benefit of the owner, if not sold directly by the owner.

5. Lock-in Period on Disposal of Property

   The properties purchased by virtue of the provisions of the Law are subject to a lock-in period of three years, on properties purchased for residential purposes, and five years, on properties purchased for other purposes. During this lock-in period, the foreign individual or juristic person shall not transfer or dispose of the property for any reason whatsoever. This lock-in period is usually marked by the DLS as a form of encumbrance on the back of the title deed of the respective property.

6. Other Considerations on Disposal of Property

   The Disposal of Immovable Assets by Juristic Persons Law provides that the disposal of property owned by companies shall be subject to the laws and regulations of Jordan and that companies owning property by virtue of the provisions of said law shall be subject to the payment of taxes and fees imposed, or that will be imposed, in relation to the property. Further, such companies are subject to the jurisdiction of Jordanian courts in connection with all matters and disputes relating to the property.

   Another consideration in this regard relates to powers of attorney issued for purposes of disposing of real property, whether by mortgage or sale. Unlike other types of powers of attorney, these need to be carefully drafted. These powers of attorney are generally only valid for one year, unless a shorter validity is provided and except for those issued amongst family members.

7. Application to Free Zones

   The Law does not apply to certain free zones including the Aqaba Special Economic Zone, which has specific requirements as to foreign ownership of property.

While the above issues may appear as substantive restrictions on foreign ownership of real property, Jordan has recently been adopting many investment friendly approaches. These approaches include revision of investment regulations and granting annual residency permits to foreign investors who purchase real property for residential purposes, subject, of course, to certain conditions and security approvals.

The Council of Ministers, under the current applicable legislation, remains vastly entitled to waiving any of the foreign ownership restrictions or granting the required approvals to projects (particularly large projects) in order to waive any of the limits set out in the Law.

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Foreigners' Right to Own Real Estate in Oman

The Sultanate of Oman is part of the Gulf Cooperation Council (GCC). The Sultanate has a Foreign Capital Investment Law, promulgated by Sultani Decree (SD) number 102/94 which restricts 100% ownership of juristic entities other than in certain Free Zones and a Special Economic Zone at Duqm (often referred to as 'Off-Shore' with the balance of the jurisdiction referred to as 'Mainland'). Wholly foreign-owned entities can be established 'Off-Shore' and acquire usufruct rights in respect of property within their specific zone of establishment.

This article discusses the restrictions applicable to the acquisition or possession of Mainland real estate by foreigners of foreign-owned entities.

For completeness, we note that Oman also has a Free Trade Agreement with the United States of America (FTA) but the FTA does not affect the restrictions discussed below.

A. Legal framework for the ownership or possession of land and general prohibition on foreign holding of absolute title

The Lands Law promulgated by SD 5/1980 constituted the State as owner of all land in Oman to which no individual could prove title. The State then commenced allocation of land for public purposes and the making of

grants of residential and/or commercial or agricultural plots to individual citizens.

Omani nationals and mixed ownership SAOGs

Previously only Omani natural persons could acquire absolute title to land in the Sultanate.

Pursuant to SD 24/95, companies were permitted to own land, provided that:

- they were wholly-Omani owned; or
- in the case of public joint stock companies (SAOGs), where not less than 51% of the capital was owned by Omanis; and
- the use of the land in question was restricted to the purpose approved by the competent ministry.

The 49% cap on foreign participation in SAOGs was eased in 2010 and now SAOGs with up to 70% foreign ownership engaged in real estate development and with relevant objects in their constitutional documents can own land in Oman for the purpose of development, subject to internal conditions imposed by the Ministry of Housing.

GCC nationals

In 2004, the Rules as to the Acquisition of Immoveable Property for Residence and Investment by Nationals of GCC Member-States (Rules) were brought into effect. This extended the right to own land in the Sultanate to GCC natural persons and wholly GCC-owned companies (no non-GCC participation at any level), subject to the exception of certain reserved areas (noted below).

It must be noted that persons purchasing undeveloped land in the Sultanate pursuant to the Rules must develop it within four years of acquisition and cannot dispose of the land within four years of acquisition or until any development is completed. Entities acquiring pursuant to the Rules can own such land for investment purposes.

The Ministry of Housing will not register ownership of land in favour of non-Omani GCC nationals in certain Reserved Areas (Al Batinah Coast, Al Gabal, Al Akhdar).

Non-GCC nationals and integrated tourism complexes (ITCs)

Since 2006 it has been permissible for non-Omani individuals and companies to acquire usufruct rights over land in areas designated as "integrated tourism complexes" (ITCs) for the purpose of building units for residential and investment purposes. Thirteen such designations have been made to date. ITC's tend to have defined tourism, commercial and housing elements.

To give effect to an ITC, the government grants the developer a usufruct right over the development site (the nature of which is discussed below). The rights and obligations of the developer are recorded in a development agreement. Where the ITC includes the development of residential real estate, once the development is complete, the developer is authorised to dispose of the residential units to third party purchasers, including non-GCC nationals, with title absolute (subject to payment of an upgrading fee to the ministry). If the developer fails to develop the land as per the development agreement the government can take over the ITC project.

Registration

A register of land ownership was established under SD 5/1980 with the register maintained by the Ministry of Housing. Registration is a requirement to evidence valid ownership rights by way of Mulkhiya (title deed).

All transactions relating to the property, including transfer, usufruct and mortgage are annotated and stamped on the Mulkhiya.

Interests held by entities are not affected by changes to the shareholders of such entities.

It should be noted that the registry maintained by the Ministry is only open to inspection by those with an interest in a specific property.

B. Rights available to foreign individuals or entities

As noted above, other than ownership rights permitted in favour of SOAGs, GCC nationals (or wholly GCC owned companies) and to non-GCC nationals in respect of residential units in ITCs, generally speaking foreign entities' rights in relation to Mainland real estate will be limited to usufructuary or leasehold rights.

Usufruct

Usufruct tenure, pursuant to the Usufruct Law (SD 5/1981), is carved out of absolute title, and resembles

it. That is to say that the right gives the usufructuary (the grantee of the usufruct) virtually all the rights of an absolute owner, such as: the right to quiet enjoyment; the right to sell; mortgage; and give on lease. The grant is, however, restricted to the specific use for which the usufruct has been granted, and is limited in time (e.g. 30 years, or the life of the usufructuary). On expiry of the usufruct right all rights in the land revert to the grantor, who has remained the owner of the underlying absolute title. Compensation for the value of any additions to the land will be due to the exiting grantee, save as provided in any private agreement between the parties.

Any grant of usufruct requires the approval of the Ministry of Housing. It is the closest approximation to absolute title that foreign acquirers can obtain outside of ITCs.

As usufruct rights fall within the category of "real", or proprietary, rights, a usufruct can be viewed as a more secure and durable form of tenure than a lease. A usufruct is, therefore, suitable for long-term projects which involve the creation of fixed assets. Usufruct is also suitable for companies with foreign participation, or for foreign natural persons, in circumstances where they would not legally be able to acquire absolute title.

Leases

Leases granted in the Sultanate confer rights to occupy land or premises. Leasehold rights are generally not viewed as a real property right, however, because they are not a form of property that can be readily mortgaged or entered as an asset on the lessee's balance sheet.

The basic legislation on leases goes back to SD 6/1989, which sets a comprehensive legislative framework for the lessor-lessee relationship, and provides for a system of registration of all residential lease contracts with the competent municipality and commercial leases over 7 years with the ministry. A fee is payable by the landlord on registration, currently set at 5% of the lease value.

C. Conclusion

The appropriate structuring of real estate dependant projects and ventures in Oman will depend on the specific requirements of the venture, the nature of the project and the nationality of the participants.

While discussion of the legal structures available to persons (natural and juristic) in Oman is beyond the scope of this article, we do note that there are various forms of corporate entity that may be incorporated in Oman, each having its own particular characteristics, minimum capital requirements and foreign share capital restrictions.

Given the applicable restrictions on real estate rights and the various elements to be taken into account when considering suitable corporate structuring options, we recommend that parties obtain detailed legal advice to ensure that the correct structures are put in place at the outset. An early investment in sound structuring advice and securing appropriate real estate rights pays dividends and, in our experience, assists real estate ventures to progress and flourish in Oman.

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Owning Property in Qatar: Options for Foreign Investors

There is a general prohibition on foreigners (natural or legal entities) acquiring any rights over fixed assets in Qatar, including desert and agricultural lands, and buildings of any type, as set out in Law No. 5 of 1963 'Concerning the Non Allowance of Foreigners to Acquire Ownership of Fixed Assets'. However, developments in the law since 1963 allow for certain exemptions to this general prohibition, such that non-Qataris may invest and own property in certain designated areas only, and subject to certain restrictions as set out below.

2002 Developments

In 2002, Qatar introduced Law No. 2 of 2002 'Regulating Property Ownership of Gulf Cooperation Council Nationals (the "2002 Law") allowing natural persons of Gulf Cooperation Council ("GCC") nations to own no more than three real estate investments in residential areas in Qatar. The three areas specified for freehold ownership by GCC nationals are Lusail, Al Khuraj and Jabal Thailab.

However such investment is subject to the following restrictions:

- The real estate must only be used for residential purposes for either the owner or the owner's family members.
- The floor area of the property must not be more than 3000 m^2.
- The owner may not transfer the title of property before the expiry of two years from the date the property was registered in the owner's name.

The 2002 Law further provides that where the real estate comprises vacant land, the owner must ensure that construction of the residential property is completed within six years of the land being registered in the owner's name; failure to comply can result in the Ministry of Agriculture and Municipality Affairs having the right to dispose of such real estate, subject to the owner being compensated, to the value of the property at the time that the land was acquired or at the value of the property at the time of disposal, whichever is lower.

In addition, the 2002 Law also affords both natural as well legal GCC persons the right to own real estate in order to practice their vocation or licensed economic activity ("LEA") provided that the real estate be limited in use for the purposes of such vocation or LEA, and that the area of the property is appropriate for such vocation or LEA. The disposal of any property acquired for such purposes is not permitted until such time as the owner has (a) discontinued the vocation or LEA; or (b) relocated the place where such vocation or LEA is being practiced.

Usufruct rights were also afforded to both natural and legal GCC persons under the 2002 Law for purposes of LEA. Usufruct is a legal term which means that the holder of a usufruct, known as a usufructuary, has the right to use the property and enjoy its benefits.

Nevertheless such usufructuary will not be an outright owner of the same, it being akin to a leasehold interest but has the effect of discontinuing any rights of the freehold proprietor until such time as the usufructuary has come to an end.

