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LAW UPDATE

Latest Legal News and Developments from the MENA Region

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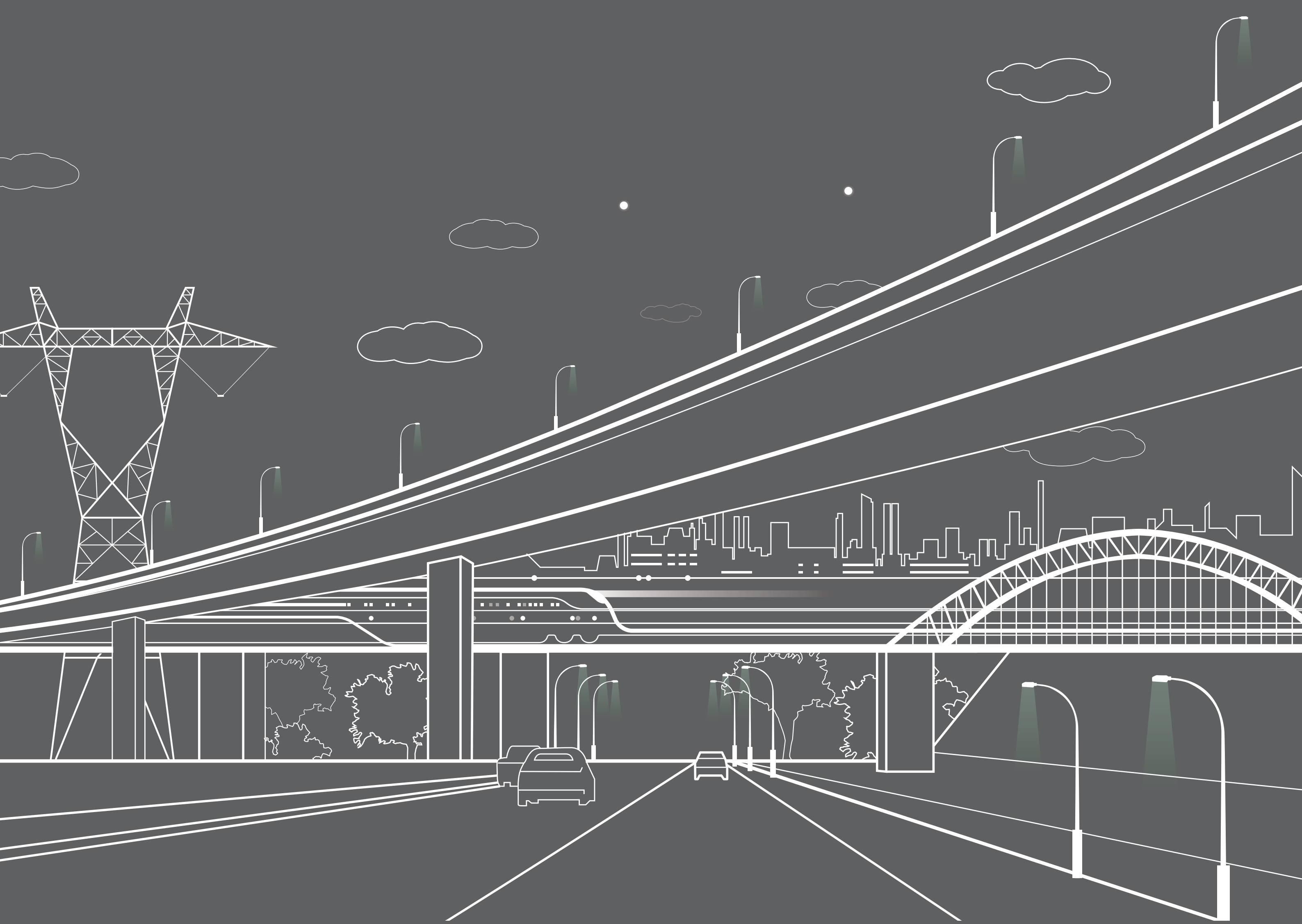

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The Middle East Legal Awards 2017

Congratulations to the firm for winning the prestigious ***Regional Law Firm of the Year, Large Practice****; and to Christina Sochacki for winning the highly anticipated* ***Associate of the Year*** *at the 2017 Middle East Legal Awards.*

In this Issue

Welcome to the May edition of *Law Update*.

It gives me great pleasure to share our recent success at the Middle East Legal Awards, where the firm was honoured with the prestigious *Regional Law Firm of the Year, Large Practice* award. We were praised for our commitment to regional expansion which has been and continues to be a key strategy for the firm. I am also very pleased to announce that one of our senior associates, Christina Sochacki, won the highly anticipated *Associate of the Year* award for her stellar efforts in assisting to raise the profile and client base of the firm's Healthcare Group. These awards recognise the exceptional achievement and best practice demonstrated by our firm and we look forward to building on our successes in partnership with you, our valued clients and friends.

In this edition of Law Update, we focus on Construction & Infrastructure – a dynamic sector compromised of many drivers and key challenges. Both challenges and opportunities are closely looked at in the articles that follow which aim at providing industry professionals with a holistic assessment of the current market. We start with the hot topic of the *New FIDIC White Book: The Key Changes* and highlight some the changes made to the 4th Edition of the White Book, and how the latest edition seems to have addressed many of the problem areas (page 44). We analyse the 'fit for purpose' clause (page 48) which at first glance may seem beneficial to employers, but may also lead to potential problems for both employers and contractors, implicating overall liability and potential loss recovery.

Following the announced proposals for significant changes to the DIFC Companies Law we look at how the DIFC is working very hard to make its offering more attractive to businesses and high net worth families. Read more on the *Major Revamp of DIFC Companies Law* (page 39).

A game of chance or a game of skill? It can be argued that chance plays a role in everything in life. However the strict legal regime that applies to gambling and associated conduct in the UAE, coupled with the high penalties for infringing the Cyber Crimes law, mean that the risk of undertaking any form of fantasy sports in the UAE is probably not worth the potential pay out. Find out more in *Fantasy Sports in the UAE: Legal or Red Card* (page 14).

Turning to the largest economy in the Middle East, Saudi Arabia, we look at *Vision 2030: Why Don't You Consider Exporting to Saudi Arabia* (page 66). In this article, we focus on commercial agency arrangements in the Kingdom as those will inevitably form a significant part of the development of Saudi economy over the coming decades.

Beyond this, we take a tour of the latest regional and jurisdictional updates and assess the Bahrain Investment Market (BIM) and how it provides an innovative platform for growing companies to quickly and efficiently raise the capital they need without having to satisfy the extensive regulatory requirements applicable to a listing on the main GCC stock exchanges (page 56). We explore how to protect your trademark and copyright in Egypt (page 58) and also share contract drafting insights from Iraq (page 60).

We hope that you enjoy this edition of Law Update and find it to be an informative reflection of the current legal trends. For further information on any of these articles, please do not hesitate to contact us.

All the best

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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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Differentiating between an Arbitration Deed and Terms of Reference in UAE law

The terms, “arbitration deed”, “arbitration instrument”, and “terms of reference” are often used interchangeably in arbitration practice leading to some confusion. The UAE legislator opted to use one term “arbitration instrument” in the UAE Civil Procedures Code, and it is not always clear whether this is referring to an arbitral agreement or the terms of reference. In a series of decisions the Abu Dhabi Court of Cassation has helpfully clarified which of the Procedures Code provisions apply to the arbitral agreement, and which provisions apply to the terms of reference. The Abu Dhabi Court of Cassation has also explained how these terms relate to each other, as well as other key issues, thus helping to clarify the applicable formal requirements applying to arbitration under UAE law.

Background

Arbitration agreements can take one of three forms: an arbitration clause in the contract; an arbitration deed entered into after the dispute arises; and an arbitration clause incorporated into the contract by reference.

In Case No.467/2013, the Abu Dhabi Court of Cassation stated that the arbitration clause constitutes an agreement between the contracting parties in their contract that any dispute resulting from the execution or interpretation of their contract shall be referred to arbitration. The arbitration clause exists before the dispute arises. Where there is no arbitration clause or any other arbitration agreement between the parties to refer a dispute arising between them to arbitration, the parties may enter into an agreement to refer the dispute to arbitration. Such an agreement is known as an “arbitration deed”. Unlike the arbitration clause, the arbitration deed begins its existence only after the dispute arises between the parties.

In case No.214/2014, the Abu Dhabi Cassation Court stated that if the contract entered into between the parties refers to another document, which includes an arbitration clause, then this is considered an arbitration clause by incorporation. However, the Abu Dhabi Cassation Court stipulated that in order to have a valid arbitration clause by incorporation, the reference to the document which includes the arbitration clause must include an explicit and specific reference to the arbitration clause in the referenced document.

Article number 203(1) of the Civil Procedures Code states that:

> *“It shall be permissible for contracting parties generally to stipulate in the original contract or in a subsequent agreement to refer any dispute between them concerning the implementation of a*

specified contract to one or more arbitrators and it shall likewise be permissible to agree by special conditions to arbitration in a particular dispute."

This recognizes the difference between an arbitration clause and an arbitration deed. It highlights that the parties may agree on the arbitration in their original contract (i.e. an arbitration clause), or can agree in a subsequent agreement (i.e. an arbitration deed).

The meaning of "Arbitration Instrument" in articles 203 and 216

Aside from the arbitration clause, arbitration deed, and arbitration clause by incorporation, the Abu Dhabi Court of Cassation judgment No. 467/2013 noted the existence of "terms of reference". This refers to a procedural document that is prepared by the arbitrators to evidence the parties' agreement of the procedural matters relating to the arbitration proceedings.

As noted before, the Civil Procedures Code refers only to one term, which is "arbitration instrument", it does not use the terms "terms of reference" or "arbitration deed". How then are we to recognise those provisions using 'arbitration instrument' to refer to 'arbitration deed', and those using it to refer to 'terms of reference'? The Abu Dhabi Court of Cassation, in judgment No.467/2013, confirmed that the UAE legislator meant to refer to the "terms of reference" in some of the Civil Procedures Code articles, and to the "arbitration deed" in some other articles:

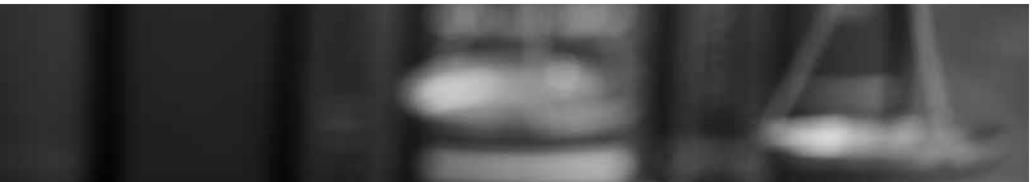
1. Article 203(3) states that "The subject matter of the dispute must be defined in the arbitration instrument or during the trial of the action even if the arbitrators are empowered to effect a conciliation, failing which the arbitration shall be void". The Court confirmed that the UAE legislator meant to refer to the "arbitration deed", and did not mean to refer to the "terms of reference".
2. Article 216(1)(a). This article states that either party to an arbitration award may request the court to nullify it if, among other things, the award is issued without "arbitration instrument", or an invalid "arbitration instrument". If the UAE legislator meant to refer to the 'arbitration deed' in this article, then the "arbitration deed" must be signed by the parties for the award to be valid because article 203/2 stipulates that the arbitration agreement cannot be evidenced unless it is in writing. However, if the UAE legislator meant to refer to 'terms of reference', then these do not need to be signed and so a party unhappy with the process cannot void the proceedings by simply refusing to sign the terms of reference. The Abu Dhabi Court of Cassation held that the UAE legislator was referring to the 'terms of reference', and not to the 'arbitration deed'. The Abu Dhabi Court of Cassation confirmed, among other things, that if either party declines to sign the terms of reference, this ought not to result in the setting aside of the arbitration award.
3. There is another precedent issued by Abu Dhabi Court of Cassation in judgment No. 112/2015, in which one of the parties sought the nullification of an arbitration award on the basis that the terms of reference were not signed by the respondent during the arbitration proceedings. The Cassation Court highlighted that the respondent was given five chances to sign the terms of reference, but refused to do so without a valid reason. The Court characterised this as an abuse of right by the respondent, and one that the respondent should not be allowed to benefit from it, and the award was upheld.

Conclusion

The use of the term 'arbitration instrument' in the Civil Procedures Code has caused some confusion as it could be referring to 'arbitration deed' or 'terms of reference'.

The "arbitration deed" is a type of arbitration agreement. The "terms of reference" is a procedural document that is prepared by the arbitrators to evidence the parties' agreement regarding the procedural matters related to the arbitration proceedings.

The Abu Dhabi Court of Cassation has confirmed that Article 203(3) of the Civil Procedures Code is referring to the "arbitration deed". Article 216(1)(a) is referring to the "terms of reference". Unlike the arbitration agreement, the "terms of reference" does not have to be signed by the parties in order to be valid. This interpretation by the Court makes the arbitral process more robust in the UAE.



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Qatar Courts Release their Grip on Restrictive Compensation Chains

In a refreshing and reassuring judgment, the Court of First Instance recently took an unusually generous approach for the Qatari Courts, by awarding direct damages and compensation to an innocent subcontractor as a result of the defaulting contractor's breach. The compensation amount was determined based on the nature of the contract and appropriate proportion to the incurred losses. This judgment is a deviation from the familiar approach adopted by the Qatari courts and this article explores matters in some further detail.

Case Facts

A foreign subcontractor (the "Claimant") entered into a subcontract agreement with a local contracting company (the "Defendant"). The contractual works included the design, supply, testing and commissioning of certain technical systems for a large project worth approximately 2 billion Qatari Riyals.

The Claimant filed a civil case against the Defendant when the Defendant withheld payments over an extended period of time against the contractual works (including works performed under variation orders made by the Defendant) completed by the Claimant. The alleged outstanding payment amounted to more than US$15 million. The Claimant also asserted that any delays in completing the works was due to the Defendant's variation orders and not by any fault of the Claimant.

The Defendant filed a counter-claim alleging that the Claimant caused delays in completing the contractual works, and at times, failed to complete the contractual works. The Defendant sought compensation from the Claimant for damages incurred by such delays. The Defendant requested the appointment of an engineering expert to assess the claims and seek to prove default on the part of the Claimant.

The Court appointed an engineering expert, and the expert verified the validity of the documents presented by the Claimant. The expert produced evidence of completed works by the Claimant for which the Defendant had not paid, and also confirmed that the issuance of the variation orders and suspension instructions by the Defendant had caused delays.

Ruling of the Court of First Instance

The Court of First Instance joined the Claimant's case and the Defendant's counter-claim and issued a combined judgment. The Court found the following:

1. Regarding the Defendant's breach of contract, the Court took the view that the contract is the law of the contracting parties, and as such, it is not up to any party to unilaterally rescind, amend or waive the contract unless the contract or the law so provides.

   Therefore, the Court ruled that it was not up to the Defendant to stop payments for the contractual works completed, and that any concerns about delay should have been notified to the Claimant in order that it be provided with the opportunity to challenge the Defendant's position. By

simply withholding payments, the Defendant had denied the Claimant the benefit of the contract despite the Claimant having performed its contractual obligations. Accordingly, the Court ruled in favour of the Claimant and obliged the Defendant to pay the outstanding amounts as proven in the expert's report.

2. Regarding compensation, the Court ruled that the Claimant had indeed suffered consequential losses that flowed from the Defendant's breach of the contract as the Claimant could not use or benefit from the amounts unpaid by the Defendant. The Court stated that it has the authority to determine an appropriate compensation amount, which should include direct losses incurred by the Claimant plus loss of profit resulting from the Defendant's breach of contract. Accordingly, the Court ordered the Defendant to compensate the Claimant with the total amount of US$800,000. In addition, the Court awarded that the Defendant meet the cost of the expenses, including the costs associated with the appointment of the expert.
3. The Court rejected the Defendant's counter-claim for lack of a factual or legal basis.

The Effect of the Judgment – Can Subcontractors Rest Assured?

Firstly, the judgment would give some comfort to subcontractors in situations of breach of contract for non-payment by the contractor after the subcontractor has performed the relevant contractual obligations (sufficiently supported by evidence). In such cases, if the Courts continue to adopt the same approach as set out above, the defaulting contractor will be held liable to reimburse the non-defaulting subcontractor. To date it has been (in practice) quite common for subcontractors to cease performance of the contract (to avoid further waste of time, money and efforts) upon realising that the contractors have stopped making further contractual payments with no apparent intention to make such payments.

Secondly, the judgment is highly significant as regards the amount of compensation that was awarded to the Claimant. Traditionally, the Courts in Qatar have been wary to render judgments with large compensation amounts. Compensation is awarded (if at all) at the Court's discretion which may not necessarily be based on calculations considering concepts of proportion. Accordingly, it is often the case that the awarded compensation is not sufficient in serving the actual purpose of recouping losses suffered by a claimant. In contrast, in this judgment the Court of First Instance has taken a more generous and unrestricted approach, as the compensation awarded is sizeable compared to previous similar cases, and is proportionate to the nature of the case, (i.e. non-payment for works performed towards a sizeable and expensive project involving significant investment).

If the Court maintains a similar approach in future cases, such judgments would also preserve and protect the sanctity and integrity of such projects in Qatar in addition to the protection of non-defaulting subcontractors against defaulting contractors. Further, the award of increased compensation in such cases may well encourage foreign direct investment in Qatar.

While the judgment is not final and remains subject to appeal, we anticipate that it is a stepping stone towards the Courts being set free from its prior restraint in terms of infamous compensation shackles.

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Alerting the Bank upon Receipt of a Fraudulent Transaction SMS: Obligation or Option?

In a recent judgment dated 14 March 2017, the Qatari Court of Cassation established a new principle regarding the responsibility of banks' customers to ensure the safety and protection of their accounts from hacking and/or fraudulent use by third parties. It was established that a customer's negligence in failing to notify the bank of possible fraudulent or suspicious use of a debit card, after receiving numerous automated SMS messages from the bank indicating a suspicion of such use, must be considered when determining liability for the losses resulting from fraud.

The case passed through the Court of First Instance and the Court of Appeal in favour of the customer and against the bank, where neither of the lower courts considered the responsibility or fault to be that of the customer. The lower courts' decision was eventually overturned by the Court of Cassation on the basis that the customer's negligence or mistake must be considered. The Court of Cassation ordered the case to be remitted back to the Court of Appeal.

Case Facts

The case relates to a claim filed by a customer against a renowned international bank present in Qatar. The customer's bank account was allegedly hacked from a foreign country and several transactions of large amounts of Qatari Riyals were carried out on the customer's debit card over a period of approximately one month.

During this time, the customer received hundreds of individual automated SMS messages from the bank regarding such transactions. Such messages are required to be sent to each customer as part of a security system introduced by the Qatar Central Bank ("QCB"). Every time a transaction is made on a customer's debit or credit card, an automated message is sent to the customer containing the date and amount of the transaction and the place where the transaction was made, as well as a helpline number for enquiries and suspicions.

The customer acknowledged that he received all of the messages from the bank, but took no action immediately upon receipt of the messages. Instead, at the end of the one month period, the customer contacted the bank when he received his monthly account statement. Upon such notification, the bank immediately froze the account, cancelled the card, and commenced an investigation. The customer refused to accept a settlement offer from the bank and filed a case in the Qatari Courts seeking compensation from the bank for the full value of the fraudulent transactions.

Court of First Instance

The Court of First Instance found that the bank was fully liable for the customer's losses and therefore was obliged to reimburse the customer for the full value of the fraudulent transactions. The Court did not provide any reasoning for such a conclusion. From this decision, it was inferred that banks were responsible to protect their customer accounts and debit/credit cards from fraudulent use, regardless of the customer's omission to notify the bank of such transactions.

“It was established that a customer’s negligence in failing to notify the bank of possible fraudulent or suspicious use of a debit card, after receiving numerous automated SMS messages from the bank indicating a suspicion of such use, must be considered when determining liability for the losses resulting from fraud.”

Court of Appeal

The bank filed an appeal on the basis that it had fully adhered to all of its duties and obligations under Qatari law and QCB regulations. The bank also argued that the customer had failed to inform it of the suspicious transactions at an early stage, despite being notified of such transactions. The bank argued that should the customer have notified it at the outset of the fraudulent use, his losses would have been minimal as the bank would have taken immediate preventive measures.

The Court of Appeal did not agree with the defence put before it by the bank and upheld the Court of First Instance’s decision, affirming that the bank was solely responsible for the losses incurred by the customer and was obliged to compensate the customer for the full amount of the fraudulent transactions.

Court of Cassation

The case was subsequently challenged before the Court of Cassation. At this stage, the arguments made before, and dismissed by, the lower courts had to be demonstrated before the Court of Cassation in the form of flaws in the application of the law by the lower courts, as opposed to incorrect findings of fact.

The Court of Cassation accepted the appeal on the basis that the lower courts did not consider or address the legal impact of all the facts and issues involved in the case. Accordingly, the case was remitted to the Court of Appeal to be reheard in light of the customer’s failure to notify the bank of the fraudulent transactions, after having received several automated SMS notifications over an extended period of time.

Significance of the Judgment

The Court of Cassation’s ruling reflects a contemporary approach taken by the judges. It is pleasant to see that the impact of technology and the important role it can play in our daily lives has been recognised. By acknowledging the SMS security system implemented by the banks, and bringing attention to the significance of a customer’s acting on the same, the Court of Cassation has set a principle that protects the efficiency and workability of this security measure. In our opinion, the decision appropriately balances the interests of the banks and the customers in the context of hacking and fraudulent transactions. Furthermore, the approach taken by Court of Cassation is in concert with the QCB regulations.

Should the Court of Cassation have rejected the notion that it was the responsibility of customers to act upon such SMS messages, the SMS security system would have been a waste of public funds and efforts of the QCB to introduce the system. A judgment to the contrary would have created a discrepancy between the Qatari Courts’ stance and the QCB’s intention in this regard. The judgment is a welcome step in paving the way for a similar contemporary approach in future cases.

The bank was represented by another law firm at the First Instance and Appeal stages, after which Al Tamimi represented the bank before the Court of Cassation.

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Extraterritorial Application of US Labour Laws in the UAE

This article considers the extraterritorial application of US employment laws in the UAE.

It is well understood that UAE laws will apply and its courts have jurisdiction within the UAE's borders. Alongside that, there is a general presumption against extraterritoriality (i.e. the application of laws issued outside the UAE).

US Laws with Extraterritorial Application

As in other jurisdictions, laws in the US presume no extraterritorial effect unless expressly identified otherwise. There are three key federal laws (amongst others) which have expressly been given extraterritorial effect as follows:

- Title VII of Civil Rights Act of 1964;
- Americans with Disabilities Act; and
- Age Discrimination in Employment Act (collectively, the "Laws").

The Laws prohibit discrimination in a number of cases such as on the basis of age, race, national origin, colour or gender.

Scope

The Laws seek to protect American citizens working as employees of US companies, whether inside the US or abroad, including within the UAE. The Laws would not afford protection to consultants or other workers. Since American nationals working in the UAE must obtain a residence visa and work permit in order to work lawfully in the UAE, they will generally considered to be 'employees' and thus, assuming all other conditions are satisfied, they will fall under the protection of the Laws.

The scope of the Laws would not extend to UAE companies with no links to the US or which do not employ American citizens. However, it should be noted that the definition of a 'US company' for the purpose of the Laws is fairly broad. In the event of a dispute, a number of factors may be considered to determine whether an entity is sufficiently connected to an US company, including (but not limited to):

- whether the UAE entity has a US parent;
- the location of the company's principal place of business;
- the nationality of the company's shareholders, officers and directors;
- whether the company is controlled by an US entity when considering matters such as:
    - degree of interrelated operations;
    - extent of common management;
    - application of common policies;
    - extent of common ownership or financial control; and
    - shared cost-centres.

Defences

The extraterritorial effect of the Laws is potentially onerous and gives rise to a range of legal implications that the UAE entity may not have envisaged. However, in deference to the sovereignty of UAE law within the UAE's borders, there are a two primary defences available to UAE companies seeking to avoid the application of the Laws as follows:

1. Foreign Law Defence

In certain circumstances, complying with the Laws would mean breaching other applicable laws in the jurisdiction within which an entity is based. To give an example, Federal Law No. 8 of 1980 (the "Labour Law") provides that women shall not be required to work at night. When applying the Laws, that provision would likely be considered to be discriminatory on the basis of gender. However, complying with the Laws and allowing both male and female employees to work night shifts would be a breach of the Labour Law. In those circumstances, employers to whom the Laws may potentially otherwise apply could rely on the existence of an obligation in the Labour Law as a valid reason for failing to comply with the Laws.

In order to successfully rely on this defence, the employing entity must be able to prove that a specific legal provision exists and that complying with the Laws would be a breach of that provision. In the UAE, this may prove to be a difficult hurdle since there are very few legal provisions which actively require discrimination. Therefore, as a general rule, where employers fall under the scope of the Laws, the relevant provisions should be complied with.

2. Foreign Sovereign Compulsion Defence

It is also possible for a company to defend actions which would otherwise amount to a breach of the Laws if the company can demonstrate that a foreign sovereign compelled the employer to engage in a practice which would otherwise be unlawful.

