Issue 322 | September 2019

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LAW UPDATE

Latest Legal News and Developments from the MENA Region

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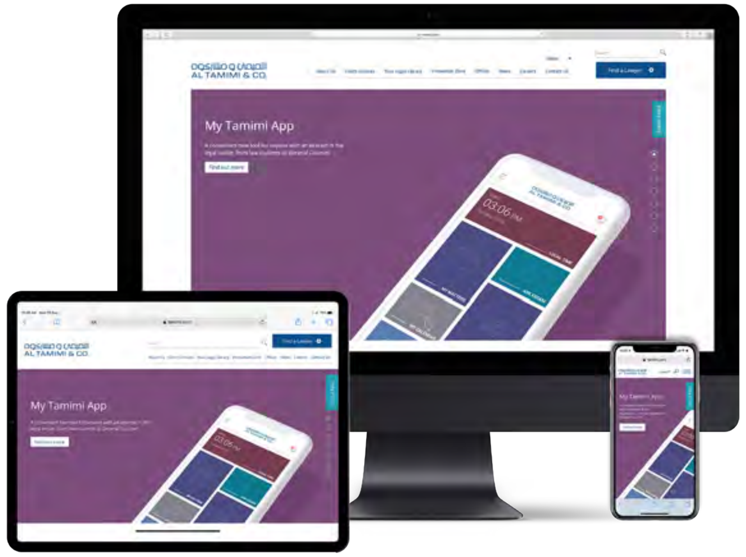

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In this Issue

Welcome to the September 2019 edition of Law Update.

This month's special Focus sections look to developments in a variety of practice areas in the Kingdom of Saudi Arabia ('KSA') as well as our expertise in Transport & Insurance across our offices in the Region.

Like many other Middle Eastern countries, Saudi Arabia continues to focus on attracting foreign investment with a view to alleviating its reliance on its diminishing oil revenues. The opportunity to invest in Saudi Arabia's healthcare system has now opened up and as of March 2019, foreign companies are permitted to own and manage healthcare institutions (page 84). Without a doubt KSA is one of the key players in the TMT sector in the Middle East and our team in the Saudi office continues to have its finger on the pulse of the most up-to-date technology and all laws and regulations related thereto. On page 114, our Saudi experts look at licensing satellite based telecommunications as well as media licensing and media regulation (page 76) both of which highlight the importance of regulation, transparency and accountability in making Saudi Arabia an attractive option for foreign investment and fertile ground for developing 21st Century technology.

Moving to our Transport & Insurance teams across the Region, it is interesting to note the rapidly growing appreciation of the importance of modern-day infrastructure in the region. On page 60, our UAE experts run through the planned rail projects for the GCC with a particular emphasis on the impact such projects will have on passengers, industry and the environment. Turning to the high seas, we look at what happens when the ownership of an arrested ship is transferred to new owners, focusing on where the liabilities and responsibilities fall (page 8). The nitty gritty procedures involved in the sale of a ship and what to expect at the closing meeting of such a sale are discussed at page 44 whilst key tips on minimising demurrage fees are offered on page 52.

In this month's Judgment section, our Qatar office looks at the appointment of arbitrators under the new Arbitration Law whilst also confirming courts' limits in so deciding (page 16). Our Dubai practitioners provide a bird's eye view of the enforcement and recognition of judgments (page 12) across the Region whilst, at the same time, focusing on those Middle East countries that choose to adopt accepted, international convention standards.

I hope you enjoy this expansive issue. Should you have any queries, suggestions or feedback, please do not hesitate to reach out.

Best regards,

Husam Hourani

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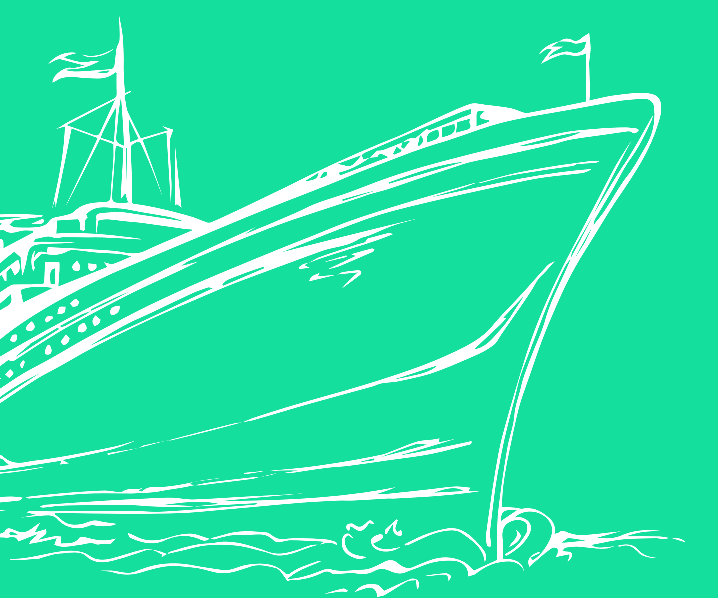
Arresting a Ship in the UAE: When the Ownership of an Arrested Ship is Transferred to New Owners



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 info@tamimi.com.

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This article is an overview of a Sharjah Court of First Instance judgment in relation to ship arrests for unpaid bunker supply charges in circumstances whereby the arresting party was the ships' former owner as well as the physical bunker supplier of the said ships.

The question before the Court was whether the former owner of the ships was entitled to arrest the ships as the bunker supplier, even though the bunkers were supplied to the ships upon the bareboat charterer's request while the former owner owned the ships and ownership of the ships changed after supplying the ships with the bunkers.

In this matter, Al Tamimi and Company represented the ships' former owner/ physical supplier.

Background

In 2013, a bunkering company (the 'Former Owner') chartered four of its ships to a shipping company (the 'Charterer') under four bareboat charter-party agreements until 14 June 2014. During the charter-party agreements, the Former Owner had been supplying the four ships with bunkers upon the Charterer's request.

On 16 June 2014, the Former Owner sold the four ships to a shipping company (the 'New Owner').

On 24 June 2014, the New Owner chartered the four ships to the same Charterer under four bareboat charter-party agreements for a period of three years.

After selling the ships, the Former Owner supplied the four ships with bunkers on 16, 17, 19 and 22 June 2014 while the ships were in

the New Owner's possession and continued to supply the ships with bunkers upon the Charterer's request.

The value of the bunkers that were supplied by the Former Owner before the ships' sale as well as after the ships' sale was in the region of US$ 2,583,46 ('Bunker Price'). However, the New Owner and the Charterers did not pay the Bunker Price.

The Nature of the Claim

In July 2015, the Former Owner (the 'Claimant') obtained arrest orders from the Sharjah Summary Judge over the four ships for the unpaid Bunker Price. The arrest orders were executed successfully over three out of the four ships (the fourth ship had left the relevant port before the arrest could be executed).

The Claimant then brought a substantive claim before the Sharjah Court of First Instance against the New Owner (the 'First Defendant') and the Charterer (the 'Second Defendant') seeking the Bunker Price, validation of the arrest order against the ships, and legal interest at the rate of 12 percent as of the date of maturity until the date of full payment.

The First Defendant's Arguments before the Court of First Instance

The First Defendant alleged before the Court that it does not have a legal capacity to be sued in this case on the following grounds:

1. the Claimant supplied the four ships with bunkers upon the Second Defendant's request;
2. there was no contractual relationship between the Claimant and the First Defendant in relation to the supplied bunkers;
3. the Bunker Price was incurred before the ownership of the four ships was transferred to the First Defendant;
4. the Clamant hid material information from the First Defendant, as it did not inform the First Defendant about the quantity of bunkers that was supplied to the ships before the ships' sale. In other words, the Claimant deceived/cheated the First Defendant; and
5. although the Claimant's debt is ranked as a priority right under Maritime Law, it had expired upon the sale of the ships according to Article 92 of the Maritime Commercial Law.

Therefore, the First Defendant petitioned the Court to dismiss the claim for lack of capacity and/or evidence.

Moreover, the First Defendant filed a counterclaim against the Claimant and Second Defendant for the ships' wrongful arrests seeking damages in the sum of US$ 20,000,000.

The Second Defendant's Arguments before the Court of First Instance

The Second Defendant argued that the claim against it should be dismissed, as the charter-party agreements included an arbitration clause and there is already an arbitration proceeding ongoing between the First and Second Defendants in relation to the charter-party. Therefore, the Sharjah Court does not have the jurisdiction to decide upon the matter.

Alternatively, the Second Defendant argued that the First Defendant should be liable for the Bunker Price, as the bunkers were supplied to its ships and under Maritime Commercial Law ships amount to collateral for the amount owed.

The Claimant's Responses to the Defendants' Arguments

The Claimant argued that the arguments of the Defendants should be ignored for the following reasons:

1. the arbitration defence must be refused as this dispute relates to the unpaid bunkers supply charges and not the charter-party agreements;
2. the arrest order over the ships complied with Articles 84, 91, 115, 117, and 255 of the Maritime Commercial Law;
3. the ships follow their debts to any hand under Article 90 of the of the Maritime Commercial Law;
4. the New Owner (the First Defendant) did not follow the requisite procedures

What was interesting in this judgment is that the Former Owner was able to arrest the ships for some debts, which arose while it was the owner of the ships, as the ships were under bareboat charter-party agreements at the time of the bunkers supply. Furthermore, the Court refused the counterclaim for wrongful arrest against the Former Owner.

set out in Article 92 of the Maritime Commercial Law after buying the ships therefore, it could not argue that the priority right of the ship had expired based on Article 92 of the Maritime Commercial Law. This Article requires the new buyer (in this case the First Defendant) to publish a resume of the ships' contracts of sale, which should include the price, the name and residence of the purchaser. This publication must be made twice with an interval of eight days, in a widely circulating local newspaper.

5. the Claimant's debts are deemed as a maritime debt under Article 115 of the Maritime Commercial Law, and therefore the arrest order over the ships are lawful. Article 115/i/k of the Maritime Commercial Law provides:

   "1. it shall be permissible to effect a preservatory arrest against a vessel by an order of the civil court having jurisdiction. Such an arrest shall not be made save for the satisfaction of a maritime debt.(i) Supplies of products or equipment necessary for the utilization or maintenance of the vessel, in whichever place the supply is made. (k) Sums expended by the master, shippers, charterers or agents on account of the vessel -or on account of the owner thereof.";

6. even if the ships were chartered to the Second Defendant under bareboat charter-party agreements and it alone is responsible for the Bunker Price, the ships should guarantee their debt and the Claimant has the right to arrest the ships that used and exploited the supplied bunkers based on Article 117 of the Maritime Commercial Law which provides:

   "If the vessel has been chartered to a charterer together with the right of navigational management thereof, and he alone is responsible for a maritime debt connected therewith, the creditor may arrest the said vessel or any other vessel owned by the same charterer, and he may not, in respect of that debt, arrest any other vessel of the disponent owner";

7. the Second Defendant shall indemnify the First Defendant against any action taken against it by the Claimant attributable to the use of the ships according to Article 255 of the Maritime Commercial Law'; or

8. alternatively, the Claimant supplied the four ships with bunkers on 16, 17, 19 and 22 June 2014 while the ships were in the First Defendant's possession. Moreover, the Claimant supplied the ships with bunkers upon the Charterer's request, after selling the ships. In addition, the First Defendant was fully aware of the bunkers that were supplied to the ships before their sale.

Therefore, the arrest orders over the ships were lawful. The ships must guarantee their debts regardless of who requested the bunkers, hence the Defendants' arguments must be ignored and the counterclaim must be dismissed.

The Court of First Instance's Judgment

I. In relation to the Claimant's Claim:

The Court found that the arrest orders over the ships complied with Articles 84, 115, 117, 254 of the Maritime Commercial Law and were therefore lawful. In addition, the Court held that since the bunkers were supplied to the ships upon the Second Defendant's request and there was no contractual relationship between the Claimant and the First Defendant in relation to the supplied bunkers, the First Defendant should not be liable for the Bunker Price. Accordingly, the Court decided the following:

a. to dismiss the claim against the First Defendant, due to the lack of any contractual relationship between the Claimant and the party named the 'First Defendant';
b. to hold the Second Defendant liable to pay to the Claimant the sum of US$ 2,583,464, plus legal interest at the rate of five percent as of the date of the claim, until the full payment is made, as well as the legal costs; and
c. to validate the arrest orders over the ships.

II. In relation to the Counter Claim

The Court decided to dismiss the counterclaim against the Claimant because the arrest orders of the ships complied with the Maritime Commercial Law. Furthermore, the Court found that since the counterclaim against the Second Defendant related to another arbitration proceeding between the First and the Second Defendants in relation to the charterparty agreements, the counterclaim should be dismissed against the Second Defendant.

The Court of Appeal and the Supreme Court Judgments

The First Defendant filed appeals before the Court of Appeal and the Supreme Court challenging the Court of First Instance's judgment. All the parties stressed their previous arguments before both higher Courts. Both the Court of Appeal and the Supreme Court upheld the Court of First Instance's judgment, which was issued in relation to the Claimant's claim. However, the Court of Appeal revoked the Court of First Instance's judgment in relation to the counterclaim and held the Second Defendant liable to pay the First Defendant the sum of AED 3,000,000 in damages since the ships were lawfully arrested by the Claimant, and consequently the Second Defendant was liable to pay the Bunker Price.

Comment

This judgment emphasises the fact that ships could always be liable for bunker supply charges regardless of who requested the bunkers for the ships, be it the shipowner/manager/operator/charterer/ship agent.

What was interesting in this judgment is that the Former Owner was successful in arresting the ships for certain debts, which arose while it was the owner of the ships, and the ships were under bareboat charter-party agreements at the time of the bunkers supply. Furthermore, the Court refused the counterclaim for wrongful arrest against the Former Owner.

Moreover, this judgment confirms the fact that if the ship is arrested for charterers' debts, the ship owners will be entitled to file a claim against the charterers for all losses and damages that they suffered during the ship arrest.

Al Tamimi & Company's Transport & Insurance team regularly advises on ship arrest claims. For further information please contact Omar Omar (o.omar@tamimi.com) or Tariq Idais (t.idais@tamimi.com).

Bound by Conventions: The Enforcement of Judgments and the Service of Proceedings of the Courts of Saudi Arabia, the Dubai International Financial Centre and the Abu Dhabi Global Market

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As the Kingdom of Saudi Arabia ('KSA') moves towards fulfilment of its Vision 2030 programme, the country's legal system is increasingly becoming connected to the international judicial order, including to the UAE's common law courts in the Dubai International Financial Centre ('DIFC') and the Abu Dhabi Global Market ('ADGM').

The DIFC Courts have recently recognised and enforced a banking decision made by a Saudi quasi-judicial tribunal, the Committee for the Settlement of Banking Disputes (part of the Saudi Arabia Monetary Agency), brought to the DIFC for enforcement against the assets of a branch of a foreign bank in the free zone. The process confirmed the conventional rules of enforcement of a Saudi judgment, order or decision in the DIFC Courts. This article explains several recent developments in the relationship between KSA and the common law jurisdictions concerning the enforcement of judgments and the service of proceedings.

The Riyadh and GCC Conventions: linking KSA and the UAE

There are two key international agreements governing enforcement and service in the region to which both Saudi Arabia and the UAE are parties: the 1983 Riyadh-Arab Agreement for Judicial Co-operation (the 'Riyadh Convention') and the 1996 Gulf Co-operation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications (the 'GCC Convention'). The Riyadh and GCC Conventions cover many of the same topics, such as the recognition and enforcement of civil judgments, rogatory assistance by domestic courts in aid of foreign proceedings, and the service of legal documents including court proceedings.

The main difference between the two instruments is in their scope. The Riyadh Convention has 18 state signatories, from across the Arab world (the UAE, Jordan, Bahrain, Tunisia, Algeria, Djibouti, Saudi Arabia, Sudan, Syria, Somalia, Iraq, Oman, Palestine, Qatar, Kuwait, Lebanon, Libya, Morocco, Mauritania and Yemen). The GCC Convention, by contrast, is limited to just the six members of the GCC: the UAE, Bahrain, Saudi Arabia, Oman, Qatar and Kuwait. As a result, many Arab parties, lawyers and judges are more familiar with the operation of the former Convention over the latter. Both Conventions are ratified in the UAE and so deemed part of the applicable domestic laws of the state.

Article 1 of the GCC Convention states that *"each of the GCC countries shall execute the final judgments issued by the courts of any member state in civil, commercial and administrative cases…"*. In order for a judgment to be enforceable, the originating court must have had jurisdiction in accordance with the definition in the Convention. The various jurisdictional gateways are set out in Article 4 and are as follows:

a. domicile or residence of the defendant in the jurisdiction;

b. disputes relating to the activity of a branch in the jurisdiction;

c. disputes about the performance of a contract which took place or should have taken place in the jurisdiction;

d. disputes about acts which occurred in the jurisdiction;

e. the existence of a jurisdiction agreement; and

f. submission to the jurisdiction by defending the action.