The 2002 Law also stipulates that individuals who have acquired a GCC citizenship may only own real estate after the elapse of five years from the date of obtaining such GCC citizenship. In order for a company to be considered a GCC legal entity, 100% of the shareholding must be held by GCC persons.

2004 Developments

In 2004, Qatar opened up designated areas of the real estate market to non-Qataris (which for the avoidance of doubt includes GCC nationals) by virtue of Law No.17 of 2004 and the subsequent Cabinet Decision No. 20 of 2004 'Concerning the Organization of Ownership and Use of Real Estate and Residential Units by non-Qataris' (together referred to as the '2004 Law'). The 2004 Law allows non-Qataris, GCC nationals or otherwise, to acquire a freehold interest in lands and residential units in the areas of the Pearl, West Bay Lagoon and parts of Al Khor.

The 2004 Law further stipulates that a non-Qatari may acquire the right of usufruct for a term of 99 years renewable on similar terms in certain specified investment areas. Such investment areas are outlined in the Law No. 6 of 2006 'Setting Terms and Procedures for Usufruct Rights of Non-Qataris in Real Estate and Residential Units', the investment areas being defined as specific zones within Msheireb, Fariq Abdul Aziz, Doha Al Jadeeda, Al Ghanim Al Atiq, Al Rifaa / Al Hitmi Al Atiq, Al Sulta, Bin Mahmoud, Rawdat Al Khail, Al Mansoura/ Bin Dirham, Najma, Umm Ghuwailina, Al Khalifat, Al Saad, Al Mirqab Al Jadeed / Al Nasr, Doha International Airport, Al Qusar / Al Dafna / Onaiza and Lusail / Al Khuraj / Jabal Thailab.

The 2004 Law provides that a non-Qatari's usufruct right will not be recognised unless such right has been registered. A registered right of usufruct is transferable to any heirs and shall terminate upon either of the following:

1. The expiry of its defined term.
2. Mutual agreement of the parties.
3. The destruction of the property.
4. The expropriation thereof for the public interest.

Foreign Missions

Non-Qataris are also permitted to own real estate for the purpose of Arab and foreign missions pursuant to Law No. 1 of 1980 'Concerning Regulating the Ownership of Real Estate by Foreign Missions in Qatar'. Foreign missions are defined by law to include regional and international bodies, organisations and agencies. Notwithstanding the foregoing, any such real estate subject to acquisition by a foreign mission has to meet the following conditions:

1. The real estate shall be located within the boundaries of the city of Doha.
2. The area of such real estate shall not be greater than 4,500 m^2 for each foreign mission, noting that such area may be increased by a resolution of the Emir; and
3. The purpose of owning real estate shall be for use as a main office for diplomatic or consular missions, or as a residence for the head of mission.

Strata Title

Whilst primary laws were introduced in 2002 and 2004 to allow foreign ownership of property in Qatar, it is only in recent years that formal transactions with non-Qataris are more common place. Many developments in the areas specified for foreign ownership comprise off-plan apartments, however a registration system for apartment ownership has yet come into place or be legislated for. Whilst the Real Estate Registration Department of the Ministry of Justice has commenced issuing titles for apartments, it has yet to have in place any system whereby a strata title can be issued to individual apartments and to establish an owners' association for the common use components of the developments.

Conclusion

Interest in the real estate market of Qatar by foreigners arose after the introduction of the 2004 Law and for GCC nationals arose after commencement of the Lusail project, which is a major development related to Qatar's hosting of the 2022 FIFA World Cup. However, with the significant numbers of apartments and compounds being constructed, the development of a strata title law is an issue that the authorities will need to address in the immediate future.

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Closing Up Shop: Keep Open Provisions In A Qatar Retail Lease

With a new mall opening every other month (or so it seems) and an estimated 'annual average rise of 7.9% on the space dedicated to "modern retail sales" in Qatar' by 2018, it is hard to imagine any retailer wanting to close up shop in Qatar. But there will be casualties as supply starts to exceed demand.

For retailers and landlords entering into long term leases and making significant capital investment in one of Qatar's emerging malls, consideration should be given to the effects of agreeing to a keep open clause.

Keep Open

Keep open clauses are commonly found in leases for retail units in shopping and retail centres. The purpose of such clauses is simple and two-fold: to dictate the opening hours of the retail shops and to ensure that the tenant of a retail unit continuously trades throughout the term of the lease. The level of detail found in keep open clauses can vary widely from lease to lease.

The commercial objective of the keep open clause is simple, landlords want all shops in its centre, especially its anchor tenants, open for business and trading for the advertised opening hours to attract as much footfall and passing trade as possible. Where the centre rents are based on turnover, the keep open clause is even more essential to a landlord. Obviously, closed shops, even where the tenant continues to pay the rent, are undesirable, as closed shops can detract from the reputation and profile of the centre and ultimately the profitability, turnover, and the investment value of the centre.

Tenant to be Mindful

However, a tenant will not want to be obligated to keep open or keep operating its shop at full rent unless either: an 'anchor' tenant in the centre, or a certain number of other 'major' tenants, or, as a very minimum, that a certain number of 'shops' are also open and trading.

In agreeing to a keep open clause, the tenant must be mindful of:

1. the level of discretion given to the landlord to change the opening hours and any financial penalties that can be imposed;
2. finding itself obligated to stay open even when other shops, in particular an anchor tenant, that it is relying on for passing trade is allowed to close for refurbishment or moves out permanently; and
3. ensuring it has flexibility to close for periods for operational reasons.

For the majority of tenants, a landlord will be unwilling to accept a lease without a keep open clause. It may only be an anchor tenant who will be able to negotiate dispensing with a keep open clause, or to limit its effect. Indeed, certain anchor tenants simply will not accept the inclusion of a keep open provision. Whereas smaller tenants, who

rely on passing trade from a larger shop for business and are not able to negotiate out of a keep open clause, may find themselves having to stay open when an anchor is closed for refurbishment or even moves out permanently.

Therefore, when negotiating a lease, tenants should seek assurances as to whether other tenants are subject to the same requirements to stay open, particularly if they are relying on any other major tenants' trading. A tenant generally will not want to be obligated to open or keep operating its shop at full rent, unless an anchor shop in the centre (i.e. a department store or supermarket) is also open and operating, or a certain number of other major tenants are also open and operating, or, at the very least, a certain number of shops are open.

Landlord Perspective

From a landlord's point of view, empty shop windows and vacant units can detract from the reputation and profile of a centre resulting in a decrease in footfall and the ability of the landlord to attract new tenants. Ultimately this may affect the investment value of the centre, particularly if the vacating tenant is an anchor tenant, and finding a replacement tenant may be difficult. In such cases, a landlord may wish to explore other remedies other than pursuing a breach of contract (lease) and termination.

What if a tenant decides to cut its losses and close up shop?

If a tenant ceases to trade, but continues to pay rent and comply with all other terms of its lease, then it will be in breach of its lease, but what can a landlord do?

Unlike the Landlord and Tenant Law in Dubai, which provides a specific ground for eviction of the tenant of a commercial shop where 'the tenant left the same without occupation and without legal reason for 30 continual days or 90 non-continual days in one year', the Qatar Lease Law has no specific ground for termination and eviction based on 'closing up shop'.

Whilst it may be arguable that closing up shop falls within the remit of the ground for eviction under Article 19 (iii) of the Qatar Lease Law, being 'that the tenant is using the leased premises for purposes contrary to the lease provisions', it is unlikely that the meaning of this ground would be extended so as to include a breach of a keep open clause. In any event, in an economic market where retailers are forcing store closures, a landlord would be unlikely to want to evict the tenant, as a replacement tenant may be hard to find. In which case, the landlord would likely want to seek alternative remedies, such as specific performance to force a tenant to continue or resume trading; or an injunction to prevent a tenant from closing if the landlord thinks that is likely.

Whilst specific performance and injunctive relief are available to the landlord in Qatar, under certain conditions, neither option is without potential difficulty. An order for specific performance can be refused if the performance of the same would be considered unduly onerous on the tenant. A tenant should also bear in mind that the courts also have powers to award, in certain circumstances, penalties for non-compliance with an order for specific performance and compensation, should a tenant fail to comply with such an order.

How the Qatar courts will interpret a keep open provision, forcing a tenant to continue or resume trading, is yet to be seen. It is difficult to know if a Qatar court would accept tenant loss in itself as an excuse for breach and to what extent forcing a tenant to continue trading would be seen as unduly onerous. For landlords, the remedy of specific performance and the remedy of injunction, although available, may also prove to be futile if it pushes the tenant into insolvency.

What is clear is that the keep open clause must be drafted in detail, and very clearly, to establish both the purpose of the clause and the benefit of reliance, in order to increase the likelihood of success in a landlord enforcing the same in Qatar.

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Real Estate Ownership and Investment in Saudi Arabia

The Saudi Vision 2030 ('Vision 2030') (and the related National Transformation Plan) sets out the Saudi Government's plan to diversify the Saudi Arabia economy and address the challenges brought by low global energy prices.

Initiatives flowing from the Saudi Vision 2030 and National Transformation Program have been viewed as providing a powerful impetus to both the encouragement of foreign investment generally in the kingdom and also to the Saudi Arabia real estate sector, despite the declining oil prices and consequent cuts in government spending.

Against this background of apparent opportunity, this article outlines the rules on foreign ownership of real estate in Saudi Arabia and recent developments to encourage investment in real estate.

Saudi Vision 2030 and the National Transformation Plan

Vision 2030 maps out significant commitments by the Saudi Government relating to housing and the development of land for a variety of uses. In particular, Vision 2030 states: 'Where it exists in strategic locations, we will also capitalise on the government's reserves of real estate. We will allocate prime areas within cities for educational institutions, retail, and entertainment centres, large areas along our coasts will be dedicated to tourist projects and appropriate lands will be allocated for industrial projects.'

Under the National Transformation Plan (the 'Plan'), the housing sector, with a budget of SAR 59 billion, is the biggest area of government expenditure. The Plan also has targets of:-

- increasing real estate sector contribution from GDP five per cent to 10 per cent;
- establishing partnerships with private sector developers to develop government land for housing projects; and
- establishing fast-track licences and special finance packages to encourage private sector investment in housing projects.

Ownership of land in Saudi Arabia

Ownership of land in Saudi Arabia is generally restricted to Saudis, but this is subject to certain qualifications. For example, Gulf Cooperation Council ('GCC') nationals and GCC companies have certain rights to own land, subject to a number of restrictions.

A GCC company (with shareholders who are all GCC nationals) or a GCC national may lease or purchase land to use it to conduct any licensed business activity from the land, and may own residential properties in Saudi Arabia, subject to a number of restrictions and conditions. However, these concessions do not apply to properties within the vicinity of Mecca and Medina.