Potential Difficulties (UAE vs. US employment laws)

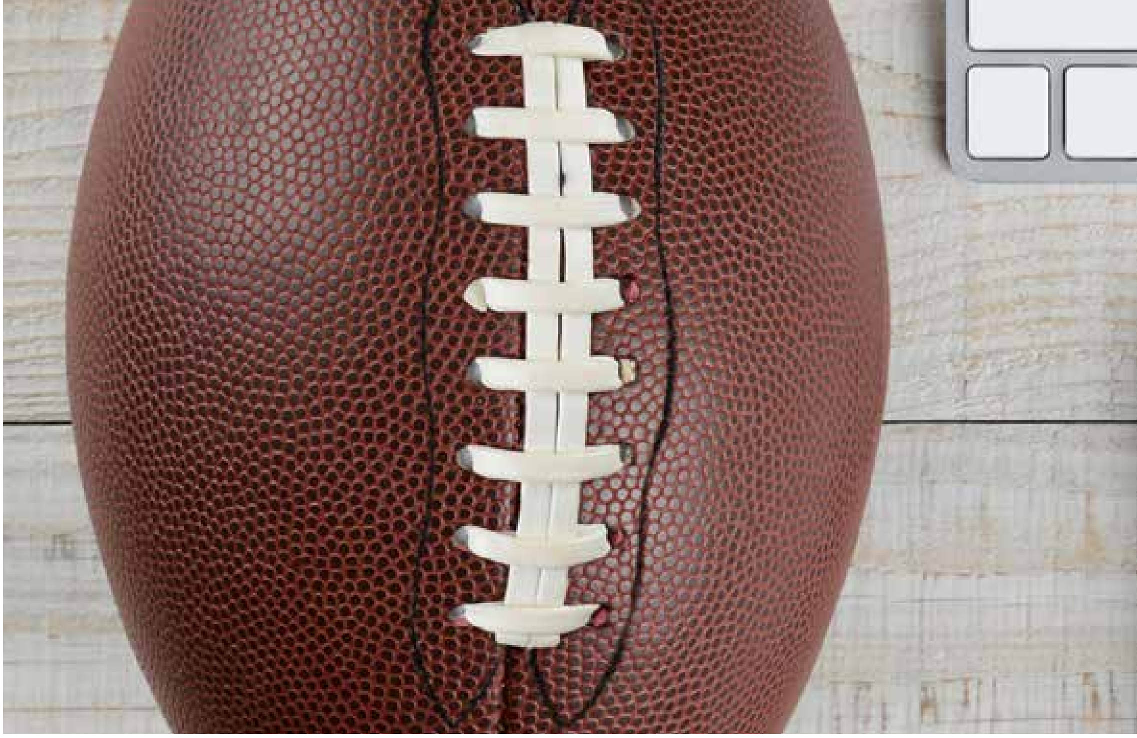
There are a number of common practices in the UAE which may give rise to breaches of the Laws for companies falling within the remit of the Laws and therefore require additional thought to be given to potential risks in the US. For example, the following actions could create a risk:

- choosing men over women for manual roles;
- employing individuals with a particular gender or religion as a result of client preference; or
- refusing to consider hiring certain nationalities due to likely difficulties with obtaining a residence visa. (It is worth noting however that an assumption that a visa will not be granted will likely be treated differently to circumstances in which an application for a visa is submitted and is then rejected by the UAE authorities.)

Conclusion

On balance, an employer's focus in the UAE should be on compliance with UAE laws. However, care should be taken where UAE entities have an US nexus and may be the subject of extraterritorial application of the Laws. It is therefore imperative for organisations to be alert to foreign laws which may apply to them and to recognise that being based in the UAE does not necessarily mean that their obligations begin and end with UAE laws.

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 please contact Gordon Barr (G.Barr@tamimi.com) or Natalie Jones (N.Jones@tamimi.com).



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Fantasy Sports in the UAE: Legal or a Red Card

In April this year, lawmakers in Texas became the latest politicians to turn their attention to the perplexing issue of fantasy football. One of the most popular online games in the world (some estimates state there are close to 40 million players in the United States alone) continues to be plagued by the age old query of whether it is a game of chance - and therefore illegal as gambling - or a game of skill.

The confusion arose from the fact that George W. Bush, when trying to stop the early spread of unlicensed internet gambling, excluded fantasy sports from the Federal Unlawful Internet Gambling and Enforcement Act (UIGEA). In brief, this law states that fantasy sports are exempt from the law, as long as people are not betting on the outcome of a single game or the performance of a single player. This allowed each state to determine its own position. The ensuing confusion has lead to a diverse opinion amongst the states in the USA, and more particularly the Attorney Generals in each state. There is a contrasting approach between those states that permit the online activity, those that restrict it to players with no ability to pay and win, and those that do not permit it at all.

So how would fantasy sports fare in the Middle East? Pursuant to the Constitution of the UAE, Islam is the official religion. There is also a general prohibition on gambling. This provides some context in which to understand references in the law to 'sin' and in determining conduct that conflicts with 'public morality'.

The key source of law relating to gambling is Federal Law No. 3 of 1987 (the "Penal Code"). Article 413 of the Penal Code defines gambling as "*a game in which each party agrees that if he loses, he will pay the party who wins the game an amount of money or anything else agreed upon.*" The Penal Code makes participation in gambling an offence, punishable by imprisonment for a term not exceeding two years (if it takes place in public) and/or a fine of up to AED20,000. This provision is replicated in the laws of several Emirates as well.

Interestingly, whilst some US states have been arguing that fantasy sports may not constitute gambling because of the (claimed) high element of skill involved in creating a team, this element would not be relevant in the UAE. The simple fact that the stake of the losing competitor is used to pay the winner would be sufficient to create an offence under UAE law. Because most fantasy sports contests include entry fees and prizes, these contests would be deemed illegal under UAE law.

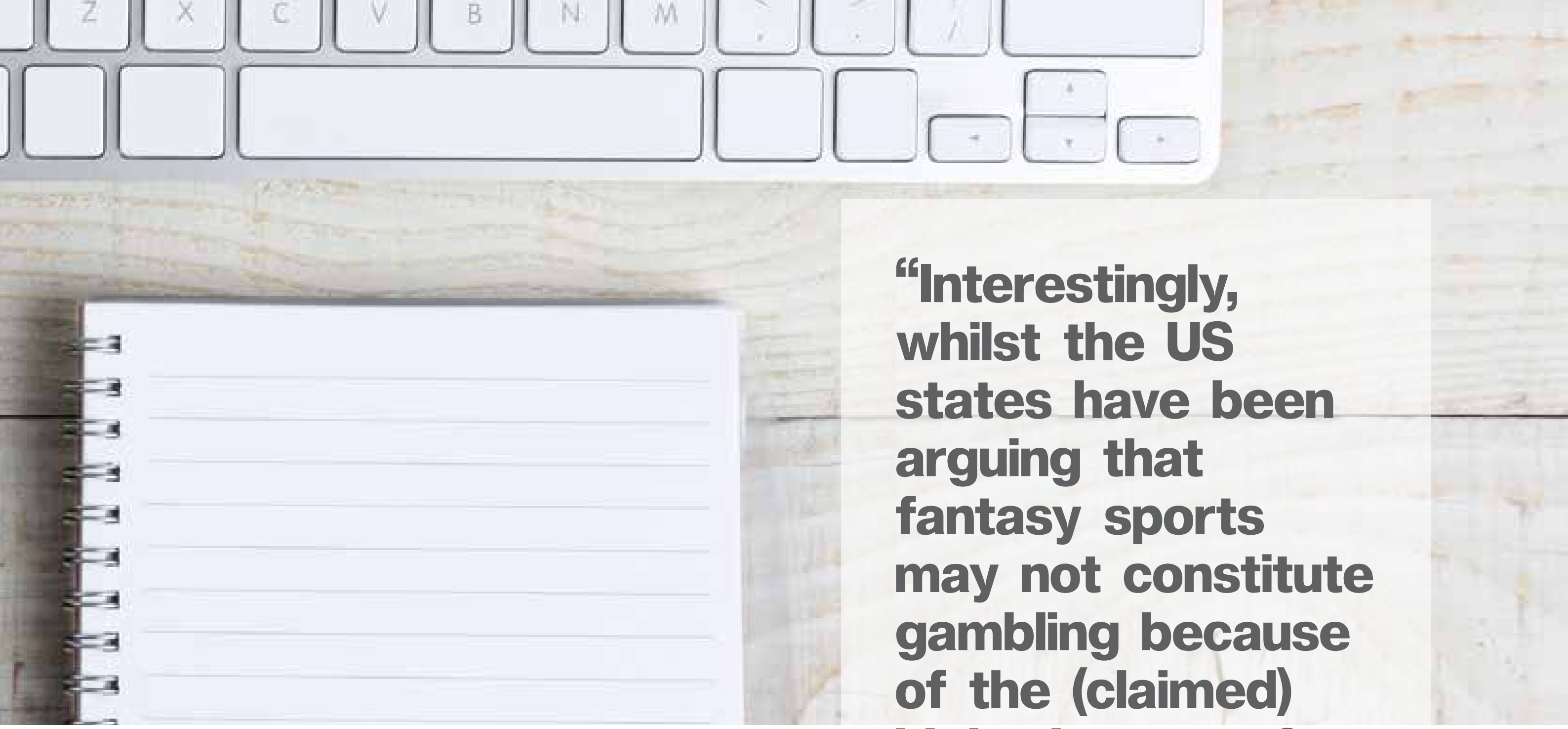
In the UAE, issues clearly lie with the creation of any game where the object is to win money. There can be no doubt that paying to play in a fantasy football tournament with the aim of collecting winnings would be considered gambling.

Opening or managing a venue for gambling, or organizing a game of chance in a public place or in a venue for gambling, is also an offence, with the penalty being imprisonment for a term of up to ten years.

Gambling and the Cyber Crimes Law

There have been ongoing issues, as noted above, in many overseas jurisdictions, arising from the difficult distinction between putting up a stake on your fantasy football team and outright gambling on sport itself. In the UAE, the position is not so difficult.

Federal Law No 5 of 2012 on Combating Cybercrimes (the "Cyber Crimes Law") contains prohibitions in relation



to gambling and sets out penalties including imprisonment and/or fines ranging from AED250,000 to AED500,000. In particular, Article 17 of the Cyber Crimes Law states sets out the penalties for "*whoever establishes, manages or runs a website or transmits, sends, publishes or re-publishes through the computer network pornographic materials or gambling activities and whatever that may afflict the public morals" and for anyone who "produces, draws up, prepares, sends or saves for exploitation, distribution, or display to others through the computer network, pornographic materials or gambling activities and whatever that may afflict the public morals.*"

The definition of gambling is not provided, leaving us with only the definition within the Penal Code (above). But clearly the act of simply setting up a fantasy sports league in the UAE would attract attention, as would distributing it (for example, posting the link on social media, even if you did not create the fantasy sports league yourself), or displaying it to others (this may mean something as innocuous as merely sharing your success in a fantasy sports league to others in the UAE).

What if there were no stakes involved?

Interestingly, the key element that determines whether an activity is gambling is the payment by the loser to the winner. So what if there was no payment required for the entry and/or no prizes to be won?

The position in this respect is obviously improved for the players and the operators, but we consider that it remains slightly unclear. If there is no payment by a loser then there would be an argument that no gambling has occurred and hence there is no issue under the Penal Code. However Article 17 of the Cyber Crimes Law does also extend to "*whatever … may afflict the public morals*". Article 15 adds that it is prohibited to use the internet or IT services for "*encouragement of sin*". Given the status of gambling itself as a sin, if a game were developed based on

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a recognized form of gambling but were free to play, would the authorities consider that an activity afflicting public morals or promoting sin? The answer is probably no, they would not. However we do believe that the continued or emphasised use of 'gambling-like activities', even within a free game, could very easily attract attention by members of the public and could result in a complaint being raised with the authorities. Ancillary to this, we believe that whilst the provision of a prize to the winner may not alter that position legally, provided that the losers were not required to pay towards, or otherwise supply, any part of that prize, the fact that a person could win anything at all might also increase the likelihood of the authorities investigating the game if a complaint were raised.

The ongoing game vs. the daily game? Will it make any difference locally?

The Attorney General in Texas, in discussing the potential new law, has said that whilst compiling a fantasy team for a season may conceivably take quite a bit of skill, the daily fantasy game, now growing in popularity in many countries, is much different. This is because the chances of something happening to a particular player during a game, or something unrelated to the game or which took a player out of a game entirely could substantially impact the outcome. If this were to happen in one game during the course of a full season, it may not vastly affect the outcome of the season. However, if one is taking a chance on a single game on a particular day, it could have a significant impact on the game and therefore on the results.

This analysis, whilst interesting from a legal perspective, has no relevance in a jurisdiction where the provision of a stake is the indicator for the illegal activity. Hypothetically, for games where no stake is required, the higher level of skill that is involved in a season of fantasy sport could make a difference in the analysis if the authorities were to be asked to determine whether the game was encouraging sin (as opposed to the daily fantasy games where there is an significantly increased element of chance).

Practical considerations – the TRA

The Telecommunications Regulatory Authority (TRA) has established the "Internet Access Management" policy which, amongst its powers, requires internet service providers (in this case du and Etisalat) to block access to websites providing illegal content or content that is inconsistent with the moral or public norms of the UAE.

The practical ramification of this is that many fantasy sports websites are blocked in the UAE. Indicating that the government does not have an issue with fantasy sports as a game - as long as no stakes are required - websites such as EA Sports Fantasy Premiere League and ESPN Fantasy Football remain available in the region.

Adding fantasy to a brand – other legal issues

Finally, it is important to remember that any competition that is designed to promote a brand would generally require the approval of the relevant Department in each Emirate. The running of a fantasy sports league, even without a stake, that is designed to promote a brand and results in a prize for a winner may require a permit. This would be even more relevant if there is a requirement to purchase goods in order to enter, and this fact may give rise to a more considered analysis of the competition by the authorities.

Conclusion

A game of chance or a game of skill – it can be argued that chance plays a role in everything in life. However the strict legal regime that applies to gambling and associated conduct in the UAE, coupled with the high penalties for infringing the Cyber Crimes law, mean that the risk of undertaking any form of fantasy sports in the UAE is probably not worth the potential pay out.

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IT Disengagement Services: Thinking Ahead for a Smooth Exit

IT services are the backbone of most public and private sector entities nowadays including those in the banking, retail, airline, hotel, manufacturing and mining industries. For this reason, it is critical that customers of IT services negotiate for the provision of comprehensive disengagement / termination services in any outsourcing contract. These services commence where the arrangement comes to an end either due to expiry or earlier termination. This will ensure service continuity through an orderly transition of the services from the supplier to either another supplier or to the customer itself.

A contract that does not contain adequate obligations on the supplier to provide disengagement services will likely result in the customer being held hostage as the contract nears expiry or is in the process of being terminated (whether due to an ongoing dispute or for any other reason). In such a situation, the customer would be left stranded with no alternative but to agree to whatever terms that are dictated by the supplier. Worst still, the customer may not practically be able to exercise its termination rights, even where it wishes to terminate the contract for cause as it has no means of migrating the provision of the services from the supplier in an orderly fashion, without causing disruption to its commercial activities.

This article will outline some aspects of disengagement services that customers ought to turn their minds to when negotiating IT outsourcing contracts.

Scope

Disengagement / termination assistance is essentially just another type of service, except that the service gradually ceases rather than being switched off at once. It is therefore essential that the scope be clearly defined and that associated fees are agreed upfront. Commitments should be obtained from the supplier to perform whatever services are necessary or reasonably required by the customer to effect a smooth transition of the services. Well-drafted contracts lay out (in the text or an exhibit) the scope of the termination services and such matters as: (i) support for a migration plan; (ii) transfers of assets and personnel; and (iii) transfers of work in progress, data, working documentation and contracts.

Fees

Most, if not all, termination assistance activities are performed by the same supplier staff who are assigned to support the customer in the provision of the steady state services. The supplier staff are paid for through the base charges for the service. The Supplier will likely argue that the customer should bear the cost of additional resources or skills (such as a transition manager) that are not ordinarily provided by the supplier in performing the steady state services. Similarly, if the customer needs additional supplier staff to complete disengagement and continue normal operations, the customer may be required to either pay for the additional support, or to relieve the supplier from service level requirements or other performance obligations. This will allow the supplier staff to support both daily operations and the transition.

It would be very difficult for the customer to obtain termination services without charge, even where the customer terminates the contract for default by the supplier. In the case of termination by the customer for default, the customer may of course pursue damages through disputes procedures and formal proceedings. Note however, that

consequential losses may not be recoverable – for example, in Saudi Arabia, courts will only award direct damages actually incurred by a party. In any event, it is in the interest of the customer to pay for the disengagement services so as to incentivize the supplier to carry out an efficient disengagement without affecting the commercial operation of the customer's business. This is particularly important in jurisdictions (such as Saudi Arabia) where the courts do not ordinarily compel a party to perform its contractual obligations (including disengagement services) by mandatory injunction or similar remedies.

Timing and Extensions

Time periods (such as notice periods for convenience termination) should be realistic, bearing in mind operational realities, the complexity of the service and other relevant considerations.

Customers need to have some flexibility about timing so it is important that the supplier phase out the services in a sequence that is determined by the customer. Also, it is possible that transition may be delayed, so it is worthwhile having a right to request that some or all services, be extended on a month-to-month or similar basis even after the disengagement services are due to expire. Naturally, this will need to be balanced against the supplier's demands re notice periods, time limits on the provision of disengagement services, relief from service levels and refresh obligations. Inevitably, suppliers will push for higher fees to be payable on the basis that the thencurrent fees for steady state services are predicated on large volumes and therefore not economically feasible for discrete or limited services.

Asset Transfers

Dedicated hardware and other assets used in providing the steady state services to the customer, such as assets at customer sites should be transferred to the customer. Suppliers will strongly resist transferring shared assets to the customer (ie those assets that the supplier uses to provide services to other customers as well). The workaround for the client may be to place an obligation on the supplier to procure assets the same as the shared assets for the customer. Also, the supplier will want to recover its unamortised or stranded costs (the value of assets purchased by the supplier for the purpose of providing the services to the customer). The supplier will ordinarily recover such costs through payment of book value of the assets or through termination charges that include the unamortised asset costs.

Similar considerations apply to leveraged contracts (such as software licenses) or subcontracts that are used by the supplier to support multiple customers. Customer specific third party contracts must contain terms that allow the supplier to transfer such contracts to the customer. This would make it easier for the customer to require that those contracts be transferred to it under the prime contract between the customer and the supplier. As for master or leveraged software licenses that the supplier uses to support multiple supplier customers, they are typically not transferable. To address this, the customer can require the supplier to obtain the relevant software licenses for it. Naturally, suppliers will either seek to pass through the expense to the customer or build it into their cost models and pricing.

Personnel Transfers

It is important for customers to have an opportunity to recruit (or allow the successor supplier to recruit) the supplier's personnel who have been involved in the provision of services to the customer, particularly those that are dedicated to the customer. Where the customer or the successor supplier wishes to acquire the business of the supplier, employment law advice for the relevant jurisdiction should be sought as to whether:

- the staff may transfer automatically through operation of acquired rights; and
- there are any laws and regulations that may affect staff reductions, transfers and severance.

Transfers of Data, Knowledge and Intangibles

The supplier should be required to comply with the following requirements without jeopardising service levels or disrupting the steady state performance of the services:

- transfer customer data, proprietary software and other intangible property to the customer;
- provide copies of procedures manuals and other working documents (at least those parts of a procedures manual or other document that are specific to the customer);
- provide supplier tools, utilities and other proprietary software for the customer's use during a reasonable transition period;
- provide commercial software products;
- make knowledgeable personnel available for debriefing and knowledge transfer to other IT professionals; and
- train customer or successor supplier personnel.

Al Tamimi & Company's TMT team regularly advises on IT outsourcing contracts. For further information please contact Haroun Khwaja (h.khwaja@tamimi.com) or Nick O'Connell (n.oconnell@tamimi.com).



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The Fundamentals of Commercial Leasing in Dubai

Most residents in Dubai will be familiar with a basic residential lease arrangement. Whilst legal complexities can arise under residential leases, they are generally uniform in that the demise or premises is the entire real estate unit and the care and maintenance of the premises is shared in a common sense fashion. However, forms of commercial lease arrangements can vary significantly depending on the nature of the property, the relevant tenant's business and the commercial objectives of the parties.

Below we outline some of the fundamental aspects to any commercial lease arrangement as well as possible variants having regard to the circumstances. We also explore some of the key risks that arise due to incomplete or unclear documentation.

The Demise

The first issue to be determined in any lease is what is being demised. The demise is the area of the building or facility designated for the exclusive use of the tenant. Often it is referred to as the "premises". Whilst this may seem, on the surface, a fairly simple exercise, there can be a number of possibilities each of which has consequences on the obligations of the landlord or the tenant in relation to repairing, maintaining, servicing and insuring the premises or building. We set out some examples of different demises below.

Building Demise

The simplest form of demise would be a demise of the entire building or facility to the tenant. Such arrangements are more likely to apply in purpose built facilities such as factories, warehouses, schools or hospitals where the tenant requires the use of the entire building or facility.

Unit Demise

The other form of demise is where only part of the building or facility is leased to the tenant. In this circumstance, the tenant would only be entitled to exclusively use and occupy the relevant part demised. Often the landlord will lease other parts of the building or facility to other tenants and reserve to itself and all tenants the right to use the common parts of the building or facility.

Licensed Areas

From a common law perspective, a license is a right over an area but one where the licensee does not have exclusive possession (i.e. the area may be shared with others or the landlord, or others may have rights of access to the area). Licenses may also be used for temporary facilities such as kiosks or promotional stands. From a common law perspective, a license would not be a lease. This distinction between a license and lease is, however, less clear in Dubai. Licensed areas may also be included in the lease alongside the demised areas. Common examples are:

1. rights to terraces for restaurant seating;
2. rights of access to and exit from the premises;
3. car parking rights; and
4. signage rights.

Landlord Reservations

Whilst "demising" the whole or part of a building or facility gives the tenant exclusive possession of such premises, landlords usually reserve the right to enter into the demised premises for various purposes including:

1. conducting repairs that the landlord accepts responsibility for;
2. inspecting the premises to ensure that the tenant is meeting its repairing, maintenance and other obligations;
3. ensuring that any services running through the premises (and serving the common parts or other premises let to other tenants) are not interrupted;
4. for the provision of services that the landlord has agreed to provide; and
5. in the case of emergencies.

It is common for the landlord to have to give the tenant some notice as to when they may access the premises except in cases of emergency.

Fit-Out & Reinstatement Obligations

Once the demise is determined, a common issue would be whether the demised premises are fitted out and ready for use or are provided as "shell and core". Shell and core means that the premises comprise just the utility service connections, premises shell and structure and no suspended ceilings, wall or floor coverings.

If the premises are shell and core or if the existing fit out is not sufficient, the tenant would usually assume the obligation to fit out the premises to meet its requirements. This can be a substantial obligation for a tenant and, in addition, the tenant will not have the benefit of the use of the premises for the period whilst the fit out occurs. In recognition of this, landlords may agree to a "rent free period". Often a tenant may be required to remove its fit-out at the end of the term of the lease and reinstate the premises to its prior condition, excluding fair wear and tear.

Repairing and Maintaining Rights and Obligations

A key part to any commercial lease is determining the rights and obligations of the landlord and tenant with respect to repairs and maintenance. As a general rule, the tenant would assume the majority of obligations to repair and maintain the demised area. However, there are exceptions to this general rule as often either the landlord or the tenant may want certain infrastructure to be taken care of by the landlord.

Good examples would be civil defence systems like sprinklers or integrated IT or telecommunications systems. Often a landlord may accept repair responsibility for mechanical, electrical and plumbing systems within the premises. Where only part of a building or facility is demised, the landlord would also assume responsibility for the maintenance and repair of the common parts.

Services & Service Charges

Although related to repairing and maintenance obligations, the rights and obligations for the provision of services is best considered separately. Services may comprise utilities, security, cleaning, mechanical, electrical and plumbing maintenance and repairs and many other aspects of the maintenance and operation of the premises or the building. The tenant would usually accept responsibility for many services in relation to the premises including utilities (where separately metered), and cleaning. In line with the obligations for repairing and maintaining, the landlord may accept responsibility for certain services within the premises. A key aspect of any commercial lease is whether the cost of such services (and insurance and other landlord costs) are payable by the tenant as "service charges" in addition to the rent or whether such charges are included in the rent.

Insurance & Risk

As the owner of the relevant building or facility, a landlord will invariably insure it against the usual property risks. A key aspect for discussion between landlord's and tenants is whether the tenant gets the benefit of the landlords insurance in this regard as, if they do not, and the tenant causes damage to the building, the insurer may look to recover directly from the tenant. Where the tenant does not get the benefit of

the landlord's property all risk insurance, the tenant should arrange its own insurance for such risks.

A landlord will not insure the tenant's fixtures, fittings, and contents and, accordingly, the tenant will need to insure for the same. In addition, a landlord may want a tenant to hold other insurances such as builders' risks (during the fit-out), and third party risks, with such insurance to also benefit the landlord.

The allocation of the various risks as between the landlord and the tenant will usually be set out in the lease as a corollary of the insurance matrix (i.e. each of the landlord and tenant may accept certain risks and be required to insure them, sometimes with the other party also getting the benefit of this insurance). Landlords may also take out "loss of rent" insurance to cover any period during which the building or facility may be damaged and rent abatements may apply.

Mall Leases

Malls are distinctive properties and accordingly commercial leases in malls often have distinct clauses. Common examples include:

1. turnover rents (the mechanics of which vary but are calculated by reference to revenue generated by the tenant from the premises);
2. obligations on tenants to contribute towards the costs of marketing the mall;
3. "keep open" obligations (whereby the tenant is obliged to keep the premises open during the opening hours of the mall); and
4. relocation clauses (where the tenant agrees to accept alternative premises if the landlord wishes to reconfigure the tenant mix).