The GCC Convention also sets out, at Article 2, a number of grounds on which enforcement may be contested. The grounds for rejection of enforcement, in full or in part, include:

a. violation of the provisions of the Shari'ah, the constitution or public order in the state where the judgment is to be executed;

b. issuance of a judgment in the absence of the defendant and without proper notification to the judgment debtor of the claim or the judgment;

c. Res judicata or issue estoppel with any judgment rendered for execution in any GCC state;

d. sovereign or state immunity (including against officials for acts done by such officials during or only due to the performance of the duties of their job); and

e. conflicts with international conventions or protocols applicable in the state where execution is required.

However, the merits of the claim may not be reviewed, as Article 7 makes clear: *"The task of the judicial authority of the state where the judgment is required to be executed shall be limited to confirming whether the judgment fulfils the requirements as provided by this agreement, without discussing the subject matter…"*

The Riyadh Convention follows a similar pattern. Article 25(b) sets out the general power and obligation to enforce judgments, orders and decisions *"regardless of nomenclature made in pursuance of judicial or jurisdictional procedures of the courts or any competent authority of any party"*:

Each contracting party shall recognise the judgments made by the courts of any other contracting party in civil cases including judgments related to civil rights made by penal courts and in commercial, administrative and personal statute judgments having the force of res judicata and shall implement them in its territory in accordance with the procedures stipulated in this Part, if the courts of the contracting party which made the said judgments are competent under the provisions of the rules of jurisdiction in force in the requested party, and if the legal system of the requested party does not retain for its courts or the courts of another party the exclusive competence to make such judgments.

KEY STATISTIC

The UAE and KSA are parties to two main agreements governing the reciprocal recognition and enforcement of judgments: the 1983 Riyadh Convention and the 1996 GCC Convention

The Riyadh Convention requires that the originating court has jurisdiction in accordance with the laws of the enforcing state, and sets out the circumstances in which the originating court shall be considered to have jurisdiction. A broad range of jurisdictional gateways are set out at Articles 16 and 26 to 29 of the Riyadh Convention, similar to, but slightly wider in scope than, the provisions of the GCC Convention on jurisdiction. Article 32 mirrors Article 7 of the GCC Convention and sets out that the enforcing court may not review the merits of the decision when deciding if the judgment to be enforced complies with the required provisions. The exceptions to enforcement at Article 25(c) are the same as Article 2(d) and 2(e) of the GCC Convention, with the addition of cases of "*Provisional and precautionary measures and judgments made in cases of bankruptcy, taxes and fees*". The exceptions at Article 30 of the Riyadh Convention mirror those at Article 2, with the specific additions of failures to take into consideration the law of the requested party applicable to legal representation of ineligible persons or persons of diminished eligibility.

Enforcement in the DIFC and ADGM

Although the civil and commercial laws of the UAE are not generally applicable in the DIFC or ADGM, the terms of treaties that form part of the law of the UAE are still binding within both free zones. In the DIFC, Article 24 of the DIFC Court Law (DIFC Law No. 10 of 2004) provides that the DIFC Court of First Instance has jurisdiction to ratify any judgment, order, or award of any recognised foreign court, and notes that, where the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards, the Court of First Instance shall comply with the terms of that treaty.

In the recent enforcement action, the DIFC Court made a number of findings on the application of the GCC Convention in the context of the enforcement of a decision emanating from a Saudi tribunal:

- the "public order" exception to enforcement under Article 2(A) is narrow and limited to those circumstances that would violate the public policy of the UAE. It is against the public policy of the UAE to refuse to enforce a final judgment of another GCC member, as opposed to granting a stay of execution;
- the bar by which a contravening public policy argument will succeed and result in an outright refusal to enforce a final GCC judgment is necessarily quite high;
- a foreign judgment should be enforced in the DIFC Courts even when countervailing arguments over comity and lawsuits pending elsewhere are raised in respect of third country courts, when those arguments do not outweigh the significant public policy considerations in favour of enforcement;
- issues of fraud that are presented to the original court are likely to be captured by the scope of Article 7 and the prohibition against reviewing the merits of the dispute incumbent on the enforcement court;
- it is inappropriate to re-open the assessment of allegations such as fraud that would require delving into the merits of the dispute as assessed by the original court; and
- the requirement to enforce a final judgment of a GCC member state is a considerably strong public policy. Factual analyses that show only a risk of offending principles of comity or illegality in the third country courts may not cross that threshold.

The ADGM Courts

The rules of the ADGM Courts on the enforcement of foreign judgments appear, at first blush, to be more restrictive than the DIFC Courts. The DIFC Courts do not require reciprocity of enforcement before enforcing judgments sent from another jurisdiction. The ADGM Courts, on the other hand, do require reciprocity to be established. For the purposes of enforcing a Saudi judgment, this requirement is satisfied by Article 170 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, which states that, where the UAE has entered into an applicable treaty with a foreign country for the mutual recognition and enforcement of judgments, the ADGM Courts shall comply with the terms of such treaty and recognise and enforce judgments rendered by that foreign country. In the case of judgments rendered by Saudi Courts, the requirement for reciprocity is established by the GCC and Riyadh Conventions. There is no bilateral arrangement between the Saudi Courts and the ADGM or the DIFC.

Service of Proceedings

In a recent dispute concerning the enforcement of an arbitral award, the DIFC Courts Registry worked with the Courts of Dammam to effect the service of DIFC proceedings in Saudi in accordance with Saudi law, having previously successfully effected service in the Kingdom through the Courts of Riyadh. Based on these experiences, the process for service in Saudi Arabia has been confirmed by the Registry. The party seeking to serve outside of the DIFC or Dubai must firstly file an application and pay a filing fee of US$ 300. The Registry staff require two complete copies of the materials to be served, which are to be certified by the DIFC Courts. Accompanied by a letter from the Registry setting out why the documents should be served, the copies are sent to the court registry in the appropriate district in Saudi Arabia. The Saudi Courts stamp both sets of documents and serve one set on the Saudi address. The other set is returned to the DIFC Courts with a letter confirming that service has or has not been carried out. The DIFC Courts have built a network of personal relations with court staff in KSA to further the mutual and reciprocal process and a recent process of service took less than two weeks to complete.

Enforcement of DIFC and ADGM Proceedings in KSA

Not only are Saudi Court judgments enforceable in the DIFC and ADGM, the corollary should also be true, and the Riyadh and GCC Conventions should provide for enforcement of DIFC and ADGM judgments in KSA, subject to local rules. The official DIFC Courts Guide to Enforcement makes clear that "On the premise that the DIFC Courts are the courts of a GCC member state, other GCC nations should enforce DIFC Courts judgments in accordance with Article 1 of the Convention, and should not distinguish between them and other judgments emanating from the Dubai Courts". As far as we are aware, to date no DIFC or ADGM Court judgments, orders or decisions have been taken to Saudi Courts for

“Close international ties exist between judges of the ADGM and DIFC and the judiciary in KSA.

It is becoming easier to serve foreign proceedings and to recognise and enforce foreign judgments in KSA and the UAE's common law courts.

recognition and enforcement. The DIFC Courts Enforcement Guide recognises the pragmatic reality of seeking to enforce a DIFC judgment in a foreign jurisdiction like Saudi Arabia where the receiving courts may not be familiar with the establishment and process of the sending courts. Judgment creditors may consider obtaining recognition of the judgment or order in the Dubai or Abu Dhabi Courts first before going on to seek enforcement outside the UAE.

Given the DIFC's success in obtaining service of proceedings in KSA by the district courts, this position may change, particularly in light of the recent enforcement of a French Court money judgment successfully executed against assets in KSA. In the absence of a bilateral or multilateral judicial co-operation treaty between KSA and France, the judgment creditor supplied evidence from French lawyers that the French Courts had enforced Saudi Court judgments in the past and the requirement of reciprocity was established. This may provide not just a legal precedent but also a procedural pathway for the future enforcement of common law judgments, orders and decisions.

Conclusion

These recent developments show that it is becoming easier to serve foreign proceedings and enforce foreign judgments in KSA and the UAE's common law courts. This should not be a surprise: close international ties exist between judges of the ADGM and DIFC Courts and the judiciary in KSA. Justice Ali Al Madhani of the DIFC Courts, for instance, has a specific remit to be involved with initiatives that help foster inter-regional relations with judiciaries in countries such as Saudi Arabia, with a view to encouraging knowledge exchange, best practices, and training, *"and in some cases, enforcement services"*. In future, judgments from the ADGM and DIFC Courts may be as portable and enforceable in KSA as UAE-seated arbitral awards are under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The International Litigation Group has experience of advising on the enforcement, in the UAE, of judgments and orders made by Saudi tribunals and the enforcement of Saudi-seated arbitral awards. For further information, please contact Peter Smith (p.smith@tamimi.com), Peter Wood (p.wood@tamimi.com) or Rita Jaballah (r.jaballah@tamimi.com).

Drawing the Line: The Finality of the Appointment of Arbitrators by the Local Court in Qatar

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Introduction

The arbitration provisions of the Civil and Commercial Procedures Law (the 'CCPL') allow the parties of an arbitration agreement to seek the assistance of the domestic court for the appointment of arbitrators, where one party or the other fails to nominate an arbitrator. However, recently, the new Arbitration Law, Law No. 2 of 2017 (the 'New Arbitration Law') introduced a similar mechanism, but with a few procedural differences.

In a case brought before the Qatari court, the Appellant in this case, initially the Defendant, argued for the application of the New Arbitration Law as the case was filed after the Law came into force. In addition, the Appellant challenged the jurisdiction of the court on the basis that the International Chamber of Commerce ('ICC') Arbitration Rules were applicable, according to which, the ICC court shall have the jurisdiction to appoint arbitrators if a party fails to nominate an arbitrator. The case went to Cassation, whereby the Court of Cassation issued a judgment setting out two important principles; the first principle concerning the pro-active effect of the New Arbitration Law; and the second principle drawing a clear line concerning the finality of court decisions on the appointment of arbitrators.

Background

Facts

The parties to the case had entered into an agreement which contained an ICC Arbitration clause. The Claimant had brought an action before the Court of First Instance pursuant to the arbitration provisions of the CCPL. The Claimant sought the assistance of the Court of First Instance under Article 195 of the CCPL regarding the appointment of arbitrators, on the basis the Defendant failed to nominate an arbitrator. The Defendant argued that the CCPL was not applicable to the dispute, but rather, the New Arbitration Law should be adopted. Further, it argued that pursuant to the ICC rules, the ICC court should have the jurisdiction to appoint arbitrators and not the domestic courts.

The Court of First Instance ruled in favour of the Claimant and appointed the members of the arbitration tribunal. The Defendant appealed the ruling on the basis that the Court of First Instance neglected the argument relating to jurisdiction (in that it was the ICC Court's jurisdiction regarding the appointment of arbitrators).

The Court of Appeal decided that the decision of the Court of First Instance was sound pursuant to Article 195 of CCPL. The Appellant challenged the decision before the Court of Cassation, re-iterating its position on the applicability of the New Arbitration Law. The Appellant also argued that even if it is found that the decision to appoint an arbitrator was not subject to appeal under Article 195 of the CCPL, the argument on jurisdiction, which was neglected by the Court of First Instance is open to appeal as a matter of law.

Judgment of the Court of Cassation

The Court of Cassation confirmed that the CCPL was applicable to the dispute however, it overturned the ruling of the Court of Appeal on the basis that the Court of Appeal, by disregarding the jurisdictional argument submitted by the Appellant, had erred on a legal point in its ruling.

The Court of Cassation stated, first and foremost, that the scope of the New Arbitration Law is limited to matters occurring after it had come into force. As the arbitration agreement was concluded before the implementation of the New Arbitration Law, then the CCPL remains the law applicable to the arbitration agreement in question.

However, the Court of Cassation found that the finality of the decision regarding the appointment of arbitrators only extends to that particular part of the judgment. It does not, in any way, affect the parties' right to appeal other elements of the judgment, such as possible neglect by the courts in question to consider legal arguments that were presented in the appeal.

The Court of Cassation determined that the appeal was based on a dispute over the jurisdiction of the Court of First Instance and not solely on a dispute regarding jurisdiction regarding the nomination of the arbitrators. The Court of Appeal had failed to consider the same, rendering the decision of the Court of First Instance open to appeal under the general rules of the CCPL. Consequently, it was found that the Court of Appeal erred on a point of law in deciding that the judgment/nomination was final, leading to its ruling being overturned.

Conclusion

The above-explored judgment is of significant importance as it is one of only a few judgments that have been issued by the Court of Cassation since the introduction of the New Arbitration Law. In this case, the Court of Cassation distinguished between the different elements of the dispute and the grounds for the appeal. This distinction highlighted the limitations on the finality of the court's decision when it comes to the appointment of arbitrators. The Cassation Court's finding separated the case into two elements: the decision of the Court of Appeal as to the appointment of arbitrators and the *jurisdiction* of the Court of Appeal. It was found that while the Court of Appeal should have the last word when it comes to the appointment of arbitrators, whether or not the court had the jurisdiction to do so in the first place is a matter of law and is hence subject to appeal.

Thus, while a decision of the competent Court of Appeal to appoint an arbitrator cannot be appealed, the decision can be challenged on the basis that the Court of Appeal, in such a case, did not have the jurisdiction to carry out such an appointment.

While the Court of Cassation concluded that the CCPL was applicable to the proceedings at hand, the principles established in the judgment may still be relevant and applicable to cases governed by the New Arbitration Law.

Al Tamimi & Company's Litigation and Arbitration teams regularly advise on the enforcement of arbitration awards and judgments. For further information please contact Hani Al Naddaf (h.alnaddaf@tamimi.com).

Implied Consent in Financial Transactions

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Most commercial contracts require explicit consent before undertaking or not, certain actions. But what is to be done when the situation demands the other party's consent and it is not provided? Is it possible to assume from a person's action or inaction that consent is/was provided to complete a transaction? This article seeks to address these questions by taking an example of a typical murabaha transaction.

Provisions under UAE Law with respect to Implied Consent

UAE Federal Law No. 5 of 1985 issuing the Civil Transactions Law ('Civil Code') and the Federal Law No. 18 of 1993 issuing the Commercial Transactions Law ('Commercial Code') set out the provisions relating to consent.

i. ***Article 125 of the Civil Code***

> *"a contract is the coming together of an offer made by one of the contracting parties with the acceptance of the other, together with the agreement of them both in such a manner* ***as to determine the effect thereof on the subject matter*** *of the contract, and* ***from which results an obligation upon each of them with regard to that which each is bound to do for the other.***",

The above provision sets out the requirements of a valid contract. Based on this provision, an underlying contract should lay out the terms of a subsequent action inaction which is required to make effective the transaction contemplated in the underlying contract.

ii. Article 133 of the Civil Code

> *"The **form of acceptance having the purport of a bare promise will give rise to a contract** by way of binding promise if such is the intention of both parties."*

Based on the above, where the bare promise to do, or not, an act will constitute the offer and acceptance, giving rise to a binding contract, where that is the intention of both parties.

iii. Article 135 of the Civil Code

> *"(1) A person who remains silent shall not be deemed to have made a statement, but **silence in the face of a circumstance in which a statement is called for shall be regarded as an acceptance.***
>
> *(2) In particular, **silence shall be deemed to be an acceptance if there has been a prior dealing between the contracting parties and the offer is related to such dealing** or **if the offer will bring about a benefit to the person to whom it is made.**"*

Based on Article 135 (1), in a situation (pursuant to a valid contract), where a customer has agreed to do something at a later date or on the happening of an event, but upon such date or on the happening of the event remains silent, it would amount to "silence in the face of a circumstance in which a statement is called for" and shall therefore be regarded as its acceptance.

Also as set out under Article 135 (2), if there is prior dealing between the parties and the subsequent offer corresponds to such dealing, staying silent on the subsequent offer would be deemed to be acceptance based on the first agreement.

iv. Article 132 of the Civil Code

> *"An **expression of intent** may be made orally or in writing, and may be expressed in the past or present tense or in the imperative if the present time is intended or by such **means as are customary** even by a person who is not dumb, or **by an interchange of acts demonstrating the mutual consent or by adopting any other course in respect of which the circumstances leave no doubt that they demonstrate mutual consent.**"*

If the actions of the silent party indicate acceptance of a documented agreement, it would amount to 'an act demonstrating mutual consent' and therefore an act by conduct, thus binding the silent party by the terms of the contract.

v. Article 108 of the Commercial Code

> *"(1) The purchaser, who has paid the full price, may ask the vendor to give him a list of the goods, where it is mentioned that the price has been paid.*
>
> *(2) Any person, having expressly or implicitly accepted a list of the sold goods, shall be deemed as having agreed to its contents. **Where the person receiving the list, does not object to its contents within eight days from the date of receipt, this shall be considered as an implicit acceptance**, unless a longer period has been agreed upon."*

In a cost plus financing transaction where a bank sends the list of the assets purchased to its customer and the customer "does not object to its contents within eight days from the date of receipt, this shall be considered as an implicit acceptance, unless a longer period has been agreed upon". This would be considered as acceptance by conduct.