As a matter of structuring, it should be noted that even the smallest equity interest held by a non-GCC entity will make a corporate entity 'foreign', triggering the requirement for a foreign investment licence, which includes conditions stipulating the amount of capital that must be invested and the timeframe for the investment by the foreign entity.

Additionally, foreigners (being non-GCC nationals or companies who are not 100 percent owned by GCC nationals) have certain rights to own land and property in Saudi Arabia. However, ownership is subject to a number of restrictions. One of the main issues is that foreign ownership of Saudi Arabia property must be linked to a particular project and is not a general right.

Structure for Investment in Real Estate

The Foreign Ownership of Real Estate Regulation (enacted by Royal Decree No. M/15 dated 17/04/1421H, corresponding to 19 July 2000G) regulates the acquisition by foreign, non-GCC nationals, of real estate in Saudi Arabia.

Under this regulation, the ownership and investment in real estate by a foreign investor is permitted, subject to obtaining a foreign investment licence from the Saudi Arabian General Investment Authority ('SAGIA').

> "Although the Saudi Arabia legal framework is quite restrictive on foreign ownership in real estate, it is hoped that the strong impetus given by Saudi Vision 2030 and the National Transformation Plan will see the introduction of greater flexibility in the rules. The introduction of REITs is a welcome step in the right direction."

A foreign company wishing to invest in real estate in Saudi Arabia will, generally speaking, need to establish a local Saudi Arabia registered entity (which can be wholly-owned by the foreign shareholders) in order to acquire title (either freehold or leasehold) to real estate in Saudi Arabia.

A foreign individual may own property in Saudi Arabia if he has normal legal residency status and has a permit from the Ministry of the Interior.

A non-GCC entity, generally, may own Saudi Arabia real estate that is reasonably required for:

- the conduct of its professional, technical, or economic activities, including for its headquarters or warehouses;
- private residences for housing employees of a licensed project; or
- residential use by individuals with normal legal residency status.

In addition, where the SAGIA licence permits, a non-GCC entity may own real estate in connection with a particular project for property development provided that, if the purchase of buildings or land is for the

construction (by a Saudi Arabia licensed contractor) of buildings for investment purposes, whether through sale or lease, the following conditions must be complied with:

a. the total cost of the project, both land and construction, may not be less than SAR 30 million (equivalent of USD 8 million); and

b. the investment in the development must occur within five years of the purchase of the real estate.

In addition to the SAGIA licence, SAGIA approval must be obtained before the purchase of any specific property.

Foreign owned entities are restricted from acquiring any right of property in real estate within the borders of the cities of Mecca and Medina. There are also ownership restrictions where other regulations, resolutions of the Saudi Council of Ministers, and royal decisions expressly prohibit the acquisition of real estate in specified locations.

However, currently, if a foreign investor wishes to acquire completed, developed retail, commercial, or mixed use property in Saudi Arabia, for the purpose of holding as a real estate investment (rather than for the purpose of developing the property), then:

a. there is no law that permits such acquisition by a foreign entity (even with SAGIA approval); and

b. we are not aware of any instance where a foreign company has been permitted to acquire property in Saudi Arabia merely for investment purposes, without further developing the property (in which case a real estate development licence, in addition to the minimum capital requirement and minimum timeframes to complete the development, are required).

Saudi Arabia also has a strict anti-fronting law, which must be carefully considered when structuring investments.

Recent Developments

In 2016, the Capital Market Authority introduced new rules allowing the formation of Real Estate Investment Traded Funds ('REITs') on the Saudi Stock Exchange (the Tadawul), in an effort to open the real estate market to investment by a wider range of investors. The rules cover the management, operation, and ownership of the REITs.

A REIT is a real estate investment fund:

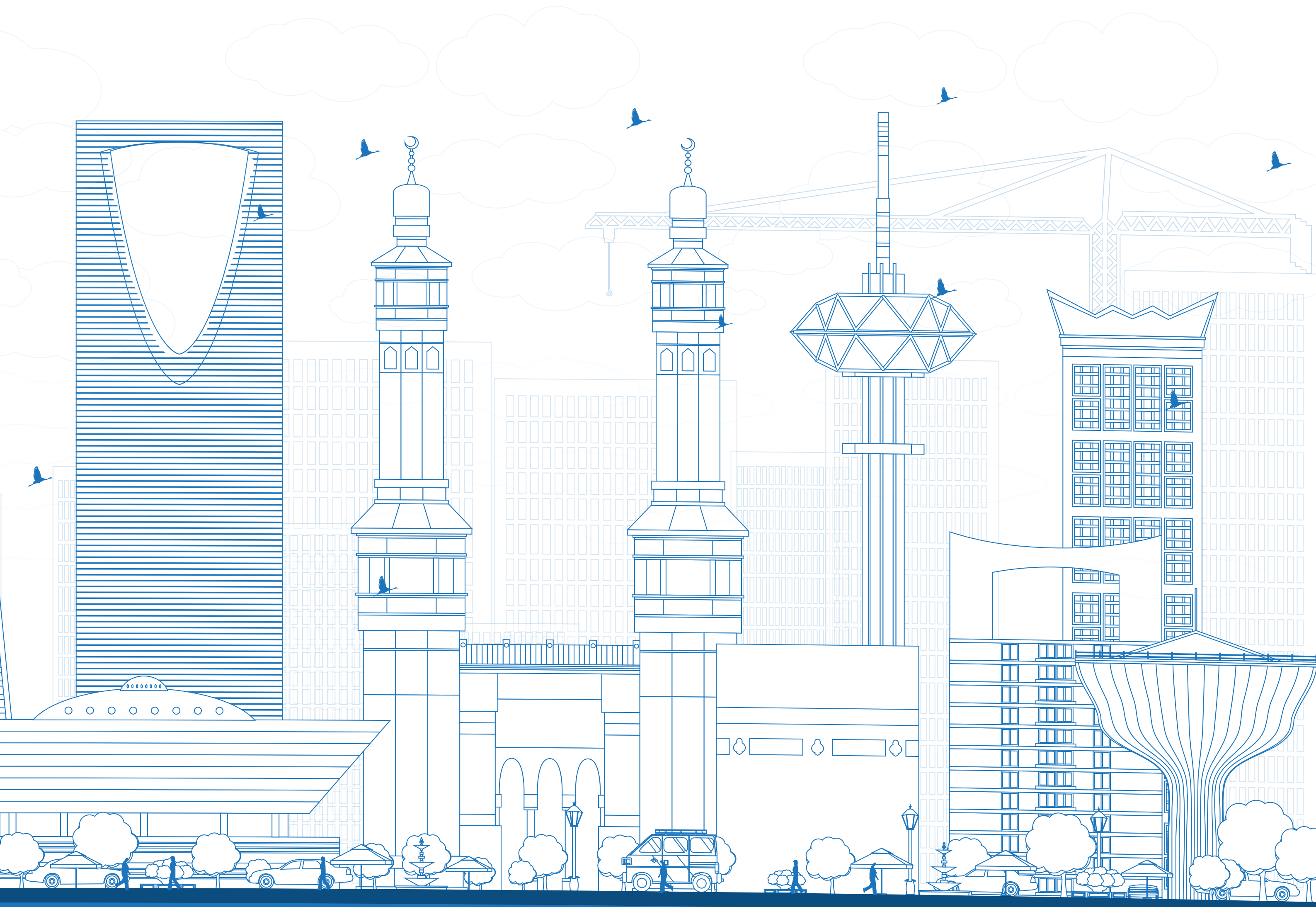
- that is offered to the public;
- the units of which are traded on the Saudi Stock Exchange;
- where the primary investment objective is to invest in real estate developed through construction that generate periodic income, including residential, commercial, industrial, agricultural, and other types of real estates;
- which must distribute a prescribed percentage of its net profit in cash to the unit holders at least annually; and
- where the fund manager must appoint one or more appropriately licensed property management companies to manage the property held for investment.

The REIT property management companies should possess the necessary experience in real estate management, and should carry out the property management activities, including property management, property maintenance, leasing services, and rent collection. The fund manager may agree with a lessee in the lease contract that the lessee will manage and maintain the property during the leasing contract period.

Subscription in a REIT is open not only to Saudis but also GCC citizens and non- Saudi residents in Saudi Arabia. Non-resident foreign investors are also allowed to trade in the units of the REITs on the Tadawul.

The introduction of REITs has been regarded as part of the implementation of Saudi Vision 2030 and the National Transformation Plan. The new rules have the target of increasing real estate contribution from GDP five to 10 per cent annually and to provide private capital for the construction of around 1.5 million homes, as announced by the Saudi Government in June 2016 and planned over the next seven or so years.

Although the Saudi Arabia legal framework is quite restrictive on foreign ownership in real estate, it is hoped that the strong impetus given by Saudi Vision 2030 and the National Transformation Plan will see the introduction of greater flexibility in the rules. The introduction of REITs is a welcome step in the right direction.



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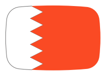
Bahrain's Changing Legal Landscape

Bahrain's legal system has recently undergone significant changes. In this article we shall explore some of the more significant changes that have been introduced as a result of the implementation of Law No. 27 of 2014 in relation to property leases in Bahrain ("Rent Law") as well as Law No. 50 of 2014 which is an amendment to the Commercial Companies Law (Law No. 21 of 2001) (together "Companies Law") which has improved the business regulatory environment in Bahrain. We shall also discuss proposed changes to improve the civil procedure rules in Bahrain.

Amendments to the Companies Law

One significant change has been the removal of minimal capital requirements when setting up a company in Bahrain. For instance, previously the minimum share capital requirement for limited liability companies was Bahraini Dinars 20,000 (approximately USD 53,250). This requirement has been removed. Instead the requirement is that the capital of a company must be sufficient to meet its business objectives. This change reinforces the requirement for strict correlation between



a company's activity and its share capital. This amendment provides flexibility and enables the Minister of Industry, Commerce and Tourism ("Minister") to use his discretion in the incorporation of companies in Bahrain.

Changes to the Companies Law have also aimed to encourage foreign direct investment in Bahrain. Amendments include removing the requirement for all shareholders in a Bahraini public joint stock company to be Bahraini nationals. The Companies Law now allows the incorporation of public joint stock companies with foreign capital and expertise, whilst giving the Minister the discretion to impose foreign ownership restrictions within certain economic sectors or in relation to specific economic activity. Branches of foreign entities no longer require a Bahraini sponsor to set up a branch in Bahrain.

A new article 3 reduces all references to sixty days (60) in the Companies Law to fifteen days (15). This change aims to ensure that procedures are completed within a quarter of the time and thereby improves efficiency. The effect of this is yet to be seen.