Key Risk Issues

The above sections constitute an overview of the fundamental aspects of commercial leases. It is important to recognise however that these fundamentals are matters set out in the contractual terms of the lease. If a lease does not express a clear position in relation to the above issues a tenant should not assume that it is covered under the general law. Below are some of the key risk issues when agreeing commercial leases.

Key problems that we are familiar with as lawyers include:

1. The failure to adequately define the demise. As you will note from the above, defining the demise is critical to determining the extent of the maintaining, repairing, services, service charges and other rights and obligations of the landlord and the tenant.
2. The failure to clearly define ancillary rights such as the right to certain licensed areas. Such areas can be critical to the success of a tenants operations and therefore should be secured and collateral to the rights of the tenant under the lease.
3. Complications around the execution and finalisation of fit-outs. Fit-outs can be relatively complex construction arrangements with obligations on both tenants and landlords. Clearly if fit-out completion is delayed disputes between the landlord and the tenant with regard to the responsibility for the delays can arise. It is therefore important for the rights and responsibilities in relation to the fit-out to be clearly defined and for the tenant to ensure its contractors and consultants are experienced and any contractual documentation with them adequately protects the tenant.
4. Failing to clearly define the "permitted use" of the premises. What the premises can be used for and even the brand name associated with the tenant can be very important considerations for both landlords and tenants.
5. The tenant failing to secure fair and reasonable rights to assign the lease or subleasing rights. Assignments of lease and subletting in Dubai are restricted unless the parties agree otherwise. Certain regulatory issues may also arise with subleasing.
6. A lack of clarity as to who is responsible for completing or paying for repairing or maintaining the premises or building or providing services. The cost of services can be significant as can resultant damage if the necessary repairs or maintenance are not undertaken accordingly. It is time well spent to clearly document such rights and obligations.
7. Failing to clearly document the standard and conditions upon which the premises are handed over to the tenant (and therefore the condition upon which they must be handed back to the landlord).
8. Unclear allocations of risk and insufficient insurance cover. Thankfully accidents are relatively rare. However given the extent of liability possible, the allocation of risk and insurance are key issues to be considered in every commercial lease.
9. Break options, rent reviews and renewals. To a large extent such issues are regulated in Dubai. Landlords and tenants may however want to plan ahead as a means of creating greater certainty as to rents, the potential need to break a lease, and additional renewal terms.

Conclusion

This article is intended to give the reader an overview of the fundamentals of commercial leasing and highlight the key issues for consideration. Tenants should always seek appropriate legal and surveying advice before entering into lease arrangements.

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How to Convert your Property to a *Waqf*?

The Islamic Sharia defines *waqf* over a property as the endowment of a building, a plot of land or other asset for charitable purposes, with no intention of reclaiming the donated assets. The donated assets may be held by a trust and the person endowing his assets in such a manner is known as the *waqif* (i.e. the donor).

For example, by the endowment of an entire building, the *waqif* dedicates all rental income generated from that building to the benefit of a specific recipient. It also prohibits any use or disposition of that building by anyone other than the specified recipient.

Dubai Local Law No. 9 of 2007 ("AMAF Law") establishing the Awqaf and Minors Affairs Foundation ("AMAF") codifies the Sharia position and defines a *waqf* as "*Every item being endowed, whether movable or immovable, for the sake of other persons who are in need and with the intention of seeking the Almighty's satisfaction by such endowment*".

The Advantages of a *Waqf*

The advantages of establishing or granting a *waqf* cannot be measured in terms of income and expenses only. The benefits will accrue to the *waqif*, the community as a whole, and the poor and disadvantaged in general.

A *waqf* has the following benefits and advantages:

a. creating a long-term and large community capital fund;
b. establishing and supporting projects from the revenues of the AMAF on a sustainable basis;
c. aiding the poor and disadvantaged communities;
d. raising the self-esteem of the poor and the disadvantaged;
e. contributing towards poverty alleviation;
f. empowering society and encouraging people to contribute in charity;
g. contributing towards forming a united community; and
h. leaving a legacy that future generations will be proud of and incentivising them to follow the footsteps of the *waqif.*

Waqfs play an important role in nurturing solidarity and charity in society and provide a significant economic aid to the poor and disadvantaged.

The Role of AMAF in Dubai

The main objectives of the AMAF are the guardianship of minors, managing and investing their funds, guiding their education and social development, and ensuring their empowerment. Furthermore, it aims to promote the grant of *waqf*s through a contemporary Islamic perspective by encouraging individuals to participate for the public good.

The AMAF is a public foundation that enjoys the independent corporate character and the legal competence to perform all activities in pursuit of its objectives. The AMAF may also contract with others legal persons, participate in litigation, and delegate to any other person for these purposes, generally under the supervision of the Executive Council.

Article 21 of the AMAF Law states that the AMAF shall undertake the legal superintendence of endowments, taking care of, investing, raising and managing funds, and disbursing their proceeds in accordance with the conditions stipulated by the *waqif.*

Waqf Requirements

The *waqf* is a contract and therefore the *waqif* must have the capacity to enter into a contract. In summary, the *waqif* must:

a. be an adult;
b. be of sound mind;
c. be capable of handling his or her own financial affairs; and
d. not be subject to bankruptcy.

“The waqif may register a waqf on a property that was granted to him by the Ruler of Dubai. However, the waqif must first seek the consent of the Ruler through the Ruler’s Court.”

The AMAF Law is silent with respect to the faith of the *waqif* and although *waqf* is an Islamic concept, being a Muslim, or even a resident of Dubai, are not mandatory requirements to be a *waqif*. The AMAF encourages individuals from all faiths and nationalities to participate and donate to aid the poor and the disadvantaged.

Registration of a *Waqf* at AMAF

A *waqf* must be registered at the AMAF following the attestation of a Dubai Courts judge. In this regard, Article 38 of the AMAF Law states that: “The endowment shall emanate from a court’s attestation”.

The requirements for registration of a *waqf* on a property at the AMAF are the following:

a. original property title deed and site plan;
b. letter from the Dubai Land Department confirming that the property is clear from any encumbrances or liabilities and that it can be converted into a *waqf*;
c. passport copy and Emirates ID of the *waqif*;
d. identity of the charity income recipient;
e. selection of the superintendent of the *waqf* (e.g. the AMAF or any third party); and
f. two witnesses for the certification of the *waqf*.

The *waqif* may register a *waqf* on a property that was granted to him by the Ruler of Dubai. However, the *waqif* must first seek the consent of the Ruler through the Ruler’s Court to proceed and register a *waqf* on the granted property.

The Commencement and Term of a *Waqf*

A *waqf* may commence at the time of registration during the life of the *waqif* or may commence following the death of the *waqif*. In this regard, Article 45 of the AMAF Law states that: “*The endowment which depends on the death of the waqif is not compulsory during his life. However, following the death of the waqif, it is necessary to carry out the endowment as registered by the waqif*”.

Paragraph 1 of Article 40 of the AMAF Law states that the *waqf* shall be considered perpetually constrained from any kind of disposition whatsoever, whether it be sale, donation or mortgage, unless it is in the interest of preserving the *waqf* which stipulates otherwise, and any such disposition shall not be made without the court’s permission.

Furthermore, paragraph 2 of Article 40 of the AMAF Law states that the endowment of a mosque shall always be perpetual. However, the endowment of other property can be either temporary or perpetual depending on the choice of the *waqif*’.

Supervision of a *Waqf*

The supervision of the *waqf* is decided by the *waqif* and in the event that the *waqif* appoints a third party, other than the AMAF, the third party must provide detailed annual reports to the AMAF, inlcuding the income and expenses of the *waqf*. In this regard, Article 47 states that: “*The superintendent of the Waqf (endowment) shall provide the Foundation with periodical statements of account regarding the returns of managed endowments, and such statements shall be provided at a date fixed by the Foundation. The Foundation may fix a separate date for each endowment (separately)*”.

In the event that the *waqif* does not specify a superintendent, the AMAF will be the superintendent by law. The AMAF is granted this authority by Article 39 of the AMAF Law, which states: “*Provided that the waqif does not appoint any relative or any other specific individual as a superintendent, the Foundation shall be the superintendent, being the authority in charge of the general custodianship regarding charity and the returns of charities for the public benefit*”.

Furthermore, the *waqif* has the right to choose any beneficiary to receive the charity and income from the *waqf* and such beneficiaries may be individuals or institutions with or social purposes, such as health, education, social services etc.

In the event that the *waqif* does a charity recipient of the *waqf*, Article 44 of the AMAF Law provides the AMAF with the authority to disburse the returns totally or partially to a party that is deemed to be the most suitable and rightful in accordance with Islamic Law.

The supervision of the property that is the subject of a *waqf* is generally administered under a property management agreement, governing issues related to distribution of the income generated from the property and the maintenance of the property. We recommend that parties intending to grant a *waqf* seek legal advice to ensure that the property is managed by the *waqif* in the manner, and for the purposes, intended.

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Enforcing Foreign Court Judgments in Dubai

In general, it's difficult

The Dubai Courts have jurisdiction to hear claims against parties based in Dubai, according to Article 20 of the UAE Civil Procedure Code (CPC). They can also hear claims against parties who are based elsewhere if certain conditions set out in Article 21 of the CPC are met, such as where the claims relate to assets held in Dubai. While the Dubai Courts fall outside the UAE federal court system, in practice their approach to jurisdiction and the recognition of foreign court judgments is the same as elsewhere in the UAE as they apply the CPC, a federal law.

Contracting commercial parties often agree that the courts of a particular jurisdiction should hear claims brought under or in relation to their contract. The Dubai Courts will ignore a contractual choice of a foreign jurisdiction (and usually also a contractual choice of governing law) if they themselves have jurisdiction to hear the claim under the CPC. The Dubai Court of Cassation, Dubai's highest court, has held that jurisdiction clauses are void on public policy grounds in cases where the UAE Courts have jurisdiction over a claim.

As a result, international parties with foreign court judgments against parties based in Dubai have historically been unable to enforce such judgments in Dubai because the Dubai Courts themselves have jurisdiction, under the CPC, to hear the underlying claims and will decline to enforce foreign court judgments on that basis.

Prevention is better than cure

At best, there is a large question mark over whether judgments from foreign courts against Dubai-based parties have any practical value in the Dubai Courts. Claimants should carefully consider in which forum to bring their claims from an enforcement perspective, not just on the basis of where they believe they will obtain a favourable judgment on the merits. If a judgment is issued in the right forum, any difficulties with its enforcement in the Dubai Courts are reduced or eliminated altogether.

Commercial parties do not always pay much attention to the dispute resolution provisions of their agreements until a dispute has arisen. Once that happens, a claimant can be left with a choice of court in its contract that is unsuitable or unenforceable in Dubai. Parties with claims against Dubai-based entities or individuals may feel bound to commence proceedings in a foreign court because their agreements require them to do so, even though the Dubai Courts would be the appropriate forum to hear their claims as a matter of UAE law. They may also prefer the courts of their home countries which they are familiar with, as opposed to the Dubai Courts which are based on the civil law system, operate in Arabic language and whose judges have different backgrounds to those of common law jurisdictions.

Claimants seeking to bring claims against Dubai-based parties but who wish to avoid using the Dubai Courts have

“ If a party is based in Dubai, the Dubai Courts will have jurisdiction over it, regardless of what a contract says.”

other forum options that present much less of a challenge from an enforcement perspective than foreign court judgments. One such option involves parties agreeing, in a contract, to submit any disputes arising between them to arbitration. The UAE acceded to the New York Convention in 2006 and despite occasional setbacks, its courts have adopted an increasingly positive approach to the recognition and enforcement of arbitral awards, particularly international awards.

A second option available to contracting parties is to submit their disputes to the jurisdiction of the Dubai International Financial Centre (DIFC), a financial free zone with its own laws and courts (DIFC Courts). The DIFC Courts are English-language common law courts that are also courts of Dubai. Their judgments have the same legal status as judgments of the Dubai Courts, including when it comes to enforcement. Apart from having jurisdiction over claims involving parties, contracts and incidents within the DIFC, the DIFC Courts have since 2011 been able to hear claims brought by parties who have opted into the DIFC's jurisdiction in their contracts but who have no other link to the DIFC. The DIFC's jurisdiction was expanded in this way as a result of Dubai Law No. 16 of 2011, which amended Dubai Law No. 12 of 2004 establishing the DIFC Courts. The amended law is often referred to as the Judicial Authority Law.

Judgments of the DIFC Courts can be enforced in Dubai outside the DIFC pursuant to Article 7 of the Judicial Authority Law. By specifying that any disputes between them are to be resolved by the DIFC Courts, contracting parties can ensure that their disputes are heard by courts that are fundamentally similar to the English Courts but whose judgments can be enforced across Dubai and the wider UAE without the difficulties associated with the enforcement of foreign court judgments.

If a cure is required

If claimants do, for whatever reason, obtain foreign court judgments against Dubai-based parties, they can try to enforce those judgments in either the Dubai Courts or the DIFC Courts.

If they select the Dubai Courts route, Article 235 of the CPC governs the enforceability of foreign court judgments. Although this provision does envisage such enforcement if it is reciprocated by the country from where the judgment originates, it goes on to specify as a condition of enforcement that the UAE Courts must not have had jurisdiction over the underlying claim. As noted above, the Dubai Courts have jurisdiction over claims against parties based in Dubai, or foreign parties with assets in Dubai.

Consequently, Article 235 of the CPC bars the Dubai Courts from recognising foreign court judgments if they themselves have jurisdiction over the underlying claims. The additional enforcement conditions set out in Article 235, such as the requirement for foreign court judgments to be final, will not even be relevant in those cases as the Dubai Courts will not generally enforce such judgments against Dubai-based parties in any event.

The approach of the DIFC Courts to the enforcement of foreign court judgments is different to that of the Dubai Courts. The DIFC Courts can, as a matter of DIFC law, recognise foreign court judgments. Article 7(6) of the Judicial Authority Law and Article 24(1)(a) of the DIFC Court Law (DIFC Law No. 10 of 2004) grant the DIFC Courts jurisdiction to ratify any judgment of a recognised foreign court.

The enforcement of a foreign money judgment in the DIFC Courts against a defendant located within the DIFC itself, or with assets there, is straightforward. This is particularly the case for money judgments from the English Courts. In January 2013 a non-legally binding Memorandum of Guidance as to Enforcement was signed by the DIFC Courts and the English Commercial Court to facilitate the mutual enforcement, subject to certain conditions, of money judgments issued in the two jurisdictions.

The DIFC Courts may also be used as a conduit jurisdiction in which claimants have their foreign court judgments (and arbitral awards) recognised despite the absence of any link to the DIFC. Following that, they can apply to have the resulting judgment of the DIFC Courts enforced outside the DIFC by the Dubai Courts. The enforcement of DIFC Courts judgments is possible in the Dubai Courts (and vice versa) as a result of Article 7 of the Judicial Authority Law.

The status of the DIFC as a conduit jurisdiction was affirmed by the DIFC Court of Appeal in the leading case of *DNB Bank v Gulf Eyadah Corporation & Gulf Navigation Holding* (in which Al Tamimi & Company represented the claimant), which opened the door to the possible enforcement of foreign court judgments across Dubai using the DIFC as a gateway. In that case, an English Court judgment was recognised and enforced by the DIFC Courts even though none of the parties to the case had a presence or assets in the DIFC.

The use of the DIFC Courts as a conduit jurisdiction for the enforcement of foreign court judgments outside the DIFC remains relatively untested. It is one example of the DIFC Courts' expanding jurisdiction, a development that led to Dubai Decree 19 of 2016 and its establishment of the Judicial Tribunal comprising judges from both the Dubai Courts and DIFC Courts to resolve conflicts of jurisdiction between them. The Judicial Tribunal has already issued several decisions on applications to it by parties claiming that the DIFC Courts exceeded their jurisdiction. While the DNB Bank case withstood such a challenge, any sign of a flood of foreign court judgments being recognised by the DIFC Courts acting as a conduit jurisdiction could lead to an intervention by the Judicial Tribunal due to the inconsistency of such decisions with the approach of the Dubai Courts and the CPC to the enforcement of foreign court judgments.

Having a treaty helps

The New York Convention is not the only treaty that supports the enforcement of foreign decisions in the UAE. Foreign court judgments will, in principle, be enforceable if they originate from a state with which the UAE has a treaty providing for the reciprocal recognition and enforcement of judgments. The UAE is party to a series of such treaties, both multilateral ones such as the Riyadh Convention or the GCC Convention, and bilateral ones with France, India and several other states.

In practice the most relevant of these treaties is the 1996 GCC Convention, which at Article 1 provides that "*the GCC countries shall execute the final judgments issued by the courts of any member state in civil, commercial and administrative cases...*", subject to the condition that the originating court must have had jurisdiction over the underlying claim. Under Article 238 of the CPC, the Dubai Courts are required to enforce qualifying GCC (and other treaty-governed) court judgments without reconsidering their merits, even where they have concurrent jurisdiction over the original claims. This is an important exception to Article 235 of the CPC, which as noted above prevents the enforcement of foreign court judgments in cases where the Dubai Courts have jurisdiction over the underlying claims.

Both the Dubai Courts and the DIFC Courts are courts of the UAE, a GCC member state, and on this basis other GCC states should enforce judgments of both these courts in accordance with Article 1 of the GCC Convention. The DIFC Courts are themselves legally bound to comply with the terms of treaties for the mutual enforcement of judgments, pursuant to Article 24(2) of the DIFC Court Law.

Conclusion

If a party is based in Dubai, the Dubai Courts will have jurisdiction over it, regardless of what a contract says. Claimants therefore need to consider carefully where they bring their claims against such parties. Obtaining a foreign court judgment may not be of any use to them in Dubai, but there are alternative forums available to them. If the claim involves a relatively straightforward debt, the Dubai Courts may be the most suitable forum for a claimant. If the subject-matter of a claim is of a technical nature, and if having proceedings conducted in English is important, submitting disputes to arbitration or the DIFC Courts may be the most appropriate option for contracting parties as the enforcement of such awards or judgments should be relatively straightforward across the UAE. However, where a claimant has already obtained a foreign court judgment, it may be enforced against a Dubai-based party by using the DIFC Courts as a conduit jurisdiction applying the DNB Bank precedent, as confirmed by the subsequent DIFC Courts judgment in *Barclays Bank & Others v Essar Global Fund Limited*.

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Overview of Law No.1 of 2017 on the Financial System of Abu Dhabi Government

Law No. 1 of 2017 on the Financial System of Abu Dhabi Government was issued on 10 January 2017 and was published in the Official Gazette on 31 January 2017, at which point it came into effect. This law defines the bodies and entities which are subject to the law (and in fact provides for a list of such entities to be issued by the Chairman of the Department of Finance after the Executive Council's approval). It also sets out limitation periods in relation to recovery of debts due from such entities. It is therefore important for anyone dealing with such bodies and entities to be familiar with the approval process in relation to the commitments of the relevant bodies and entities.

Who does the law apply to?

The law applies to:

- the Government of Abu Dhabi;
- Government Agencies, comprising local departments and corporate bodies affiliated to the Government of Abu Dhabi, which have full legal capacity and which either manage a public facility or provide a public service;
- Government Institutions, which are public corporate

bodies, owned entirely by either the Government of Abu Dhabi or a Government Agency, whose principal activity is commercial in nature;

- Government Companies, which are companies owned entirely and directly by either the Government of Abu Dhabi or a Government Agency; and
- Companies in which a Government Institution or Government Company holds directly or indirectly, jointly or severally, more than 50% of the capital.

What is the aim of the law?

The intention behind the law is to set out the budget and approvals process in respect of the incurrence and payment of expenses in relation to the Government of Abu Dhabi and related entities.

Budgets and Approvals

The law provides for the Abu Dhabi Department of Finance to, amongst other responsibilities, prepare the public budget, oversee compliance with the budget, and manage public debt and government guarantees. This Department will also be empowered to lend in the name of the Government of Abu Dhabi, where it has the consent of the Executive Council of Abu Dhabi.

The public budget will include spending by the Government of Abu Dhabi and Government Agencies, but will not include budgets for Government Institutions and Government Companies (each of which should maintain independent budgets).

Any borrowing by the Government of Abu Dhabi will be entered into by the Chairman of the Department of Finance, provided that the consent of the Executive Council has been obtained. The law provides a list of the purposes for which the Government is permitted to borrow and this includes a general limb applicable to 'other borrowing approved by the Executive Council'.

Government Agencies cannot borrow and no person or party is permitted to lend money to Government Agencies, save as expressly provided in the law. Under the law, a Government Agency can only incur or pay a liability where it has an applicable Financial Credit (which is essentially an authorisation under the law that permits the incurrence and payment of an expense from the Treasury of Abu Dhabi). Government Agencies are not permitted to enter into commercial sponsorship agreements to finance events or activities unless those activities or events are specified in the annual budget. Government Agencies can, however, enter into commercial sponsorship agreements which are financed by the private sector.

Government Institutions and Government Companies are, however, obliged to comply with the Ownership Policy and Financial Performance Intent Statement (the former of which will be prepared by the Department of Finance and approved by the Executive Council, and the latter of which will follow a form prescribed by the Department of Finance). Their budgets will need to be approved by the respective board of directors and a copy submitted to the Department of Finance. Importantly, there is a wide ranging provision of the law which prohibits Government Institutions, Government Companies and Subsidiaries from increasing their capital, borrowing or giving guarantees, or lending, save in accordance with rules to be issued by the Department of Finance and approved by the Executive Council. The law clearly states that the Government of Abu Dhabi is not responsible for the liabilities of Government Institutions, Government Companies and Subsidiaries and goes on to exclude any responsibility for liabilities of a company or other party which the Government contributes to, controls, or has an interest in.

Government Agencies, Government Institutions and Government Companies are prevented from providing or receiving grants, subsidies, donations, or aid, unless these are within their approved budgets.

Government Guarantees

Importantly, the definitions of Public Debt and Government Guarantees require that the relevant loans and guarantees are approved in writing by the Government and, in the case of guarantees, include the Government committing itself explicitly to pay a loan in the case of the borrower's failure to pay. This makes clear that any informal agreement is unlikely to be accepted and parties believing they have this type of loan or guarantee would be well advised to review their arrangements to ensure they meet the relevant requirements.

The law makes clear that no person is permitted to give a guarantee or indemnity on behalf of the Government unless the law is complied with. The process under the law for the giving of such guarantees is as follows:

- the Executive Council provides its consent;
- the Chairman of the Department of Finance provides the Government Guarantee; and
- the beneficiary of the relevant guarantee must periodically notify the Department of Finance about paying the guaranteed debt. The law is unclear as regards the meaning of beneficiary, but we believe this is a reference to the borrower whose debt is guaranteed, rather than the recipient of the guarantee (i.e. the lender).

The law requires that Government Institutions, Government Companies and Subsidiaries who 'issue a debt' must explicitly

"The new law sets out the framework within which the Government of Abu Dhabi and related entities enter into transactions, so should be reviewed by anyone contracting with legal entities that may be captured by the law's provisions."

state that the debt is not guaranteed by the Government (save where a Government Guarantee is approved and provided in accordance with the law).

Although the law does not have retrospective effect, it provides that the Chairman of the Department of Finance shall, within 3 months of the issuance of the law, reissue any government guarantee submitted prior to the issuance of this law. Therefore, parties benefitting from an existing government guarantee would be well advised to request its reissuance or otherwise confirm its validity and continuation.

Government Fees and Services

The law provides for the Department of Finance to issue a Government Services Pricing Guide, which is expected to be the basis on which services provided by Government Agencies will be priced. There is also an anticipated review of existing fees and tariffs imposed by Government Agencies to measure such fees against the new pricing guide. This may lead to changes in Government Agency fees.

There are also provisions providing that money held by the Government of Abu Dhabi or Government Agencies which is not claimed within one year from maturity will become public money and be transferred to the Government of Abu Dhabi. There is a saving provision which allows a person to come forward in respect of any such money within a period of ten years. If that person can prove their claim to the original monies, then the relevant amount will be paid to them.

Government Procurement

The Department of Finance is given responsibility for government procurement and bidding, including developing the legal framework and IT platform applicable to bids, and signing contracts with suppliers.

Limitation Period

The law includes the following limitation periods applicable to debt claims against:

- the Government of Abu Dhabi, Government Agencies, Government Institutions and Government Companies – the limitation period being the end of the fifth year that follows the fiscal year in which the debt became due; and
- natural persons or corporate bodies in respect of debts due from Government Agencies, Government Institutions and Government Companies – the limitation period being the end of the tenth year that follows the fiscal year in which the debt became due.

Conclusion

We hope that this law will give greater clarity around dealing with certain government related entities and the way in which their activities are approved. In particular, the issuance of a list of entities covered by the law, as contemplated, would be a welcome development, providing certainty to parties transacting with companies with some government involvement as to capacity and authority. Historically, this area has been quite difficult to navigate, given the variety of legal structures involved.

Al Tamimi & Company's banking and finance team regularly advises on capacity and authority in respect of financing transactions. For further information please contact Renata Rai (r.rai@tamimi.com).

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How will you be affected by the new UAE VAT regime? Failing to Prepare is Preparing to Fail

This article provides an update on the status of the VAT implementation across the GCC, the future legal framework of VAT in the UAE and the expected features of the UAE VAT system based on the first workshop recently held by the UAE Ministry of Finance.