Practical Example in a Financial Transaction

Generally, as a market practice in UAE, in a murabaha facility offered by a bank or financial institution ('Bank') to its retail customers, the Bank enters into the following documents, in the following order:

i. the customer executes a personal finance application form;

ii. on acceptance of the application by the Bank, the Bank and the customer (together the 'Parties') enter into the murabaha facility documents (typically, the murabaha facility terms and conditions and a promise to purchase issued by the customer in favour of the Bank (together the 'Murabaha Documents'). Pursuant to these Murabaha Documents, the Bank agrees to purchase an asset based on the customer's promise to purchase such asset from the Bank on a Murabaha basis; and

iii. upon execution of the Murabaha Documents and subsequent purchase and acquisition of the asset by the Bank, the Bank sends the customer an offer ('Offer to Sell'), which the customer has to accept and send to the Bank to give effect to the sale of the asset by the Bank to the customer.

(i) to (iii) together constitute a 'Murabaha Transaction'.

Pursuant to Article 135 (2) of the Civil Code, given that there is "*prior dealing*" i.e. the Murabaha Documents "and the offer is related to such dealing" i.e. Offer to Sell, staying silent on the Offer to Sell should be sufficient to be the customer's acceptance based on the Murabaha Documents.

Further, if the customer sells the asset received from the Bank without providing its consent on the Offer to Sell, it would amount to "*an act demonstrating mutual consent*" as per Article 132 of the Civil Code, which would therefore bind the customer to the terms of the Murabaha Transaction.

> **Silence in the face of a circumstance in which a statement is called for shall be regarded as an acceptance.**

What happens if the customer does not accept the Offer to Sell and the Bank has already purchased the asset based on the Murabaha Documents? Based on the Murabaha Documents and the customer's agreements therein, does the Bank have apparent authority to bind the customer without the customer's express consent to the Offer to Sell?

In a Murabaha Transaction, it is clear that (i) the Bank purchasing the asset is doing so based on the customer's agreement to purchase such asset from the Bank once it has been acquired by the Bank; and (ii) the Murabaha Documents are the actual contract and the Offer to Sell is the resultant 'effect' of the obligations agreed by the Parties under the Murabaha Documents (Article 125 of the Civil Code).

As per Article 135(1) of the Civil Code, by the customer staying silent and not submitting its acceptance to the Offer to Sell to the Bank, pursuant to agreeing to purchase the asset from the Bank under the Murabaha Documents would indicate that it is "*silence in the face of a circumstance in which a statement is called for*" and shall therefore be regarded as the customer's acceptance.

Therefore, a customer would not be able to disregard or refuse the Offer to Sell by virtue of remaining silent or positively rejecting the Offer to Sell, as the agreement to purchase and on-sell the asset by the Parties was made under the Murabaha Documents itself.

Associated Risks with Implied consent

a. Doctrine of good faith

On the basis of the above-cited provisions of UAE law, even though it can be argued that the silent party may have impliedly consented to certain acts required to conclude a contract and therefore the other party had the apparent authority to bind the silent party to the contract, the silent party may challenge such act to have been done in bad faith. This will however require the silent party to provide evidence to show that implied consent was construed in bad faith. As an example, in the context of the Murabaha Transaction, a customer could present an argument that the Bank had no apparent authority to bind the customer to the Murabaha Transaction if the underlying asset acquired by the Bank and to be sold to the customer did not meet the agreed specifications or description in the documents.

b. Death of the silent party

If the party remaining silent passes away after entering into the contract and the other party to the contract is not be aware of this fact and, after seeking consent but getting no response, takes the silence as 'implied consent' – it is possible that the successors/heirs of the silent party may challenge the validity of such contract and the transactions contemplated thereunder.

Conclusion

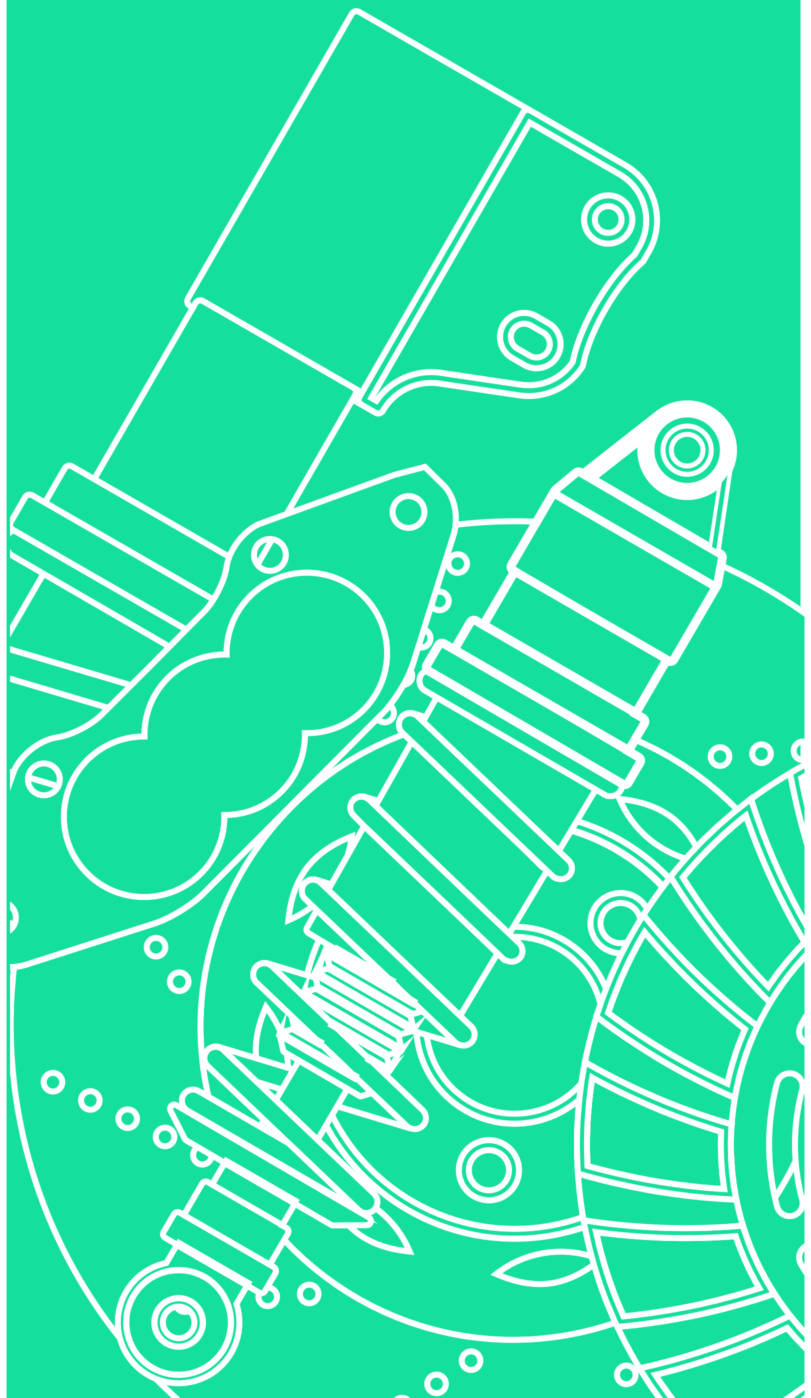
While the obligations under the agreements following implied consent (pursuant to the above provisions) may be enforceable, it does not mean that each obligation will be enforced in accordance with its terms and in all circumstances. Certain rights and obligations of the parties may be qualified among other things by, doctrines of good faith and fair conduct and other similar matters.

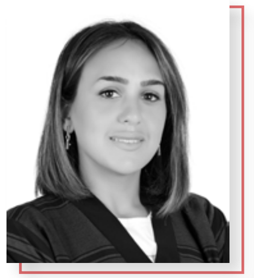
The presence of implied consent is ultimately a question to be determined at the discretion of the court, therefore enforcement against the silent party may also be limited by the discretionary powers of the courts in the UAE.

Based on the above-cited provisions of UAE law, 'implied consent' can be a tool for contract parties to rely upon so as to ensure obligations can be duly performed or rights exercised. However, and as a general note, the conclusion in the article should not be applied generally to all contracts. Each contract will have to be looked at individually in order to determine how the concept of implied consent may apply.

Al Tamimi & Company's Banking & Finance team regularly advises on contractual issues affecting Financial Transactions, including implied consent. For further information please contact Maymoona (Mandviwala) Talib (m.talib@tamimi.com).

SASO Regulations for Auto Spare Parts





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Introduction

In recent years the Saudi Standards Metrology and Quality Organization ('SASO') has taken steps to streamline its product clearance and entry requirements with international best practices. To this end, on 1 January 2019, SASO launched a new online platform (namely SABER) to implement its product certification programme for all imported consumer related products. This launch also witnessed SASO's introduction of a new Saudi Product Safety Programme ('SALEEM') The following article briefly examines the new changes, which SASO has introduced in the context of launching the SABER online portal, and, which affect the automobile industry.

What Does SALEEM Do?

SALEEM is a series list of technical regulations, which SASO previously and more recently issued to regulate and enforce the SASO standards in respect of various types of goods/products. The current/up to date list of regulations in force is available on the SASO website.

The SALEEM series list is certainly not exhaustive as SASO has yet to pass the relevant technical regulations for all types of products. Additionally, not all products have SASO standards which govern them as the introduction of such standards continues to be a work in progress. In the absence of such standards and technical regulations, SALEEM would be inapplicable.

Relevance to the Automobile Industry

For interested stakeholders in the automobile industry, the SALEEM list does include the SASO Regulations for Auto Spare Parts. These SASO Regulations subject all spare parts (whether imported or locally manufactured) to a conformity process and testing. In this respect, the Regulations distinguish between two types of conformity processes: (a) the certification of conformity; and, (b) the declaration of conformity. The Regulations also divide spare parts into two categories: (a) classified; and, (b) unclassified. The Regulations' classification of spare parts determines which of the two processes mentioned above will apply to them. Classified spare parts will require a certification of conformity whereas unclassified spare parts will require a declaration of conformity. The process and documents required for completing each type of conformity differ on SABER pursuant to the SASO Regulations. For a step-by-step process to follow for compliance conformity purposes, SASO has helpfully issued guides and relevant video demos on its online web portal (https://saber.sa/home/UserGuide).

Where SALEEM is Inapplicable

Products, including auto spare parts, for which no standards or, technical regulations exist and which are entering the KSA would still be subject to a conformity process testing. In such cases, the KSA Customs ought to refer a sample of the product in question to one of the SASO accredited labs for examination. The lab would examine the sample with the aim of determining which standards apply to similar products, and which may apply in this case. The lab would then issue a certificate of examination that verifies if the product is compliant. To initiate the referral of the sample for examination importers would need to submit a declaration of conformity application via SABER.

Impact on Counterfeiting Auto Spare Parts

One of SABER's aims is to reduce the influx of counterfeit products that affect consumer safety. In this respect, the SASO Auto Spare Part Regulations hold all importers of spare parts liable for ensuring that they source the parts from factories, which are licensed to produce them in the country of origin. To this end, the Regulations prohibit the import of auto spare parts, which bear counterfeit marks and any other false misleading commercial indications.

Moreover, as the conformity process is extensive for classified/regulated products, the impact on the ability of traders to import counterfeits of such regulated spare parts should be significant. Counterfeit parts are often inferior in quality and therefore should not pass the tests and meet the criteria which the SASO Auto Spare Part Regulations have imposed. However, the SASO Auto Spare Part Regulations do distinguish between 'genuine parts' and 'commercial parts' which are normally cheaper to obtain in the Saudi market than genuine parts. The definition for each under the Regulations is as follows.

> *"Genuine spare parts are parts, which have been designed and manufactured in accordance with the standards and specifications of the manufacturer of the vehicle for the performance of a function that the vehicle manufacturer has specified or that the spare part manufacture has specified according to the standards, specifications and quality assurance system of the vehicle manufacturer."*

> *"Commercial parts are auto spare parts, which have been manufactured in accordance with any international, European, country of origin standards, or the standards of the spare parts manufacturer and which meet the performance requirements of the vehicle manufacturer in accordance with the standards set out in SASO GSO 1712."*

SASO's increased efforts to streamline its product clearance and entry requirements with international best practices are certainly improving the products regulation regime in the KSA. With the introduction of modern technical tools such as SABER and SALEEM, this improvement is specifically evident in the automobile industry.

Theoretically, it would be possible to envisage a scenario where a trader, who intends to increase their margin of profit, imports regulated commercial parts, which:

a. do not bear any false or misleading commercial indication before and at the time of entry to the KSA;
b. satisfy the Regulations' conditions for entry in to the KSA;
c. the trader/importer has registered on SABER;
d. have duly been issued a certificate of conformity and shipment certificate; and
e. after entry in to the KSA have their labelling changed to bear counterfeit marks and other false/misleading commercial indications.

Conversely, too, for unclassified/unregulated spare parts, SASO's envisaged impact on counterfeiting may not be as significant as the self-declaration conformity process for such parts is evidently less stringent. The above scenario for such parts would therefore be more plausible too. To better monitor import activities, the SASO Auto Spare Part Regulations do however prohibit Saudi importers of genuine auto spare parts from importing commercial auto spare parts. Therefore, the risk of foul play as envisaged in the above possible scenario ought to be more limited to importers of commercial auto spare parts and/or only cases where the spare parts are unclassified/unregulated.

Lastly, the increased Saudi regulation of auto spare parts may prompt a spur in cross-border smuggling activities, which could result in a higher influx of counterfeits. The SASO Auto Spare Part Regulations do authorise local law enforcement authorities in the KSA to monitor the Saudi spare parts market and seize any products, which breach the Regulations. Therefore, much would depend on the level and efficacy of this enforcement.

Conclusion

SASO's increased efforts to streamline its product clearance and entry requirements with international best practices are certainly improving the products regulation regime in the KSA. This improvement, through the introduction of modern technical tools such as SABER and SALEEM, is specifically evident in the automobile industry. Though more room for improvement exists, SASO's efforts in this regard are helping to reduce the influx of counterfeit auto spare parts that affect consumer safety.

Al Tamimi & Company's Intellectual Property team regularly advises on product registration and clearance requirements in the KSA. For further information please contact Bachir A Chakra (b.chakra@tamimi.com).

The New Cabinet Resolution No (40) of 2019 concerning the UAE Federal Law on Medical Liability (Law No. 4 of 2016): An Analysis

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The long-awaited Cabinet Resolution No (40) of 2019 (the 'Resolution') issued on 3,July 2019 provides the necessary detail to implement the provisions of Federal law No (4) of 2016, concerning Medical Liability (the 'Law').

Article 34 of the Law introduced stringent penalties for medical practitioners who commit a 'gross medical error' to include imprisonment and a fine. The issuance of the Resolution helpfully now clarifies the circumstances in which a medical practitioner is considered to have committed a gross medical error, which will be discussed in detail in this article.

Further, Article 18 of the Law requires all medical malpractice claims to be referred to a New Medical liability Committee (the 'Committee'). The Resolution provides clarity regarding the formation of a Committee and outlines the rules and procedures each Committee must follow.

For the purposes of this article, we have provided a summary of the key provisions of the Resolution as follows:

Article 5 (Gross Medical Error)

Article 5 of the Resolution sets out the circumstances in which a medical practitioner is deemed to have committed a 'gross medical error'. Before the issuance of the Resolution, a gross medical error was not defined and therefore a practitioner who committed any malpractice (whether gross, or not) could be held criminally liable. In accordance with Article 34 of the Law, only medical practitioners who have committed a gross medical error will be held liable for criminal medical negligence. As a gross medical error is now defined by Article 5 of the Resolution, we consider there will be a decline in the number of malpractice cases referred to the criminal court.

The new Resolution provides the circumstances in which gross medical negligence occurs as follows:

"1. A Medical error is considered 'gross' if it causes a death to a patient (including a fetus), loss of a limb, impairment to a bodily function, or any other gross damage, including but not limited to the following:

a. *extreme ignorance of the recognised medical code of practice, as per the degree and specialisation of the profession practitioner;*

b. *following a method not medically recognised;*

c. *unjustified deviation from the medical rules and code of practice in practising the profession;*

d. *the physician is under the influence of alcohol or illegal substances;*

e. *gross negligence or lack of clear attention in following the standard procedures, such as leaving medical tools inside a patient's body, giving a patient the incorrect dosage of medicines, failure to switch on medical equipment during or after the surgical operations, resuscitation, delivery or not giving a patient the medically appropriate medicine or any other acts that may considered as gross negligence;*

f. *intentionally practise the profession out the scope of the specialisation or clerical privilege enjoyed by the physician under his/her licence; or*

g. *the physician, without medical supervision, issues a diagnosis or administers treatment in which he/she is not qualified or trained to do.*

Articles 8 – 15 (Medical Liability Committee Rules and Procedures)

Articles 8 -15 of the Resolution provide the necessary detail regarding the formation of the Committee and the rules and procedures each Committee must follow. In the first instance, all medical liability cases must be referred to a Committee for determination. The existing Supreme Committee will act as an Appeal Committee only. In accordance with Article 20 of the Law, the complainant and the medical practitioner can file an Appeal with the Supreme Committee within 30 days of receiving the Committee's report. Before the issuance of the Resolution, the Supreme Committee reviewed all complaints and its decision was final.