Rent Law

The Rent Law brought in much needed reform in the real estate sector in Bahrain. Formerly, there was no single consolidated legislation in this area. For over seventy years, various property lease laws in Bahrain only applied to certain municipalities or certain types of purposes and premises in relation to renewal of leases only. As a result, there was significant confusion over which law to apply resulting in inconsistency issues. The introduction of the Rent Law which applies to all types of leases in Bahrain, achieves the aim of providing clarity and consistency.

The Rent Law introduced the requirement for all new leases to be registered by the landlord within one (1) month of being executed, at the Lease Registration Office, for which a prescribed fee is payable.

Previously, the landlord could increase the rent of both commercial and residential properties by no more than ten percent (10%) only once during the term of the lease agreement. If the landlord and tenant did not mutually agree to a rent increase before the lease expired then the landlord would lose his right to increase the rent. However, under the Rent Law unless the parties have agreed otherwise in writing, the Rent Law restricts a landlord from increasing the rent until the earlier of two (2) years from date of the lease. The Rent Law prescribes the level of the increase as five percent (5%) for residential leases and seven percent (7%) for all other leases. The rent cannot be increased more than five (5) times during the term of the lease. A landlord must provide a tenant with written notice of the rent increase not less than three (3) months from the expiry of the two (2) year period mentioned above.

The Rent Law also established the 'Rents Dispute Committee' ("Committee") as the local courts were inundated with cases relating to disputes between landlords and tenants. With the establishment of the Committee, any dispute relating to and/or arising out of any lease agreement now have to be brought before the Committee. However, once a judgement is issued by the Committee in a case, the losing party may lodge an appeal with the court of appeal. Despite this, the establishment of the Committee means that there will still be an overall reduction in the burden on the civil courts.

The Rent Law is a welcome and long-awaited development in the regulation of the real estate sector of Bahrain.

Proposals for reform to the civil procedure rules

Bahrain's civil procedure rules are in much need of reform in relation to pre-action protocols, case management procedures and legal fees and costs.

Under the Civil Commercial Procedures Law (the "CCPA") there are no pre-action protocols that have to be followed by parties contemplating litigation. Although there are basic case management procedures that set out the procedures that must be followed until the first hearing in case (which is when legal proceedings officially commence in Bahrain), once the first hearing takes place, there is no established procedure for the management of a case, including no established rules for disclosure and inspection of documents. Introducing pre-action protocols would help encourage settlements and where settlement is not achieved it would narrow down the legal issues in a dispute to facilitate a more efficient and cost effective trial process.

The timeline and management of a case depends on the particular circumstances of the case and the judge's discretion. There is also no established system of checks and balances to ensure that the parties abide by case procedural requirements. A defendant can potentially stall legal proceedings by abusing the process, for example, by failing to submit documents that may be required of him. There is much need for cases to be tried within specific time frames established at the beginning of a case.

The Bahraini courts have broad discretion in determining how to apportion the costs of a case. However, in practice lawyers' fees are borne by each party and the winning party's legal fees will not be ordered to be paid by the losing party. This is because the courts tend to see the client–lawyer relationship as a personal one. This makes litigation a less cost-effective method of dispute resolution as defendants can drag a case on to the point of financial harassment for the claimant. By introducing a system whereby the losing party pays the winning party's legal fees and costs, it would discourage parties to bring frivolous claims and would encourage parties to be mindful of their conduct during the litigation process.

The amendments to the Companies Law and the introduction of the Lease Law have brought about much needed change to the legal landscape of Bahrain.

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Does a Directors' Release Suffice to Negate Liability in Egypt?

The Board of Directors of a joint stock company in Egypt is the body that is entrusted with all management and operation aspects of the company. The Board of Directors, as commonly referred to as the 'Board' or individually as the 'Directors' as headed by a chairman, have, by law, the widest powers to run the day-to-day business affairs of the company and represent the company before third parties, including various governmental authorities, state agencies, and courts, unless otherwise restricted in the company's statutes. Consequently, it is quite understandable that such broad powers would bring along a correspondingly equal liability exposure. Such liability can be particularly raised by the shareholders and/or the company itself.

The duties and liabilities imposed on the Directors of a joint stock company (whether such Directors are natural or juristic persons) are stipulated in several legislative sources in Egypt. The main source is the Law Concerning Joint Stock Companies, Partnerships Limited by Shares and Limited Liability Companies (Law No. 159 of 1981) and its Executive Regulations, as amended, (the "Companies Law") in addition to some piecemeal provisions under the Commercial Code (Law No. 17 of 1999) (the "Commercial Code"), as well as the Capital Market Law (Law No. 95 of 1992) and its Executive Regulations.

Parameters and Requirements of Directorship

Basically, for a person to qualify for directorship, he cannot be convicted of a felony or misdemeanour for theft, fraud, dishonesty, forgery, bankruptcy with deceit, or any other penalty provided for under the Companies Law. The requirement not to have a criminal record is also a condition for a Director to remain in the office.

Appointing a Director, without observing the requirements set by the Companies Law, could give rise to the criminal liability of the person(s) involved in appointing such Director. Such liability further extends to the Director entrusted with the management of the company or the so called 'Managing Director' (i.e. the CEO).

Fiduciary Duties

Additional to the specific statutory duties and obligations of the Directors under the Companies Law and other relevant laws, the courts rely on a general concept of fiduciary duties being owed by a Director to the company and its shareholders. In that sense, a Director is assumed to owe a fiduciary duty to the company to act diligently, honestly, and in the company's best interest.

The Egyptian State Council has issued a ruling to the effect that a Director is deemed to be an agent of the shareholders and, in this respect, he owes a fiduciary duty to the company to act honestly and avoid, unless otherwise permitted, conflict of interests. According to the Companies Law, Directors are required to inform the Board of any transaction in which they may have a conflicting interest and shall have no right to vote with respect to such matter. Furthermore, a Director must not trade for his own account, or a third party's account, in the same branch of activities of the company without the specific permission of the general assembly of shareholders, otherwise, such transactions would be deemed to have been made in the company's favour.

A Director's breach of his fiduciary duties would give rise to his/its liability vis-à-vis the shareholders and the company. A breaching Director who has acted to the detriment of the company would be liable to pay equitable compensation to the shareholders and the company where the latter to seek legal recourse.

Statutory Duties

The Directors of a joint stock company in Egypt are bound to run the business and affairs of the company towards achieving its object. Such management shall, in all events, be in strict compliance with the scope of their powers as determined by the Companies Law and the statutes of the company.

The Director's statutory duties are spread out under the various provisions of the Companies Law and its Executive Regulations. Some of these duties give rise to criminal liability in case of breach. By way of example, a Director would be subject to imprisonment for not less than two years and a monetary penalty of not less than two thousand Egyptian pounds and not more than ten thousand Egyptian pounds in the event that the Director, among other things, resolves on matters related to dividend distributions in a manner contradictory with the provisions of the Companies Law or the statutes of the company, or intentionally commits an act of forgery in the company's documents or otherwise presents misleading documents or falsified data to the general assembly. The sanction would be imposed personally on the perpetrating Director, if an individual, and on the corporate Director and/or its representative, in case the Director is a juristic person.

Moreover, the Director who fails to observe the parameters and scope of his directorship and powers, breaches any of the mandatory rules under the Companies Law, or intentionally obstructs the invitation of the general assembly of shareholders to convene shall be personally subject to a monetary penalty of not less than two thousand Egyptian pounds, but not exceeding ten thousand Egyptian pounds.

The aforementioned criminal liability would not prejudice third party's rights, including the shareholders and the company, to invoke the breaching Director's civil liability and claim damages remedying the losses incurred thereby due to the misconduct of such Director.

Directors' Personal Liability for Insolvent Trading

One of the significant protections invoked for the company and its shareholders, against the Directors who fail to observe their duties and conduct the business and management diligently, is the threat of rendering the Directors bankrupt upon the bankruptcy of the company. Pursuant to the Commercial Code, a Director who undertakes commercial activities for his own benefit under the company's umbrella and disposes of the company's funds and property, as if they were his own funds, may be declared bankrupt along with the company.

The Commercial Code further provides that the bankruptcy court may oblige the Directors or some of them, jointly or severally, to pay the debts of the company where the assets are insufficient to settle at least 20 per cent of such debts, unless the Directors prove that they have managed the company according to the standards of a reasonable person.

Directors' Release

According to the Companies Law, the general assembly of shareholders has to annually review the Directors' actions and decide whether to absolve the Directors of any liability resulting from their actions and management of the company during the pertinent year. In the event that the general assembly of shareholders decides to absolve the Directors, the shareholders and the company would have then waived their rights of recourse against the Directors, except in the case of a default that was then not known or disclosed to the general assembly.

Conclusion

The Directors of a company, whether natural or juristic persons, owe a fiduciary duty to such company and its shareholders and must at all times act within the scope of the powers vested therein, as well as the applicable laws and regulations. Directors' decisions in the course of carrying out regular managerial duties shall be binding to the company vis-à-vis bona fide third parties. However, where the Directors exceed the scope of their duties or commit negligence or wilful misconduct in the course of management (as based on the actions of a reasonable person), the Directors would be liable vis-à-vis the shareholders and the company for such actions. Such liability cannot be limited or released except to the extent decided by the general assembly and provided always that the Directors' actions do not give rise to criminal liability.

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Suggested Amendments to the Registration Regulations of Foreign Company's Branches and Offices in Iraq

The Iraqi Companies Law Number 21 of 1997 (the "Companies Law") has set the foundations for registering offices and branches affiliated with foreign companies and economic institutions. The Companies Law, however, left all other details for specific regulations to be issued separately. Accordingly, the Regulation No. 5 of 1989 was passed and is still valid (the "1989 Regulation"). In order to facilitate the mechanism of registration of foreign companies offices and branches in Iraq, the department of Foreign Companies Registry at the Ministry of Trade prepared new draft regulations to replace the 1989 Regulation. The proposed draft will touch upon the most important points covered by the 1989 Regulation and will address several other corporate issues in a different manner.

This article compares some of the key areas of comparison between the 1989 Regulation and the new proposed draft:

Obtaining a license for a branch

According to the 1989 Regulation, a foreign company or economic institution cannot be given a license for its branch unless (i) it was licensed to do permanent business in Iraq on the basis of an agreement or a convention with the Government; or (ii) it was contracted to implement a given project with the State organizations or with the Socialist Sector and thereafter upon it serving a written notification to the Companies Registrar (the "Registrar"). However, this service requirement does not apply to companies and institutions contracted to supply commodities and goods unless they have a real physical presence in Iraq, or if their supply agreements included rendering services of any kind. The Registrar should decide within two weeks of receiving the notification as to whether it approves the registration of the branch license.