GCC VAT Framework Agreement

The GCC VAT Framework Agreement, which is yet to be published, has now been signed by all six countries in the GCC. It is understood that it will be made public after it has been ratified by all the GCC countries, which is expected to happen shortly.

The GCC VAT Framework Agreement sets out broad principles to be followed by all the GCC countries whilst giving individual member states some freedom to adopt a different VAT treatment in respect of certain matters. Each GCC country will issue its own domestic legislation to implement VAT based on the underlying principles in this common framework.

Implementation date

All GCC countries have agreed to implement VAT from 1 January 2018 and by 1 January 2019 at the latest. Currently only the UAE, which has been at the forefront of the GCC VAT drive and appears to be at the most advanced stage in terms of implementation, has formally announced that it will introduce VAT on 1 January 2018.

> **"While VAT is not imposed on and should not be a cost to businesses, ultimately the responsibility of accounting for VAT resides with them."**

The other GCC countries are likely to face many challenges and obstacles in finalising the domestic legislation and pushing it through by 1 January 2018 and so it is anticipated that not all the GCC countries will achieve implementation simultaneously as has been reported. VAT is expected to be effective in the Kingdom of Saudi Arabia in the first quarter of 2018 and in Bahrain by the middle of 2018. Qatar, Oman and Kuwait have not yet made any official announcements on the specific timing.

The UAE VAT Administration and Legislative Framework

A federal tax authority ("FTA"), which is currently in the process of recruiting staff, was established last year and is entrusted with the management, collection and enforcement of VAT.

The Federal National Council recently approved the tax procedure law and this is expected to be issued before Ramadan (June 2017). The tax procedure law will be relevant for all current and future taxes, including VAT, and will set out the procedures for tax registration, collection, audits, penalties, appeals etc.

The VAT rules and obligations will be governed by a separate Federal VAT law. This will be supported by executive regulations which will provide guidance on the detailed application of the VAT law. As there are still a number of key policy decisions to be taken, it is likely that the VAT law will be issued around mid-2017 with the executive regulations to follow later in the year.

VAT Basics

VAT is a consumption tax that is levied on the value added at each stage in the supply chain. VAT registered businesses will charge VAT on the goods and services supplied to customers and pay VAT on goods and services received from suppliers. The difference will be accounted for by the business and paid to, or reclaimed from, the government as appropriate.

Although VAT is collected by businesses on behalf of the government, it is generally ultimately borne by the final consumer. Unless the goods or services are exempt or zero rated, the supply of the goods or services will be subject to VAT at the standard rate.

The distinction between zero rated and exempt supplies is important. Businesses that make zero rated supplies may be entitled to register for VAT and recover VAT on their purchases but exempt businesses will not.

What do we know about VAT in the UAE?

Under the GCC VAT Framework Agreement, VAT will apply at the standard rate of 5% across the GCC. Additional details have emerged from the first Ministry of Finance VAT awareness session on the specific features of the future VAT regime in the UAE. However, the VAT treatment described below may be subject to change and can only be confirmed once the VAT law is approved.

VAT will be charged based on the destination principle on the local supply and importation of goods and services (i.e.

VAT applies where the goods and services are consumed in the UAE), with exports subject to VAT at zero rate.

Businesses must register for VAT if they have annual turnover that exceeds the mandatory registration threshold of AED 375,000 - reduced from AED 3.75 million, which was proposed last year. An option to register for VAT will be available if the taxable supply and imports are below the mandatory registration threshold but exceed the voluntary registration threshold of AED 187,500 - reduced from AED 1.875 million. The previous limits were set high to alleviate the compliance burden on businesses; however, in a shift to the strategy designed to enable businesses to recover VAT, these limits have been significantly lowered.

For businesses with no turnover, it will be possible to register voluntarily if the expenses exceed the voluntary registration threshold, which gives start-up businesses the ability to recover input VAT. The Ministry of Finance has indicated that it will be possible to register for VAT on a voluntary basis from the third quarter of 2017, before VAT registration becomes compulsory from the final quarter of 2017.

Group registrations will also be available for companies that meet the criteria of a "VAT Group". A VAT group will be treated as a single person for VAT purposes with the consequence that only one VAT return will be required to be submitted for the group.

Although VAT will be levied at the federal level, businesses will be required to report revenue for each Emirate in the Federal VAT return. This will result in an additional compliance burden for businesses that will need to ensure that their systems record sales in this manner.

Healthcare and education services will be zero rated rather than exempt, which was widely expected to be the case. Zero rate will also be applicable to medicine and medical equipment.

It is expected that margin-based financial services will be exempt due to quantification issues while fee-based products will be subject to the standard rate of VAT. The VAT treatment of Islamic finance will be aligned with the conventional equivalent. General insurance services will be subject to the standard rate of VAT except life insurance, which will be exempt.

In terms of real estate, sale and lease of commercial property will be subject to VAT at the standard rate whereas the sale and lease of residential property will be exempt. However, the first sale of new residential property will be zero rated, which is good news for property developers who will be able to recover VAT on costs (including construction costs). Supplies of bare land will be exempt.

Local passenger transport, such as taxis, buses and trains, will be exempt from VAT. Jewellery will be standard rated whereas investment grade gold, silver and platinum will be zero rated.

The import of goods into the UAE will be subject to the reverse charge mechanism, which means that there will be no cash impact for most businesses because though VAT will be charged by the recipient there will be a corresponding deduction for the input tax. On the other hand, import VAT will apply on import of goods into other GCC member states transhipped through the UAE with no right to recover the VAT in the UAE.

Exports of goods and services outside the GCC and international transportation are expected to be zero rated. Given the low rate of VAT, it is currently anticipated that initially there will no VAT refunds for tourists, but this is subject to further deliberation.

The VAT treatment of supplies within free zones is still under consideration, including whether there should be a different VAT treatment adopted for businesses operating in "fenced" free zones and "unfenced" free trade zones as well as the treatment of supplies to, within, from and between free zones. The Ministry of Finance will issue further guidance on this area in due course.

There will be no special "body" level exemption for the government and, accordingly, supplies to government bodies will be subject to VAT at the standard rate and a VAT refund claim would need to be made by the relevant government authority.

VAT returns will be due on a quarterly basis for most businesses with returns and payments required to be submitted within a month after the quarter end. There is a possibility that larger businesses may be permitted to file on a monthly basis. The UAE will introduce an electronic registration, filing, payment and refund system. There is a requirement to keep records, including invoices, for five years.

There will be strict penalties for non-compliance - including business closure for three days and penalties up to 500% of the VAT owed in cases of fraud. The FTA will also have the power to conduct VAT audits with five days notice, unless fraud is suspected.

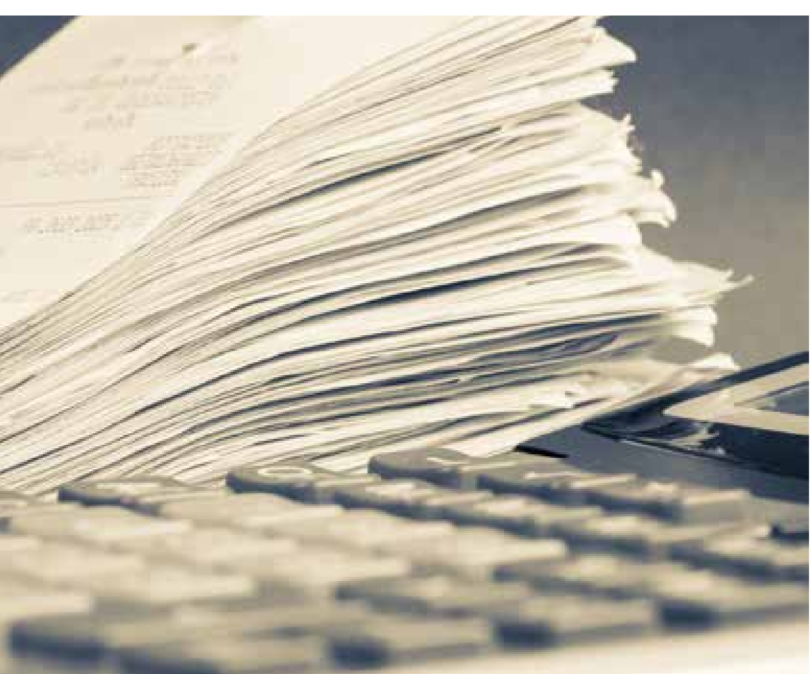
Final thoughts

The introduction of VAT will help the UAE generate additional revenue to fund public expenditure and to reduce its dependence on hydrocarbons, in line with the national diversification strategy. VAT is a popular tax for governments because it is easy for them to administer and enforce, as the compliance burden is transferred to businesses and it is cheaper for them to operate than direct taxes. It also allows governments to generate sustainable tax revenue which is collected on a regular basis at each stage of the production and distribution chain. The fact that it will be levied on transactions at the low rate of 5%, compared to the global average rate of about 15% for VAT and similar taxes, combined with the VAT recovery mechanism for businesses and exceptions for some sectors means that it should not have an adverse impact on foreign investment and the economy in general.

The UAE Ministry of Finance delivered on its promise to be transparent about this tax and to educate businesses. Its clarification on how the VAT regime is expected to operate in the UAE and how some of the key sectors will be affected is a welcome development. There are many positives which indicate that the UAE government have taken into account socio-economic policy considerations and carefully assessed the potential effect of VAT on certain types of businesses and industry sectors.

The zero rated treatment for healthcare, education and property development is unlikely to affect prices for these services and, therefore, businesses and customers in these sectors should not be impacted. The reduced mandatory VAT registration threshold and a low voluntary VAT registration threshold will enable many small and medium enterprises and start-up businesses to register and recover VAT.

While VAT is not imposed on and should not be a cost to businesses, ultimately the responsibility of accounting for VAT resides with them. There will be significant compliance costs for companies in ensuring that they collect and remit the tax to the UAE Ministry of Finance and otherwise comply with the reporting requirements Given that VAT will be introduced from 1 January 2018 in the UAE, businesses will be under pressure to get ready within a limited time. The challenges are compounded when you take into account that the VAT legislation will not be finalised and issued until later this year. However, the clarity provided by the UAE Ministry of Finance in the interim will help UAE businesses to prepare their people, vendors, customers and systems even before the VAT law is issued.



It is important for businesses to start preparing now by proactively assessing the impact of VAT on their operations across all functions including finance, legal, procurement, sales, marketing, IT and human resources. Existing functions, processes, invoicing, operating models, enterprise resource planning systems and commercial contracts should be reviewed and any changes implemented as soon as possible in order to be compliant with requirements in the VAT legislation.

Companies should not only consider including clauses in new contracts to address any VAT risks which were previously not relevant, but existing long term contracts, such as construction contracts, that straddle VAT implementation and agreements with automatically renewable terms should also be examined and potentially renegotiated. The lack of adequate protection in the agreements may have the unintended consequence of the suppliers bearing the VAT cost rather than the customers. Contracts with long payment terms should also be renegotiated to manage cash flow otherwise businesses will end up funding the VAT cost. Putting appropriate systems and measures in place is the key and will help to reduce compliance costs, maintain margins and minimise cash-flow issues.

As the VAT should ultimately be borne by the final consumer, it should have a neutral impact on most UAE businesses if the risk is properly managed. In practise, however, the ability of suppliers to shift the VAT burden to customers will be a matter of commercial negotiation. Companies will have to decide whether to bear the burden of the VAT cost or pass on the cost to customers. It will be a difficult balancing act between maintaining margins and risk low revenue due to reduced customer demand and so some businesses are likely to or will be forced to absorb a share of the VAT cost to remain competitive. Companies that make exempt supplies, such as financial institutions, will suffer an absolute cost unless the VAT cost is passed on to customers because they will not be able to recover the VAT on their purchases.

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Control It or You'll Lose It: Quality Control Provisions in Trademark Licence Agreements in the UAE

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Licence agreements are an effective tool for trademark owners to capitalise on their trademarks, allowing the brand to be developed internationally and in regions that extend beyond the trademark owner's area. Through such agreements, the licensee (company or person to whom the trademark has been licensed), is responsible for providing the goods and services bearing the trademark in a specific region and for a specific term.

Corporations extend significant time and resources in choosing, marketing, and developing a trademark, as such there is a duty of care to exercise quality control over the goods and services bearing the trademark. In brief, quality control provisions extend to the trademark owner a right to control and monitor the quality of the goods and services provided by the licensee. Accordingly, the level of standards on the goods and services offered by the licensee need not be higher than those provided by the licensor; however, the quality must be equal to the quality of the goods and services of the licensor. Quality control provisions are necessary to maintain brand uniformity and it is also an important aspect for brand longevity. To this end, quality control provisions ensure the quality of a product or service that consumers have come to expect from the brand. In the same light, a brand owner or licensor with numerous licensees in various regions can ensure that all licensees are subject to the same quality of standards, and, furthermore, ensure that the consumer experience is consistent and uniform, despite the region or location where the goods and services have been purchased or acquired.

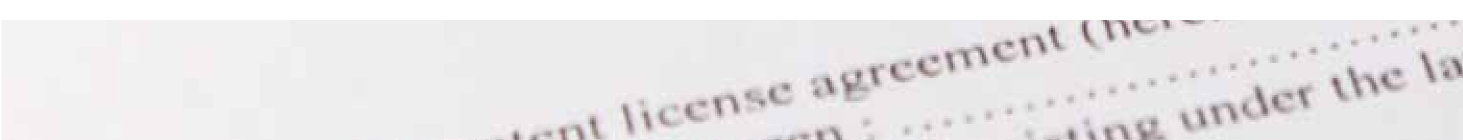
Licensor's have a variety of tools to exercise control over the licensees and verify that the goods or services meet the licensor's standard of requirements. Such provisions can include: 1) a right to inspect the licensee's premises; 2) the licensee can be required to periodically provide samples for the licensor's review; 3) advertising and promotional materials should be subject to the licensor's approval; 4) at the onset of the licensor/licensee agreement, the licensee is provided a trademark usage guideline outlining the appropriate methods of use of the trademark.

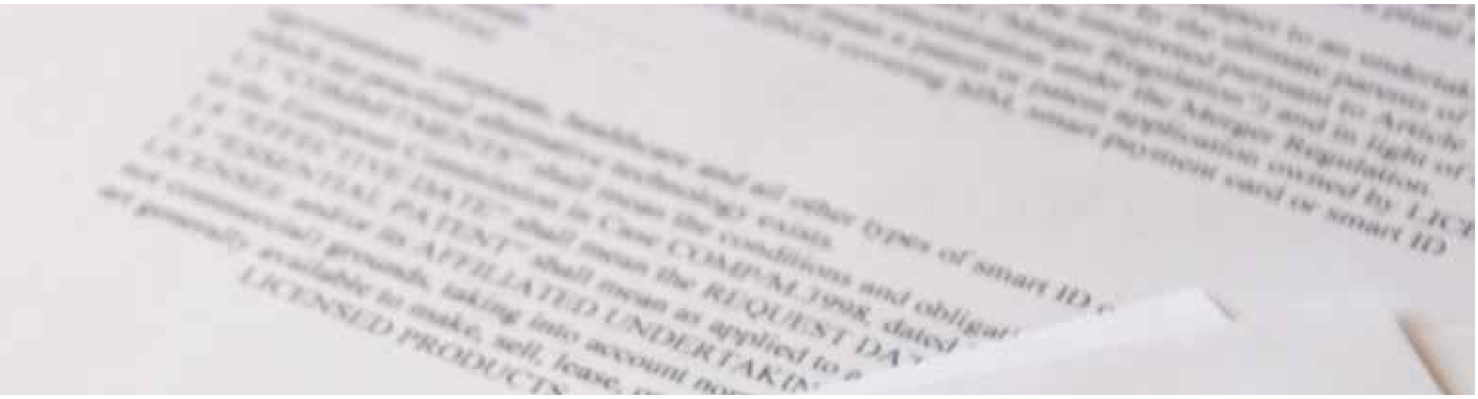
Monitoring Licensee's Premises

Licensors should reserve provisions allowing them to periodically inspect a licensee's facilities, manufacturing products, finished products, company records, and stock inventory, in order to ensure that the licensee is in compliance with the licence agreement and is adhering to the quality control standards. Oftentimes, provisions allowing access to the licensee's premises include conditions as to the licensor's visit. Such conditions can include: 1) visits to the licensee's premises, which should be limited to normal business hours; and 2) advance notice should be provided to the licensee, such as 24 hours notice.

Sample Requirements

In order to protect the quality of the brand and conformity of the goods, the licensor should insist on provisions within the licence agreement requiring the licensee to submit samples of proposed uses of the trademark, or in case of a licensed product, the licensee should provide samples for licensor's review and approval. Sample requirements and approval from the licensor will effectively control how the





goods and services are being offered to the consumers and ensure that the goods and services are on par with the licensor's standards. Sample requirement provisions can include: 1) request for samples can be made without prior notification; 2) licensor's review of the sample and written approval thereafter may be required, including a timeframe for the licensor to either refuse the sample and provide its comments or accept the sample; and 3) in the event of disapproval, licensor should provide suggestions or suggested improvements and can request that the licensee discontinue manufacturing the licensed product until the deficiencies have been rectified.

Trademark Usage guidelines

A licence agreement should leave no room for ambiguity as to the allowed trademark, artwork, logo, colour, trademark placement, and font that can be used by the licensee. Such provisions are imperative so that the licensee is not provided a leeway to create its own version of the licensed trademark. Trademark usage guidelines can include the following elements: 1) the licensed trademark is required to be used in its entirety, without any abbreviation or variations thereof; 2) the licensed trademark should not be used in combination with another trademark or trade name; 3) licensor can request that the trademark is used along with the appropriate notice symbols, such as ™ or ®, which indicate that the word or logo is being used as a trademark.

Under the provisions of the UAE trademark law, article 34 of the law specifies that a trademark licence agreement may include restricting provisions, namely:

1. Limiting the geographic area of the licensed trademark;
2. Limiting the period of use of the licensed trademark;
3. Control of the quality of the products under the licence agreement; and
4. Licensee should abstain from acts that may negatively impact the licensed rights.

Although the language in the UAE trademark law suggests that quality control provisions are not mandatory and, instead, may be included in a trademark licence agreement, for the reasons discussed above, quality provisions are nevertheless highly advisable in order to avoid disputes over the misuse of a licensed trademark.

Quality and brand association are the very essence of trademark rights and, therefore, cannot be severed from the rights associated to licensed trademarks; therefore, it is in the licensor's and licensee's mutual interest to protect the goodwill and reputation of the trademark. It is recommended that defined quality control standards are incorporated within the licence agreement. Furthermore the licensor should retain the ability to terminate the licence agreement in case the licensee deviates from the terms of the parties' agreement or fails to meet the quality standards. In order to effectively terminate the agreement, the licensor should provide the licensee a written notice and a reasonable time to remedy the deficiencies. In the scenario that the licensee fails to mitigate the deficiencies, the licensor may decide to unilaterally terminate the licence agreement.

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Part 2: Extent of the Insurance Company's Right of Recourse in Marine Cargo Claims in UAE

This article is the second in a two part examination of a recent court case concerning the extent of an insurance company's right of recourse against the carrier in marine cargo claims. Part I of this article was published in Law Update in May 2016 and can be found online at www.tamimi.com.

As a reminder, in this case the court decided that both the insurers of the steel plates cargo ('Insurers') and the carrier were jointly liable to indemnify the receivers of steel plates cargo ('Receiver') based on a distinct legal basis. The Insurers were required to pay damages to the Receiver and, consequently, they filed a recourse case against the carrier, as identified by the court, after obtaining a subrogation of rights from the Receiver. The recourse case was based on both the judgement and the right of subrogation at the same time.

In Part I of this article, we stopped at the point where the Insurers filed a court case against the ship-owners in order to claim the amount they paid to the Receiver, pursuant to the previous proceedings (in which judgement was issued in favour of the Receiver against both the Insurers and the ship-owners) and to the execution claim filed by the Receiver against the Insurers.

To recap, the Insurers argued in the Court of First Instance in Dubai ('Court of First Instance') that the ship-owners are ultimately liable to pay to the Insurers the amount awarded to the Receiver, but the ship-owners had asked the court to stay the proceedings until the Cassation Court of Dubai ('Cassation Court') issued its final decision in the appeal filed in the previous proceedings. The ship-owners also argued that they were not the carrier under the bill of lading and should not be held responsible.

In the reinstated Court of First Instance proceedings, the Insurers argued the following:

- the proceedings should not be stayed in this case because the other Appeal Court of Dubai ('Appeal Court') had already decided on it based on the directives of the Cassation Court and that any further appeal should be rejected by the Cassation Court because the judgment was final;
- the same arguments raised by the Receiver before the Appeal Court should be followed so that the ship-owners are the carrier as per the bill of lading, as it was signed on its behalf, and the evidence provided, which shows that the charterers had appointed the agent, is based on an old e-mail issued by the charterers and has no value; and
- if the claimed damages are caused by the ship agent at the port of discharge then the ship-owners are responsible because they appointed the agent and he represents them in the delivery.

The Court of First Instance rejected the Insurer's case on the following basis:

- the judgment issued in the case filed by the Receiver obliged both the Insurers and the ship-owners to pay value of the short landed Cargo ('Claimed Amount');
- the judgment was not to pay the amount jointly or 50 per cent each equally (as the source of the Insurers' obligation is different from that of the ship-owners);

- the Insurers may not claim from the other defendant the amount they paid to the plaintiff (Receiver) whether they pay the full amount or 50 per cent of it; and
- if the court rendered its judgment against the Insurers and the ship-owners jointly and severely (or 50 per cent each), then the insurance company may claim the amount so paid to the Receiver from the ship-owners.

The insurers filed an appeal before the Appeal Court against the ship-owners on the following basis:

- according to the Appeal Court judgement in the case filed by the Receiver, the shortage was confirmed; the Insurance paid the amount awarded to the Receiver pursuant to a direct settlement of AED 2,308,201.00 and then subrogated its rights;
- the payment made by the Insurers to the Receiver was subject to the settlement and the assignment by the Receiver to the Insurers and not the execution of the judgment by the Receiver; and
- the right of the Insurers to recover from the ship-owners is protected by the unjust enrichment of the ship-owners who are ultimately liable for the damages as a carrier.

The ship-owners argued that:

- they are not the carriers and are thus not responsible for the shortage;
- the shortage is not proven as there was only a wrong delivery by the agent of the charterers who issued the bills of lading; and
- the case is time barred after the lapse of one year from the cargo delivery date and 90 days in recourse action starting from the date of paying the awarded amount to the Receiver (insured).

The Appeal Court found the following:

- the Insurers paid the damages claimed by the Receiver on 22 Feb 2012, pursuant to the execution case filed by the Receiver; thus, the Receiver had subrogated all its rights to the Insurers;
- the decision of the Appeal Court - which concluded that the ship-owners and the Insurers are liable to mutually pay the Receiver - was upheld by the Cassation Court judgment;
- the liability of the ship-owners was confirmed and proven according to the above Appeal Court and confirmed by the Cassation Court judgment;
- as the Insurers filed the case on 4/10/2012, there is a legitimate excuse for the Insurers not to file the case before the liability of the ship-owners is confirmed;
- the Cassation Court did not conclude that the ship-owners are the carrier but rather it stated that the appeal judgment was wrong for not holding the ship-owners liable for the damages and returned it to the Appeal Court to reconsider the liabilities again;
- the relationship between the two defendants and the right of recourse of the Insurers to recover what has been paid did not emerge from the mutual liability of both defendants, but from a different source that is the subrogation/assignment of rights; and
- therefore, the Appeal Court in this case decided that the ship-owners should pay to the Insurers the Claimed Amount plus interest, at nine per cent annually, until full payment, in addition to legal costs.

In our view, the above reasoning of the Appeal Court was intended to explain why the case could be filed pursuant to the subrogation letter; and to explain why the case is not time barred.

The ship-owners filed an appeal before the Cassation Court based on the following arguments:

- When the Insurers were subrogated to the rights of the insured (Receiver), the Insurers takes the place of the Receiver in pursuing the case against the carrier (or who it believes to be the carrier or responsible for the damage). As the insured (Receiver) had filed the case against the ship-owners and the Insurers and the case has exhausted all levels of litigation, the rights to further pursue the claim could not be subrogated since the right was exercised by the insured himself and the case had become final.
- In a sense, the same case for damages against the carrier was filed twice, once by the receivers and the second time by the Insurers to whom the rights of the insured was subrogated. Therefore, these actions contravened the basic premise in UAE law that the same cause of action or case cannot be filed twice. The case has either to be filed by the Insurer or the insured from the beginning.
- This point was raised due to the fact that the Appeal Court judgment stated that the relationship between the two defendants and the right of recourse of the Insurers of what it paid to the Receiver did not emerge from the mutual liability of both defendants, but from a different source, which is the subrogation/assignment.
- The case was filed by the insurers against the ship-owners after paying the court awarded amount pursuant to the execution case filed by the Receiver. It was argues that the subrogation was made up just to justify the recourse against the ship-owners and,

"The Insurers had a legitimate excuse to file the recourse case against the ship-owners, as carriers, after one year time limitation had elapsed."

accordingly, the appeal judgment should be revoked as the right of recourse of the Insurers of what it paid to Receiver did not emerge from the subrogation/ assignment, as alleged.