Article 4 (Medical Research on humans)

Article 4 relates to the prohibition of medical research and experiments conducted on human beings unless his/her consent is obtained as well as from the competent authority. We expect the Minister of Health will issue future guidance regarding the controls, rules and procedures regulating the conduct of medical research and experiments on humans.

Appendix to the Cabinet Resolution No. (40) of 2019 concerning the Executive Regulation

The appendix to the Resolution sets out the terms and conditions for the provision of Remote Health Services. Previously, Remote Health Services were prohibited in the UAE. Patients, therefore, were required to visit their Medical Practitioners in person.

Key definitions of the Remote Health Services as per the Resolution are as follows:

- **Remote Medical Consultancy:** Consultancy by using the information technology and telecommunication, to provide advice on the best ways to deal with the medical case between a physician and another one or between the physician and the patient, in the care in which the patient and physician are not in the place.

- **Remote Treatment Prescriptions:** The physician shall describe the treatment in the cases when the physician and the patient are not in the same place, by using the information technology and telecommunications after the remote diagnosis without clinical examinations of the patient, or remote prescription based on the conventional clinical examination.
- **Remote Diagnosis:** To identify the disease or the medical condition of the patient by using the information technology and communication with the medical service provider.

- **Remote Medical Monitoring:** To obtain all the vital signs and monitor the patient condition by using the information technology and tele-communications from the health service provider.
- **Remote Medical Intervention:** Any remote medical intervention by using the information technology and telecommunications.

Conclusion

The issuance of the Resolution provides much needed clarity regarding the implementation of the Law. It is expected that the Law and the Resolution will improve the quality of healthcare in the UAE and streamline the manner in which malpractice claims are managed. The Resolution helpfully clarifies the definition of the meaning of 'gross medical error' and outlines the rules and procedures regarding the formation of a Committee. Medical practitioners and patients will now have greater protection, as appeals can now be heard through the Supreme Medical Committee.

Al Tamimi & Company's Litigation team regularly advises on legal and regulatory matters pertaining to healthcare litigation. For further information, please contact Mohamed AlMarzouqi (m.almarzouqi@tamimi.com).

"The Resolution helpfully clarifies the definition of the meaning of 'gross medical error' and outlines the rules and procedures regarding the formation of a Committee. Medical practitioners and patients will now have greater protection, as appeals can now be heard through the Supreme Medical Committee.

CHARTERING A COURSE FOR CLIENTS ACROSS AND BEYOND THE MIDDLE EAST

Once again we come to you with juicy legal topics related to the latest developments in the Aviation, Shipping and Insurance markets. This year was a very exciting year for our practice. The Aviation and Shipping practices have spread their wings adding the first dedicated Customs and Logistics practice and thereby increasing the scope, variety and capabilities of our legal offering.

The insurance practice is about to start its very own dedicated credit insurance practice in response to the market's increasing demand for this type of knowledge and advice.

Yazan Saoudi remains one of the leading Aviation lawyers in the region and is recognised by Who's Who Legal on both the contentious and transactional sides of shipping and his practice is rated in band one in the shipping field by Legal 500.

Omar Omar and his shipping practice are consistently ranked in band one in both Legal 500 and Chambers Global in addition to being a leading lawyer recognised for his shipping expertise by Who's Who Legal.

The Transport & Insurance practice was the proud sponsor of the Seatrade Maritime Congress 2019 and will continue to collaborate with the Seatrade Maritime Congress in Dammam 2020. In addition, the Transport & Insurance department will be participating in a joint seminar with Quadrant Chambers in London on 1 October 2019 which will address many legal issues of interest in the Middle East including sanctions and the latest legal developments in the region.

The final touches are being made to the Singapore Chamber of Maritime Arbitration conference which is expected to convene on 25 November 2019. Further, our Transport & Insurance practice has won the honour of organising one of the most prestigious maritime gatherings - the Ship Arrested Legal Conference 2020 in Jordan.

Aviation wise, our lawyers took to the stage during the Cape Town Academic Project Conference in Oxford where they covered a variety of topics including linguistics and the interpretation of the Cape Town Convention from the perspective of the UAE.

In this Transport & Insurance focused edition, we have tried to cover as many different jurisdictions as possible. We have cherry picked what we believe to be the current 'hot' topics and offer the benefit of our hands-on experience. In Shipping, we have cruised between vessel closings, the ever-complicated crew legal issues, vessel arrest, owners' liabilities and ongoing legal developments. Our colleagues in the Customs practice have explored several important aspects regarding handling customs-related matters in the UAE. Our insurance team has also touched on the legal developments in the Kuwaiti and UAE markets.

We hope you find this Focus issue informative and interesting and look forward to receiving your feedback.

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FOREIGN INSURANCE BRANCHES IN KUWAIT

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In General, Law No. 68 of 1980 of Kuwait (the 'Commercial Law') states that a foreign entity cannot conduct business activities in Kuwait except through the use of a Kuwaiti agent or by participating in the ownership of a separate Kuwaiti legal entity. As per the Kuwaiti Companies Law No. 1 of 2016 (the 'Companies Law'), such legal entity may take various forms, with the most common forms being a shareholding company ('KSC'), a company with limited liability ('WLL'), a holding company or a sole proprietorship.

Under Article 23 of the Commercial Law, a foreign entity may not establish or own a company in Kuwait unless it has a Kuwaiti partner or partners and provided that such Kuwaiti partner(s) shall own at least 51 percent of the Kuwaiti company (the 'Foreign Ownership Restriction'). There is an exception to this Foreign Ownership Restriction which allows foreign investors to own up to 100 percent of business entities in non-restricted sectors in accordance with the Foreign Direct Investment Law no. 116 of 2013 ('FDI Law'), provided that an investment licence is obtained from the Kuwait Direct Investment Authority ('KDIPA') the remit of which is to attract and encourage foreign and local direct investment within the State of Kuwait.

In determining whether a foreign company is conducting business in Kuwait and is, therefore, subject to relevant Kuwaiti laws and regulations, Kuwaiti authorities will analyse the nature of the business activities being conducted by the foreign entity within Kuwait. In the event that a foreign entity has, among others: (i) a physical presence in Kuwait; (ii) employees working in Kuwait; and (iii) advertises its services and/or products in Kuwait, then such foreign entity is at risk of being considered as conducting business in Kuwait and will therefore, be subject to the relevant Kuwaiti laws and regulations. We note that Kuwaiti officials generally take a very broad approach in determining whether a foreign entity is conducting business within Kuwait.

In respect of insurance companies, as per law No. 24 of 1961 (the 'Insurance Law'), as well as the Ministerial Decree No. 511 of 2011 and its amendments regarding the establishment of insurance and re-insurance companies, all insurance and re-insurance companies must take the form of a shareholding company.

However, as an exception to this principle, and pursuant to the Ministerial Decree No. 158 of 2015 regarding branches of foreign insurance companies, Kuwaiti law permits foreign and Arab insurance companies to establish a branch in Kuwait without a Kuwaiti commercial licence, where article 2 of the Ministerial Decree No. 158 of 2015 states that the branches of foreign insurance companies rely on the establishment and validity of the commercial licence of its parent company.

In order for a foreign insurance company to conduct business in Kuwait, a licence must be granted by the Insurance Department at the Ministry of Commerce and Industry (the 'Regulator'). However, the establishment of a branch in this way violates both Commercial and Companies Law in Kuwait which led to the merger between two types of incorporations: (i) establishing a branch in accordance with Article 2 of the Ministerial Decree No. 158/2015 without a Kuwaiti commercial licence; and (ii) contracting with a Kuwaiti agent to avoid the illegality of establishing and operating in Kuwait without an agent or a Kuwaiti partner. This process of establishing the branches of insurance companies is not the same as for establishing branches in other industries in Kuwait.

The following conditions must be met for in order to insurance companies to operate in Kuwait: the insurance foreign branch must have a physical presence in Kuwait; employees working in Kuwait; and advertise its services and/or products in Kuwait, and at the same time the entity should working through a Kuwaiti agent.

A further exception in the Ministerial Decree No. 511 of 2011, is that no capital is required for branches of foreign insurance companies as long as the capital of the parent company is not less than KWD 10M which is approx. equivalent to US$ 33M. A deposit (detailed below) should be lodged in a bank operating in Kuwait, as a guarantee in the name of the Minister of Commerce and Industry in order to fulfil their obligations arising from their insurance policies executed in Kuwait. The value of the guarantee shall be determined as follows:

1. KWD 500,000.00/- (approx. equivalent to US$ 1,650.000.00/-) to conduct life insurance.
2. KWD 500,000.00/-(approx. equivalent to US$ 1,650.000.00/-) to conduct general insurance.
3. KWD 1,000,000.00/- (approx. equivalent to US$ 3,330.000.00/-) to conduct both life and general insurance together.

That said, the recent introduction of new laws has helped to regulate the establishment of commercial companies in Kuwait. These laws include the new companies law, new agency law, and foreign direct investment Law, as well as the new insurance law No. 125 of year 2019, establishing the Insurance Supervisory Authority, which was issued on the 1, September 2019. This combined with the changing trends in the MOCI, points to the Kuwaiti insurance market undergoing new, and indeed, radical changes in the near future.

This Article was intended to provide you with a brief overview of the establishing of a Foreign Insurance Branches in Kuwait. In our next articles, we shall discuss the any anticipated new changes in the Kuwaiti insurance law and market.

Al Tamimi & Company's Transport & Insurance team regularly advises on setting up of foreign branches of Insurance Companies in Kuwait. For further information please contact Ahmed Rezeik (a.rezeik@tamimi.com).

“The Kuwaiti insurance market is set to experience new and indeed radical changes in the near future.

THE UAE INSURANCE AUTHORITY IS NOW A DISPUTE RESOLUTION BODY

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Introduction

On 1 May 2018, the Federal Law No. (3) of 2018 amending certain provisions of Federal Law No. (6) of 2007 on the Establishment of Insurance Authority & Organization of Its Operations (the 'Amending Law') came into force and introduced numerous amendments that directly affect the insurance sector in the UAE. Amongst those amendments are the set of procedures to be followed in processing insurance claims and resolving disputes between insurers and insureds or beneficiaries. At this juncture, the Amending Law sets out the process by which insurance claims should be dealt with internally by insurers as well as the process for insureds and/or beneficiaries who wish to challenge the insurers' decisions before the Insurance Authority ('IA').

Notably, the Amending Law stipulates that insurance related disputes will not be heard by local courts unless such disputes have first been considered by the Dispute Resolution Committees (the 'DR Committee(s)') to be set up by the IA pursuant to a resolution issued by the IA Board of Directors. According to the Amending Law, the aforementioned IA resolution would set out amongst others, how the DR Committee(s) will be formed together with details regarding their jurisdiction, powers as well as the procedures to be followed in the dispute resolution process. The IA resolution will also identify the types and branches of insurance which may be resolved before the DR Committee(s).

On 15 July 2019, the IA issued Board Resolution No. (33) of 2019 Concerning the Regulation of the Committees Responsible for the Settlement and Resolution of Insurance Disputes (the 'IA Resolution'). The IA Resolution will come into force three months after the date of its publication in the Official Gazette (the IA Resolution was published in issue no. 659 on 31, July of 2019).

Formation of the DR Committees and their Jurisdiction

According to the IA Resolution, each DR Committee will consist of a chairman and two or more members IA employees. Additionally, each DR Committee will have a substitute chairman and members which assumingly would be engaged in the absence of the main members. The IA Resolution further provides that the IA may assign the chair position in the DR Committees to a judge to be delegated in consultation with the relevant authority.

Pursuant to Article (4) of the IA Resolution, the DR Committee(s) will consider insurance disputes of all classes and types arising from complaints made by an insured, beneficiary or an affected person who has a right to bring a dispute against an insurance company incorporated in the UAE and any foreign insurance company licensed to carry out insurance activities in the UAE through a branch or through an insurance agent. This means that any claim by an insurance company against the insured would fall outside the jurisdiction of the DR Committee(s).

Article (5) of the IA Resolution also sets out the types of actions and disputes that are beyond the jurisdiction of the DR Committee(s), namely:

1. orders, summary and interim actions and orders, or precautionary attachment;
2. the insurance disputes heard before courts prior to the date of the IA Resolution coming into force; and
3. insurance disputes which are subject to an arbitration clause.

Dispute Resolution Procedures and Referral of Disputes to the DR Committee(s)

Upon the occurrence of an insurance dispute, a written complaint must be submitted to the IA via its electronic system by the insured, the beneficiary or the affected person and the complainant must attach all relevant information and details along with supporting documents.

The IA will then review the complaint and request the insurance company to provide clarification within five working days. If the complainant is not satisfied with the clarification provided by the insurance company, the complainant can object and request the dispute be referred to the DR Committee(s). The IA is responsible for registering the complaint to the relevant DR Committee(s) within three working days of the complainant's objection.

At the initial stage, the DR Committee(s) should attempt to settle the dispute amicably within a maximum period of 15working days, which may be extended by similar period(s) by mutual consent of the parties or by a decision of the chairman of the relevant DR Committee(s)If a settlement is reached between the disputing parties, the terms of the settlement will be documented in a settlement deed that is attested by the DR Committee(s).

If the dispute is not resolved amicably, the DR Committee(s) will proceed to hear the dispute and resolve it in accordance with the dispute resolution procedures set out under the IA Resolution. Although the DR Committee(s) are not bound to follow the rules and procedures set out under the UAE Civil Procedures Law, it appears that the dispute resolution procedures resemble, to some extent, the litigation process followed by local courts.

The DR Committee(s) have been granted extensive powers and authorities similar to those granted to local courts by virtue of the UAE Civil Procedures Law No. (11) of 1992 and its amendment ('Civil Procedures Law')and the Law of Evidence in Civil and Commercial Transactions No. (19) of 1992. For instance, DR Committee(s) are entitled to hear witnesses, appoint experts and award costs. Not only that, Article (14) of the IA Resolution permits the complainant to join parties to the dispute and permits the insurance company ('Respondent') to join other corporate defendant(s) to the dispute if it has legal recourse against the said defendant(s) (this provision is almost identical to Article 94 of the Civil Procedures Law). This arguably indicates that insurers may be able to join re-insurers to the complaint or, if applicable, the corporate person that caused the loss.

It is pertinent to mention that once the DR Committee(s) concludes its investigation procedures and receives all relevant information and details, the DR Committee(s) is required to issue its final decision within 20 working days. If deemed necessary, the DR Committee(s) may extend this duration for similar periods.

The DR Committee(s) Decision

Pursuant to Article 16(3) of the IA Resolution, decisions issued by DR Committee(s) may be challenged by the concerned party before the competent court of first instance within a period of 30 days which starts to run from the following day on which the party was notified of the DR Committee(s) decision. If the decision is not challenged within the aforementioned time-frame, the decision will be considered final and enforceable. The IA Resolution provides that DR Committee(s)' decisions are considered execution deeds in accordance with the applicable laws. This means that once the decisions issued by the DR Committee(s) becomes final and conclusive (upon lapse of the challenge period), such decisions may be enforced through the competent execution department in the country.

"The introduction of the Amending Law and the IA Resolution represent a significant shift in the resolution of insurance disputes in the UAE. Although the new dispute resolution mechanism may seem to have added an additional layer to the insurance dispute resolution proceedings, nevertheless, given the technical experience of the DR Committee members, it is expected that the technical findings of the DR Committees will have considerable value in the dispute and before the relevant local courts.

It is worth noting that both the Amending Law and the IA Resolution are silent on the issue of whether the ruling of the relevant court of first instance would be considered final or would be subjected to further stages of challenge before the courts of appeal and cassation.

Furthermore, given the technical expertise and background of the members of the DR Committee(s), it is unclear how strict legal challenges that may be raised by the disputing parties will be tackled, such as time prescription or if the DR Committee(s) will even entertain such legal challenges. Also, given that the issue of insurance claims' time prescription is not addressed under the Amending Law and the IA Resolution, it remains unclear whether the filing of the complaint before the IA Committee would interrupt the running of the applicable time prescription period.

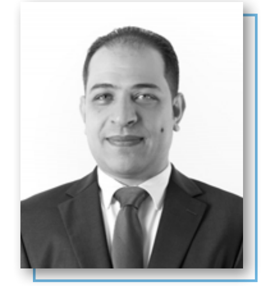
Conclusion

The introduction of the Amending Law and the IA Resolution represent a significant shift in the resolution of insurance disputes in the UAE. Although the new dispute resolution mechanism may seem to have added an additional layer to the insurance dispute resolution proceedings, nevertheless, given the technical experience of the DR Committee(s)' members, it is expected that the technical findings of the DR Committee(s) will have considerable value in the dispute and before the relevant local courts.

More clarity regarding the practical application and impact of the IA Resolution will come to light in the near future after the IA Resolution comes into force and the new system is fully operational and tested.

Al Tamimi & Company's Transport & Insurance team regularly advises on regulatory insurance matters. For further information, please contact Yazan Al Saoudi (y.saoudi@tamimi.com) or Malek Zreiqat (m.zreiqat@tamimi.com).