Now, with the proposed regulation, the above-mentioned conditions are amended so that any foreign company contracting with any Iraqi public/private sector business can register its branch or office in Iraq, provided that the contract's sum is not less than One Million US dollars. Previously, the company could not register a branch in Iraq unless it had a contract with a governmental entity and was registered as representative office but with the introduction of this law any company can registered a branch whether it has contract or not.

Furthermore, the 1989 Regulation obliges the office [what is an 'office' – do we meant the 'entity'] or the branch to submit the latest balance sheet of the foreign parent company, along with two copies of the Board of Directors' Report attached or annexed thereto, for each fiscal year, along with the final accounting report of that representative office or branch. The proposed regulation, however, obliges the presentation of the fiscal status report of the parent company only when the articles of association are presented for registration, and the branch is not required thereafter to present the annual accounts of the parent company and it is only necessary to present the final fiscal report for the Iraq branch.

As with the 1989 Regulation, the proposed regulation retains the obligation on the foreign company to file an application at the Registrar's office within 75 days from the date of concluding the contract, convention or agreement with a copy requiring to be attached to the application.

Both the 1989 Regulation and the proposed regulation stipulate that the Registrar shall issue the branch's license within 15 days from the date of publishing the approval of the registration in the local newspapers, and upon issuing the license, the branch shall acquire legal status.

The Branch Director's Residency in Iraq

As for the management of the branch in Iraq, the 1989 Regulation stipulates that the director of the branch, or the manager authorized by the foreign company or institution, shall reside in Iraq. Further, in terms of accountability, that individual is treated equally to the Iraqi companies' directors, and such an individual is required to appoint a deputy to manage the branch in their absence.

The proposed regulation provides that the person who manages the branch "has the right to move between Iraq and the countries where his/her business requires his/her presence".

Supervision of the Branch

As with the 1989 Regulation, the proposed regulation obliges foreign companies and branches to pursue activities that fall within the development plans and they are considered as economic units in the same way as Iraqi companies. In order to regulate their activities, the proposed regulation subjects branch offices to a monitoring system similar to that applied to Iraqi companies. The proposed regulation dictates that the branch or representative office should keep regular account books in the Arabic language for all its activities related to its works in Iraq, according to the accounting system referred to in Article 201 of Companies Law. The branch is also committed to submit an annual plan including a comprehensive report on its intended activities in Iraq for the following year, in addition to submitting regular reports related to the implementation of its previous annual plan, to its parent company at least once a year. The proposed regulation also obliges the branch to provide information to the Registrar about the employees of the branch as per the forms adopted for this purpose. It also gives the Registrar the right to request any further information it deems necessary to facilitate the implementation of the regulation.

The proposed regulation also stipulates that the branch management should notify the Registrar when the branch ceases to do business in Iraq, giving appropriate justification for the decision, within 30 days as of the date of stopping the business. The branch management should also notify the Registrar if the foreign company or economic institution declares bankruptcy/liquidation, it merges or if it is in the process of amending its articles of association. The proposed regulation allows the Registrar to nominate one or more of competent specialized inspectors to inspect the works of the branch or office if so required, and the office or branch should extend all necessary assistance for the inspector to carry out his inspection.

Liquidation of Branches Working in Iraq

According to the 1989 Regulation, if the license is no longer valid by reason of the branch being required to liquidate, the branch shall commence the liquidation process within 60 days as of the date in which the license is revoked, by a written request being presented to the Registrar stating the reasons of liquidation, accompanied by a statement that shows the financial status of the branch at that date. The liquidation procedures should be finalised, including presentation of the liquidation accounting reports, and the Minister of Tradehas the right to extend this period if a concerned parties so requests, explaining the justifications for such request. Whenever such liquidation is finalised according to the law, the Registrar shall issue a decision to write off the branch from its records, publish the decision within a local newspaper within 10 days after the date of the decision thus completing the liquidation process.

In the proposed regulation, there are two further examples where the branch may be liquidated:

First: The branch shall be liquidated by the Registrar without waiting for its management to present their request for liquidation if the branch practices no business, or makes no contract with any public or private sector party within two years of the issuance of the registration certificate in circumstances where it has not: :

a. Appointing a legal advisor for the branch as well as a notarized accountant;
b. Opening a bank account in one of the Iraqi banks, or the licensed international banks in Iraq;
c. Presenting a certified lease agreement for the administration of the branch in Iraq; and
d. Presenting the final annual fiscal statements of the branch.

Second: where the branch has provided the information listed in (a) to (d) above, it shall still be liquidated by the Registrar without waiting for the company to submit a request for liquidation if it does not, within 4 years after the registration of the branch in Iraq, not pursue any business in Iraq or engage in any contract with any entity, whether in the public or private sectors within the above-mentioned period of time.

In light of the above, in the event that the proposed amendments are adopted, it will provide a smoother mechanism for foreign entities in Iraq in terms of the registration and de-registration (liquidation) procedures. It shall further open the way for a more time-efficient and convenient process in terms of transactions with the private sector where the same level of approvals are no longer a requirement.

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Discipline & Dismissal Penalty According to Iraqi Labour Code

The Iraqi Labour Code No. 37 of 2015 (the "Labour Code") became applicable on 7 February 2016 and represents one of the most important Iraqi legislative introductions since Iraq became open to all foreign businesses post 2003.

As an overview, the Labour Code is the law that regulates employment relationships in Iraq with very narrow exceptions such as public sector employees who are subject to a civil service code and other categories such as army personnel, police and internal security. The Labour Code sets out the minimum rights and entitlements of employees working in Iraq.

Specifically, this article considers the discipline and dismissal sanctions within the Labour Code.

Discipline & Dismissal Penalties

As a starting point, it should be noted that an employment contract cannot dilute the requirements of the Labour Code.

The Labour Code provides that a disciplinary sanction must be put in writing by the employer and the employee must thus be notified of this sanction by way of posting the outcome on a bulletin board or at another prominent place within the work site. Having done so, the employee is unable to assert that he has not been notified of the sanction once a 10 day period has elapsed.

An employee has a right to file a claim disputing the disciplinary sanction (outside of a dismissal) before the Iraqi Labour Court provided he does so within 15 days of the outcome having been communicated to him by his employer. The court judgment will be final.

Separately, if the outcome of the disciplinary is that the employee should be dismissed, the employee has a 30 day period to file proceedings before the Labour Court and the Court will issue its judgment within 30 days of the claim being filed.

In the event that the employer has 10 or more employees, the Labour Code requires it to prepare internal disciplinary rules. Further, the employer has to discuss these rules with any employee representative should one exist. The obligation to do so must be met within three months of the introduction of the rules or within three months of the Labour Code becoming applicable (which, as a reminder was on February 7, 2016).

The content of the internal disciplinary rules will be relevant and agreed to next list of information as follow:

a. Hours of operation including starting and finishing times, the site opening time and daily and weekly rest breaks;.
b. Wages in respect of regular hours and overtime;
c. Health and safety procedures;
d. Employees' duties and discipline rules;
e. Annual and special leave entitlements; and
f. Name and titles of applicable supervisors.

In addition, internal disciplinary rules or its amendments are to be approved by legal department at the Iraqi Labour Office. The later has to notify the employer within 30 days of approval

request of its opinion or it will considered approved.

Moreover, the employer has to post the internal disciplinary rules onto its bulletin board after being approved and to keep it readable and on good condition.

The Labour Code provides that the employer may impose one of the following disciplinary sanctions within 15 days of identification of the employee's act:

a. Written warning including implications of further sanctions should the conduct be repeated in the future;
b. Three day suspension;
c. To remove the employee for consideration for any pay increase for a period of no longer that 180 days;
d. Downgrading his position level including his wage according to new demoted level; and
e. Dismissal.

However, any of the above discipline sanctions have to be reasonable with reference to the conduct of the employee and the employer is unable to penalise an employee twice for the same infringement.

Furthermore, before imposing any disciplinary sanction, it is necessary that the employer carry out an investigation and consider the employee's defence (if any) to the allegations in the presence of an employee representative (if any). and if penalty assigned in cash to be forward to employees social security department.

At noted, the Labour Code provides that dismissal is one of the available sanctions but that it can only be an outcome in the following situations:

i. If the employee has committed a serious error that caused a material damage to the employer.
ii. If the employee has disclosed one of the employer's secrets.
iii. If the employee violates vocational health and safety instructions provided that employer in such case previously sent a written notice of a dismissal if such violation take place again.
iv. If the employee was found drunk, more than once, during work hours according to a medical report from a specialist and employee has been notified more than once regarding same violation.
v. If the employee has committed a behavior that does not comply with work honour and ethics, provided that he has been notified before regarding same behaviour.
vi. If the employee has inflicted physical harm on the employer personally or upon a supervisor or colleague, whether or not at work.
vii. If an employee has been absent from work without justification for 10 consecutive days, or for 30 non-consecutive days in a given year.
viii. If the employee has committed, during work hours, a felony or an offence against one of his colleagues and was convicted with a clear-cut judgment for such felony or offence.
ix. If the employee was convicted to serve a one year prison sentence or more with a clear-cut judgment.

Furthermore, in terms of dismissal by reason of absence (item VII above) the employer has to warn the employee in writing after five consecutive days of absence or twenty non-consecutive days of absence from work without justification. If so, then the employer can dismiss the employee after a further five consecutive days of absence or after ten extra non-consecutive days of absence.

Accordingly, if the reason for dismissal is not stated in the Labour Code, the employer can only lawfully terminate any employee's employment contract in circumstances where the employee has made an error which is repeated once or more provided that the employer has warned the employee about the implications of a committing such an error again. Furthermore, an employer can dismiss an employee by reason of his poor performance provided that it has provided him with sufficient instructions (in order to improve his performance) and a writing warning but where the employee has continued to underperform for thirty days from date of the warning notice. Once again, it is necessary that the employee be provided the right to be supported throughout the process by an employee representative or union or any other person he may chose to be his defendant against allegations regarding his behaviour or performance.

Court dealing with labour case disputing sanctions imposed by employer may reinstate dismissed employee and may ruling to compensate the same because of any sanction imposed by his employer when find it illegal according to Labour Code and taking on considerations Iraqi Civil Law No. 40 for the year 1951 and Retirement and social security law No. 39 of 1971, all that only if and if employee request compensation/reinstatement on his dispute.

The Labour Code considers the employee responsible before the employer in respect of any damages caused when an employee has acted in breach of his contractual obligations to the employer. However, the employer has to prove that damages were caused by reason of the breach for the Court to award any compensation to the employer. Further, any such breach requires to be intentional or by reason of gross negligence or as a result of serious error.