- According to the above, the same case was filed twice, once by the Receiver and the second time by the Insurers to whom the right of the insured (Receiver) was subrogated. The insurers should have paid the indemnity to the Receiver and subrogated his rights against the party responsible for the damage.
- On the assumption that filing the case for the second time by the Insurers was allowed based on the subrogation, then the ship-owners would be entitled to raise all defences it may have against the Receiver including the time bar issue.
- If invoking the judgment of the case filed by the Receiver was allowed, then the case may not be based on the subrogation/ assignment, it is rather based on the right of recourse, which is not allowed in this case. This is due to the fact that the judgment was issued in a way that if either of the defendants pay the amount awarded, he may not claim the same from the other party as the source of the liability of both defendants (the ship-owners and the Insurers) is different (one from the contract of carriage and the other from the insurance policy).
- Concerning the legitimate excuse that the Insurers have that will suspend the time bar, the Insurers may not benefit from the legitimate excuse for suspending the running of the time bar as the delay of their filing the case against the ship-owners is not attributable to the confirmation of the court of the ship-owners' liability. Rather, it is attributable to the Insurers' refraining from paying the insured's claimed amount to the Receiver. The Insurance resisted its liability towards the receiver before the courts and wasted time instead of paying the insured amount to the receiver and taking over the case from the beginning, after obtaining the subrogation. The legitimate excuse must be a cause that is beyond the person's control. The Insurers must not benefit from this, thus time bar must be applied in this case.
- Alternatively, the Insurers could have protected themselves and avoided the case being considered time barred by applying to the same court hearing the case filed by the Receiver (to oblige the ship-owners to pay whatever the judgment obliges the Insurers to pay), since it is open to make any application to the court by all parties against any other party.

The Cassation Court refused all arguments raised by the ship-owners in this appeal and confirmed the Appeal Court judgment on the following basis:

- The Insurers may claim the amount paid to the Receivers from the ship-owners even if such claim is based on subrogation. The case may not be considered as a previously concluded case because the dispute was not raised between the same parties, as the right of recourse was not subject to court consideration in the previous case filed by the Receivers.
- The Insurers had a legitimate excuse to file the recourse case against the ship-owners as carriers after one year had elapsed (time limitation to file the cargo damage claim) as they were unable to file the case until they became aware of the carriers' identity, in accordance with the Appeal Court judgment. In addition, the Insurers could not file the case of recourse against the ship-owners until they paid the insurance indemnity to the Receiver.
- The ship-owner was barred from raising the same arguments that were raised before the court during the previous case filed by the Receiver in relation to his liability, as the same issue has been previously concluded.

Conclusion:

The Court of Cassation, in this instance, was flexible in its consideration of the application of the 'time bar' and in its analysis of legal principals and article of laws, as well as in applying the rules of justice. However, this is not always the case. In many insistences, the Cassation Court tends to strictly apply the rules of law as its role is mainly focused on ensuring and observing that the law is applied correctly by the lower level courts.

Major Revamp of DIFC Companies Law

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On 20 March 2017, the Dubai International Financial Centre ('DIFC') announced proposals for significant changes to the DIFC Companies Law (DIFC Law No. 2 of 2009) by releasing a draft restated law ('Proposed Law'). The DIFC requested the business community to provide comments on the Proposed Law by 19 June 2017.

Although the Proposed Law may undergo changes before enactment, we highlight in this article the key changes that the DIFC has proposed.

These key changes are:

a. a new scheme for corporate classification of DIFC companies by removing limited liability companies and introduction of division into private and public companies;
b. enhanced directors' duties;
c. new mergers and scheme of arrangement provisions;
d. 'whistle-blower' protection provisions;
e. expanded powers for the Registrar of Companies ('Registrar'); and
f. enhancements to company accounting and audit requirements.

New Classification of DIFC Companies

The DIFC Companies Law presently envisages two types of companies: companies limited by shares and limited liability companies ('LLCs'). The Proposed Law would no longer have the LLC regime and would instead divide companies limited by shares into two new classifications.

The Proposed Law would establish a distinction between public and private companies. Under the Proposed Law, a public company could offer its shares to the public, could have any number of shareholders and must operate with at least two directors and a company secretary.

A private company, on the other hand, would be prohibited from offering its shares to the public and could seek subscriptions only through a private placement of shares. Further, private companies could have a maximum of fifty shareholders and operate with only one director under the Proposed Law.

Regulatory requirements concerning private companies (e.g. accounting and general reporting requirements) would be significantly lighter than those applying to public companies. This distinction is designated to allow smaller businesses to operate in the DIFC with lower capitalisation levels and without facing onerous compliance burdens.

A significant change proposed is the replacement of the current minimum share capital requirement of USD 50,000 with tailored capital requirements for public and private companies. A public company would be required to have a minimum capital of USD 100,000, of which at least 25 per cent must be paid up. However, a private company would not be required to have a minimum share capital.

We understand that there will be some new provisions introduced under DIFC Companies Regulations (COR)

> **"The amendments under the Proposed Law evidence the fact that the DIFC is working hard to make its offering more attractive to businesses and high net worth families."**

concerning a transition process for already incorporated LLCs, facilitating their conversion to public or private companies limited by shares.

Directors' Duties

Under the current law, DIFC directors are required to act honestly, in good faith and lawfully, with a view to the best interests of the company, and to exercise the care, diligence and skill which a reasonably prudent person would exercise in comparable circumstances. The other important duty of any DIFC director is to disclose interests in a transaction entered into, or proposed to be entered into, by the company that conflicts or may conflict with the interests of the company.

The Proposed Law would expand the current regime of directors' duties by providing more prescriptive duties applicable to directors, including duties to: (a) act within powers conferred by the company's constituent documents; (b) promote the success of the company; (c) exercise independent judgment, reasonable care, skill, and diligence; (d) avoid conflicts of interest; (e) decline to accept gifts from third parties capable of creating a conflict of interest; and (f) declare any personal interest in a proposed or existing transaction or arrangement.

The Proposed Law would also introduce a requirement for the board of directors of a public company to submit a report for each financial year setting out, amongst other things, the performance of the company during the year, which must be included in the company's annual report. This requirement would not be applicable to private companies.

Mergers and Schemes of Arrangements

Under the current law, no merger or scheme of arrangement provisions exists. The only comparable provision addresses the protection of minorities in a takeover.

However, the Proposed Law would introduce a new merger regime that applies to public companies established in the DIFC wishing to merge with other companies, including those established in jurisdictions outside the DIFC.

A major initiative added under the Proposed Law is the addition of new provisions that allow companies to conclude compromises or arrangements with creditors and/or shareholders, with final approval by the DIFC Court. These provisions will give much greater flexibility to companies in implementing both solvent and insolvent restructurings. The provisions for compromises and arrangements apply to both public and private companies.

Registrar's Powers

Under the current law, the objectives that the Registrar is to pursue in exercising its powers and discretions are not expressly stated. The amendments under the Proposed Law contain significant new provisions relating to the Registrar's powers. These include:

a. defining the objectives for the exercise of the Registrar's powers;
b. introduction of 'due process requirements' ;
c. extension of the Registrar's enforcement powers;
d. addition of investigative powers under other legislation administered by the Registrar; and
e. expanded document inspection powers.

The Proposed Law creates a new power for the Registrar to inspect premises of and obtain information and documents from, a DIFC company and to dissolve a company that has undergone a voluntary winding-up process.

In addition, the amendments under the Proposed Law:

a. extend the Registrar's powers in respect of recognised foreign companies;
b. enable the Registrar to take action against the company or any officer of the company (both existing and former) for a period of three years from the date the Registrar becomes aware of an alleged contravention of DIFC law based on the information found by an inspector;
c. strengthen the powers of the Registrar relating to inspection and investigations; and

d. enable the Registrar to apply to the DIFC Court to disqualify a director from being involved in the management of a company.

Accounting and Audit

Whilst retaining the current regime relating to company accounts, reporting, and audit requirements in substantially the same form, the Proposed Law would introduce directors' reporting requirement for public companies.

Small private companies would be exempted from the requirements to have the company's annual accounts audited and filed with the Registry, to alleviate unnecessary regulatory burdens on such companies. To qualify for this exemption, a private company must have not more than 20 shareholders and its annual turnover cannot exceed USD 4 million.

'Whistle-Blower' Protection

Neither the current DIFC Companies Law nor the DIFC Employment Law provide any specific protections for 'whistle-blowers'.

The new proposals under the Proposed Law would introduce new 'whistle-blower' protection provisions in the DIFC Companies Law that shield any person who discloses to the Registrar, or a company's auditor or director, any information relating to a reasonable suspicion that the company has, or may have, contravened DIFC law. Such a discloser would be shielded from civil or contractual liability, unfair dismissal, and other actions prejudicial to the interests of that person – provided the disclosing person acted in good faith.

Although the UAE Penal Code applies in the DIFC and generally prohibits disclosure of confidential information, should DIFC law allow such disclosure, the whistle-blower is arguably also exempt from such liability under onshore UAE law because the UAE Penal Code provides an exception if the disclosure is 'allowed by law'.

Other Changes

The amendments under the Proposed Law also include the following new provisions:

a. the requirement to file special resolutions with the Registrar, so that such information is available to the DIFC;
b. introducing more formal pre-emption rights for existing shareholders of companies, to guard against undue dilution of existing shareholders' rights, with appropriate exclusions for arrangements such as employee share schemes, but retaining flexibility for private companies to remove or restrict pre-emption rights through express provisions in their articles of association; and
c. providing companies with the flexibility to hold, as treasury shares, those shares redeemed by the company (including redeemable shares), provided certain conditions are met.

The amendments under the Proposed Law evidence the fact that the DIFC is working hard to make its offering more attractive to businesses and high net worth families. The proposed changes confer greater flexibility to companies to do business, with the option to select the level of regulation applying to their business. Investors and creditors of public companies will derive extra comfort from the higher levels of transparency and accountability of their corporate directors.

The DIFC Authority should be applauded for sharing the Proposed Law with the business, financial, and legal community, permitting wide discussions, comment and meaningful consultation.

Al Tamimi & Company's Corporate Commercial team regularly advises on matters of corporate commercial nature to corporate clients operating in the DIFC and UAE on-shore and public and private companies registered and operating in the UAE, particularly family businesses as well as incorporation / transfer of incorporation of entities in/to the Dubai International Financial Centre. For further information please contact i.szadkowska@tamimi.com.

A Focus on Construction & Infrastructure

In this month's Law Update we focus on the construction and infrastructure sector.

Our Construction &Infrastructure team continues to grow and achieve greater recognition as one of the leading practices in the GCC.

Over the last year the sector has been a tale of 2 types of economy. While the oil sector based economies have not had strong construction activity over the last year, Dubai (along with Bahrain) remains buoyant the leading light for construction work.

It is hoped that with the oil price now being stable that the second half of this year will start to see the sector improve throughout Abu Dhabi, KSA and the rest of the region.

The sector is facing challenges to traditional work practices with new forms of contract being proposed and new project management technologies.

There are proposed new FIDIC forms of contract to be released this year. Last Law Update we considered the claims aspects of the draft FIDIC Yellow Book 2017. In this edition we consider elements of the proposed White Book 2017.

Building Information Modeling (BIM) is being increasingly adopted across the industry. Notwithstanding this innovation and its impact on productivity and efficiency, contracts have not been changed to accommodate it. In this edition we consider the missed chance for the FIDIC 2017 contracts to address this issue and also the opportunities for how it might be addressed by a proposed protocol.

While the industry has been focused on traditional forms of procurement, we have started to see more projects moving to design and build procurement and away from construct only procurement. Reasons for this shift maybe due to the greater use of BIM and ways in which outcome certainty can be better managed through reporting and technology. The risks of fit for purpose in this form of contracting is examined and compared to the traditional design risk to use reasonable care to achieve an outcome.

Our team also holds regular breakfast seminars throughout the year and can deliver customized workshops. Details of these are in this edition.

Next year will see the introduction of VAT. When details are clear our Team will deliver a sector specific seminar in VAT in the construction sector.

This is an exciting time for the sector and we will continue to see changes throughout 2017 and beyond. Our team will be there to assist you.

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New FIDIC White Book: The Key Changes

FIDIC intends to release a 5th edition of the FIDIC Client/Consultant Model Services Agreement, known to many as the White Book, this year. A pre-release version of the 5th Edition was provided to delegates at the FIDIC International Contract Users Conference in London late last year.

The 5th Edition contains some important changes being made from the current 4th Edition of the White Book, which was released in 2006.

Form of Agreement

The 4th Edition Form of Agreement sets out the documents that should be deemed to form and be construed as part of the Agreement. However, it failed to state a specific order of precedence. In particular, while it stated the 'this Client/Consultant Model Services Agreement' was to form part of the Agreement, it failed to specify whether the general or particular conditions should take precedence.

The 5th Edition rectifies this problem with an order of precedence both under the Form of Agreement and within Clause 1.15 of the General Conditions.

Services

Services under the 4th Edition were divided into Normal, Additional and Exceptional Services. Normal and Additional Services were expressed in Appendix 1 of the Particular Conditions, while Exceptional Services were defined in Sub-Clause 3.2.2 as:

'those which are not Normal or Additional Services but which are necessarily performed by the Consultant in accordance with Clause 4.8'

This is a confused approach which does not conform to normal industry use of how the scope of services is described. There is also inconsistent use of 'varied Services' and 'Additional Services'. Further, there was no mention in the Agreement of how or when the client would be informed of the impact or costs of any Exceptional Service.

The 5th edition has adopted a more usual industry position in that the Scope of Services shall be defined and any changes will be variations under the new clause 5.

Exceptional Events

The 4th Edition managed force majeure – or the similar the concept of changed circumstances – under clause 4.2. The 5th Edition uses a more familiar approach under Sub-Clause 4.6 [Exceptional Event] which shares the risk of such an event between the client and consultant.

An exceptional event arises under Sub-Clause 4.6 of the 5th Edition where:

- the consultant is prevented from performing any of its obligations under the Agreement; or
- an unavoidable change occurs to the Scope of Services; or
- a delay occurs to the completion of the Services.

Variations

The 5th Edition deals with variation in a significantly more comprehensive manner.

The 4th Edition simply provides that the agreement may be varied on application by either party. If the client requests a variation, the consultant is to submit its proposal for the client's approval, and the proposal will be considered an additional service. The consultant is not required to commence the varied services until such time as the client has given written approval of the fees associated with the varied Services.

There are no clear time-limits set out in the variation procedure for the submission of variation requests, nor is there a clearly set out methodology of substantiation or valuation. The clause may arguably also limit the client's right to omit part of the services. The need to negotiate an agreement of the fees for variations may delay a project if the consultant is not required to commence the varied service until an agreement is reached.

Clause 5 of the 5th Edition follows the traditional variation clauses seen in construction contracts. It provides that variations must be relevant to the services without substantially changing the extent or nature of the services. The client has the right to:

- amend the Scope of Services
- omit services (though only if no longer required by the client)
- change the sequence or timing of the services
- change the method of implementation.

The 5th Edition also contains a provision dealing with an instruction which the consultant believes is a variation, but is not described as a variation. In such cases, the consultant must give notice to the client as soon as reasonably practicable which must contain details of the estimated impact upon the programme and costs. The value of any variation is to be determined in accordance with the Remuneration and Payment provisions found within the Particular Conditions.

Programming

The 4th Edition includes provision for a Time Schedule for Service in Appendix 4. There is no detail for what is to be contained in the schedule, nor any obligation that the consultant submit or even comply with a programme.

While the 4th Edition states that that the services shall proceed in accordance with the Time Schedule in Appendix 4, there is no clear obligation or liability on the consultant to proceed expeditiously with or guarantee the completion of the Services.

Sub-Cause 4.3 of the 5th Edition obligates the consultant to provide a programme within 14 days of the commencement date. It also specifies that the programmes shall include the order and timing of services, key dates for performance or delivery of parts of the services, as well as key dates for decisions, approvals or information from the client to the consultant.

Sub-Clause 4.5 of the 5th Edition provides that the consultant shall revise the programme if the client does not reasonably believe the project will be completed on time. However the 5th Edition still does not contain a clear obligation to proceed expeditiously with the services. It also does not impose liability to pay compensation in the form of delay damages if the services are not completed within the Time for Completion.

Standard of Care

A major criticism of the 4th Edition is its treatment of the consultant's standard of care under the agreement.

Sub-Clause 3.3.1 states that:

> *'the Consultant shall have no other responsibility than to exercise reasonable skill, care and diligence in the performance of his obligations under the Agreement' (own emphasis added).*

This widely drafted provision affords a loop-hole to consultants, as it applies not only to the standard of reasonable skill and care in the services performed, but to all obligations within the agreement, including commencement, the completion dates, the procurement and maintenance of insurance and any reporting.

This issue was reinforced by Sub-Clause 6.1.1 of the 4th Edition which states:

> *The Consultant shall only be liable to pay compensation to the Client arising out of or in connection with the Agreement if a breach of Clause 3.3.1 is established against him.*

As a result, establishing a consultant's liability is more difficult than where only a breach of contract has to be proven.

The 5th Edition provides that the standard of reasonable skill, care and diligence only applies to the performance of the Services. All other obligations are treated as absolute obligations. It also raises the standard of care to the standard to be expected from a consultant experienced in the provision of services for projects of a similar size, nature and complexity.

However, FIDIC have refrained from introducing a 'fit for purpose' clause. In some GCC countries the lack of such an obligation will not circumvent the consultant's decennial liability for the partial or total collapse of a building (for example, under Article 880 of the UAE Civil Code).

Termination

A termination clause is a crucial part of any consultancy agreement, and usually contains important protections for both clients and consultants.

Although it is an industry standard for clients to want the right to terminate consultancy agreements, the 4th Edition does contain a termination for convenience clause but does not differentiate the effect of it from other forms of termination. It also failed to give clear rights for immediate suspension in that the clause did not distinguish between the notice to suspend and notice to terminate for convenience.

Furthermore, the 4th Edition, also does not allow the immediate termination for specific cases of the consultant's default – for example for bankruptcy and corruption.

The 5th Edition's differentiates the effects of termination for convenience from termination for the consultant's default.

If the Agreement is terminated for the consultant's default then the client is entitled to any documents or deliverables pertaining to the services necessary to enable the client to complete the services, as well as any reasonable costs directly incurred as a result of the termination. The client may withhold any payment due to the consultant until such time that all costs, documents and deliverables have been received from the consultant.

If the Agreement is terminated for convenience and the consultant incurs additional costs, the client shall pay the consultant for the extra time spent by the consultant's personnel in the performance of the services, at the rates stated in the Appendix 3 [*Remuneration and Payment*]. The client shall also cover the cost of all other expenses reasonably

incurred by the consultant, and the consultant is entitled to be paid the loss of profit that would otherwise have been earned on the services not performed due to the termination.

The 5th Edition now allows for immediate termination where there is insolvency or corruption. It also contains a clear power for the client to suspend the services for convenience, upon giving 28 days notice.

In relation to termination for convenience the 5th Edition allows for a shorter time-frame on the consultant's right to terminate following the client's suspension for convenience. It provides that when the services have been suspended for more than 168 days, the consultant may terminate, after giving 14 days notice. This is compared to the 4th Edition, where the consultant may terminate upon giving 56 days notice to the client, where services have been suspended for more than 182 days.

The consultant's right to suspend has also been enhanced to allow the consultant to suspend services after 7 days notice has been given since the date of non-payment, whereas the 4th Edition only permitted suspension following 28 days of non payment. After the services have been suspended for 42 days, the consultant may terminate the agreement, after giving a further 14 days notice.

Sub-Clause 6.3 of the 5th Edition also has more specific detail on how a resumption following suspension is to be managed and as well as each party's entitlements.

Additional clauses will still need to be added to deal with making termination valid in Middle Eastern countries (such as the UAE) without a court order.

Dispute Mechanism

The 5th Edition also makes changes to the dispute resolution procedure. Having previously adopted mediation as part of a multi-tiered dispute resolution process, the 5th Edition now includes adjudication.

It is likely that this provision will be amended by particular conditions in the GCC to refer any dispute straight to arbitration.

Summary

The pre-released 5th Edition White Book seems to have addressed many of the previous problem areas identified in the 4th Edition.

As a result of the changes the parties will be in a better position to understand and manage their risk allocation.

Al Tamimi & Company's Construction & Infrastructure team regularly advises on contract drafting and the use of the FIDIC suite of contracts. For further information please contact Scott Lambert (S.Lambert@tamimi.com).

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'Fit for Purpose' or 'Reasonable Care'? Dealing with Design Liability in the New FIDIC Yellow Book

It is not unusual for construction contracts to contain different obligations with regards to design and workmanship.

Often, a contract may contain an obligation of reasonable skill and care in relation to design and stricter 'fitness for purpose' obligations regarding compliance with performance specifications or the Employer's Requirements in relation to workmanship.

The distinction between these two types of obligations may give rise to a number of difficulties for both the Employer and the Contractor or Consultant.

So what is the difference between the two obligations? In simple terms, a '*fitness for purpose*' obligation is an obligation to achieve a result. If the result is not achieved, regardless of any other circumstances, the Contractor will be in breach and liable to compensate the Employer in damages. A '*duty of reasonable skill and care*' measures the performance of the Contractor, usually in comparison to other professional persons of the same standard carrying out similar work.

Sub-Clause 4.1 [*Contractor's General Obligations*] of the FIDIC Yellow Book contains a fitness for purpose obligation:

> *'The Contractor shall execute the Works in accordance with the Contract. When completed, the Works (or Section or Part or major item of Plant, if any) shall be fit for the purpose(s) for which they are intended as defined and described in the Employer's Requirements.'*

The proposed Yellow Book Second Edition 2017 ("Second Edition") also includes a number of new references from the 1999 Edition that are related to fitness for purpose, including:

- Sub-Clause 4.9.2 - Compliance Verification System
- Sub-Clause 4.11 - Sufficiency of the Accepted Contract Amount
- Sub-Clause 8.13 -Resumption of Work
- Sub-Clause 13.1 - Right to Vary
- Sub-Clause 17.7 - Indemnities by Contractor
- Sub-Clause 19.2.3 - Liability for breach of professional duty

It may be assumed that a stricter fitness for purpose obligation is preferable for the Employer; however this may not always be the case.

Fitness for Purpose

The Contractor will in breach of Sub-Clause 4.1 of the Second Edition if any part of the works is not fit for the purposes defined in the Employer's Requirement's, without the Employer having to prove negligence.

This is especially dangerous for the Contractor, who may exercise all reasonable skill and care when carrying out the design for the works and constructing the works, and comply with all other Contractual obligations but still remain liable for breach.

By way of an example, in a recent UK case the Contractor entered into an agreement with the Employer for the design, fabrication and installation of the foundations for 60 wind turbine generators. The contract provided that the design must comply with an international standard known as J101 for the design of offshore wind turbines. However, unbeknown to the Contractor and everyone else at the time, J101 contained an error which resulted in the foundations being defective.

The Contract contained a fit for purpose clause, although this was qualified and not found to be an absolute warranty of quality. Had the contract

> **" Though a fitness for purpose obligation may be easier to prove in a dispute, it may have adverse effects on the Employer's ability to recover damages from the Contractor."**

contained an absolute warranty of quality, as is found in Sub-Clause 4.1 of the Second Edition, however, the Contractor would arguably have been liable for the defects. This is despite the fact that it exercised all reasonable skill and care and produced a design that was compliant with the Employer's Requirements and international standards.

Fitness for Purpose and Insurance

Whilst a stricter performance obligation may appear to benefit the Employer, it would be prudent to exercise caution. Though a fitness for purpose obligation may be easier to prove in a dispute, it may have adverse effects on the Employer's ability to recover damages from the Contractor. Most professional indemnity policies will only cover the Contractor in the event that the Contractor has failed to exercise reasonable skill and care – i.e. has committed professional negligence.

Sub-Clause 19.2.3 [*Liability for breach of professional duty*] of the Second Edition provides that the Contractor shall obtain professional indemnity insurance:

> *'indemnifying the Contractor for his liability arising out of negligent fault, defect, error or omission in the carrying out his professional duties which result in the Works not being fit for purpose(s)... and resulting in any loss and/or damage to the Employer.'*

The Second Edition only states that the Contractor must be insured for *negligent* breaches that result in the Works not being fit for their purpose, though it is arguably liable whether negligence occurred or not. In such cases, it may not be impossible for the Employer to fully recover its losses if the Contractor does not have the funds to cover the uninsured claim.

Duty of Reasonable Skill and Care

On the other hand, it is possible for a Contractor or Consultant to limit its liability so that it has no other responsibility than to exercise reasonable skill and care in the performance of his obligations. This is the standard in the FIDIC Model Services Agreement (the "White Book").

Obviously this standard is preferable for a Contractor, as it is more difficult for the Employer to prove breach, insurance policies are more readily available and it easier to agree pass-through obligations with any Subcontractors.

UAE Law

Unlike in the UK and other common law jurisdictions, there are no implied terms which dictate that all *muqawala* contracts must be carried out with reasonable skill and care. However, there is a statutory source for such an approach. Article 383(1) of the UAE Civil Code does provide that:

> *'If that which is required of an obligor is the preservation of a thing, or the management thereof, or the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved, unless there is an agreement or a provision of law to the contrary.'*

Therefore, under UAE law it is possible that the Contractor may have fulfilled his obligations if the work or services are performed with reasonable skill and care, even though the intended 'object' – or purpose – is not achieved. This is subject to there not being a strict fitness for purpose obligation within the agreement.

It is important to note than under UAE law, where a contract is silent as to a consultant's obligation to perform the services will often be viewed as an obligation to achieve a result, and will be treated an as fitness for purpose obligation. This applies not only to the design, but to the supervision of the construction.

Furthermore, Article 880 of the UAE Civil Codes provides that the Contractor and Consultant shall always be jointly liable to compensate the Employer for a period of ten years from the date of delivery of the work, if the building suffers (a) total, or (b) partial collapse, or (c) there is a defect that threatens the stability and safety of the building.