LIABILITY OF SHIP OWNERS TOWARDS SEAFARERS UNDER UAE LAW



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Introduction

Abandoned seafarers is an issue that often attracts the attention of the media for humanitarian reasons. Some ship owners voluntarily elect to disregard their contractual duty and moral obligations towards the seafarers, by ceasing to supply the vessel with the necessary supplies such as bunker, food, fresh water as well as the crew's wages. Other owners of vessels are unable to meet their legal obligations to their crew because they struggle financially when their ship is seized.

As a result of the increase of shipping disputes around the world, the question of ship owners' legal and humanitarian obligations to seafarers has come into focus.

In a recent case heard before the Fujairah Federal Court, a UAE based financial institution obtained an arrest order against a vessel over which it had a mortgage. When the ship owner breached the mortgage agreement, the financial institution applied to the competent court seeking the imposition of a precautionary attachment over the vessel. The vessel was arrested in compliance with the applicable law and upon arresting the vessel, the owners simply ceased to pay crew wages, supply bunker, fresh water and food. The obligations of the ship owners, under domestic and international conventions for the seafarers' wellbeing and wages remain a controversial issue. In this article, we discuss those obligations.

(i) International Conventions

Generally, international treaties and conventions aim to provide coverage and protection to seafarers. The International Convention for the Safety of Life at Sea ('SOLAS;) sets out the minimum safety standards that should be met by merchant ship owners so as to ensure the safety of the seafarers on board. The Maritime Labour Convention 2006 ('MLC 2006') as (amended and which came into force on 20 August 2013), is considered to be one of the International Labour Organization conventions, and the convention has been ratified by most of the large flags representing the majority of global shipping. The main objective of the Convention is to protect seafarers' rights by providing decent work conditions, payment of wages, repatriations, on board medical care, food and health and safety protection. However, MLC 2006's reach stretches beyond signatory states.

MLC 2006 Regulation 2.5 (2) obliges ship owners, flying a member state flag to provide financial security to ensure that seafarers are repatriated home in certain circumstances including cases of abandonment. Standard A2.5.2 (5) describes the necessary support to which seafarers are entitled as "*adequate food, accommodation, drinking water supplies, essential fuel for survival on board the ship and necessary medical care.*" Guideline B2.5 adds further that, the seafarers will be entitled to repatriation if, among other reasons, the ship owners are not able to continue their legal or contractual obligations as an employer.

(ii) Domestic Legislation

Due to the sensitivity of the issue, UAE Maritime Commercial Law No. (26) Of 1981('Maritime Code') imposes an obligation on the operator of a vessel, including owners and/or charterers, to provide food and healthcare treatment to seafarers during their service on board a vessel. Article No.185 of the Maritime Code provides that the operator must provide food and accommodation on board the vessel for seafarers, free of charge. In addition, Article 187(1) of the Maritime Code stipulates that the operator is required to provide healthcare and treatment of seafarers where necessary, free of charge, during their service on board the vessel.

Although the UAE has not ratified MLC 2006, the convention is unofficially recognised in the Emirates and many of its provisions are adopted and integrated in the UAE legislative and regulatory systems. In recognition of the ship owners' liability towards seafarers, the Federal Transport Authority – Land & Maritime ('FTA') (which is the regulating body responsible for the safety of maritime transport), issued Circular No. (6) Of 2018 pertaining to compulsory insurance requirements of the ship owners' liabilities towards the seafarers ('Circular No. (6/2018)'). The said Circular is widely based on MLC 2006 Regulation 2.5, Standard A2.5.2 and guidelines B2.5. Pursuant to Circular No.(6/2018) the owners of international voyage UAE ships (over 200ton) and foreign flag ships passing through UAE waters (over 200ton) are required to procure insurance coverage to cover the ship owners' liabilities regarding the repatriation of the crew, in addition to supplying their essential needs for up to four months. Essential needs include food, wages, accommodation, and medical care for all seafarers on board these vessels.

Following the implementation of Circular No. (6/2018), there was significant decrease in the number of abandonment cases off the coast of the UAE. The FTA, pursuant to Circular No. (1) Of 2019 ('Circular No. (1/2019)'), further extended the application of Circular No.(6/2018) to all UAE registered flag ships as well as to foreign flag ships passing through UAE waters irrespective of their tonnage capacity. The said amendment is anticipated to further reduce the number of abandonment cases off the UAE coast.

Interestingly, FTA's Circular No. (1/2019) imposes an obligation on the ship's agent to ensure the ship complies with the Circular prior to taking over the agency, otherwise, the ship's agent will be held liable for all responsibilities and obligations, towards the seafarers. The FTA's decision is considered to be a step in the right direction, because the ship's agent is widely recognised as the owner's representative within the UAE and therefore his acceptance of the agency of the abandoned vessel can be construed as an implied acceptance of all the risks and obligations associated with that agency.

"The procedures and regulations outlined above and implemented in the UAE have proven to be some of the most effective means of protecting seafarers who have been abandoned.

Letter of Undertaking

A Letter of Undertaking ('LOU') is a letter duly signed and stamped by the arresting party which undertakes to compensate ship owners for any damages caused in the event of wrongful arrest of their vessel. Although the UAE courts require a LOU, its scope is not extended to cover the supply of food, drinking water and/or seafarers' wages. Some courts might require counter-security to cover the damages sustained by the ship owners, in the case of a wrongful arrest. It should be noted that Dubai Courts often require additional LOUs where the arresting party will undertake to pay expenses, port dues, charges, seafarers' wages and other charges incurred during the arrest period. However, in practice, the enforcement of such LOUs is very rare. Usually, these types of expenses are reimbursed from the vessel proceeds, upon judicial sale, depending on each debt priority.

(iii) Other jurisdictions

Other jurisdictions such as Singapore adopt a different approach. The liability of ship owners towards seafarers is transferred from the ship owner to the arrestor upon imposing the arrest over a vessel. Although the courts in Singapore do not require a counter-security for arresting a vessel, the Sheriff is entitled to require the arrestor to deposit a form of security to cover the vessel's maintenance and other expenses including, supplying the vessel with fresh water, food, bunker and cost of guard service. Pursuant to Order 70 of the Singapore Rules of Court, the Sheriff will be entitled to oversee the arrest of the vessel. Order 70 Rule 9 stipulates that a vessel arrest cannot be effected unless a satisfactory undertaking, in writing, is submitted to the Sheriff by the arresting party. This undertaking sets out the obligations of the arresting party in relation to its liability for fees and expenses. Alternatively, the Sheriff may accept a sum which should be deposited with him to cover the fees and expenses instead of the security deposit.

Conclusion

The procedures and regulations outlined above and implemented in the UAE have proven to be some of the most effective means of protecting seafarers who have been abandoned. In order to keep pace with the best industry practices as well as to ensure the security and attractiveness of the UAE shipping sector it would be encouraging to see the UAE consider ratifying MLC 2006. In 2018, FTA had signed a MOU with the International Transport Workers Federation ('ITF') to protect the right of the seafarers within UAE territorial waters. Pursuant to the said MOU, the FTA and the ITF will work closely in issues pertaining to the abandonment of the seafarers and by applying the principles of MLC 2006 – perhaps ratification of MLC 2006 is closer than we think!

Al Tamimi & Company's Transport & Insurance team regularly advises on issues associated with abandoned ships and the liabilities of the ship owners. For further information please contact Omar Omar (o.omar@tamimi.com) or Wael Elgouhari (w.elgouhari@tamimi.com).

CLOSING TIME! WHAT TO EXPECT AT A SHIP SALE & PURCHASE CLOSING MEETING

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Ship sale and purchase transactions typically consist of several stages. A rough outline of stages may include:

- preliminary negotiations;
- inspection of the vessel and due diligence;
- signing of a Memorandum of Agreement ('MOA');
- preparation of documents and vessel for delivery; and
- closing.

Here the authors consider the final stage: closing. This stage concludes the sale and purchase of a ship and generally takes place after several weeks of preliminary actions. It is, in essence, where the ship (and relevant documents) are delivered against payment of the purchase price. This seemingly straightforward exchange does, however, involve numerous requirements and customs unique to shipping.

Legal and documentary requirements for closing need to carefully accommodate practical elements. Our aim in this article is to outline what parties may expect on closing day.

Where does the Closing Meeting Take Place?

Closing meetings may take a variety of forms. Here we outline a typical arrangement whilst acknowledging there are many possible variants. The structure is premised on the elected MOA being a Norwegian Saleform 2012 ('NSF 2012'), arguably the most widely used MOA for ship sale and purchases.

Typically, there will be two simultaneous meetings on closing day. One meeting will take place 'ashore'. This may be at the offices of one of the parties, their legal advisors, or even appointed escrow agents. This meeting leads the closing. The second meeting will take place 'aboard' (i.e. aboard the subject vessel).

Roadmap of Events at Closing

There are a variety of parties which may be involved in a closing, each with its particular part to play. To aid an efficient closing, parties would do well to circulate a Closing Memorandum ahead of time. This document should detail who is required to do what, when. It should also provide an outline of all parties, the particular individuals required to be present on the day, and their direct contact numbers. A typical transaction may see the following parties involved at closing, whether required at one of the physical meetings, or on stand-by remotely:

- buyer and seller (with respective legal counsels);
- escrow agents;
- crews (led by masters);
- managers (technical, crew and commercial);
- flag state representatives;

- bank representatives (where subject to debt finance);
- sale and purchase brokers;
- insurance brokers/representatives; and
- ship agents

Assuming that the buyer and seller have jointly appointed an escrow agent to receive and release the purchase price (i.e. the deposit and balance) and payment for bunkers and lubricants remaining on board ('ROBs'), a typical order of events at closing may be as follows (some actions occurring simultaneously):

No.	Description	Event	Location
1	Crew Change	Buyer's crew and master board vessel in anticipation of closing.	Aboard
2	ROBs Measured	Bunkers, lubricants, stores and other agreed consumables which remain on board are measured.	Aboard
3	Document Inspections	Technical and Closing Documents inspected/ confirmed by both parties.	Aboard and Ashore
4	Payment	Buyer pays Purchase Price and ROBs.	Ashore
5	Delivery of Vessel	Seller delivers vessel to Buyer and documents are exchanged.	Ashore

Document Inspections

Documents inspected at closing are generally not documents the parties are considering for the first time. At closing, parties are normally only confirming that the agreed forms of documents are now present, in original and signed, if required.

There are typically two categories of documents in a ship sale and purchase: Closing Documents and Technical Documents.

(i) Closing Documents

These documents are normally listed in the body of the MOA (Clause 8 in the NSF 2012). These are key documents required for closing, some of which will only be signed and dated at the closing meetings. Examples of documents in this category are: the Bill of Sale; Powers of Attorney; Corporate Authorities; Certificate of Ownership and Encumbrances; and Certificate of Class.

(ii) Technical Documents

Generally, Technical Documents are documents required for the maintenance and operation of the vessel. Industry practice dictates the types of documents typically found in this category. The list of agreed technical documents is often annexed to the MOA.

Technical Documents are normally standard form and required by international conventions, for example: certificates pertaining to safety; pollution; communications; and insurance. Technical Documents are generally voluminous, and parties normally rely on appointed technical managers to consider the documents before closing to confirm they are in order, or advise of any deficiencies.

Many Technical Documents are kept aboard the vessel. This is a legal requirement for certain documents. At closing, parties will not normally inspect technical documents comprehensively, as this is done before closing. The exercise at closing is normally to confirm that the agreed documents are there and ready for delivery.

Crew Change

As previously noted, the legal and documentary requirements for closing need to complement practical considerations. This is especially true when considering command and control of the subject vessel. The incoming crew, led by their master, should be kept fully apprised of progress of the meeting ashore. Parties should be mindful that, at the moment the vessel is delivered, the new owner's master is required to take command of the vessel and assume all associated responsibilities, legal and otherwise.

It is advisable to have direct communication between the two meetings. Practically, this means a speakerphone from boardroom to bridge, ensuring maximum transparency so as to avoid any mis-communications. Masters should record in the deck log, in real time, the exact time and place of physical delivery and change of command.

Bunkers and Lubricants Remaining On-board

Normally on the morning of closing the parties will agree the quantities of ROBs. Practically, this requires measurements of the bunkers, lubricants, stores, supplies and any other consumables subject to sale and separate payment. Parties may engage a third party to confirm these measurements, or simply arrange for the buyer's and seller's respective masters to agree figures, and advise the meeting ashore.

Payment

The buyer usually pays three sums at closing:

i. deposit for the purchase price of the ship ('Deposit');
ii. balance of the purchase price ('Balance'); and
iii. payment for ROBs.

Parties often appoint an escrow agent to receive and release all three sums. This is only one option for payment, with several alternatives. Should an escrow agent be appointed on this basis, by closing, all three sums should have been deposited into its bank account.

In instances where the escrow agent is facilitating the ROB payment, a buyer may pre-position an excess of funds with the agent, with any surplus returned to the buyer after the agreed amount has been transferred to the seller.

Delivery of the Ship against Payment

A closing meeting culminates with the signing of two critical documents: the Release Instructions to the escrow agent; and the Protocol of Delivery and Acceptance ('PODA'). The former transfers the money, and the latter the ship.

At delivery, the vessel should be legally and physically ready for delivery, and this may be declared through a Notice of Readiness from the seller. Readiness in this instance also assumes the vessel is at the agreed location for delivery and in a satisfactory condition (e.g. in the same condition as per last inspection, fair wear and tear excepted). The seller will also generally warrant the vessel is delivered free of charters, encumbrances, mortgages and maritime liens, and indemnify the buyer accordingly.

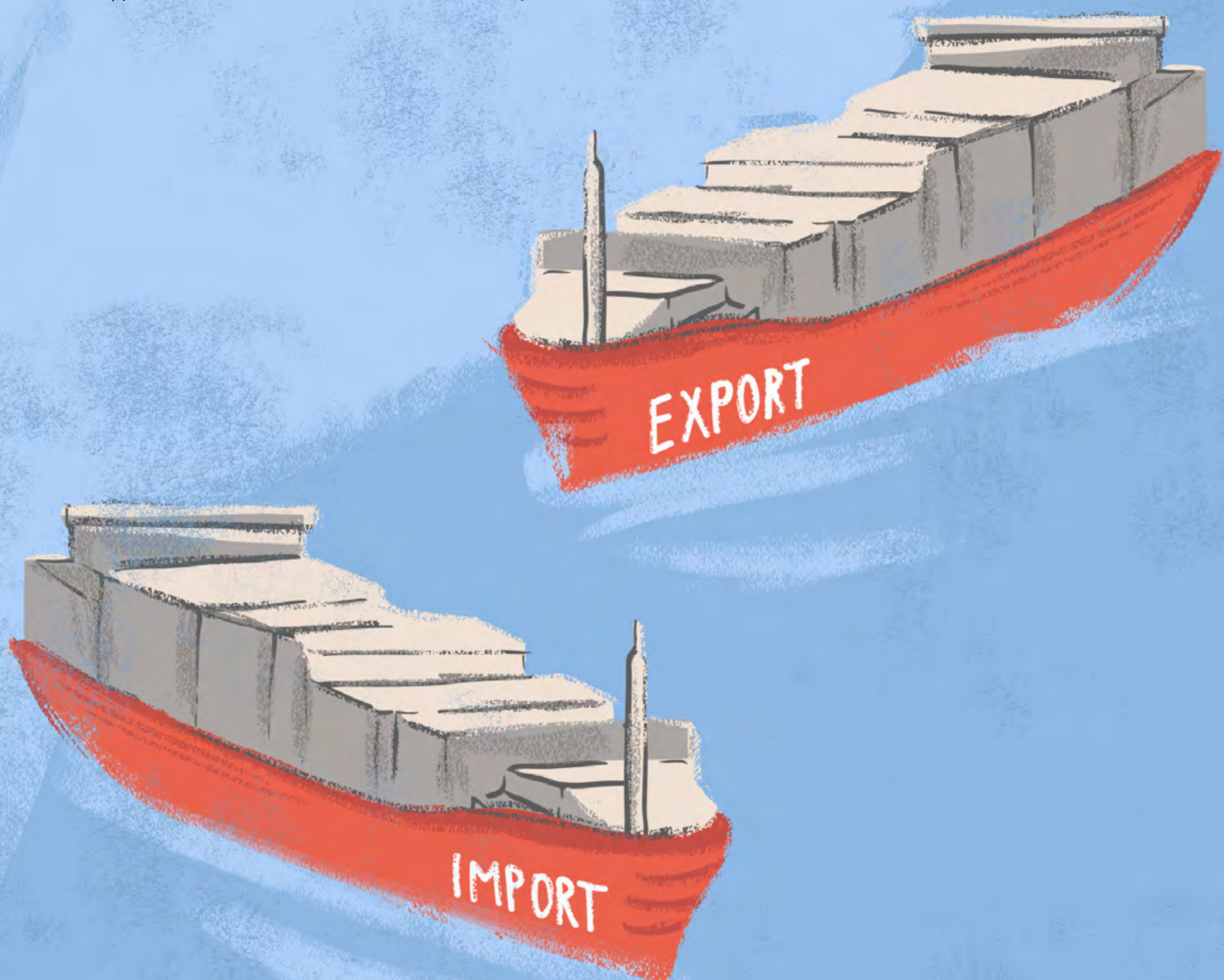
Once the parties are satisfied that all documents are in order, and the vessel is ready, delivery against payment is the final step. The buyer will effect payment, normally through the provision of irrevocable release instructions to the escrow agents. Once the escrow agents acknowledge receipt, the parties may jointly sign the PODA which (legally) evidences delivery of the vessel. Here the time, date and vessel's location at delivery are all noted – such details also being entered by the master in the vessel's deck log.