In conclusion, the Labour Code provides a welcome structure to govern the employment relationship in Iraqi and balances the employer and employee interests in a manner that was not evident in previous years. It remains to be seen whether the employment laws in Iraqi will continue to be developed in the future but the Labour Code is a promising starting point.

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Derivatives in the Kuwait Market

Financial instruments known as derivatives are widely used across the GCC and in the State of Kuwait. Derivatives are financial instruments that allow parties to hedge against adverse movements in exchange rates, interest rates or market prices. Financial derivatives also allow parties to take speculative positions in the market. There are many types of derivatives that parties may enter into, such as currency swaps, options, equity derivatives, credit derivatives, asset swaps, basis swaps and interest rate swaps. The term "derivative" is used to describe these classes of financial instruments due to their value being linked to an underlying bond, currency, stock, commodity, interest rate and even including weather data such as inches of rainfall. It is crucial to note that derivatives settle on a financial basis rather than a physical source. For instance, derivatives that are based on a particular commodity are generally settled by the payment by one party to the other and not by the physical delivery of the actual underlying commodity.

ISDA Documentation

The International Swaps and Derivatives Association ("ISDA") provides the standard documentary formalities for swaps and derivatives. The use of the ISDA documentation in order to effectuate such derivative transactions is customary in Kuwait. ISDA documentation generally consists of the ISDA Master Agreement (the "Master Agreement"), the ISDA Schedule (the "Schedule") and the ISDA Confirmation (the "Confirmation"). Credit support documentation may also be supplemented to these documents in the event that the counterparty is providing a collateral in order to mitigate the credit risk arising from the transaction. However, such credit support documents are not mandatory in order for an ISDA governed derivatives transaction to be completed.

The Master Agreement sets out the general terms of the transaction, essentially identifying and managing the obligations of the respective parties to the Master Agreement. The Agreement also lists in detail how the derivative transactions may be closed out upon the occurrence of certain events of default or otherwise labelled as the 'termination events'. The Master Agreement does not contain any specific terms of the particular transaction; rather these terms are comprehensively scheduled in the confirmation document.

The Master Agreement is not commonly amended. Any amendments deemed necessary to ensure that the derivatives transactions governed by the particularised ISDA documentation meet the commercial and legal positions of the counterparties are made in the Schedule. The counterparties will decide what representations, threshold amounts, events of default and termination events, amongst any supplementary provisions, will apply and to which party. The Schedule is applicable to all of the transactions that take place under the Master Agreement. The negotiation of the Master Agreement provisions to be consolidated in the Schedule are largely determined in accordance with the relative strength of the concerned parties.

Kuwait Legal Issues

As mentioned above, many parties in Kuwait, including foreign and local financial institutions as well as corporates, enter into derivative transactions by utilizing the aforementioned ISDA documentation. Consequently, there are many Kuwait specific issues that such parties must bear in mind upon entering into ISDA documentation with a Kuwaiti counterparty.

a) Authority and Capacity

Generally, under Kuwait law, the capacity of corporate bodies to enter into a particular transaction is connected to its objects which are set out in the subject company's constitutional documents. The objects of a company determine the capacity of said company to enter into any particular transaction. Therefore, a counterparty cannot assume that a Kuwaiti counterparty's entry into an ISDA transaction is in the ordinary course of its business. Consequently, a counterparty to an ISDA transaction

dealing with a Kuwaiti counterparty should ensure that the Kuwaiti counterparty has either; explicit authority subject to its constitutional documents to enter into the ISDA transaction or has obtained the appropriate corporate authorisations that are required pursuant to the constitutional documentation in order to enter into the ISDA transaction (i.e. a partners' resolution or shareholders' resolution).

Furthermore, with respect to the restrictions under the law, it is imperative to note that the Central Bank of Kuwait (the "CBK") has advised local financial institutions that banks, investment companies and investment funds may not enter into derivative transactions unless it is for 'hedging' purposes. Conversely, we are unacquainted of any instances in which the CBK has prohibited a financial institution from entering into an ISDA governed derivatives transaction due to it being deemed as entering into the derivative transaction for speculative purposes. In the event that a Kuwaiti financial institution does intend to enter into an ISDA governed derivatives transaction for speculative purposes, such Kuwaiti financial institution should obtain the prior consent of the CBK. In the event that the CBK discovers any such derivatives transactions that have in fact been entered into for speculative purposes by the Kuwaiti financial institution, sanctions may well be imposed against the said institution.

b) Documentation Requirements

Part 3(a) of the ISDA Schedule governs the documentation requirements for the counterparties to the Master Agreement. As aforementioned, parties negotiating an ISDA with a Kuwaiti counterparty should ensure that the Kuwaiti counterparty has either specific authority or capacity to enter into the ISDA transaction. Consequently, these documents should be requested from the Kuwaiti counterparty under Part 3(a) of the ISDA Schedule.

Moreover and depending on the legal form of the Kuwaiti counterparty, the respective parties are obliged to obtain the Kuwaiti counterparty's Articles of Association/Memorandum of Association, certificates issued by the Ministry of Commerce and Industry as well as the company's commercial license and commercial registration. In any case, Kuwait legal counsel should be retained for the purposes of providing a formal legal opinion on the Kuwaiti counterparty's requisite authority and capacity to sign, deliver and perform its obligations under the Master Agreement.

c) Netting & Set-Off

A significant feature of the ISDA Agreement is 'close out netting'. Close out netting occurs between a defaulting and a non-defaulting party. Under the close out netting, upon a default or termination event taking place, all derivatives transactions may be closed out and the values calculated and netted off against each other thus providing a single amount to be payable. This is important because in the event of insolvency of either party, the insolvency administrator will be unable to handpick ISDA transactions; insist on the payment of any profitable ISDA transactions and refuse to do so on non-profitable ISDA transactions. The reason the close out netting mechanism is possible across all derivatives transactions taking place under an ISDA Agreement is due to the presence of the specific provisions in the Agreement that provide that the Master Agreement, the Schedule and the Confirmations comprise one consolidated contract and that a counterparty may terminate all transactions (either automatically or, depending upon the provision selected in the ISDA schedule, on notice) upon the event of insolvency proceedings being instituted against a party.

"The Central Bank of Kuwait has advised local financial institutions that banks, investment companies and investment funds may not enter into derivative transaction unless it is for 'hedging' purposes."

Although the legal concept of set-off, which is akin to the concept of close out netting in the ISDA Master Agreement, is recognized under Kuwait law, it is not clear that the netting provisions of the ISDA Agreement will be enforceable against a bankrupt Kuwaiti counterparty. It is very possible that a Kuwaiti bankruptcy court could set aside a termination and close out netting under an ISDA Agreement. As these issues have not been litigated in a Kuwaiti court and there are no clear laws regarding the same, it is difficult to predict how a Kuwaiti court will rule.

d) Central Bank of Kuwait Issues

Although there are no specific regulations or instructions regarding ISDA documentation, the CBK issued an instruction in 2006 whereby licensed Kuwaiti banks may enter into options, financial futures, interest rate futures and forward rate agreements both for hedging and trading purposes. However, as mentioned above, the CBK has advised local banks to not enter into derivative transactions for speculative purposes. Therefore, in the event that a party is negotiating an ISDA with a Kuwaiti financial institution, it may be advisable to include a representation and warranty by the financial institution that it is entering into the derivative transactions for hedging purposes and not for the purposes of speculation.

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Update on Labour Bans in Qatar

It has been just over three months since Qatar's new sponsorship law, Law No. 21 of 2015, regulating the entry, exit and residence of expatriates in Qatar as amended (the Expatriates' Law) took effect. The Executive Regulations regarding the implementation of the Expatriates' Law have not yet been released, however, given that many employers in Qatar will have undergone their annual performance appraisal processes in recent months, it seems an appropriate time to review how the new Expatriates' Law impacts the ability of employees in Qatar to change jobs.

Reliance on this article

For the avoidance of any doubt, the opinions expressed in this article do not reflect the views of the Ministry of Administrative Development, Labour and Social Affairs (MADLSA) or the Ministry of Interior (MOI) in Qatar. However, this article is based not only on a reading of the Expatriates' Law, but also on comments made by MADLSA officials at various presentations regarding the new Expatriates' Law. The understanding as at the date of this article may be clarified further and/or be amended once the Executive Regulations are released.

Further, the matters contained in this article will not apply to employees working in the Qatar Financial Centre, which has its own (separate) laws regarding employment and immigration matters.

Bans prior to 13 December 2016

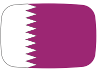
Until 13 December 2016 (the date on which the Expatriates' Law took effect), all transfers of employment in Qatar required a no objection certificate (NOC) from the outgoing employer. If the outgoing employer refused to provide a NOC, the employee was automatically banned from working for any other employer in Qatar for a period of two years.

The new rules regarding bans

Under the new Expatriates' Law, the automatic ban has been softened. The ability of an employee to transfer his/her employment to another employer in Qatar (and the extent of any employment ban) will depend upon factors including the following matters:

- whether the employment contract is stated to be for a fixed term or for an indefinite period;
- whether the employment contract is terminated by the employer or the employee, or whether termination is due to a "change in circumstances" (discussed below);
- if the employment contract is terminated by the employer, whether termination is due to "gross misconduct" on the part of the employee;
- if the employment contract is terminated by the employee, whether this was due to the employer breaching a fundamental term of the employment contract;
- the length of the employee's continuous service with his/her employer as at the date of termination;
- whether the employee is bound by any valid post-termination restrictive covenants (note that a non-compete provision must be reasonable, and should only restrain conduct to the extent necessary to protect the employer's legitimate business and legal interests. It should therefore be limited in time/duration; place/geographical scope and nature/ business sought to be restricted); and
- whether there are any overriding "public interest" considerations relevant to the transfer.