Conclusion

A 'fitness for purpose' clause which at first glance may seem beneficial to Employers, may lead to potential problems for both Employers and Contractors, implicating overall liability and potential loss recovery. Careful drafting is needed in order to manage these risks and clearly allocate liability.

Al Tamimi & Company's Construction & Infrastructure team regularly advises on contract drafting and the use of the FIDIC suite of contracts. For further information please contact Scott Lambert (S.Lambert@tamimi.com).

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FIDIC and BIM: Missed Opportunity or Turning the Corner?

Building Information Modeling (BIM) is becoming an essential part of construction project delivery and as a result some standard form contracts have moved to provide clauses to assist with the implementation of BIM.

FIDIC is planning to release a new edition of its contract suite later this year and so far there is no indication that it will include clauses which assist with BIM facilitation.

As with any new construction management tool, BIM raises legal challenges that need to be recognized and resolved.

The questions that we keep getting asked are:

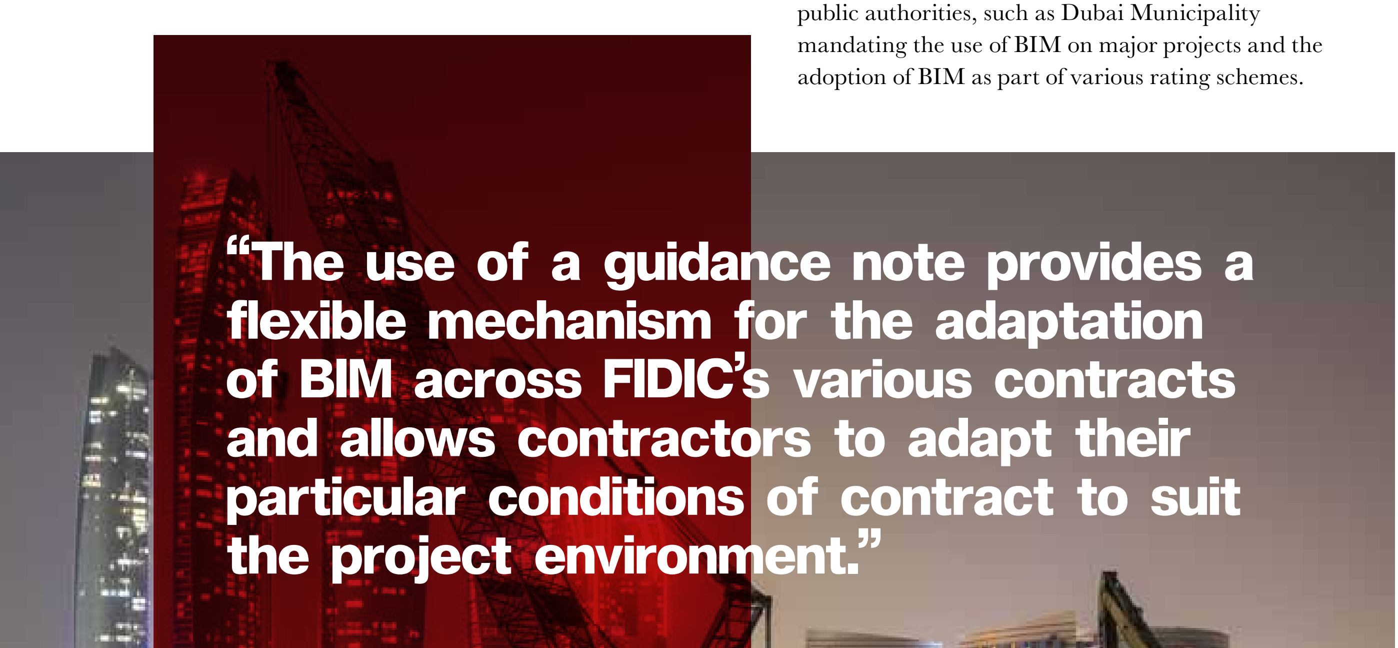
1. How do we expect BIM to be addressed by FIDIC?
2. How do other contract suites deal with the BIM issue?
3. What impact does this have on the drafting of my bespoke contract?

Missed Opportunity?

Should FIDIC decide to not add BIM facilitating clauses, it raises the question as to how BIM may be addressed in the new FIDIC suite of contracts. It also raises a more important question: how should the contractual issues that arise as a result of the use of BIM be addressed given the needs of the construction industry within the UAE today?

It is the collaborative elements involved in BIMs successful use that raise the most contractual uncertainty, particularly in an industry that is adversarial by nature and where participants are expectedly cautious about their own self interest.

Despite this, from a local perspective, the use of BIM has been gaining traction. More and more architects, engineers, and contractors, are using BIM for their own benefit after realizing that its use can have a real and positive impact on project delivery and bottom line. This move to BIM adoption has also been driven by the foresight of public authorities, such as Dubai Municipality mandating the use of BIM on major projects and the adoption of BIM as part of various rating schemes.



"The use of a guidance note provides a flexible mechanism for the adaptation of BIM across FIDIC's various contracts and allows contractors to adapt their particular conditions of contract to suit the project environment."

As the gradual adoption of BIM continues, there may be confusion as to how to contractually manage its implementation in the absence of guidance in the FIDIC general conditions.

However we understand that various FIDIC committees are taking the time to consider the best approach in deciding how to address BIM throughout the FIDIC rainbow suite.

Encouragingly, FIDIC has provided a tentative timetable to deliver drafting instructions sometime in 2017.

Turning the Corner

How might FIDIC propose to address the adoption of BIM?

It may be that the most sensible and likely outcome is that FIDIC will introduce a mechanism to address the use of BIM through a guidance note. This may include a protocol document and an execution plan that clearly addresses the contractual issues inherent in implementing BIM.

The use of a guidance note provides a flexible mechanism for the adaptation of BIM across FIDIC's various contracts and allows contractors to adapt their particular conditions of contract to suit the project environment.

Other popular standard form contracts, such as the Joint Contracts Tribunal (JCT) and NEC Engineering and Construction Contract (NEC3) have taken a similar approach.

A criticism of using a protocol is that it may fail to address the contractual issues that arise during a BIM project.

For example the CIC BIM Protocol, developed in conjunction with the Government of the United Kingdom, lacks sufficient detail to be used effectively. An illustration of this is that it has been criticized for failing to address collaborative information sharing in the BIM common data environment despite this being a fundamental aspect of BIM implementation.

Criticisms of BIM protocols are hardly surprising given that BIM can mean so many different things to different people and organizations and having a singular protocol may not meet every project need. It also demonstrates that the contractual implications of using BIM are still evolving and will vary from project to project. If a protocol does not deliver a foundation of trustworthiness, safety and security over the digitally built assets, the effectiveness of its use are significantly diluted.

BIM, as has been said before, can only be as good as the people who use it and while the protocols developed for use by other standard form contracts may be diamonds in the rough, it is here where a FIDIC guidance note has the opportunity to distinguish itself.

With the updates to the rainbow suite expected in 2017 focusing on a more collaborative contractual approach, FIDIC has the chance to carry this trend through to any BIM guidance note and suggest an appropriate BIM risk allocation. For example the proposed new early warning procedure may be aided by the use of BIM as an early warning tool, identifying potential clashes between design and construction at an earlier stage in the construction cycle.

Risks to be Mitigated

We expect the drafting of the guidance note to include (at a very minimum) a protocol which includes clauses on the following broad categories for BIM implementation:

i. Process and Data

BIM is, at its heart, a management tool that establishes processes. In order to utilize BIM to its fullest, any protocol should include clear and accepted processes which establish each party's responsibilities.

For example, the protocol may establish a mechanism for dealing with changes in design and variations, stating how to notify all design team members. This may include the appointment of a BIM Manager to oversee design changes.

A protocol may also specify the design information to be included within that model, which party will host or store that model and data, and what security should be provided to ensure there are back-ups of the data.

ii. Interoperability

There remains a risk of a loss of data integrity where different systems and software are used. To reduce this risk, a protocol is expected to specify compatible software programs that may be used as well as providing a procedure to minimize the risk of errors in the data infecting the design.

iii. Standardization and Consistency

Given the collaborative nature of BIM it is important to have a standardized dictionary. A protocol may include defined terms, confirm deliverables and specify how compliance is demonstrated.

As a practical note, contract conditions should include that the protocol terms and outcomes are to be included in all subcontracts that have a design responsibility.

iv. Copyright and Ownership

Traditionally the position has been that each party will own the copyright for each element of the model for which they are responsible for the design. This is expected to continue in the FIDIC protocol. Where parties are to be working on the model for which another party is responsible for the design, the protocol may grant a non-exclusive license. This may also extend to where the owner is to use the model for maintenance purposes before handing over of the project.

The protocol is also likely to define when ownership of the model will vest in the employer or end user.

v. Risk Allocation

A protocol may also include a provision for the inclusion of a form of warranty for the data provided in the model by the various designers.

vi. Collaboration

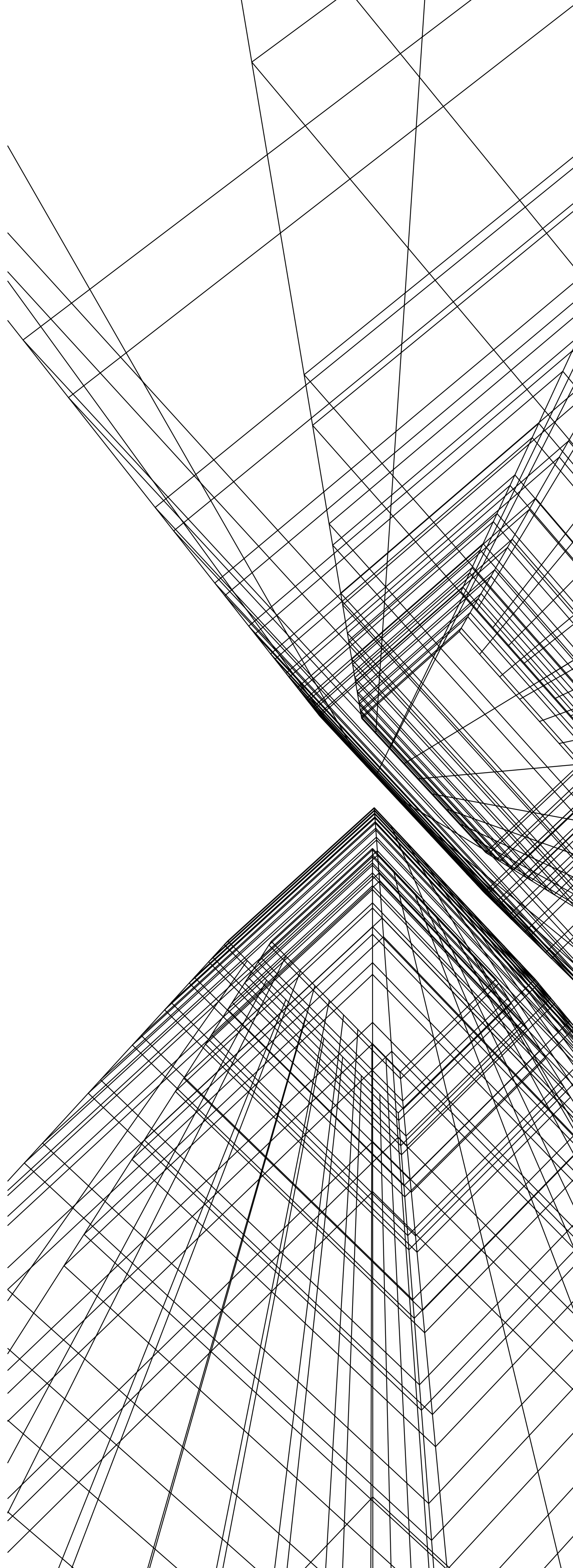
To assist with collaboration a protocol may include requirements on all designers to attend coordination meetings and to work with the BIM Manager.

Conclusion

FIDIC has instructed three committees to investigate how best to address BIM across its suite of contracts. This is a sensible approach. We expect that FIDIC will release a guidance note with a protocol explaining how to implement BIM under each contract. It is expected that this guidance note will follow the same philosophy being adopted for the proposed revised rainbow suite focusing on proactively managing the project and actively avoiding disputes, as well as addressing the contractual issues that inherently arise during a BIM-enabled project.

In the meantime we will continue to provide our expertise and assistance to those in the industry who would like to implement BIM on their next project.

Al Tamimi & Company's Construction and Infrastructure team regularly advises on Building Information Modelling and Scott Lambert is (BIM expert, qualifications ect). For further information please contact Scott Lambert (s.lambert@tamimi.com) or Jeremy Russell (j.russell@tamimi.com).



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Completion and Taking Over: Why it's so important

Taking over is a critical part of any project - it constitutes confirmation that the works have been satisfactorily completed by the contractor (save for minor defects and outstanding items of works) and should signify the point that the project has become a revenue generating asset.

What are the key issues for both the employer and the contractor to consider in relation to taking over the works?

When does take over occur?

Taking over normally occurs when the contractual requirements for the works to be considered 'complete' have been satisfied.

Contracts should clearly specify what needs to be done in order for the works to be accepted by the employer. Although the specific requirements will depend on the nature of the project, typical requirements include that the works can be used for their intended purpose (notwithstanding the existence of minor defects), all tests on completion have been passed and all necessary approvals for the works to be used have been obtained.

Tests on completion vary depending on the nature of the project. Works with a significant mechanical and/or electrical component (such as processing plants) will typically only be taken over if the facility is both physically complete and all mechanical and commissioning tests have been passed, while power plants usually need to meet specified levels of heat rate (i.e. the efficiency that the power plant produces energy from a unit of fuel) and output (i.e. the measure of the plant's capacity to produce energy).

FIDIC based contracts in the Middle East usually require the engineer (who is required to act fairly) to confirm when completion has occurred. The contractor may bring a claim if it considers that the engineer has unjustifiably failed to issue a taking over certificate, particularly if this failure has resulted in the employer seeking to levy delay damages.

As it is usual that the works need not be 'perfect' in order to be taken over, the form of taking over certificate should clearly specify the known defects and outstanding works at that time (usually in a schedule) and require such defects and outstanding works to be completed within a specified time. This should not be an exhaustive list and the contractor should be under an express obligation to remedy any subsequent defects which become known from time to time.

"Taking over is a critical part of any project for all stakeholders as it constitutes confirmation that the works have been satisfactorily completed ... and should signify the point that the project has become a revenue generating asset."

Deemed taking over

Even though the works have not achieved the state to be taken, parties should be aware that the works may be 'deemed' to have been taken over in certain circumstances.

For example, sub-clause 10.2 of the FIDIC 1999 Red Book provides that works will be deemed to have been taken over in the event that they are used or occupied (other than on a temporary basis which is agreed by the parties) by the employer prior to the issue of the taking over certificate.

This is because such use or occupation of the works by the employer demonstrates adequate completion of the facility and the employer's use or occupation of the works may cause damage or disruption for which it would be unreasonable to hold the contractor liable.

In certain circumstances, it may, unexpectedly, become commercially important for the employer to undertake commercial activities using the facility (i.e. to accommodate a lucrative order or to hold a one off event) even though the facility does not satisfy the contractual requirements for it to be taken over. Regardless of any other consideration, this approach should only be adopted if all legal consents and approvals for the use or occupation in question have been obtained.

In this situation, the employer could consider circumventing the risk of the whole of the works being deemed to have been taken over by dividing the works into sections and only taking over particular sections (but not the entire works). If this approach is not viable (i.e. because the entire works need to be used or occupied), the employer could consider issuing express qualifications to the effect that its use of the facility is a temporary measures which should not be deemed to constitute taking over on account of specified defects or items of incomplete works.

However, we consider that the underlying contract would need to contain specific bespoke drafting to enable the employer to confidently take this action without the contractor being able to strongly argue that the works should be deemed to have been taken over.

Why is taking over so important?

Taking over the works is a significant landmark for various reasons.

Perhaps the most important consequence is that, upon take over, the project should have become a revenue generating asset.

Additionally, possession of and the risk in the works is, upon take over, transferred from the contractor to the employer. It is therefore vital that the employer ensures that it has adequate insurance for the works (i.e. in respect of loss of use, damage and destruction) upon the date of take over as the contractor's insurance obligations will cease.

If the works are taken over after the contractual time for completion and delay damages have fallen due, the contractor's obligation to pay delay damages will cease.

Taking over may also have a significant impact on the performance security under the contract. For example, the value of the performance bond may be reduced (i.e. by 50 percent) while a percentage of the retention monies (usually half) may need to be paid to the contractor.

Defects

The defects liability period commences upon the issue of the taking over certificate. This period is usually between 12 and 24 months (particularly for facilities with a significant mechanical and electrical component). The contract may provide that the defects liability period shall be extended for any defects which are remedied during the defects liability period.

During the defects liability period, the contractor is required to promptly return to the site to remedy any defects or outstanding works (including those referred to in the taking over certificate).

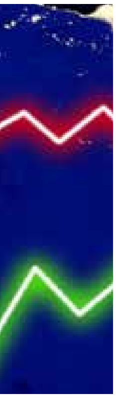
If the contractor fails to comply with this obligation, the employer should have the express contractual right to remedy the defect at the contractor's expense. In this situation, it is important that the employer can readily recover this cost (i.e. through offsetti≠ng the cost from the retention or making a call under the performance bond). An alternative would be for the employer to subtract the value of the defect from the contract price and this will be reflected in the final statement.

Employers typically insert drafting in the contract to clarify that the issue of the final certificate (following the expiry of the defects liability period) shall not been deemed to constitute acceptance of the works and that the issue of the final certificate should not absolve the contractor from liability for latent defects. Contractors, on the other hand, frequently seek to insert drafting to the effect that the final certificate should release them from further liability regarding the works (other than in respect of Decennial Liability). Resolution of this issue is frequently determined by the respective bargaining power of the parties.

Conclusion

It is important that construction contracts contain carefully tailored taking over requirements that fully address the specific requirements of the project in question and that the works should not be accepted unless, as a minimum, they can be used for their intended purpose and can therefore generate revenue.

Al Tamimi & Company's Construction & Infrastructure team advises on all aspects of construction law. For further information please contact Scott Lambert (s.lambert@tamimi.com) or Euan Lloyd (e.lloyd@tamimi.com).



Bahrain Investment Market (BIM) Opens its Doors for Business

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March 2017 witnessed the inauguration of the eagerly awaited Bahrain Investment Market (BIM), an alternative equity market operated by the Bahrain Bourse which seeks to offer developing companies access to growth capital, without the requirements or level of regulatory burden associated with a listing on the main board market ("Main Board Market")

The Bahrain Bourse is an institution licensed by the Central Bank of Bahrain (being the public corporation empowered to regulate the financial sector in the Kingdom of Bahrain) ("CBB") as a self-regulatory organisation, entrusted with operating the stock exchanges in the Kingdom of Bahrain. The development and launch of BIM by the Bahrain Bourse is in accordance with its stated goals of furthering Bahrain's position as a regional financial hub, stimulating the capital markets sector in the Kingdom, and to fostering a market to help fast-growing companies in the Kingdom of Bahrain and beyond (admission to the BIM is not restricted to companies incorporated in Bahrain). There are no nationality restrictions on persons wishing to invest in and trade in shares of companies listed on the BIM.

The primary rules governing and regulating the BIM are the Bahrain Investment Market (BIM) Rules 2016 (the "BIM Rules"). Whilst the Rules have been approved by the CBB, the body enforced with interpreting, administering and enforcing the rules is the Bahrain Bourse. The BIM Rules provide details of the requirements to be satisfied by a legal entity seeking admission to and listing on the BIM together with the sale of its shares to the public, and the requirements that must thereafter be satisfied on an ongoing basis by entities listed on the BIM. As with other comparable listing rules, the BIM Rules are not deemed to be exhaustive, and the Bahrain Bourse are empowered to make admission subject to additional conditions, and/or impose additional requirements.

The process for admission to and listing on BIM

The streamlined process which a listing applicant will go through to offer its shares for sale to the public and to be admitted to and listed on the BIM can be summarised as follows:

- *Step 1: Discussion with the Bahrain Bourse.* Listing applicants are encouraged to approach the Bahrain Bourse to discuss the listing applicant's requirements and objectives, and to seek the advice and guidance of the Bahrain Bourse.
- *Step 2: Appoint a sponsor.* The listing applicant should select and appoint its sponsor (see further below)
- *Step 3: Prepare Documentation.* With the sponsor's help, the due diligence process is carried out, and the application form and Listing Document (see further below) are completed and submitted to the Bahrain Bourse.
- *Step 4: Approval.* Successful applicants will receive their approval from the Bahrain Bourse for the sale of its shares and admission to and listing on the BIM. The process of obtaining eligibility to list can be obtained as quickly as 30 days from the date of submission of all required documents to the Bahrain Bourse (by contrast the IPO process on the Main Board Market can take up to two years).
- *Step 5: Sale of shares.* The listing applicant invites applications to subscribe for purchase of its shares. The sale of shares must be kept open for at least 10 trading days. After the sale of shares closes, the listing applicant announces the outcome of the sale of shares, and where appropriate, the level of subscription and the basis of allocation and allotment, and the subscription rate
- *Step 6: Admission and Listing.* After completing the process of the sale of shares, the sponsor submits to the Bahrain Bourse various documents and information required by the BIM Rules. Once finalised, the listing applicant is officially admitted to the BIM and trading of its shares on the BIM can commence.

Some key requirements for admission and listing

The key requirements to be satisfied by a listing applicant to be admitted to and listed on the BIM include the following:-

- *Corporate form.* The listing applicant should take the corporate form of a Closed Joint Stock Company (if incorporated in Bahrain) or its equivalent (if incorporated outside of Bahrain).
- *Paid up capital.* Listing applicants should have paid up capital of a minimum of 250,000 Bahraini Dinars or its equivalent in other currencies (by way of example, approximately US$ 663,000). By way of comparative example, the Main Board Market listing rules ("Main Board Listing Rules") impose paid up capital requirements of 3,770,000 Bahraini Dinars (equivalent to almost US$ 10,000,000) for foreign companies.
- *Financial Track Record.* Unlike with a listing on the Main Board Market, listing applicants to the BIM are not required to show an established track record or revenue of profitability, or to provide audited financial statements. Rather, the application process enables listing applicants to apply based on the applicant's financial projections. Listing applicants are also required to have sufficient working capital for present requirements and for at least the period of 12 months after the proposed listing date.
- *Sponsor.* Listing applicants are required to appoint a 'sponsor' to carry out on its behalf the sale of its shares for the purposes of its listing, and to provide cost effective guidance, support and assistance to the listing applicant to enable it to become and thereafter remain fully compliant with the requirements of the BIM Rules. The BIM Rules define a sponsor as an entity authorised by and registered with the Bahrain Bourse to act on behalf of an issuer with regards to the initial listing activities (i.e. the sale of the shares, the assessment of listing eligibility, etc.) as well as post-listing activities (e.g. advising the Issuer on compliance with the BIM requirements, announcements, etc.). Typically all communications between the Bahrain Bourse and the listing applicant will go through the sponsor. The cost of engaging a sponsor (both pre-listing and post-listing) is be covered by Tamkeen through a dedicated program created solely for this purpose (Tamkeen is an independent Bahraini agency established by the Bahraini government to promote the development and productivity of Bahraini enterprises).
- *Listing Document/s.* Listing applicants are required to provide various documents to the Bahrain Bourse, including an application for and a listing document. The BIM Rules provide details of all of the information to be contained in the listing document, including the type and amount of the shares, the listing price, and the minimum and maximum subscription limits. The requirements applicable to the application form and listing documents are considerably less extensive than those applicable to the prospectus/offering document required by the Main Board Rules.
- *Senior Management.* The directors and senior management of the listing applicant are required to have appropriate experience and expertise to manage the listing applicant's group.

Upon acceptance for admission to the BIM, the listing applicant may proceed with the sale of its shares as per its Listing Document/s.

Some other points to note

- *Fees.* A one-off fee of 1,000 Bahraini Dinars is payable to the Bahrain Bourse upon listing (by comparison, initial fees payable upon listing on the Main Board Market will between 5,000 and 15,000 Bahraini Dinars . Thereafter an annual fee is payable, equivalent to 0.3% of the entity's paid-up capital (subject to a minimum fee of 1000 Bahraini Dinars and a maximum fee of 6,000 Bahraini Dinars).
- *Minimum public subscription.* The BIM Rules require that the proportion of post listing share capital to be held by the public should not be less than 10% of the listing applicant's paid up share capital.
- *Employee share schemes.* The listing applicant is entitled to reserve up to 25% of the offered ordinary shares for allocation and allotment to its employees, directors, customers, and suppliers.
- *Lock in periods.* The listing applicant's founder shareholders are prevented from selling any of their shares in the applicant company for a lock in period of two years from the date of listing (note – at the time of listing all founders in aggregate should hold at least 30% of the listing applicant's share capital).
- *Transfer to the Main Board Market.* The BIM Rules provide for any issuer listed on the BIM for at least 6 months to apply for the approval of the CBB to transfer to the Main Board Market. To do so, the issuer is required amongst other things to satisfy the requirements of the Main Board Rules.

Conclusion

The BIM provides an innovative platform for growing companies to quickly and efficiently raise the capital they require for their continued growth and development, without having to satisfy the extensive regulatory requirements applicable to a listing on the main GCC stock exchanges. At the same time, investors should take considerable re-assurance from the focussed nature of the BIM Rules, the exemplary track record of the Bahrain Bourse and the CBB. Bahrain enjoys a consistently high ranking in terms of the transparency and robustness of the general regulatory framework, and has a proven track record and reputation as a major financial hub for the region and beyond.