Closing Remarks

Each closing is different. There are numerous moving parts and, inevitably, unexpected issues will arise. Parties should allocate sufficient time to close, be prepared to co-operate to overcome obstacles, and thoroughly plan beforehand.

Al Tamimi & Company's Transport & Insurance team regularly advises on ship sale & purchases. For further information please contact Omar Omar (o.omar@tamimi.com), James Newdigate (j.newdigate@tamimi.com) or Gabriel Yuen at (g.yuen@tamimi.com).

HIGHLIGHTS ON CUSTOMS TRANSACTIONS



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As the UAE does not have its own customs law, like all other GCC states, it applies the Common Customs Law No. 85 of 2007 of the GCC States (the 'Common Customs Law'). The Common Customs Law applies to all commodities crossing the customs line, at the points of importation or exportation. The commodities imported into the country are subject to the customs dues as specified in the Customs Tariff issued pursuant to the Common Customs Law. Any procedures, guides, laws or regulations issued/implemented in the UAE regarding customs are all subject to the Common Customs Law.

Import and Export Transactions

Dubai is one of the main trade hubs worldwide and many companies choose Dubai as the centre for their trade transactions for many reasons. One of these reasons is the friendly online portal ('Mersal II') created by Dubai Trade. The portal allows users to handle the clearance process for any imported or exported goods online. Below is a brief overview of the necessary procedures to be followed by companies planning to import into or export from the UAE.

The company that wishes to import/export products to or from the UAE must be established in the UAE, and hold a valid commercial licence. The commercial licence is issued by either a local onshore authority or a free zone authority depending on where the company is established. In addition, the company must obtain a Business Code (which allows the company to import and export to and from UAE).

For a company to obtain a Business Code, specific online steps should be followed. Thereafter, the company or its clearing agent must open a customs account through the Dubai Trade Portal: www.dubaitrade.ae; after paying a minimal fee and submitting the following documents:

a. copy of the company's trade licence; and

b. copy of the ID of the authorised person.

This account is subject to the approval of the Dubai Customs Authority. Once the customs account is approved, the company can proceed with import and export transactions once the required documents have been submitted.

The Required Documents for Importation and Exportation

The documents required for the customs declaration are not expressly defined in the Common Customs Law however, established practice makes it clear that the following documents are required regarding the import/export of goods:

Offending companies have the opportunity to reduce their fines by following specific procedures.

(a) Importation

1. Bill of Lading/Airway Bill;
2. Commercial Invoice;
3. Packing List;
4. Certificate of Origin; and
5. Special approval letters such as approval from Telecommunications Regulatory Authority (TRA), Emirates Authority for Standardization and Metrology (ESMA) or Dubai Municipality (only upon importing the products to the local market for trading purposes).

Importers in Dubai are granted 14 days in order to submit the original copies, or they may pay a guarantee of around 1,000 AED until they submit the original copies.

(b) Exportation

1. Commercial Invoice;
2. Customs declaration form processed through the system of Mersal II;
3. Bill of Lading/Airway bill; and
4. Packing List.

HS-Codes

The HS-Code (the 'Harmonized Coding System) is an international standardised system of names and numbers for classifying goods.

The HS-Code is a significant element in the importation/exportation process because it gives the importer/exporter an indication regarding the required special approvals for importation, the applied customs tariff and the applied tax; if any such excise tax is to be applied or even if the product is prohibited. The importer/exporter should be aware if the product requires a special approval from the relevant authorities as some products require an approval (as a requirement for importing or exporting).

Verifying/classifying the HS-Code for a product will be necessary in order to confirm if any approvals are required from the relevant authorities. Both the verification and the classification process require a specific procedure to be followed before the Customs Authority. New codes should be approved by the Federal Customs authorities, the GCC Customs authorities and the World Customs Organizations ('WCO'). The HS-Codes are updated every three years by the WCO, and the UAE updates its database accordingly, therefore importers should verify if there are any changes to the used codes in order to avoid the accusation of a mis-declaration by the UAE Customs authority in line article (47), (141-142) of the GCC Customs Law.

Penalties imposed for Breaching the Importation and Exportation Requirements

a. as per Article (145) of the Common Customs Law, violating the restrictions of an import and export transaction is considered to be 'smuggling' which is an offence punishable by: confiscation and destruction of the goods;
b. imposition of a fine (up to double the value of the Customs Duties on the goods in question);
c. confiscation of the means of transportation and the tools and materials used in smuggling, excluding public means of transportation such as ships, aircraft, trains and public vehicles, unless they are intended or hired for smuggling purposes; and/or
d. the penalty may be doubled if the offence is repeated.

The Common Customs Law includes imprisonment charges (up to three years) however this is rarely enforced.

Customs Audit

The Customs Audit is an important procedure handled by the Customs Audit Department (the 'Department'). Through this procedure the Customs Authority can investigate any company's import and/or export transactions and verify whether the company is breaching the Common Customs Law and impose the relevant penalty.

The Department can request any company at any time to provide a stock declaration together with supporting documents in order to track the import and/or export transactions so as to verify whether there has been any violation. The company should be careful in providing incorrect or inaccurate declarations because the Department will examine and cross-reference the information and the supporting documents with available data in the Department's records.

In the event of a violation, the Department will follow specific procedures and a fine in the range of 10 percent (over the total value of the goods/products/commodities) will be imposed in addition to the applicable customs duty which fall in the range of up to 100 percent.

The offending company has the opportunity to reduce its fines by following specific procedures and subject to the Department's approval.

As the fines can (in some cases) be high, it is advisable to consult specialised customs' lawyers once a fine is issued, so as to explore ways to minimise the penalty where possible.

The Customs Common Law, regulations and practices are very connected elements not only to the trade but also to any company that deals with or handles import and export transactions. From this perspective, companies should seek consultation from the experts in this field and to be aware of the relevant laws, regulations, and practices in order to avoid violating the law and consequently the potentially high fines which may be levied in some cases.

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HOW TO AVOID HUGE DEMURRAGE INVOICES: A PRACTICAL NOTE FOR CHARTERERS

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As global trade is stymied by a myriad of macro-economic headwinds, many in the commodity trading business are turning to increasingly high-risk jurisdictions to make a healthy profit. In pursuit of this aim, many of our local clients are fixing vessels in the Middle East/East African region for loading and discharge of cargoes in challenging ports and with difficult contractual counterparties. Whilst the fruits of such endeavours are tantalising, and often reaped, such voyages entail significant risk of delay during operations. Naturally, with the increased delay risk comes higher demurrage rates for charterers enjoying use of those ships. If caught on demurrage, it is quite common for charterers to see their profits from the transaction quickly erode and even disappear entirely.

This article examines the English law position on laytime and demurrage with a view to guiding charterers on some simple steps to take to mitigate exposure to demurrage.

Avoiding Demurrage in English law

The purpose of demurrage is to compensate the owner for detaining its vessel beyond the contractually agreed period for loading and discharge, known as "laytime" or "lay days". A familiar maxim in English maritime law is 'once on demurrage, always on demurrage', meaning once the laytime has expired, the vessel is, usually, on demurrage permanently until completion of loading or discharge. It follows that the starting point for a charterer is to try to agree laytime that allows for a margin of delay and anticipates possible causes of delay.

After the laytime has expired and demurrage commences, a charterer can avoid demurrage under English law in one of two ways. Firstly, at the negotiation of the charterparty terms, the parties can expressly agree to exclude demurrage in defined circumstances by inserting an appropriate clause. Secondly, at common law the charterer can avoid demurrage where the owner, or those for whom he is responsible, is at fault for the delay.

This article focuses on avoidance of demurrage by reliance on an exclusion clause. However, with respect to fault-based avoidance, the general rule in English law is that it is implied that a party is not entitled to benefit from its own wrongdoing. It follows that a ship owner cannot seek demurrage for delay to loading or discharge operations for which it is at fault. Determining the presence of fault is fact-sensitive but guidance can be found in a significant body of English case law.

Exception Clauses

The first and most potent way of ensuring the demurrage is excluded in defined circumstances is to agree it with the owner and insert an appropriately worded clause into the charterparty. The ability to negotiate inclusion of effective exclusion clauses depends on the bargaining position of the parties, relationships and wider market conditions, but charterers can often help themselves by anticipating causes of delay specific to the concerned ports and parties involved.

As mentioned above, the starting point for charterers during negotiation of the charterparty terms is to try to secure the best laytime period possible. Thereafter, charterers should carefully consider the various possible causes of delay which could push charterers into demurrage. Using template terms in high-risk shipments leads to high demurrage invoices. This undertaking is by no means simple; it requires creative thinking, drawing on experience and pragmatism. Rarely will charterers be able to exclude demurrage with broad strokes, but narrower, defined risks can be avoided if clauses are worded carefully. Once delay risks are identified, charterers should seek to agree exclusions to demurrage in the charterparty.

Charterers may foresee risk of delay caused by third parties. Such delays would not normally interrupt demurrage. However, charterers may seek to do so, or at least reduce demurrage rates in certain circumstances. A non-exhaustive list of exclusions is set out below by way of example:

1. charterers have concerns about the age and condition of the vessel. Charterers seek to exclude time lost arising from unseaworthiness regardless of whether owners exercised due diligence;
2. the concerned port has a reputation for taking berth fees and then delaying the berthing slot in order to maximise ship-intake. Charterers are aware that their arrival date falls during a busy season for the port. Charterers seek to exclude demurrage for time lost waiting for a berth, or to secure a reduced demurrage rate in such an eventuality;
3. the port authorities at the concerned port are slow to provide the necessary clearance documentation due to corruption. Excluding or reducing demurrage where port authorities are causing the delay may be an option;
4. charterers need to deliver to a port in a conflict area. The international monitoring body regulating port activity is causing delays to cargo operations by conducting spontaneous vessel inspections. Charterers seek to include a clause interrupting demurrage where such inspections occur; and
5. charterers are aware of recent reports of theft of loading hoses at the concerned port resulting in time lost waiting for import of new hoses. Charterers negotiate the inclusion of an exclusion clause for time lost during laytime and/or demurrage arising from theft-related incidents at the port.

Additionally, rather than relying on the implied common law rule that owners cannot claim demurrage when they are at fault, charterers would do better to agree definitions of fault which, if occur, would result in the interruption of demurrage. For example, charterers could seek to include a clause whereby demurrage is interrupted where the vessel's equipment breaks down. Alternatively, if the equipment breaks down but cargo operations can continue at a decreased rate, demurrage rate is reduced by a pro-rated figure. This approach brings clarity to owners' entitlement to demurrage in fault-based situations.

“When negotiating the inclusion of an exclusion clause, it is important for charterers to ensure the clause will be effective and enforceable should it be relied on.

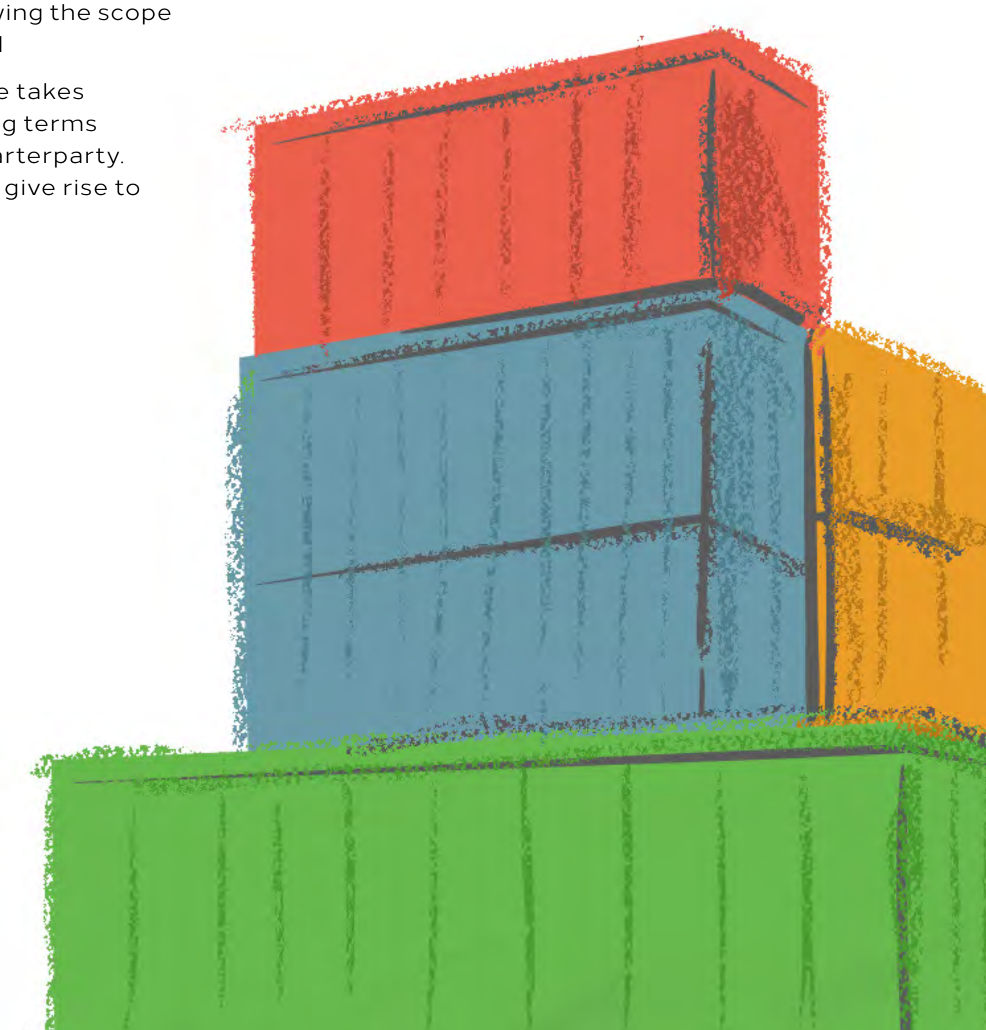
When negotiating the inclusion of an exclusion clause, it is important for charterers to ensure the clause will be effective and enforceable should it be relied on. In doing so, charterers would be prudent to bear in mind the following three points:

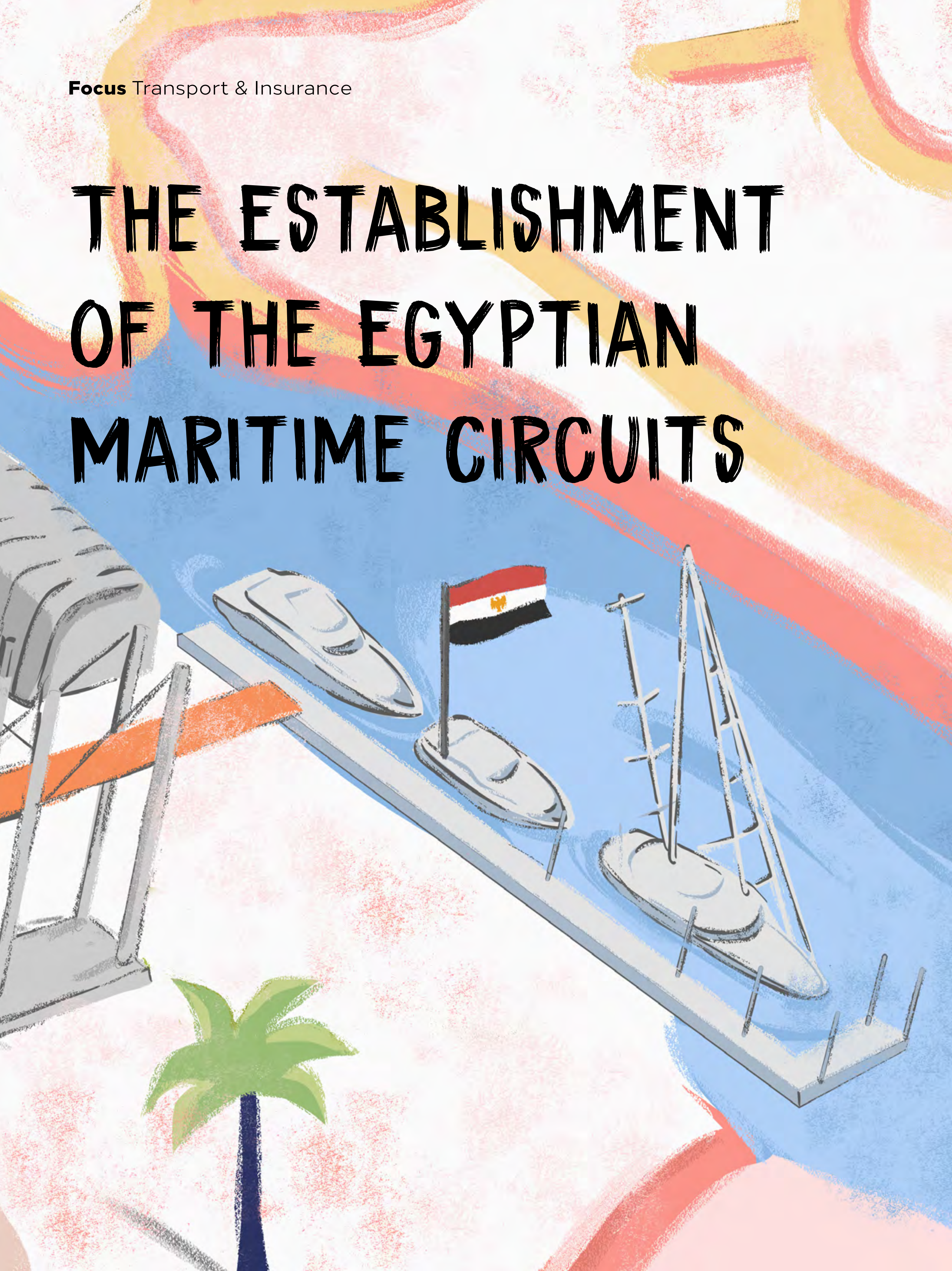
1. an exception clause will normally be construed as applying only to the period covered by laytime, not demurrage. It will not protect the charterer after the vessel has come on demurrage, unless it explicitly so provides. For example, a statement such as 'time will cease to run when...' will interrupt laytime but will be insufficient to interrupt demurrage. To be safe, charterers should expressly state that demurrage would be interrupted;
2. where an exception clause is ambiguous, it will usually be construed against the party seeking to rely on it. Therefore, if charterers want to rely on a clause to interrupt demurrage, the meaning of the clause should be clear and precise. Charterers should seek to use as much detail as possible to define the circumstances in which demurrage will be interrupted, without narrowing the scope of the clause too much; and
3. ensure the exclusion clause takes precedence over conflicting terms in the main body of the charterparty. Conflicting provisions may give rise to ambiguity or uncertainty.