In order to illustrate how these considerations impact whether or not an employee will be subject to an employment ban post termination, we have prepared the following summary (this summary is based on a reading of the Expatriates' Law together with comments made by MADLSA officials regarding the application of the Expatriates' Law):



Party Terminating	Circumstances of termination	Can employee transfer without a NOC and will any ban be imposed?
Employee	Employee is employed on a **fixed term contract**, employee resigns (without fault of the employer).	If the employee is employed on a fixed-term employment contract: a. for the duration of the agreed fixed term, the employee will continue to require a NOC in order to transfer his employment; however b. once the agreed fixed term expires, with effect from 13 December 2016, the employee may transfer to another employer in Qatar without having to obtain a NOC from his former employer (the employee still needs to notify his former employer and abide by any minimum notice provisions). We understand that the Expatriates' Law applies with retrospective effect, therefore, the original date of employment will apply (i.e. the term does not restart on 13 December 2016). In situation (a) above, if the former employer refuses to provide the NOC, we understand that the employee will be unable to work for another employer in Qatar until the expiry of the fixed term agreed with his/her original employer. The only exception to this is where it would be in the public interest to allow the individual to transfer without having to wait (in which case the authorities have the power to approve the transfer). What is meant by "public interest" in this context remains to be seen, and is perhaps a matter that will be discussed further in the Executive Regulations.
Employee	Employee is employed on an **open/ indefinite** term contract, employee resigns (without fault of the employer).	If the employee is employed on an unlimited contract, then: a. if the employee has less than five years' continuous service with his/her former employer as at the date of termination, the employee will continue to require a NOC in order to transfer his/her employment; however b. if the employee has more than five years' continuous service with his former employer as at the date of termination, with effect from 13 December 2016, the employee will be able to transfer his/her employment to a new employer in Qatar without having to obtain a NOC from his/her former employer (the employee still needs to notify his/her former employer and abide by any minimum notice provisions). We understand that the Expatriates' Law applies with retrospective effect, therefore, the original date of employment will apply for the purposes of calculating the five years' continuous service period (i.e. continuous service does not restart on 13 December 2016, the date on which the Expatriates' Law took effect). In situation (a) above, if the former employer refuses to provide the NOC, we understand that the employee will be unable to work for another employer in Qatar until the date on which the employee would have completed five years' continuous service with his original employer. The only exception to this is where it would be in the public interest to allow the individual to transfer without having to wait (in which case the authorities have the power to approve the transfer). What is meant by "public interest" in this context remains to be seen, and is perhaps a matter that will be discussed further in the Executive Regulations.

<table>
<tr>
<td>Employee</td>
<td>Employee resigns due to his employer breaching a fundamental term of the employment contract (i.e. employer fault).</td>
<td>If the employee resigns (either part way through his/her fixed term contract, or before five years' continuous service in the case of an indefinite contract), then where the resignation is due to the employer breaching a fundamental term of the employment contract (which must be proven), the employee will be permitted to transfer his/her employment without the need for a NOC from his/her former employer. The employee must lodge a complaint and the employer's breach must be proven before the transfer will be approved.

The Expatriates' Law does not state what type of breach would be sufficient to prove that it was a fundamental breach, however, under the Qatari Labour Law (Law No. 14 of 2004, as amended from time to time), an employee has the right to resign with immediate effect and remain entitled to end of service gratuity (if applicable) in the following cases:

• if the employer commits a breach of its obligations under the employment contract or the provisions of the Labour Law;
• if the employer or its responsible manager commits a physical assault or immoral act upon the employee or any of his/her family members;
• if the employer or its representative has misled the employee at any time in relation to the entering into of the employment contract and/or as to the terms and conditions of the work; and/or
• if continuance with the work endangers the safety and health of the employee provided that the employer is aware of the danger and does not take the necessary steps to remove it.

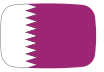
The above scenarios (under the Labour Law) may provide some guidance regarding the seriousness of the breach required under the Expatriates' Law in order to prove that the employer has breached a fundamental term of the employment contract, however, this is perhaps a matter that will be clarified by the Executive Regulations.</td>
</tr>
<tr>
<td>Employer</td>
<td>Dismissal for gross misconduct (i.e. for one of the reasons set out in Article 61 of the Labour Law).</td>
<td>If the employee is guilty of gross misconduct and is summarily dismissed by his/her employer, the employee will not be able to transfer his/her employment to any other employer in Qatar. In fact, in accordance with Article 26 of the Expatriates' Law, the individual will be banned from returning to Qatar for a period of four years.</td>
</tr>
<tr>
<td>Employer</td>
<td>Dismissal for any reason other than gross misconduct (e.g. redundancy, poor performance etc).</td>
<td>We understand that where the employer is the party terminating the employment contract, and termination is not due to gross misconduct on the part of the employee, the employee may transfer his/her employment to a new employer in Qatar without the need for a NOC from his former employer. It seems that when the employer is the party terminating the employment, the employee is free to seek suitable alternative employment, however, this matter is not expressly contained in the Expatriates' Law and the exact position cannot be confirmed until the Executive Regulations are released.

Relevantly, if the employee has agreed to be bound by a non-compete provision, then provided that the restraint is reasonable (as outlined above) and enforceable, the employer may rely on the provision to prevent the transfer of the employee's employment to a competitor in Qatar. The mere existence of the restraint will not act as a blanket ban, rather the onus will be on the employer to prove that the new employer is a competing entity, and that the role that the employee would be performing would amount to a breach of the restraint agreed between the original employer and the outgoing employee.</td>
</tr>
<tr>
<td>Change of circumstances</td>
<td>Death of employer (if employer is an individual) or company ceases to exist (if employer is a corporate entity)</td>
<td>If:

a. the employer is an individual and the employer dies; or

b. if employer is a corporate entity and the company ceases to exist,

the employee's employment will terminate due to a "change of circumstances" and the employee may transfer to a new employer in Qatar without the need for a NOC from his former employer.</td>
</tr>
</table>



In all cases, the employee will still require the usual approvals (namely approval from the MOI and the MADLSA) and will need to provide the usual documentation (such as a police clearance certificate) in order for the transfer to take place.

A special committee, namely the Expatriates' Exit Grievances Committee, has been established to hear disputes in relation to the Expatriates' Law, including disputes regarding requests to transfer employment. The committee comprises members from the MOI, the MADLSA and the National Human Rights Committee.

Practical considerations for employers

Due to the automatic employment bans that applied in Qatar prior to 13 December 2016, in practice, employers did not need to rely on contractual non-compete provisions to prevent an employee from working for a competitor. The previous law (Law No. 4 of 2009 as amended from time to time) acted as an automatic bar to any such competitive activity post termination. In the light of the changes introduced on 13 December 2016, employers should review any post termination restrictions contained in the employment agreements for its key personnel and also consider whether the legitimate interests of their business would be sufficiently protected in the event that a key employee sought to transfer his/her employment under the new rules.

Once the changes introduced under the Expatriates' Law become clearer and also more widely understood, we are likely to see employees in Qatar gaining more leverage in terms of their ability to change employers. Undoubtedly, attracting and retaining good employees is a key consideration for any business in any region. However, until recently, employers in Qatar have largely been able to rely on the local laws (and the built in employment ban) to retain key employees. Going forward, given that there is no ready supply of candidates in the market (because employees may only work in the country if they are validly sponsored to do so), employers in Qatar will need to consider practical ways to incentivise employees to stay, particularly key employees, including for example through the use of long term incentive plans. We will continue to closely monitor the position and will provide an update upon issuance of the Executive Regulations and/or any substantive change in approach by MADLSA or the MOI.

"The Executive Regulations regarding the implementation of the Expatriates' Law have not been released as yet, however, given that many employers in Qatar will have undergone their annual performance appraisal processes in recent months, it seems an appropriate time to review how the new Expatriates' Law impacts the ability of employees in Qatar to change jobs."

As the largest dedicated specialised employment law team in the Middle East, Al Tamimi & Company's Employment team regularly advises employers on contentious and non-contentious employment law issues. For further information in respect of Qatari employment law considerations please contact Kamaljit Dosanjh (k.dosanjh@tamimi.com).

News & Events

11th MENA Regulatory Summit

Al Tamimi & Company were proud sponsors of the 11th MENA Regulatory Summit, in association with the Dubai Financial Services Authority (DFSA) and under the patronage of H.E. Sultan bin Saeed Al Mansouri, the UAE Minister of Economy.

On day two of the conference Andrea Tithecott, Partner, Head of Regulatory Practice, joined Blom Bank, the Pearl Initiative and Thomson Reuters on a panel discussing risk and supply chain management, which examined:

- Reputation risk and supply chain (third party risk)
- Due Diligence process: corporate vs. financial institutions
- Trade compliance: challenges of import and export

This year's summit was the largest yet and it was great to be the official legal partners.

Andrea Tithecott
Partner, Head of Regulatory Practice
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Construction and Infrastructure Seminar Series

On Wednesday the 8th of February we held an interactive Construction and Infrastructure seminar which took place in our Abu Dhabi office. The theme of the discussion was *Do you get what you claim? - How to be more successful*, and addressed the following areas:

- An overview of key issues
- Cause and effect
- Forum issues
- Proving your claim

Euan Lloyd, Senior Associate presented the seminar to a wide range of attendees. Our seminars cover topical issues surrounding the legal aspects of construction in the region. For more information on upcoming Construction and Infrastructure breakfast seminars, please contact events@tamimi.com.

Euan Lloyd
Senior Associate
e.lloyd@tamimi.com

National Sports Day in Qatar

Al Tamimi & Company were proud Gold Sponsors of the AHK German Industry and Commerce (German Business Council) Football Tournament on Qatar National Sports Day. The Qatar office sponsored alongside a host of other companies in Qatar including Siemens, Birkenstock, Turkish Airlines, Q-Auto, SAP, Nasser Bin Khaled, Lipton and Aquafina.

The event day saw many companies come together to play in the football tournament. Al Tamimi played very well, qualifying into the Semi Final and finishing at 4th place.

DIFC Data Protection Seminar

On Tuesday the 14th of February, Al Tamimi & Company's Technology, Media and Telecommunications team held a seminar which addressed DIFC Data Protection and Information Security.

Entities registered in the DIFC, and those considering setting-up need to be familiar with the DIFC data protection regime. The seminar provided an opportunity for the attendees to ask questions and discuss practical issues arising in the course of ensuring compliance with DIFC data protection requirements.

Additionally, the session touched on information security, the obligation to ensure security, and what to do in the event of a data breach.

Nick O'Connell, Partner, Technology, Media and Telecommunication, Al Tamimi & Company discussed the following key areas:

- An overview of data protection in a DIFC context
- Data protection notification requirements
- Legitimate processing of personal data and sensitive personal data
- Transfers of personal data to places outside the DIFC
- Rights of data subjects
- Powers of the Commissioner of Data Protection
- Information security obligations, and data breach response

The event was well attended and gave a useful refresher on data protection in the DIFC.

Nick O'Connell
Partner
n.oconnell@tamimi.com

FIDIC Middle East Contract Users' Conference 2017

On the 14th – 15th of February, Al Tamimi & Company's Construction and Infrastructure team sponsored the FIDIC Middle East Contract Users' Conference.