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Protecting your Trademark and Copyright in Egypt

This article considers the protection of trademark and copyright in Egypt including a review of some cases that can constitute trademark and copyright infringement according to the laws in Egypt.

Background

It is well known that corporations and individuals register their trademark in order to protect their brand so that competitors and infringers do not use confusingly similar or identical trademarks. Since trademarks are a means to differentiate from one product to the other and it is very much in the benefit of trademark owners to register the trademark, logos and designs that they have developed. To this effect a trademark registration creates a favorable presumption that the registrant is in fact the owner of the mark. In case of a dispute over the trademark or its registration, the person challenging the trademark registration has the burden of proof (which is a heavy one) to establish that the trademark should not have been registered due to a third party's prior use of the trademark, or that the registration was obtained fraudulently.

In other cases, where the intellectual property right is a software code, literal or artistic work, the author of such work can resort to the Egyptian Copyrights' Office to obtain a copyright certificate, as proof that the work has been registered as a copyright. Although by its definition, the rights associated to copyright exists from the moment of its creation, a copyright certificate is however a necessary requirement by the Egyptian Courts in cases claiming copyright infringement and for copyright enforcement cases. Much like trademark certificates, a copyright registration creates a favourable presumption towards the registrant of the right. Hence, in case of third party challenges as to the validity of the copyright, the burden of proof lies with the challenging party.

In order to protect trademark and copyright holders against unauthorized use of their work and brands, the Egyptian Legislature has enacted Law no. 57 of 1939 for the Protection of Trademarks and Trade Information, and the Law no. 354 of 1954 for the Protection of Copyrights. Following which, the Law no. 82 of 2002 for the Protection of the Intellectual Property Rights replaced the former laws, which governs the protection of Trademarks, Trade Secrets, Patents, Industrial Designs, and Copyrights.

Trademark Infringement

Where a third party is attempting to register an identical or confusingly similar trademark, a trademark owner has the right to file an opposition against the published trademark. Proposed trademarks are published in monthly gazettes. It is up to the brand owners to monitor the gazettes for confusingly or identical trademarks. According to the regulations in Egypt, oppositions are required to be filed within 60 days from the date of proposed trademark publication. Once a proposed trademark is opposed, an opposition board is appointed by the trademark office, and its task is to adjudicate on the parties' argument and evidence and decide on whether the registration of the proposed trademark can lead to consumer confusion with prior existing trademark rights. Opposition proceedings are an effective tool for brand owner's to stop third parties seeking to enter the market with confusingly or identical trademarks, and potentially prevent trademark infringement.

Trademark infringement can also occur in other instances whereby an entity manufactures products bearing a trademark similar or identical to another's registered mark. In such a case the infringing party has not sought to register the confusingly similar or identical trademark, but rather has affixed the disputed trademark directly to the goods and is exploiting the infringing trademark for commercial gain. In such cases, the goods are usually identified as counterfeit goods. The Egyptian legislature provides a brand owner with more than one route to legally pursue his rights. One such route is to file a complaint before the Commercial Fraud Bureau which can conduct a raid on the factory, warehouse, and/or store and seize the infringing goods. Following a raid, a sample of the seized product shall be sent to the Trademarks' Office which will be required to prepare a report as to the similarity of the trademarks. If it is determined that there is an infringement, the Public Prosecutor can impose criminal charges against the infringer for commercial fraud and the imitation of a registered trademark.

Another legal avenue which may be explored by brand owners is filing an action for unfair competition before the Economic Court, requesting for the immediate cease of manufacturing and marketing of the products bearing the confusingly similar or identical trademark. Additionally, the brand owner has the right to claim damages for the loss profit and the damages sustained to the brand, i.e. the bad publicity resulting from the low quality of the infringer's imitated products and/or the profits gained by the infringer.

It should be noted that the legal protection under the Egyptian Intellectual Property Law is not limited only to registered trademarks; it also extends to unregistered marks and grants owners of a well-known trademark the legal right to protect their mark, even if the trademark is not registered in Egypt.

Copyright Infringement

Copyright infringement can occur in various forms. For literary works, infringement occurs when the work is published by a third party and without the consent of the author. In such a case the author of the work may resort to the competent court to request the withdrawal of the work. In addition the author would also be entitled to claim damages sustained as a result of the unauthorized publication of his work, and claim the profits made by the infringer.

Stealing and copying of software codes is another form of copyright infringement. The Egyptian legislature provides software developers various methods to enforce their rights. Right holders can file a complaint to the the General Administration of Copyrights Investigation, which in turn investigates the incident in cooperation with the Ministry of Communication and Information Technology and the Ministry of Culture. If it is discovered that an infringement has occurred the matter will be referred to the public prosecutor whereby criminal charges will be imposed. The right holder may alongside the criminal action file a civil suit claiming compensation and remedies.

Summary

Enforcement actions and civil claims are effective tools for the protection and enforcement of intellectual property rights in Egypt. The general policy is directed towards the protection of acquired rights and the encouragement of investments in Egypt, and what better way to encourage investors than to protect the rights derived from their practice and business.

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Contract Drafting Insights from Iraq

In this article, I aim to provide guidance on drafting contracts in general and specifically on drafting contracts performed wholly or partially in Iraq. I start by answering the two most frequently asked contract drafting questions, then cover legal culture quirks in Iraq, and finally go over some practical considerations for concluding contracts in Iraq.

This article does not aim to give specific legal advice or to advocate a specific position, and interested parties should always take specific legal advice. Instead, it aims to offer some guidance on what can be expected in Iraq.

Frequently Asked Contract Drafting Questions

By far the most frequently asked contract law questions are, firstly, whether a given choice of forum clause is enforceable, and secondly, whether the contract will be read in the light of the law chosen by the parties.

Choice of Forum

Choice of forum can be a little tricky in Iraq because courts do not look to party autonomy or choice when deciding jurisdiction. The default jurisdiction rules in Iraq are considered part of public policy, and they allow for suing a foreigner, if:

a. he or she is present in Iraq;
b. if the lawsuit involves real state property that is in Iraq territory;
c. if it involves a contract that was signed or performed in Iraq; or
d. if it involves an event, which took place in Iraq.

This leaves contracting parties very little room to affect the court's decisions on jurisdiction. The only way to give some certainty over jurisdiction is to structure properly the contract (and particularly the place of contractual performance).

Even in the case of an arbitration clause, and notwithstanding that party autonomy is a core tenant of arbitration, Iraqi courts add a twist to the usual position. Iraqi courts now respect arbitration clauses, but due to the current interpretation of Iraq's peculiar position and international commitments, a case brought before an Iraqi court is not dismissed on jurisdictional grounds if a defence raising arbitration is used, instead, proceedings are stayed.

In addition, further complications arise when the contract, or parts of it, engages mandatory rules in Iraqi law and sometimes rules dictating exclusive jurisdiction of Iraqi courts. A prominent example of such rules are labour contracts, which are subject to the exclusive jurisdiction of Iraqi courts.

Choice of Law

The answer to the second question on choice of law is at first simpler than choice of forum because under the Iraqi Civil Code, the law of the parties' common domicile or the law of the state within which the contract was concluded governs the contract unless an agreement otherwise exists (or unless one of the default rules referred to above has effect). However, even with a simple rule that allows the parties to choose a governing law for their dispute resolution, practice teaches us otherwise. When deciding whether to respect a choice of law agreement, the Iraqi court is likely to start by asking how simple the chosen foreign law is. Litigation experience shows that if foreign law can be presented in a simple and straight-forward way, the courts are more receptive to enforcing its rules. If a party's arguments are based on an understanding of a complicated statute built on previous precedents from a common law jurisdiction that contains many exceptions and complex passages, it is akin to speaking in tongues to an Iraqi court.

In short, it is not impossible to have a foreign choice of law clause respected by the Iraqi courts, and we have certainly seen foreign laws applied by courts in Iraq, but prospective parties should consider the form and complexity of the legal regime for practical reasons.

Legal Culture and Contract Drafting

Like many other civil law jurisdictions, Iraq has codes that contain general rules and principles covering a very broad area of conduct. A few examples include the Civil Code, the Code of Commerce, the Code of Civil Procedures, and the Code of Criminal Procedures. These codes provide a legal framework of default rules, which often form the starting point of any given legal reasoning. Another aspect of Iraqi legal culture is that Iraqi courts accept evidence external to the contract document. In addition, all it takes to conclude an enforceable contract is the intent to form an agreement, a lawful object of the agreement, and a lawful purpose. With this in mind, Iraqi parties, including the government, draft short contracts and leave much detail to the broader legal framework. This is not seen as a problem because, given the general rules and principles that apply, it is rather difficult to argue that an agreement is not enforceable for lack of specify.

Parties prefer to leave much unsaid in their contracts because the legal process views their agreement in light of their overall conduct, any facts admitted by a counter party or proven otherwise, and general legal theory. This may be alarming to parties unfamiliar with Iraqi law looking to do business in Iraq. Parties considering an agreement under Iraqi law should:

- Make their contracts simple. Simpler contracts are understandable by lawyers and non-lawyers alike making them more useful documents for their intended audiences and reducing transaction costs.
- Bear in mind that Iraqi law covers many situations that parties would normally make provision for in their agreements. People are bad prophets of the future and so trying to plan for every possible contingency is not a very wise approach.
- Remember that additional agreements such as collateral and side contracts can be added later on. A simple agreement is more flexible and keeps more options open allowing it to evolve with the parties' relationship.

To better illustrate the cultural expectations in Iraq and the preferences outlined so far, take the example of two construction subcontracts for work awarded by the Iraqi government. Iraqi law governed both contracts and they were of roughly the same value. One contract was between two Iraqi parties and it was a simple contract; the other was between an Iraqi and a foreign party and it was a more detailed contract. Unexpected events took place during the performance of the lengthy detailed contract. However, the added contract terms were of no aid to the parties under the new circumstances. The parties with the much simpler contract would have been in the same legal position had the same calamity befell them.

Practical Considerations for Concluding Contracts in Iraq

Contract enforcement in any jurisdiction requires parties to follow certain formalities specific to that jurisdiction. In Iraq, with only a few notable exceptions, most legal formalities ensure the parties ability to prove the existence of a contract not its validity. Therefore, it is always advisable to notarise contracts even if it is not a legal requirement. Notarised contracts can be authenticated through a public notary, providing strong evidence of the parties' agreement. Notarisation does not need to take place in Iraq, but it is much easier to use documents that have been notarised in Iraq because they do not have to be authenticated through as many government bodies as documents originating outside of the country. Finally, while notarization is mostly restricted to proving authenticity of a signature not the content of a document, it adds a unique benefit as documents notarised or stamped by a public official have a "definite date", the date of notarisation, which is very difficult to disprove barring an allegation of forgery.

Conclusion

In conclusion, drafting contracts is more of an art than an exact science, and so it is never possible to claim that one approach is better in all situations. Nevertheless, some observations can be made and understanding different approaches can be a great aid in drafting cross border contracts.

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The New Kuwait Business Center and the 'One-Window Transaction'

During the last few years, the Kuwait government has taken a number of positive steps towards sustainable development and economic growth by reducing bureaucracy, quickening the administrative process, and generally promoting the Kuwaiti economy. In addition to numerous amendments and developments made to the existing laws and regulations, a number of new laws have been issued to tackle fundamental obstacles in facing investors in the State of Kuwait, such as Law No. 116 of 2013 (Regarding the Promotion of Direct Investment in the State of Kuwait), Law No. 116 of 2014 (Regarding Public Private Partnerships), Law No. 20 of 2014 (Promulgating the Electronic Transactions Law), Law No.13 of 2016 (Regulating Commercial Agencies), and Law No 49 of 2016 (Public Tenders Law).

In light of the emerging trend, the Ministry of Commerce and Industry ("MOCI") recently launched the new 'One-Window Transaction' at the Kuwait Business Center ("KBC") as a significant shift to a successful implementation of a 'paperless' government initiative. The notion of KBC was conceived in late 2015 when the Kuwait government contemplated gathering all government bodies under one umbrella with the ability of submitting the necessary documents for a company's establishment electronically in order to make it easier for investors and reduce delays in incorporating an entity. By going 'paperless' effectively, government bodies are able to reduce bureaucracy and significantly improve efficiency and cost benefits. However, many entrepreneurs, investors and professionals were eager to see whether this new KBC will run effectively and have the capacity and resources to deal with the volume of requirements from the differing governmental authorities, particularly with the general lack of

communication between such government bodies which often presents frustrating challenges.

After considerable efforts of the officials, H.E. Khaled Nasser Abdullah Al-Roudan the Minister of Commerce and Industry announced the trial of the KBC in Ishbiliya Area in the latter quarter of year 2016. Thereafter, the KBC was officially launched at the end of 2016 and headed by Mrs. Adawiyah Al Failakawi.

We are pleased to confirm that the newly devised system works very well. The government has achieved their objectives to create a paperless system for the incorporation of companies. Whilst the time required to establish an entity used to take an average of 7 – 9 weeks and included numerous visits to various government bodies, this has been significantly reduced to only three days (on occasion, less), with just one visit required in order to authenticate the memorandum of association before the notary public at the Ministry of Justice and subsequently register an entity in the Commercial Registry. Thereafter, within approximately six months, investors may apply electronically to obtain the commercial or industrial license required to carry out their desired business whilst the KBC assists in expediting the regulatory approvals. Moreover, in the event that an authority delays in sending their approval, the KBC will provide investors with a temporary license for 60 days in order to carry out their business and allow time to follow-up with the concerned authority.

At this stage, the KBC is fully functioning but accepts only establishment applications of certain types of profit companies such as Partnership, With Limited Liability and Single Person Companies. Currently it does not accept applications for establishing shareholding nor non-profit companies.

Furthermore, it is worth noting that the KBC is using a standard form of memorandum of association and are very reluctant to make any substantive changes to this. Accordingly, investors are not free to tailor the registered memorandum of association to reflect the actual agreed terms they wish to incorporate within it. Nonetheless, the founders may register their new entity and afterwards amend the Memorandum of Association through the traditional route at the MOCI.

In conclusion, while incorporating and registering an entity might have been an intimidating process before, now through the KBC:

- The application for establishing an entity has become much more simple;
- An effective link has been successfully established between over 35 government bodies; and
- The officials of the KBC are very professional, friendly and keen to provide the support required to investors through its' entire incorporation process'.

We believe that launching the KBC and providing such professional services to investors will enhance Kuwait's ranking position within The World Bank's annual 'Doing Business' report and enable Kuwait to attract further foreign investment to sustain and grow its economy into the future.

"The Ministry of Commerce and Industry ("MOCI") recently launched the new 'One-Window Transaction' at the Kuwait Business Center ("KBC") as a significant shift to a successful implementation of a 'paperless' government initiative."

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Regulatory Framework of Travel Offices in Qatar

Driven by Qatar National Vision 2030, the hosting of the FIFA 2022 World Cup, and Qatar’s focus on the development of its non oil & gas revenues, Qatar has declared its intention to diversify its economy and market Qatar as a tourism hub.

Qatar’s efforts to develop its tourism sector can be easily seen through its efforts in attracting investments in several aspects of the tourism sector, including the investment in travel agencies, where there are currently 332 licences issued for companies providing travel related services.

The Ministry of Economy and Commerce of Qatar has recently set out rules for investing in travel business, in order to promote the growth of this sector and achieve Qatar National Vision 2030, which is aimed at establishing a diversified and competitive knowledge-based economy.

The permitted services of travel offices, as defined by law, include services related to selling and issuing of travel tickets, facilitation of luggage transfers, reservation of seats in regular transport, carrying out exchange of passenger’s transportation, and any other related businesses and services. In order to perform the services of travel offices, a licence must be obtained from the Civil Aviation Authority of Qatar. The application for such a licence must be accompanied with the following:

a. letter explaining relevant experience in the travel related services;

b. engineering design for the office by an authorised and licensed engineering firm based in Qatar;

c. guarantee in the amount of two hundred thousand Qatari Riyals (QR 200,000) in cash to the Civil Aviation Authority treasury. The guarantee may also be submitted in the form of a bank guarantee addressed to the Authority, issued by a bank operating in Qatar, valid for the entire duration of the licence period, and unrestricted by any conditions or limitations. This guarantee will be used to pay any debts or obligations in the event of a default on part of the travel office; and

d. the initial licence fee, being ten thousand Qatari Riyals (QAR 10,000).

The establishment of travel offices is governed by the general rule of doing business in Qatar, as stipulated under the Foreign Investment Law (Law No. 13 of 2000), where such business cannot be carried out in Qatar without 51 per cent of the capital of any enterprise being owned by Qataris. However and as an exception, it is permitted for GCC nationals (whether individuals or companies fully owned by GCC nationals) to own up to 100 per cent of companies in the field of air travel offices in Qatar, without the need for a Qatari partner(s).

Under the provisions of the Proxy Law (Law No. 25 of 2004, concerning Combating Concealment of Non-Qatari Practice in Commercial, Economic, and Professional Activities in Contravention of the Law), and in particular Article 1 of the Proxy Law, it is a criminal offence for a non-Qatari to be engaged in any commercial, economic, or professional activity within Qatar, unless legislative exclusions are available. Article 2 of the Proxy Law provides that Qataris may not assist foreigners in carrying on the activities set out in Article 1.

Taking into consideration the restrictions under the Proxy Law, there are some schemes used in Qatar that are believed to be legal and within the provisions of the Foreign Investment Law and the Proxy Law. Such schemes could include:

1. Subscription for the shares of the company to be formed (the 'Company') should be 51 per cent by a Qatari national, with 49 per cent to the non-Qatari national;
2. The Articles of Association of the Company could provide that all managers/directors of the Company are to be appointed by the non-Qatari national;
3. The Articles of Association of the Company could provide that the vast majority of the profits (up to 97 per cent are to be distributed to the non-Qatari national, as permitted under the Commercial Companies Law (Law No. 11 of 2015);
4. The simple majority of 51 per cent for shareholders' resolutions could be increased to 60 per cent, so that the Qatari partner may not unilaterally pass shareholders' resolutions;
5. The powers to the management appointed by the non Qatari partner could be given very widely to ensure that there is a bare minimum that requires the approval of the Qatari partner at a shareholders' meeting;
6. A Shareholders' Agreement could be entered into by the shareholders of the Company, where it will be agreed that the non-Qatari partner will provide management services for the Company, so as to justify a higher profit margin to the non-Qatari;
7. A Shareholders' Agreement can also provide for the shares of the Qatari partner to be transferred to the non-Qatari partner at par value in the event the law changes so as to allow a foreigner to hold more than a 49 per cent shareholding;
8. Assuming that the non-Qatari partner will finance the operations of the Company and its capital, the Shareholders' Agreement could provide that the capital of the Qatari partner is provided by way of a loan from the non-Qatari partner, repayable upon transfer of shares or dissolution of the Company; and
9. An Option Agreement could be signed by the Qatari partner granting the non-Qatari partner the right to acquire all of the Qatari's shares at par value at any time, either in its own name (if the law permits) or in the name of a nominee appointed by the non-Qatari partner.

It is worth mentioning that these structures have been successfully used in Qatar, but to date have not been tested in courts. However, foreign investors should note that there should be no legal agreements that make provisions for the non-Qatari national to 'own' any or all the shares of the Qatari national, and consideration should be given by the non-Qatari national to maintain levels of assets at minimal levels, using equipment leases and the like whenever suitable.

Vision 2030: Why Don't You Consider Exporting to Saudi Arabia?

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The Kingdom of Saudi Arabia ("KSA") is the second largest oil producer and the world's largest oil exporter as well as the only Arab country to be part of the G-20.

With approximately 31 million inhabitants, Saudi Arabia has a globally important, and by far the largest, economy in the Middle East. Historically, the economy has been oil based and revenue from oil dominates export earnings and government revenue.

The Islamic *Shari'ah* is the primary foundation of all Saudi Arabian laws. The formation and enforceability of contracts is governed by and relies upon uncodified *Shari'ah* principles. Under *Shari'ah*, contracts which are not expressly prohibited by the Holy *Qur'an* or the *Sunnah* are permitted as binding and valid. In practice, the parties are generally free to agree their commercial bargain except and to the extent that it contravenes *Shari'ah* principles as interpreted and applied in Saudi Arabia or any secular law.

In recent years the Saudi government has introduced a number of measures aimed at developing the country's economy. These include limited deregulation, the encouragement of foreign investment and privatisation in selected areas of the economy. In 2016 the Saudi Government launched its Saudi Arabia's Vision 2030, a roadmap to diversify its economy and address the challenges brought by lower global energy prices. The implementation of Saudi Vision 2030 will lead to major changes and opportunities across all sectors of Saudi business.

In this article, we focus on commercial agency arrangements in the KSA as those will inevitably form a significant part of the development of Saudi economy over the coming decades.

Main Body

In terms of the available structures for setting up in the KSA, businesses should keep in mind they may be able to export goods to the Kingdom and sell them through a local distributor, without having to obtain a business registration in the KSA.

Legal Framework

Agency arrangements in the KSA are governed by the Commercial Agencies Law (Royal Decree No. 11 dated 20/02/1382 H), ("Law"), and the Implementing Regulation of the Agency Law (Decision of the Minister of Commerce and Investment No 1897 dated 24 / 05/ 1401 H), ("Regulation"). Under Saudi law, a commercial agency is a contractual relationship formed between a producer and its representative in the Kingdom ("Agency Contract"). Under the Agency Contract, an agent/a distributor performs the commercial activities to make profit. Under Saudi law, if the

local agent engages any sub-agents in the carrying out of the Agency Contract, the local agent remains responsible for all legal obligations towards the customer in the KSA.

Who Can Be an Agent?

Under Saudi law, only a Saudi national (natural or legal person) can be a commercial agent. The capital of the local agent's business must be contributed by Saudi partners only, all the directors, managers and authorized signatories of the local agent must be Saudi nationals.

The agent shall: (i) provide the required spare parts to its customers in the KSA at reasonable prices (including providing rare spare parts within 30 days of the customer's request); and (ii) provide the maintenance needed for the products at reasonable charges and according to the standard specifications of the Kingdom.

Goods Specification

In order to obtain customs clearance, all imported goods must have a "Conformity Certificate for the Goods Exported to the Kingdom of Saudi Arabia". A conformity certificate must be issued by an accepted accreditation body authorised by the relevant official agency in the country of origin.

The Saudi Standards, Metrology and Quality Organisation ("SASO") formulates national standards for products including labelling, inspection and testing. The party submitting the conformity certificate must declare compliance of the goods with SASO's requirements.

Imported goods must identify the country of origin on both the shipment packaging and the product itself.

Conditions of Registration

Under Saudi law, the foreign principal and the local commercial agent must enter into the Agency Contract which must be registered within three months of it commencing with the Commercial Agencies Department of the Ministry of Commerce and Investment ("Agencies Department"). Failure to register can result in fines and other penalties.

The registration application documents must be submitted for validation with Under Secretary of the Ministry of Commerce and Investment ("MOCI") before the Agency Contract is registered. The information required under the application form are the name, the address of the commercial agent or distributor, the name the authorized signatories, and the duration of the commercial agent, description of the goods to be brought into the KSA foe distribution, name, nationality, and address of the principal.

Pursuant to the regulation, to meet the registration requirements, the following documents must be filed with the Agencies Department:

a. Two copies of the Agency Contract (one of them shall be original and notarized by the competent authorities in the KSA);
b. An accredited Arabic translation of the Agency Contract and any other documents in the language of the principal;
c. A copy of the commercial registration of the local agent that allows the agent to act as agent in relation to the goods to be distributed, in the KSA;
d. A written confirmation issued by the MOCI confirming 100% of the share capital of the local agent is held by Saudi natural/legal persons; and
e. Copy of Chamber of Commerce certificate of the local agent; and
f. Receipt confirming the relevant fees for the registration of the arrangement with the Agency Department have been paid.

Export documentation

The commercial documents required for all shipments from outside the Kingdom into it include, in relation to the goods to be imported into the KSA:

a. Commercial invoice with Arabic translation;
b. Certificate of origin;
c. Bill of lading or airway bill;
d. Steamship or airline certificate;
e. Insurance certificate (where goods are insured by the exporter); and
f. Packing list.

There may also be additional authorisations and requirements applicable to the particular products.

How About the Letterhead?

All correspondence in relation to the distributed product taking place in the Kingdom (e.g. corporate correspondence, contracts, advertisements, and invoices) shall bear the agent's name, the nature and territory of the agency, and the registration number of the agency under the Agencies Department.

Violation and Penalties

Under Saudi law, certain government officials have been appointed ted to monitor compliance by businesses with the Law and the Regulations. Their authority extends to accessing documents and inspecting business premises of the agent/other parties to verify compliance with the Law.

A penalty may be imposed by authorities in the KSA against any person violating the Law. Penalties vary. They shall be between SAR 1,000 and SAR 50,000 per violation. Also, if a penalty has been imposed, the authorities will process a publication of information about it in a local newspaper, at the expense of the local agent. If the non-Saudi principal or the non-Saudi principal and the local agent (acting jointly) have been found in breach of the Law/ Regulations, the authorities in Saudi may order that the local business that had been carrying out the arrangement in breach of Saudi law be liquidated and banned from operating an agency for an unlimited period of time/permanently.