Conclusion

Trading in high-risk jurisdictions with high-risk parties necessitates high demurrage rates. Consequently, charterers need to exercise greater foresight in anticipating the likely causes of delays in loading and discharging operations at specific ports with specific parties. Once identified, charterers should attempt to negotiate realistic laytime periods and, thereafter, effectively worded demurrage exclusion clauses to guard against crippling demurrage risks. In doing so, charterers will be better placed to retain profits from high-risk trading.

Al Tamimi & Company's Transport & Insurance team regularly advises on laytime and demurrage disputes. For further information please contact Omar Omar (o.omar@tamimi.com) or Adam Gray (a.gray@tamimi.com).





THE ESTABLISHMENT OF THE EGYPTIAN MARITIME CIRCUITS

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One of the most significant issues that the Egyptian judiciary system has faced since the early 1950s is the unnecessary delay in concluding claims lodged before the Egyptian courts. In an attempt to reduce the duration of commercial claims before the court, the Egyptian legislators introduced Law No. 120 of 2008, which was published in the Official Gazette on May 22, 2008, and which came into force on October 1, 2008 establishing the Egyptian Economic Courts, which aims to overcome this chronic problem. The Egyptian Economic Courts were granted a specialised juridical nature, overseeing economic matters in both criminal and civil proceedings, offering expedited commercial redress.

The Economic Courts' structure is composed of Chambers of First Instance and Chambers of Appeal. Appeal is available under the Economic Courts Law for cases involving amounts of five million EGP, or its equivalent, to US$ 310,000 or less. If the value is higher, the case should be litigated directly in the appellate circuits and the decision may be subject to further appeal before the Court of Cassation. The Egyptian Economic Courts are geographically located in eight Egyptian Governorates (Cairo, Alexandria, Tanta, Mansoura, Ismailia, Beni Suef, Assiut, Qena.).

The Economic Courts have established new circuits, which have jurisdiction over economic matters in both criminal and civil proceedings. The said Court is dedicated to the investors and disputants engaged in economic activities and overseen by specialised judges in those type of claims, with a view to expediting commercial and investment dispute resolution claims, without further burdens on the litigants, in the interests of attracting more foreign investment into the country.

Since its inception in 2008, the Economic Courts have improved the efficiency of dispute resolution in relation to commercial matters heard before courts, and they have gained a reasonably good reputation, in comparison to the ordinary court system.

On August 7, 2019, Law No. 146 of 2019 amending some provisions of the Law on the Establishment of Economic Courts promulgated by Law No. 120 of 2008 was issued. The new law expanded the jurisdiction of the Economic Courts, to hear claims related to the Commercial Maritime Law and Civil Aviation Law among other laws. At the outset, it appears the Egyptian legislators have increasingly paid attention to the significance and importance of resolving claims that involve international transactions of a maritime and/or an aviation nature.

The new amendments raised the quorum of the Economic Courts of First Instance by no more than 10 million Egyptian Pounds (or its equivalent of US$ 620,000), instead of five million Egyptian Pounds, and consider its decisions as final and conclusive if the value of the claim does not exceed 500 thousand Egyptian Pounds or its equivalent of US$ 30,000. Any claim that exceeds the

The new amendment to the Economic Courts law aims to attract investment by updating its legislation to keep pace with the changes taking place in the country. The new amendments are key to providing a fertile atmosphere for investment in Egypt through the development of Economic Courts, as they are competent to hear special economic claims and disputes.

amount of 10 million Egyptian Pounds will be heard directly before the Economic Court of Appeal, without the need of the claim being considered before the court of first instance.

Pursuant to the newly issued amendments, the jurisdiction to adjudicate the expedited matters pertaining to the imposition of the precautionary attachment over vessels and aircrafts is vested within the jurisdiction of the Economic Courts.

In a move to a more digitalised legal system, the new amendments have introduced the electronic litigation system for the first time in the history of the Egyptian judiciary system. A designated portal of the Economic Court will be created, and is expected to be operational by early October 2019.

The portal will be dedicated to the electronic establishment, registration and announcement of cases; whereby the litigants will be notified via their e-mail addresses, and have to register, peruse and file their claims online. Moreover, the court fees and expenses will be paid online through a secured payment system.

The new amendments have enhanced the role of the preparation judge (the 'Preparatory Panel'), which comprises one or more judges, from the judges of Economic Appeal Courts. The Preparatory Panel shall be responsible for verifying the completion of the pleadings, examining and reviewing the associated documentation, scheduling hearings for claims, preparing a memorandum summarising claims and supporting arguments, as well as other aspects of conflict between the parties, within a period not exceeding 30 days from the date of filing the case.

The head of the circuit may grant the Preparatory Panel an extended period of 30 days for completing the preparation; otherwise, the circuit shall hear the claim.

The Preparatory panel shall commence and facilitate an amicable settlement between the litigants. If the litigants reach an amicable settlement, the Preparatory Panel shall submit a jointly-signed statement to the head of the circuit for its annexure to the court hearing minutes and for consideration as an execution deed.

The new amendments also allow the competent court, upon request of the litigants, to suspend the proceedings of any claim heard before the court and refer it back to the Preparatory Panel in order to conduct settlement negotiations between the parties. The new amendments also give authority to the Preparatory Panel to seek the assistance of any of its experts for the conclusion of its work.

Moreover, any party to a dispute, which falls under the jurisdiction of the Economic Courts, may apply directly to the chief judge of the Preparatory Panel with a view to settling the dispute amicably without filing a claim.

The Preparatory Panel will have a significant impact on maritime and aviation claims, particularly where an amicable solution is preferred and accepted by the litigants. Further, the procedure will enable time and cost savings through the promotion of settlements. Also of note, is the recognition of any new approved form of guarantees generally recognised by the maritime/aviation practice and P&I clubs. For example, P&I Club LOUs will be considered good forms of security.

The new amendments provide that the ordinary commercial courts, currently hearing any claim falling under the jurisdiction of the Economic Courts, must refer those claims directly to the competent Economic Courts, without any additional fees.

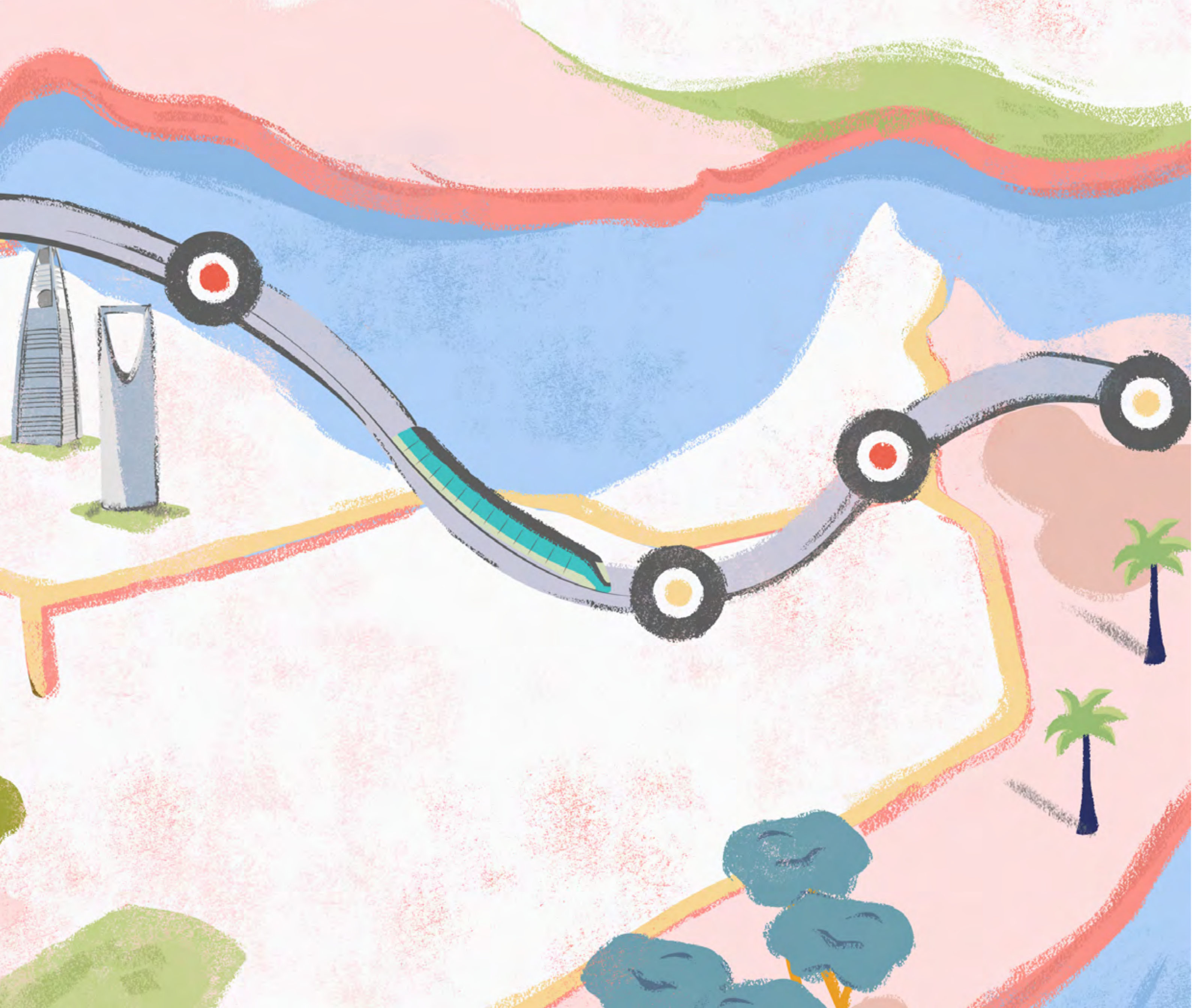
However, this amendment raises a number of problems. For example, the number of geographical locations of the current Economic Courts does not cover all cities and Governorates, including those which have major ports such as the Suez Governorate and Damietta. For the avoidance of such geographical disruption, experience suggests that two new Economic Courts in the Governorates of Suez and Damietta be established, and even though the suggestion was widely accepted by many judges and courts; the proposal is still under the consideration by the competent authorities

The establishment of a specialised maritime circuit is anticipated within the Egyptian Economic Courts to hear the claims relating to commercial maritime and civil aviation laws, where the judges will have a maritime background, which will insure an expedited decisions in those type of claims instead of those suffering unjustified delays before the ordinary court which have been known to drag on for many years and which usually result in an unfavourable outcome whereby the vessels are abandoned and consequently the maritime environment is exposed to pollution.

In conclusion, the new amendment to the Economic Courts law aims to attract investment by updating its legislation to keep pace with the changes taking place in the country. The new amendments are key to providing a fertile atmosphere for investment in Egypt through the development of Economic Courts, as they are competent to hear special economic claims and disputes.

Al Tamimi & Company's Transport & Insurance team regularly advises on matters pertaining to the Egyptian Courts law. For further information please contact Omar Omar (o.omar@tamimi.com) or Yasser Madkour (y.madkour@tamimi.com).

THE DEVELOPMENT OF RAIL INFRASTRUCTURE PROJECTS IN THE GCC



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Introduction

The rail sector in the Gulf Cooperation Council ('GCC') is rapidly evolving. In recent years member states have gradually realised the importance of developing this aspect of the region's infrastructure and the key role the rail industry can play in the diversification of economies, in facilitating GDP growth and providing a more environmentally friendly and sustainable alternative method of ground transportation.

As of 2017, there was estimated to be over 1,300 active transportation projects in the GCC spanning the four key transportation sectors (rail, road, aviation and maritime), with a total project value of nearly US$ 380 billion. A significant proportion of this investment has since gone towards developing the GCC's rail infrastructure, most notably a GCC-wide development initiative known as the GCC Railway Project. With an estimated cost of over US$ 240 billion, the GCC Railway Project is set to be one of the largest contemporary cross-border rail networks in the world, linking key cities within each of the GCC nations of the United Arab Emirates, Saudi Arabia, Kuwait, Bahrain and Oman, into an integrated, pan-Arabian route of over 2,117 km. Originally tabled for completion in 2018, it is now expected to be completed in 2021.

A number of other rail projects are either ongoing or planned for the region, further reaffirming the heightened regional focus on developing this sector. Saudi Arabia, for example, has embodied its strategy for rail infrastructure development within the Saudi Vision 2030 plan, a key feature of its ambitious policy to help diversify the Saudi economy. The Riyadh Metro project (owned by the Arriyadh Development Authority), a US$ 23 billion scheme consisting of six lines totalling 176km and 85 metro stations, is set to be a key part of the Kingdom's transportation network once completed. Currently in the testing phase, the Riyadh Metro is due to become fully operational in 2021 at which point it is expected to transport 3.6 million passengers per day. The Saudi Railway Company has also announced plans to construct a 960km railway line between Jeddah and Riyadh as well as a 340km railway linking the industrial cities of Yanbu and Jeddah.

The construction of the Jeddah-Riyadh rail link will cut the time needed to travel between the two cities from the 10 to 12 hours currently required to do so by bus, to six hours. It is also forecast to carry up to eight million tonnes of freight per year. It is scheduled for completion in 2023.

In the UAE, the Government of Dubai's Roads and Transport Authority is in the process of extending the existing metro network which could see the addition of at least four new stations. Etihad Rail are also embarking on Phase 2 of their country-wide rail network project which will see 1200km of track laid across the UAE which will connect the main emirates of the UAE and which will help facilitate the creation of a faster and more environmentally efficient method of transporting passengers and freight between the emirates. And in Oman, Oman Rail is examining the feasibility of a 375km train line to transport minerals from mining hubs to the port town of Duqm.

In this article we will briefly examine some of the more commonly-used procurement arrangements for this form of infrastructure project, highlight the challenges often faced during the project life cycle, and explain some of the potential long term benefits.

Procurement

There are various procurement methods available to developers operating in the rail sector. The most suitable approach will depend upon a range of variables including the nature, scale and complexity of the works to be undertaken, the amount and availability of funding, the risk appetite of the parties, as well as other technical, commercial and legal factors. The main contractual models which can be adopted are design-and-build, construct-only, and turnkey solutions. Additionally, large-scale transport projects frequently lend themselves to PPP-type agreements (particularly if there is a desire to construct and operate the project through the use of private sector investment as well as private sector expertise).

- **Design-and-build contracting:** The design and build procurement route generally involves the design of the works being undertaken entirely by the building contractor/its professional team of design consultants. Alternatively, the initial design may be developed by the employer/its professional team of consultants, after which responsibility for the developed designs will be transferred to the contractor. The contractor will take single point responsibility and thus will be liable to the employer for both the design and construction of the works.
- **Construct-only (traditional) contracting:** This is arguably one of the most common forms of procurement in the railway sector. This involves the employer engaging the professional team of consultants to prepare the designs and specifications for the works which are thereafter constructed by the works contractor. The contractor will only be responsible for the construction of the works, with design responsibility remaining with the design team. Therefore, to the extent that any design defects arise with the completed project, these will not be the responsibility of the contractor to rectify.
- **PPP:** Here a public authority usually engages a private entity (ordinarily a special purpose vehicle that has been especially incorporated for the purposes of undertaking the design, construction, operation and maintenance of the project) for a specific term. The introduction of a PPP law in Dubai in addition to the proposed enactment of a PPP law in Saudi Arabia, arguably underline the growing emphasis being placed on such public-private procurement structures in the region as this structure has been successfully used in other regions. An important advantage of PPPs is that they allow the procuring entity to leverage efficiencies and expertise in the private sector in order to enable it to attain its development objectives. For private sector participants, this form of procurement can facilitate the process of securing third party funding due to the involvement of a governmental or quasi-governmental authority. For the public sector, PPPs can allow governments to mitigate the financial risk associated with these types of large scale projects.