The conference was the largest event for FIDIC contract users' in the Middle East and provided useful insights on:

- Variations Under FIDIC Forms of Contract
- New Official Guidance on Modifying FIDIC Conditions of Contracts – FIDIC Golden Principles
- The Forthcoming FIDIC Yellow Book Subcontract
- The FIDIC Pink Book - Strenghts, Limits & Procurement Reform

Scott Lambert, Head of Construction & Infrastructure, Al Tamimi & Company spoke on day two of the conference and addressed *The BIM Revolution and its Impact on FIDIC contracts in the Middle East*. The session focused on risks, the necessary procedures and contractual arrangements for the management of BIM within construction and professional services agreements.

It was great to be part of such a successful event!

Scott Lambert
Head of Construction & Infrastructure
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26 FEB

Nasdaq Dubai Capital Markets Seminar

On the 26th of February Al Tamimi & Company in collaboration with Nasdaq Dubai and Emirates NBD Capital hosted The Nasdaq Dubai Capital Markets Seminar at the Movenpick Hotel Ibn Battuta Gate.

The event was the perfect platform for attendees to discuss and explore the public market and how to raise capital through an Initial Public Offering (IPO). The regulatory framework of Jebel Ali Free Zone (Jafza) has been updated to allow current FZE and FZCO type of entities to list their company on the stock exchange.

Ahmed Ibrahim, Partner, Head of Equity Capital Markets, Al Tamimi & Company along with other key speakers from Nasdaq Dubai and Emirates NBD Capital addressed the following topics:

- The equity raising process
- Deal execution
- Marketing to institutional investors
- Listing structures
- Listing regulations
- The implication of tapping public market liquidity to access a wider pool of funds

The seminar was well attended and very informative.

Ahmed Ibrahim
Partner, Head of Equity
Capital Markets
a.ibrahim@tamimi.com

28 FEB

Key Contract Terms for Freelancers and Suppliers in Media

On Tuesday, the 28th of February Al Tamimi & Company's Technology, Media and Telecommunication team held an informative workshop exploring the essential legal basics for all of those doing business in the media industry across the UAE.

Fiona Robertson, Senior Associate, Technology, Media and Telecommunication lead the session and addressed key areas such as:

- What is a contract?
- Why should you use a contract – law and practice?
- How to form a contract in the UAE
- Important legal terms to consider in contracts
- Looking at contract chains
- Taking legal action in the UAE

The workshop was a great opportunity for a number of Dubai's top producers to network with their peers and other industry experts.

Fiona Robertson
Senior Associate
Technology, Media & Telecommunication
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APPOINTMENT AS ARBITRATOR- BREAKING THE OLD BOYS' NETWORK

Women in Arab Arbitration take **Gary Born** out for Lunch

WHEN

May 8, 2017
12pm – 2pm

WHERE

Al Tamimi & Company

Dubai International Financial Centre (DIFC)
Building 4 East
6th Floor
Dubai, UAE

RSVP: events@tamimi.com
Spaces are limited and will be allocated in order of registration

A WIAR Event Organized By• Heba Osman• Nayiri Boghossian• Laila El Shentenawi • Ilham Kabbouri•

AGENDA

12.00 – 12.30pm
Registration and Networking

12.30 – 12.35pm
Host's Welcome
Thomas Snider

12.35 – 12.40pm
WIAR's Welcome
Heba Osman

12.40 – 13.55pm
Lunch Discussion
Breaking the Old Boys' Network- Tips, Tricks and Q&A
Gary Born, **President of the Singapore International Arbitration Centre (SIAC) and Chair of the International Arbitration Practice Group, Wilmer, Cutler, Pickering, Hale and Dorr LLP**
Facilitator: *Ilham Kabouri*

13.55 – 14.00pm
Closing
Laila El Shentenawi

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United Arab Emirates
Ministry of Justice

47th Year
Issue No. 611
3 Jamadi al-Ula 1438 AH
31 January 2017

FEDERAL DECREES

241 of 2016	On the retirement of an official at the Ministry of Presidential Affairs.
243 of 2016	On ratifying the Agreement for the Avoidance of Double Taxation & Prevention of Tax Evasion with respect to Taxes on Income and Capital Gains between the UAE and the UK.
1 of 2017	On ratifying the Agreement for the Avoidance of Double Taxation & Prevention of Fiscal Evasion with respect to Taxes on Income and Capital between the UAE and the Principality of Liechtenstein.
2 of 2017	On ratifying the Agreement for the Avoidance of Double Taxation & Prevention of Income Tax Evasion between the UAE and the Slovak Republic.
3 of 2017	On ratifying the Agreement for the Avoidance of Double Taxation & Prevention of Tax Evasion with respect to Taxes on Income between the UAE and Jersey.
4 of 2017	On ratifying the Agreement on Reciprocal Waiver of the Visa Requirement for Holders of Diplomatic and Special Passports between the UAE and the Republic of Costa Rica.
5 of 2017	On ratifying the Agreement between the UAE and the Republic of Uganda for Air Services Between and Beyond their Respective Territories.
6 of 2017	On the UAE’s accession to the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004.
7 of 2017	On appointing the Deputy National Security Advisor.

REGULATORY DECISIONS OF THE CABINET

1 of 2017	On the implementation of UAE mandatory standards.

DECISIONS OF THE DEPUTY SUPREME COMMANDER OF THE ARMED FORCES

15 of 2015	On adding an entity to the list of entities where national and alternative service is offered.
30 of 2016	On adding UAE airports to the list of entities where alternative service is offered.
35 of 2016	On adding the Food Security Centre – Abu Dhabi to the list of entities where alternative service is offered.

MINISTERIAL DECISIONS

- From the Ministry of Justice:

761 of 2016	Amending the regulation on attestation and notarization promulgated by Ministerial Decision No. (476) of 2007.

- From the Ministry of Community Development:

545 of 2016	Announcing the establishment of the UAE Poets Association.

- From the Ministry of Economy:

523 of 2012 — Announcing the incorporation of Mohammad Omar bin Haidar Holding Group PSC.

526 of 2016 — Announcing a revision of the Articles of Association of Awtad PSC.

682 of 2016 — Announcing a revision of the Articles of Association of Emirates SembCorp Water and Power Company PSC.

690 of 2016 — Announcing a revision of the Articles of Association of Al Hikma Development Company PSC.

ADMINISTRATIVE DECISIONS

- From the Federal Authority for Land and Maritime Transport:

90 of 2016 — On the registration, licensing and use of marine pleasure craft.

- From the Emirates Identity Authority:

9 of 2016 — On implementing the human resources regulations across all independent federal bodies while they continue to retain certain powers.

10 of 2016 — Amending Decision No. (13) of 2007 promulgating the implementing regulations of Federal Law No. (9) of 2006 on the Population Register and ID card system.

- From the Securities and Commodities Authority:

2/T.M of 2017 — Amending SCA Decision No. 17/T of 2010 concerning anti-money laundering and counter-terrorist financing guidelines.

3/T.M of 2017 — Concerning the regulation on promotion and referral activity.

4/T.M of 2017 — Concerning the regulation on administrative services for mutual funds.

- Certificate of approval of amendment of the Articles of Association of Al Ramz Corporation Investment and Development PJSC.

- Certificate of approval of amendment of the Articles of Association of Noor Takaful Family PJSC.

- Certificate of approval of amendment of the Articles of Association of Noor Takaful General PJSC.

- Certificate of amendment of the Articles of Association of Dana Gas PJSC.

- Certificate of approval of amendment of the Memorandum and Articles of Association of Dana Gas PJSC.

United Arab Emirates
Ministry of Justice

47th Year
Issue No. 612
2 Jumada al-Akhira 1438 H
28 February 2017

FEDERAL DECREES

11 of 2017	On appointing an undersecretary for the Ministry of Presidential Affairs.
16 of 2017	On appointing a UAE non-resident ambassador.

REGULATORY DECISIONS OF THE CABINET

3 of 2017	On revising and updating fees for services provided by the Ministry of Economy.
4 of 2017	On the organizational structure of the Emirates Standardization & Metrology Authority.

MINISTERIAL DECISIONS

- From the Ministry of Finance:

412 of 2016	On the apportionment of revenue from online advertising within the Federal Government between the Ministry of Finance and Latest On.

- From the Ministry of Economy:

598 of 2016	Announcing a revision of the Articles of Association of Dubai Aluminium PSC.
599 of 2016	Announcing a revision of the Articles of Association of Emirates Global Aluminium PSC.
618 of 2016	Announcing a revision of the Articles of Association of Al Dhabi Investment PSC.
674 of 2016	Announcing a revision of the Articles of Association of Ras Al Khaimah Dredging Company PSC.
683 of 2016	Announcing a revision of the Articles of Association of Taweelah Asia Power Company PSC.
687 of 2016	Announcing a revision of the Articles of Association of Al Ghaith Holding Company PSC.
688 of 2016	Announcing a revision of the Articles of Association of Al Maqsad Development Company PSC.
689 of 2016	Announcing a revision of the Articles of Association of Manhal Development Company PSC.
694 of 2016	On the adjustment of legal position of limited liability companies, joint liability companies, and limited partnership companies to comply with the Commercial Companies Law.
27 of 2017	Announcing a revision of the Articles of Association of Emirates Aluminium Co. Ltd. PSC.

ADMINISTRATIVE DECISIONS

- From the Telecommunications Regulatory Authority:

98 of 2016	On approving the National Numbering Plan Policy.

99 of 2016 On approving the Numbering Resource Utilization Policy.

3 of 2017 On approving the Consumer Protection Regulations, Version 1.3.

- From the Federal Authority for Land and Maritime Transport:

7 of 2017 On certificates and documents issued to ships and seamen online.

8 of 2017 On the implementing regulations of Federal Law No. (9) of 2011 on road transport.

- From the Emirates Standardization and Metrology Authority:

9 of 2017 On approving the Industrial Measurement System.

11 of 2017 On approving UAE standard specifications.

12 of 2017 On approving the electronic energy efficiency label.

- From the UAE Central Bank:

  - The Capital Adequacy Regulation.

- From the Securities & Commodities Authority:

  - Certificate of approval of amendment of the Articles of Association of Arkan Building Materials Company PJSC.
  - Certificate of approval of amendment of the Articles of Association of the National Central Cooling Company PJSC.
  - Certificate of approval of amendment of the Articles of Association of United Insurance Company PJSC.
  - Certificate of approval of amendment of the Articles of Association of Arabtec Holding PJSC.
  - Certificate of approval of incorporation of Orient UNB Takaful PJSC.
  - Certificate of approval of amendment of the Articles of Association of DAMAC Properties Dubai Co. PJSC.
  - Certificate of approval of amendment of the Articles of Association of the General Holding Corporation PJSC.

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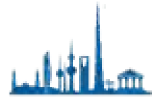

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