Termination

The commercial agent has no statutory right to compensation upon the lawful non-renewal or termination of the Agency Contract. However, claims are often made by commercial agents for compensation for their contribution to the goodwill of the principal's business. Commercial agents may sometimes refuse or delay de-registering commercial agencies on expiry or termination with a view to obtaining compensation from the foreign principal, although it is generally possible to register a new agent without de-registration.

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Charting the General Average in KSA

The law of general average is an admiralty doctrine devised by early sea venturers to determine their proportional liability for any issues in cases of emergency where some cargo has to be voluntary jettisoned in order to save the whole voyage. In abstract the principle remains almost the same everywhere in the world; nonetheless it ranges in application according to jurisdiction and contract. This article analyses the general average from a domestic perspective to Kingdom of Saudi Arabia "(KSA") while drawing comparisons with the international practice.

So what is General Average?

The question of general average will face the shipmaster when there is a "force majeure" event (e.g. piracy, fire, powerful storms, etc.) that causes the parties to the sea venture to face probable and foreseeable perils. In such a case of emergency, the shipmaster has to make a choice to alleviate what could be a greater loss by voluntarily jettisoning some of the cargo off-board to save the reminder of cargo and the ship. The basic principle for general average can be summarised as follows:

> "that which have been scarified for the benefit of all, shall be made good by the contribution of all"

In essence, the general average would result in changing the original legal positions of the parties and redistributes it amongst them according to the risk of peril, so they will be placed in new positions compelling them to share the loss with one another. This principle is also known in Arabic as Qismat Ghorama'a.

As a result of the law of general average, there are many variances in practice as to who should bear the loss, the applicable rules, and how and where to bring a claim.

The Law of General Average in KSA

In the KSA, maritime law is governed by the Commercial Court Law ("CCL") of 1931. In the absence of a prior agreement amongst the parties on the rules to administer general average, the adjustment of the claim, the Saudi courts will review the proceedings in accordance with Chapter 12 of the CCL.

Chapter 12 of the CCL has 32 articles dealing with the definition and rules of treatment for maritime losses, the required declarations by the shipmaster and others, the adjustment of values and the production of documentary evidence, and the duties of the parties concerned.

In additional to the principals outlined in Chapter 12 of CCL, Saudi Courts may take into account the contractual rules of adjusting and claiming general average. These rules are typically included in charter agreements, bills of lading, contracts of freight, and marine insurance policies. The most internationally recognized standards for average adjusting are the York-Antwerp Rules ("YAR") of 1974 later amended in 1994, and these will be recognized in KSA.

It is important to note that other local KSA laws may potentially be concerned with the general average adjustment and claim: The law of Procedure before Shariah Courts provides guidance to the local conventional litigation process; the Saudi Law of Arbitration oversees aspects of local arbitration; and the Saudi Enforcement Law introduces requisites and directions to the enforcement thereof, in addition to the enforcement of foreign judgments and arbitral awards.

Adjustment of General Average in KSA

The general average undergoes two main phases in KSA. First, the advisory phase of adjusting the claim, which is essentially when the claim of average derives merit. Second, is the litigation phase when the claim is raised seeking accreditation and enforcement of the adjustment on the contributing party. The treatment of average adjusting is stipulated in both the CCL and the YAR.

According to the CCL, the shipmaster has to, as soon as possible, declare the state of general average and report the same to the shipowners and the other interest holders. Furthermore, the shipmaster and his fellow marine advisors would have to collectively "sign off" on their official report that would include a description of the events, justifications of sacrifice, and the list of the items jettisoned or damaged in the wake of the event.

Following the official report, interest holders should file a request with an accredited Average Adjuster for adjusting the loss. The Average Adjuster is a specialized professional authorized to administer and advise on the general average. Normally the Average Adjuster expert is appointed by the shipowners who incurred the initial expenses and perhaps most of the loss, yet he will act independently of their influence to administer the adjustment fairly amongst the parties. Hence, the Average Adjuster effectively takes over the administration of the failed voyage and manages its settlement going forward; as such he is responsible for collecting and admitting evidence and relevant persons, manages the guaranties and accounts, registers objections, and produces a conclusive advice on the average adjustment.

The amount of general average will include the cost of repairing the ship, loss freight to the unfinished journey, and the ost to cargo owners where their goods have been partially lost or have diminished in value. The value for items under adjustment will be settled according to the net value at the place and time of terminating the sea venture, taking into account of original values as ascertained by their respective invoices. According to the CCL, the value of the cargo is to be calculated as actual value but the value for the ship and freight is only to be considered for one half of its actual value. Eventually contributing values will be settled in proportion to each party's respective value.

"The Practice of general average in KSA has particular nuances and it is possible to draw a few comparisons between the CCL and the YAR."

The General Average Claim in KSA

After the adjustment is completed by the Average Adjuster, it is possible that legal proceedings may be commenced by an interested party to seek the adjustment by KSA Courts or an arbitration tribunal, and also to obtain effective enforcement of such on the defaulting party.

The KSA has no devoted maritime courts, but it has specialized commercial courts or circuits with subject matter jurisdiction over maritime claims and damages including that of general average. International claimants should be aware that Saudi courts honour arbitration clauses regarding general average and the CCL, the parties may agree to arbitration.

A Comparative Glance

The practice of general average in KSA has particular nuances and it is possible to draw a few comparisons to the practice between the CCL and the YAR. It is fair to say that, the CCL is written as a classical civil text and uses such terms as "grave harm" or "general losses" when referring to the general average incident. Conversely, the YAR is a set of modern common law rules that are perhaps more comprehensive and organized with clear subheadings and lettered and numerical rules.

According to the CCL, maritime losses come in one of two categories; they would either be solely and privately borne or they would commonly and collectively contribute for. To differentiate between private and general losses the CCL applies a three-tier test on the sacrifice; (i) whether it was for the common safety, (ii) whether it was extraordinary, and (iii) whether it was intentional or voluntary.

The YAR also requires all of the said three elements in addition to a fourth element to the standard for the determination of peril; whether it was imminent or whether it could have been avoidable. The YAR is more strict than the CCL as it enables the court to review the shipmaster's "discretionary power" in declaring the event, whereas under the YAR his discretion is subjected to a heightened standard of reasonableness, so much so that the YAR would only admit the general average claim if there was a truly imminent peril and not just a looming one. This qualitative requirement means that the shipmaster cannot take a subjective decision for following precautionary measures and expect the loss to be adjusted as general average. The CCL significantly differs from the YAR as it does enable the court to check the shipmaster decision, as we further explain below.

The CCL imposes a different standard of reasonableness on the shipmaster decision. The threshold test requires that the shipmaster only need to obtain a secondary opinion from his marine advisors and that the items are jettisoned in specific order. According to the CCL, if the shipmaster decided to jettison any items off-board, even as a precautionary measure to escape peril or harbour into safety, he would only need to obtain the advice of his veteran marine navigators and also cargo interest holders if any of them were on board the ship. Also, the master must abide by the following order of jettisoning; (1) the least necessary, (2) the heaviest load, (4) the least valuable, and then (5) items stored on the deck after seeking the advice of veteran marine navigators. This means that even the shipmaster precautionary measures may be considered a reasonable loss and thus may be included in the average adjusting, as long as the shipmaster has followed the procedure to the letter and obtained his advisors consensus to validate his concerns and proposed measures.

Moreover, the CCL lists 6 types of private losses (known as the negative list) to be excluded from what is to be commonly shared by the parties. This negative list is as follows: (1) vessel malfunction, (2) expenditure for salvaging the ship and its cargo, (3) ship mass and ropes lost due to sea perils, (4) replenishment and repair expenditure for emergency docking at refuge port, (5) sailors accommodation expenditure in case of vessel arrest, (6) losses befalling the vessel or its freight.

Conversely and to the exclusion of the aforesaid negative list, the CCL lists 13 types of general average losses beginning with pirate ransom and ending with erecting a temporary dock for the ship. All of the 13 types summarised under one definition pointed in the CCL as follows: "all the harms and damages and expenditure sustained voluntarily, for the entire duration of the event, and for the benefit and safety of all, as reported by the master and navigators".

A final comparison on the treatment of salvaged goods under KSA law is particularly important with regards to the respective duties to the preservation of cargo. For instance, the YAR allows the interested party to withhold from releasing the salvaged goods as considers the goods to be a direct lien for guaranteeing average contribution. In contrast in KSA law, the CCL prohibits such practice and only awards the interested party with a lien over the goods value post liquidation. Intuitively, the CCL also imposes a duty on the shipmaster and interested parties to preserve the cargo by liquidating remaining assets with haste before further deterioration occurs.

A Local Merchant View

The international Saudi merchant should be alert and prepare for a general average event. If the unlikely event happens, he may be required to undertake a cash deposit or a bond to release the remaining cargo. The purchase of an insurance policy with adequate coverage to the general average could save valuable recourses from being locked on account for a prolonged time. Considering that the average bond could potentially exceed the value of the original investment, marine insurance coverage is a sound investment. In return to its financial bail, the insurance company may ask the merchant to relinquish ownership rights over the salvaged goods or its sale value. If the merchant defaults, or instruct the insurance company to default, he could be at risk of losing the right to object to the settlement and perhaps worse as he may lose the right to receive the rest of his cargo.

It is strongly advised that any Saudi merchant and others taking over his rights and position should seek professional advice as soon as the general average is declared. By doing so, the Saudi merchant will be able to understand their rights and obligations from the very beginning, and will be able to be prepared to face the peril and the consequences that follow.

3
APRIL

The Civil Law Focus Group

On Monday, 3 April Al Tamimi sponsored The Civil Law Focus Group ("CLF"), an initiative of the Arab Arbitration Forum.

The Civil Law Focus Group provides a platform for arbitration practitioners and experts to meet and share their thoughts on arbitration in the MENA Region.

The event was aimed at increasing awareness amongst practitioners on features of the civil law system that is adopted by most of the MENA jurisdictions, and to create a better understanding for practitioners coming from the two legal systems, common law and civil law.

The CLF was the seventh gathering, organised on the margins of the ICC Annual MENA Conference in Dubai.

4
APRIL

Lunch Roundtable Discussion: Doing Business in Egypt

On Tuesday, 4 April Al Tamimi & Company held an interactive and informative lunch roundtable discussion which addressed Doing Business in Egypt – Opportunities and Considerations.

Given the continuous development and significant interest internationally, Egypt has become an attractive location for doing business. With increasing growth and favourable economic outlook, the lunch was a timely occasion to discuss investment opportunities.

Guest speaker Mohamed Khodeir, CEO of the General Authority for Investment and Free Zones, attended the lunch to share his valuable insights on Egypt's business potential and foreign direct investments.

The event allowed for an open discussion with senior representatives who have an interest in investing, or are currently doing business in Egypt.

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10 & 20 APRIL

Al Tamimi Healthcare Group Breakfast Briefings – Dubai and Abu Dhabi

Al Tamimi's Healthcare team held a breakfast briefing for clients in our DIFC office on Monday 10 April 2017. The third in our quarterly series of briefings, this seminar commenced with a de-brief by Al Tamimi's Andrea Tithecott on Arab Health Week and predictions for Healthcare in the Middle East in 2017. This was followed by an examination of the new Dubai tele-health services regulations by our Healthcare Senior Associate, Christina Sochacki. The goal of the regulation is to establish the basic requirements for providing tele-health services in Dubai, and to ensure patient safety and quality of care. The topic generated a lot of discussion amongst the audience members. The briefing was finished off with a presentation by Kamaljit Dosanjh from our Doha Employment team on changes in Qatar's Sponsorship Law and its impact on freedom of movement on employers and employees.

An Abu Dhabi healthcare briefing was held on Thursday 20 April featuring an informative keynote presentation by Neil Clarke from Health Authority – Abu Dhabi on their healthcare strategy. Al Tamimi's David Bowman, Real Estate Senior Associate, also examined real estate issues in the healthcare sector and the considerations for businesses in Abu Dhabi.

The next breakfast briefing is scheduled for 20 September and will be run in conjunction with Dubai Science Park.

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Christina Sochaki
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11 APRIL

Lunch with Beijing Delegation: Legal Affairs Office of People's Government

On the 11th of April, Al Tamimi & Company had the pleasure of hosting a lunch event for the Legal Affairs Office of People's Government of Beijing, the main government agency to undertake legal tasks and act as counsel for the government.

The Beijing government has put a special focus on perfecting the legal framework and exchanging ideas with other jurisdictions to facilitate the trade and investment.

The purpose of the lunch was for the delegation to meet with our Al Tamimi lawyers and gather insights on how to build a whole set of legal mechanism to attract investment and promote trade.

12
APRIL

Legal 500 General Counsel (GC) Lunch Roundtable

On Wednesday, 12 April Al Tamimi sponsored The Legal 500 General Counsel (GC) Lunch Roundtable held at Gaucho, DIFC.

The event invited a group of experienced general counsel to discuss the changing market and the role of an in-house lawyer.

The Middle East has been a changeable place in the recent past. There is no doubt that the market downturn has directly impacted the legal teams that service both domestic and international companies.

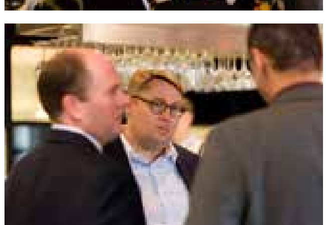
The decline in oil prices has created insecurity in the market and, according to the GCs, the effects of this insecurity have already filtered down to in-house legal teams.

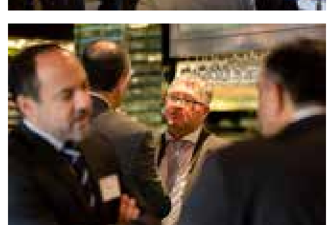
Another interesting discussion point was technology and its uses / drawbacks. Many of the GCs who attended the lunch had looked to technology for a range of in-house matters, from compliance training, dealing with changing regulations and sharing knowledge.

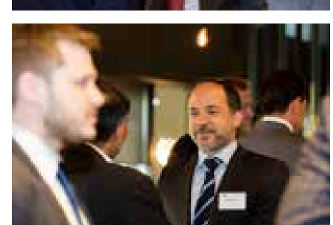
The discussion also touched on:

- What role does the GC actually play now?
- How to get budget for your team?

The lunch was a great opportunity for our Al Tamimi lawyers to re-connect with the general counsel community and discuss some of the hot topics.







25 APRIL

KSA Employment Law Essentials

On Tuesday, 25 April, we held a very insightful seminar entitled KSA Employment Law Essentials. Zahir Qayum, Senior Associate Employment - KSA discussed the following topics:

- Employment Contracts: The standard form Ministry contract and the mandatory terms and conditions of employment.
- Medical Insurance Cover: The requirement for a unified health insurance policy and the penalties for non-compliance.
- Saudisation: The costs and penalties of not complying with Saudisation quotas.
- Recruitment of Expatriates: The mandatory steps to be taken by employers before recruiting expatriate workers.
- Redundancy: The introduction of new grounds for termination under Article 74 of the Saudi Labour Law and the recent Ministerial Resolution concerning 'mass terminations' of Saudi nationals.
- Unlawful Termination Remedies: The removal of reinstatement as a remedy and the changes to compensation for unlawful termination.
- Penalties for Labour Law Violations: The increased powers of the Ministry of Labour to apply fines and sanctions.

If you would like to find out further information please email events@tamimi.com.

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Gordon Barr
Partner
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25 APRIL

Structuring Options for Businesses in Kuwait

Al Tamimi & Company's Kuwait office and the Dubai International Financial Centre (DIFC) held a joint seminar on Tuesday, 25th April 2017.

Tarek Hajjiri, Senior Vice President, DIFC started the session by giving a brief introduction to the DIFC, its offering and details on how to use DIFC companies for regional structuring and expansion.

Alex Saleh, Partner & Co - Head of Office, Al Tamimi & Company, Kuwait presented a detailed discussion on the use of DIFC companies for regional structuring and expansion and the use of DIFC SPC for structured finance, Sukuk and finance arrangements.

Alex was joined by Al Tamimi's UAE lawyers Gary Watts, Partner, Head of Corporate Commercial and Izabella Szadkowska, Partner, Corporate Commercial. Gary and Izabella discussed family business & succession plans.

The session was very informative and a great success.

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25-27
APRIL

Al Tamimi Attends the Major Event and Security Summit

Al Tamimi was a proud supporter of the Major Event and Security Summit, held in Dubai between 25 and 27 April. Also supported by Dubai Police and Dubai Events Security Committee, ME3S gave attendees the unique opportunity to explore new business opportunities and network with buyers from the likes of EXPO 2020, MOI and Abu Dhabi Police Border Security.

Steve Bainbridge, Head of Sports Law and Events Management, provided attendees with a review of the UAE Federal Law concerning Sports Facilities and Events Security, and the implication for major events.

Other speakers included experts from EXPO 2015, Leonardo, Interpol and Dubai Police.

Steve Bainbridge
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Events Management
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30
APRIL

Institute of Chartered Shipbrokers

Al Tamimi & Company in collaboration with the Institute of Chartered Shipbrokers held an informative seminar which addressed Abandoned Cargo! Duties & Liabilities – What should you do?

Our shipping lawyers Omar Omar, Partner, Head of Transport & Insurance (UAE), James Newdigate, Associate, Transport & Insurance and Tariq Idais, Associate, Transport & Insurance discussed the following topics:

1. Determining liability for abandoned cargo under different circumstances;
2. Steps parties should take – both practical and legal;
3. Consideration of available legal remedies.

It was great to host a room full of senior representatives from the shipping community.

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United Arab Emirates
Ministry of Justice

47th Year
Issue No. 614
30 Rajab 1438 H
27 April 2017

FEDERAL LAWS

1 of 2017	On anti-dumping and remedial and preventive measures.
2 of 2017	Approving the consolidated final account of the Federation and the final accounts of independent bodies for the financial year ended 31.12.14.
3 of 2017	Approving the consolidated final account of the Federation and the final accounts of independent bodies for the financial year ended 31.12.15.
4 of 2017	On consolidating the general budget of the Federation and the ancillary budgets for its independent bodies for the financial year 2017.

FEDERAL DECREES

27 of 2017	On conferring the rank of minister.
28 of 2017	On the retirement of an official at the UAE President's Private Department.
29 of 2017	On the termination of the duties of the UAE non-resident Ambassador to the Republic of Mauritius.
30 of 2017	On the appointment of a UAE non-resident ambassador to the Bolivarian Republic of Venezuela, Jamaica and the Republic of Haiti.
31 of 2017	On the ratification of the Unified VAT Agreement for the Cooperation Council for the Arab States of the Gulf.
32 of 2017	On the ratification of the Unified Selective Excise Tax Agreement for the Cooperation Council for the Arab States of the Gulf.
33 of 2017	On the ratification of Agreement for the Avoidance of Double Taxation & Prevention of Fiscal Evasion with respect to Taxes on Income and Capital between the UAE and the Republic of Kosovo.
34 of 2017	On the ratification of Agreement for the Avoidance of Double Taxation & Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains between the UAE and the Federal Republic of Nigeria.
35 of 2017	On the ratification of the Agreement between the UAE and the Republic of Armenia on the Encouragement and Reciprocal Protection of Investments.
36 of 2017	On the ratification of the Agreement between the UAE and the United Mexican States on the Encouragement and Reciprocal Protection of Investments.
37 of 2017	On the ratification of the Agreement between the UAE and the Republic of Kosovo on the Encouragement and Reciprocal Protection of Investments.
38 of 2017	On the ratification of the Agreement between the UAE and the Federal Republic of Nigeria on the Encouragement and Reciprocal Protection of Investments.
39 of 2017	On the ratification of the Agreement between the UAE and the United Nations, represented by the UN Entity for Gender Equality and the Empowerment of Women, on the establishment of a UN Women liaison office for the GCC.

40 of 2017	On the secondment of an official to fill the post of Director General of the National Media Council.
41 of 2017	On the promotion of an official at the Federal Transport Authority – Land & Maritime.

DECISIONS OF THE UAE PRESIDENT

2 of 2017	On the appointment of the Secretary General of the Federal National Council.

REGULATORY DECISIONS OF THE CABINET

10 of 2017	UAE Regulation on the Control of Hazardous Substances in Electrical and Electronic Equipment.

MINISTERIAL DECISIONS

- From the Ministry of the Interior:

213 of 2017	Amending the Regulation for Cabinet Resolution No. (24) of 2012 regulating civil defense services in the UAE, promulgated by Ministerial Decision No. (505) of 2012.

- From the Ministry of Community Development:

79 of 2017	On the registration of the UAE Association for Management Consultants and Trainers.
80 of 2017	On the registration of the Himaya Foundation for Women and Children.
81 of 2017	On the registration of the UAE Positivity and Happiness Association.

- From the Ministry of Economy:

437 of 2016	Announcing a revision of the Articles of Association of Emaar Industries & Investments PJSC.
142 of 2017	Announcing a revision of the Articles of Association of Awtad PSC.
143 of 2017	Announcing a revision of the Memorandum and Articles of Association of Shuweihat Asia Power Company PSC.
227 of 2017	Announcing a revision of the Memorandum and Articles of Association of Arabian Power Company PJSC.
241 of 2017	Announcing the incorporation of Sweihan Photovoltaic Power Company PSC.

ADMINISTRATIVE DECISIONS

- From the Insurance Authority:

9 of 2017	Regulations on the licensing and registration of actuaries and regulation of their operations.
10 of 2017	On the licensing of an insurance company.

- From the Telecommunications Regulatory Authority:

13 of 2017	On the fees for data link connections to the site of the connected party and wholesale leased line services.

- From the Securities & Commodities Authority:

39/R.T of 2017 On the investment policy of the open-ended public mutual fund.

- Certificate of approval of amendment of the Articles of Association of National Petroleum Construction Company PJSC.
- Certificate of approval of amendment of the Articles of Association of Emirates Insurance Company PSC.
- Certificate of approval of amendment of the Articles of Association of Ajman Bank PJSC.
- Certificate of approval of amendment of the Articles of Association of SHUAA Capital PSC.
- Certificate of approval of amendment of the Articles of Association of Commercial Bank of Dubai PSC.
- Certificate of approval of a merger involving National Bank of Abu Dhabi PSC and First Gulf Bank PJSC.
- Certificate of approval of amendment of the Articles of Association of Abu Dhabi Islamic Bank PJSC.
- Certificate of approval of incorporation of Mubadala Investment Company PJSC (Mubadala).
- Certificate of approval of amendment of the Articles of Association of National Bank of Umm Al Qaiwain PSC.
- Certificate of approval of amendment of the Articles of Association of National Bank of Abu Dhabi PJSC.

About Us

Al Tamimi & Company is the largest law firm in the Middle East with 17 offices across 9 countries. The firm has unrivalled experience, having operated in the region for over 25 years. Our lawyers combine international experience and qualifications with expert regional knowledge and understanding.

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

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

17 offices

9 countries

56 partners

330 lawyers

670 staff

45 nationalities

Our Accolades

Our Practices

- Arbitration
- Banking & Finance
- Capital Markets
- Commercial
- Construction & Infrastructure
- Corporate
- Corporate Structuring
- Education
- Employment
- Family Business & Governance
- Financial Crime & Sanctions
- Financial Services Regulation & Enforcement
- Healthcare
- Hospitality
- Insurance
- Intellectual Property
- Litigation
- Mergers & Acquisitions
- Projects
- Real Estate
- Regulatory
- Sports & Events Management
- Technology, Media & Telecommunications
- Transport

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التميمي و مشاركوه
AL TAMIMI & CO.

Construction and Infrastructure

Free Workshop series 2017

Our philosophy has always been to showcase our capabilities through willingly sharing our knowledge and vast and varied expertise.

We aim to keep our clients informed of the latest in legal updates. We have prepared a series of workshops free of charge for your benefit. These workshops can be tailored to your business needs and interests. If you wish to get your team together, we can deliver one of these workshop at your office.

Speaker:

Scott Lambert

Regional Head of Construction & Infrastructure
Al Tamimi & Company
s.lambert@tamimi.com

Topics backward

Registration

To organise a workshop, please choose your preferred topic and fill in the required information; and send to:

Nitya Malik
Email: n.malik@tamimi.com
Fax: +971 4 364 1777

Full Name

Position

Company Name

Phone

Email Address
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Construction & Infrastructure Breakfast Seminars: Abu Dhabi

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

Upcoming sessions include:*

Topic: Construction Arbitration in the GCC – Practical tips and Latest Developments — **11 October 2017**

The seminar will cover an overview of key issues such as Where to arbitrate, Choosing arbitrators, Managing the evidence, and Dealing with experts

Speaker: John Gaffney
Senior Associate /j.gaffney@tamimi.com

Topic: Time and claims — **15 November 2017**

What is your right to claim, Your right to reject a claim, What you can do to protect your rights

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

** Please note that the dates are subject to change*

For more information, please contact Scott Lambert, Regional Head of Construction & Infrastructure, Al Tamimi & Company
s.lambert@tamimi.com

Construction & Infrastructure Breakfast Seminars: Dubai

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

Upcoming sessions include:*

Topic: Contract preparation – the first key to a successful project — **22 August 2017**
Choosing the risk allocation, FIDIC Golden Principles, and Tips and Traps.

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

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Topic: Construction Arbitration in the GCC – Practical tips and Latest Developments — **17 October 2017**
The seminar will cover an overview of key issues such as Where to arbitrate, Choosing arbitrators, Managing the evidence, and Dealing with experts

Speaker: Justin Ede
Senior Associate / j.ede@tamimi.com
Laura Adams
Associate / l.adams@tamimi.com

Topic: Time and claims — **05 December 2017**
What is your right to claim, Your right to reject a claim, What you can do to protect your rights

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

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** Please note that the dates are subject to change*

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