The Risks and Challenges

Unsurprisingly, there are a number of risks and challenges when embarking on infrastructure projects of this nature. There is a delicate interplay of issues that needs to be evaluated and reconciled, including construction and engineering risks (linked to the design, engineering and technical complexity of the project), financial risks (such as cost overruns and securing third party funding), social risks (public perceptions regarding the project as well as the need to address the perceived negative impact such developments may have on local communities) and political risks (such as policy and regulatory uncertainties and changes some of which arise from the apparent lack of clear regulatory frameworks applicable to the governance of these types of projects). Additionally, the patronage risk needs to be carefully evaluated and it is imperative that detailed feasibility studies are undertaken to ensure that the project is financially viable. If not properly assessed, managed and monitored these issues can potentially cause delays to the completion of the project, can result in further cost overruns and regulatory infringements. There can also be significant complications when obtaining stakeholder consents for the proposed routes.

Lack of adequate risk management at all stages of the value chain and throughout the life cycle of a rail project is a common issue, largely as a result of poor risk assessment and contractual risk allocation during the concept and design phases of a project as well as poor drafting of the underlying construction and other commercial agreements which may not accurately reflect the legal and commercial arrangement between the parties.

Interface risk between the contracting parties and key third parties/stakeholders (such as other contractors, existing rail operators and users) in addition to the interface risk associated with the assets involved in the project, for example with respect to the rail equipment, track and materials to be used, means that potential issues need to be identified and assessed early in the project's development with a strategy advanced in order to manage such risks before they consume or overshadow the progress of a project.

The rail sector in the Gulf Cooperation Council [...] is rapidly evolving. In recent years member states have gradually realised the importance of developing this aspect of the region's infrastructure and the key role the rail industry can play in the diversification of economies, in facilitating GDP growth and providing a more environmentally friendly and sustainable alternative method of ground transportation.

Furthermore, the parties must ensure such issues are adequately addressed in the underlying contract, for example by identifying interface issues with existing properties, infrastructure and utilities. This may also be undertaken by ensuring, amongst other things, that the contract contains adequate collaboration and co-operation provisions as well as clear design and specification obligations.

Alternatively, a separate project specific interface agreement may be agreed alongside the construction contract in order to add clarity in this respect.

The design of a project is obviously an integral factor as to whether or not it will be a success, fit for its intended purpose and thus able to operate safely and in accordance with the required parameters. It is therefore imperative that a professional team, of engineers, design consultants and contractors with industry specific knowledge and experience of working in the rail sector, are engaged. This will help reduce the likelihood of issues arising later in the project. In this regard, it is imperative that design nuances between different jurisdictions are fully addressed if a rail project is to span different countries to ensure the seamless operation of the project.

Not possessing the required licences, permits and consents can also have a significant impact upon the programme of a project. Proper attention should therefore be given to obtaining the required development consents through ensuring early consultant and contractor involvement in the planning and application process. This should include identifying any property owners that may be impacted by the works in order to obtain the required consents. This is vital to ensure that the route of the network can be confirmed.

The Benefits

Despite the many challenges and complexities associated with developing rail projects, there are also potentially a number of far-reaching, long-term benefits.

One obvious benefit of developing the rail infrastructure is that enhanced railway links enable individuals, goods and services to be transported more easily and effectively both within and between GCC states. More efficient and cost effective transport for people, goods and services will contribute to developing tourism and commerce in the region as well as help enhance employment opportunities for those living in areas where such rail links are located, by allowing them to explore opportunities beyond the area in which they live.

The primary mode of freight transport is currently by vehicle, which can be slow, inefficient and expensive, as well as more detrimental to the environment. Use of rail will enable greater volumes of goods to be transported within a shorter period of time, and at less cost, facilitating more efficient trade. Railway hubs will require staff to operate and maintain the facilities. There will also be a need to service both staff working at and passengers travelling to, from and through such transport intersections, creating employment, retail and other investment opportunities.

Developing rail transport in underdeveloped areas can act as a catalyst for regeneration, for example by connecting urban hubs with remote rural parts of the country in which they operate. If planners can ensure that they inter-connect these regions with other transport services, such as airports, ports and other local transport infrastructure, this can help encourage inward investment and economic growth in such areas.

The environmental benefits must also not be overlooked. Whereas presently the majority of passengers and freight are transported within and between GCC states by either road or air, rail investment will eventually enable a greater volume of people and goods to be transported in a single journey, reducing the amount of heavy vehicle traffic on roads and in the air and therefore lowering the average carbon footprint per journey.

Conclusion

Developing railway infrastructure is back on the agenda of governments across the Gulf. There is a healthy and encouraging portfolio of ongoing and pipeline projects which, once completed, will have potentially significant and far-reaching consequences for individuals and commerce throughout the region. Yet the true measure of success will only really be quantified not solely by reference to contractual milestones and economic indicators but by the projects' social impact and the positive legacy they can leave for generations to come.

Al Tamimi & Company's Construction & Infrastructure team regularly advises on all elements of the construction procurement process. For further information please contact Euan Lloyd (e.lloyd@tamimi.com).

VISION SAUDI ARABIA

We are very pleased to share with you the following special Law Update on the Kingdom of Saudi Arabia ('KSA').

Last year proved to be another year of continuing success and expansion for Al Tamimi & Company in the Kingdom, with a number of new staff joining our Saudi offices, including: new Head of KSA, Babul Parikh; General Manager, Mike Wakefield; and HR Specialist, Hanine Saab. In addition, we welcomed the promotion of three new partners, Emad Salameh - Litigation and Legislative Drafting; Bandar Al Hamidani – Corporate Commercial and Sports & Events Management; and Dr. Ahmed Basrawi – Litigation and Arbitration.

We repeated our success of 2017 by being named KSA Law Firm of the Year 2018 in The Oath Middle East Legal Awards. Other significant achievements include:

i. a highly successful seminar which we co-hosted in Tokyo with the Saudi Arabian General Investment Authority (SAGIA) the Japan External Trade Organisation (JETRO) and the well-known Japanese law firm Nishimura & Asahi; and

ii. the launch of the 3rd edition of our 'Doing Business in Saudi Arabia' book (now published in Arabic, English, Chinese and Japanese).

We were honoured to be appointed to the prestigious legal panels of the National Centre for Privatization and the Red Sea Development Company as well as the international panel of law firms of the Ministry of Finance.

The Saudi Arabian Government's Vision 2030 reform agenda continues to gather momentum, with frequent announcements regarding social and legislative reforms, new large scale giga-projects, high value tenders and world class events which are all helping to maintain an increasingly busy news cycle.

The last 12 months have also seen the introduction of a number of new laws which have had a significant impact on the regulatory landscape and which include:

- Competition Law;
- Government Tenders and Procurement Law;
- E-Commerce Law; and
- Maritime Law.

In addition, socially significant steps have occurred in line with the Government's Vision 2030 agenda. For example, over the last 12 months we have seen a number of 'firsts' as highlighted below:

- women winning the right to drive;
- the re-opening of cinemas to the public;
- the issue of tourist visas for foreigners;
- tourist visas being issued to foreigners for special events;
- Saudi women over the age of 21 may now travel abroad without the need for the permission of their guardian; and
- a new law providing for 24 hour trading licences available from 1 January next year.

The following feature on Saudi Arabia touches on a number of current key issues. We hope you will find our Focus KSA interesting and informative. For further information about any of the highlighted topics, or anything else KSA related, please do not hesitate to contact any of our KSA Al Tamimi & Company team directly.

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THE MARCH TOWARDS MARKET EFFICIENCY: SAUDI ARABIA'S NEW COMPETITION LAW

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Introduction

The General Authority for Competition ('GAC'), the regulator of Saudi Arabia's Competition Law regime, has been increasingly active in recent years, especially in relation to allegations of anti-competitive conduct and merger and acquisition notifications. A new competition law was published in March 2019 ('New Law'). When it comes into force in September 2019 it will replace the competition law regime that has been in place since 2004 (as amended in 2014) ('Old Law') and seems likely to foreshadow even greater activity by the regulator.

As with the Old Law, the New Law seeks to protect and foster competition. This is done by prohibiting specified practices and behaviour that are regarded as 'anti-competitive' as well as imposing controls on mergers and acquisitions to avoid monopolies and cartels being established which impact adversely on competition in the market. The New Law provides that prices will be determined according to the market and free competition, with the exception of products and services where prices are regulated and set by law or by the Council of Ministers.

The New Law reaffirms the overall thrust of Saudi Arabia's competition law regime. However, the opportunity has been taken to clarify and, in some important respects, extend the reach of that regime. Some of the changes made appear to have been inspired by difficulties experienced by GAC in the application of the Old Law. At the time of writing this Article, a draft of new implementing regulations ('Draft IR') has been circulated by GAC for consultation which ends on 19 September 2019. Although we have highlighted some of the main provisions of the Draft IR it is still hoped that the consultation and final implementing regulations of the law, together with its application in practice, will bring greater clarity.

To whom does the New Law Apply?

The New Law applies to "*Establishments*" and this term refers to individuals and legal persons (such as companies) carrying on economic activities. The expression "*economic activities*" is defined broadly to include commercial, agricultural, industrial and service businesses and the purchase and sale of products. The Draft IR also makes it clear that the New Law applies to online platforms.

In a departure from the Old Law, governmental organisations and wholly-owned state companies are no longer automatically exempt from the reach of the New Competition Law. To be exempt, the entity must be exclusively authorised by the Saudi Arabian government to provide certain commodities and services in a specific sector. A state-owned utilities company would therefore be exempt. Conversely, a company established to undertake a large development project would not be unless there was scope for that to be considered 'providing commodities and services in a specific sector'.

The prohibition against 'suggesting prices' indicates that a manufacturer's recommended resale price could potentially trip the prohibition, even if the recommendation related to a maximum selling price.

It follows that the privatisation of a state-owned utilities company would result in the loss of the exemption.

Those active in the Saudi market should be aware that even their actions abroad have the potential to trigger competition issues in Saudi Arabia as both the Old Law and the New Law apply if there is an anti-competitive impact within Saudi Arabia.

The Market

As with the competition regimes in other countries, the concept of the 'Market' is central to an understanding and application of Saudi Arabia's competition law regime. The impact of particular actions is viewed through the prism of their impact on the 'Market'.

The Old Law and the New Law both define the 'Market' as:

> *"The place where or the means by which a group of current and potential purchasers and sellers meet during a certain period of time".*

It may be defined by geographical region and products but it could also be (and often is) defined as a particular type of business or economic sector.

Anti-Competitive Conduct

As with the Old Law, the New Law restricts any agreements or contracts that have the aim or effect of disrupting or violating competition and Article 5 of the New Law sets out a non-exhaustive list of practices that are prohibited. In some cases, the proscribed practices are judged by their impact on the Market but in other cases this test is not applied.

Examples of practices that are prohibited by the New Law without consideration of their impact on the Market include:

- fixing or suggesting prices of products, services or conditions of sale, and the like;
- fixing sizes, weights and quantities of the production of products or provision of services;
- freezing or limiting the processes of manufacturing, development and marketing and all other aspects of investment; and
- acting in collusion or unlawful co-ordination in proposals or bids in respect of governmental auctions and tenders or the like in a way that compromises the competition.

Examples of conduct that may be prohibited which are Market related include:

- limiting the flow of products and services into the Market or eliminating the same from the Market, in full or in part, by concealing, unlawfully storing or refusing to deal in the same;
- any attitude that sets barriers against the entry of a particular Establishment into the Market or aims to eliminate it from the Market;
- withholding products or services available in the Market, in full or in part, from a certain Establishment(s);
- applying market division or market allocation for the sale or purchase of products and services according to any criterion, particularly the following criteria:
  - geographical location;
  - distribution centres;
  - clients' type;
  - seasons and time periods.

One subtle, but important, change relates to the issue of price control. In the Old Law, the prohibition relates to:

> *"controlling prices of commodities and services meant for sale by increasing, decreasing, fixing their prices or in any other manner detrimental to lawful competition".*

In the New Law the prohibition has been extended to:

> *"fixing or <u>suggesting</u> prices of products, services or conditions of sale and the like".*

The prohibition against 'suggesting prices' indicates that a manufacturer's recommended resale price could potentially trip the prohibition, even if the recommendation related to a maximum selling price. General practice and the final text of the new implementing regulations should, it is hoped, bring clarity to the extent of how and when this provision will be enforced. It is notable that the provisions of the Draft IR make no reference to "suggesting prices".

The Draft IR are clear that all activities that have anti-competitive objectives or consequences are prohibited. They further provide that four practices that take place between Establishments that are competitors (or likely to be competitors) are deemed to be explicit violations:

- raising, lowering or stabilising commodities prices or determining sale or purchase conditions or the like;
- total or partial monopoly of commodities available in the market by a particular Establishment(s);
- dividing or allocating markets (as set out above); and
- bid rigging.

Mergers and Acquisitions

A proposed merger must be notified to and cleared by GAC if it would result in what is known as an 'Economic Concentration'.

Under the Old Law an Economic Concentration was:

> *"any act resulting in the full or partial acquisition of ownership rights or usufruct of an entities properties, rights, stocks, shares, or obligations to another entity that puts an entity or group of entities in a position of domination of any entity or a group of entities by way of merger, takeover, acquisition or the combination or two or more managements into one joint management or any other means which leads to having a market share of 40% of the total sales of a commodity in the market."*

One difficulty encountered with the application of the previous Economic Concentration test was that there was often a lack of sufficient and reliable publicly available information about the relevant Market. Consequently, where a proposed merger was notified, it could be difficult, in practice, for GAC to determine whether the merger would result in the merged or acquired entity having a share of 40 percent of the total sales of a commodity in the Market. It is also likely that many mergers which would have resulted in an Economic Concentration were not in fact notified.

The New Law (and the Draft IR) replaces the existing Economic Concentration test that hinges on market share with one that is triggered if the total sales of all entities participating in the Economic Concentration exceeds SAR 100,000,000 (US$ 26,666,667). GAC also reserves the right to publish standards for reporting an Economic Concentration if total annual sales cannot be established. The simplification of the test for 'Economic Concentration' is clearly calculated to remove a lot of the ambiguity embedded in the existing test and it seems reasonable to assume that the new test will lead to a lot more notifications to GAC.

Once notified, GAC assesses the application for Economic Concentration against certain criteria including the level of competition in the Market, ease of entry to the Market and the effect on commodity prices, amongst others. GAC also considers whether the Economic Concentration will affect competition in Saudi Arabia and whether it can be justified in the public interest or have other benefits that outweigh the prevention or reduction of competition.

Under the New Law, notifications to GAC must be made 90 days prior to completion of the Economic Concentration (increased from the 60 days notification period previously required).

Dominant Position

What is it?

Under the Old Law an entity or a group of entities was considered to have a Dominant Position if:

- it has a market share of at least 40 percent of total sales for a period of 12 months; or
- it is in a position to influence the price in the Market.

The New Law defines a Dominant Position as:

> *"The condition where an entity or group of entities assumes control and/or is able to affect a certain percentage of the Market where it carries on its business".*

The Draft IR have set the percentage of the market at 40 percent (with no reference to a time period) and continues to apply tests related to the ability to influence the price in the Market. Factors to be taken into consideration include competitors and market share. Therefore, if there are limited players in a market there is likely to be an inference that an entity within that market has an ability to influence price.

While the Draft IR expand the factors GAC may take into account in determining whether an entity has a Dominant Position, reaching a conclusion is likely to remain challenging in circumstances where there is an absence of reliable and relevant market-based information.

Why is an Entity with a Dominant Position in the Market singled out for special treatment?

The existence of a Dominant Position in the Market is not of itself prohibited. However, the acquisition of that Dominant Position may be prohibited if it leads to an Economic Concentration (see above) or if that Dominant Position is abused.

There is working hypothesis that an entity with a Dominant Position has opportunities to distort competition in the Market that other entities do not have.

Abuse of Dominant Position

If an entity has a Dominant Position in the Market, it must not abuse its Dominant Position *"in order to compromise or limit competition"*. Article 6 of the New Law sets out a non-exclusive list of anctions that are considered to be an abuse of a Dominant Position:

- selling a particular product or a service at a price lower than the total cost thereof, in order to eliminate Establishments from the Market or to expose them to gross losses, or to set barriers against the entry of prospective Establishments into the Market;
- fixing or imposing prices or conditions of resale of products or services;
- decreasing or increasing available quantities of products in order to control the prices and to cause unreal abundance or deficit;
- discrimination between Establishments on similar contracts with regard to prices of products and services or the conditions of sale or purchase thereof;
- refusing to deal with an Establishment, without an objective justification, with intent to limit its opportunity to enter the Market;
- requiring an Establishment, as a condition, to refrain from dealing with any other Establishment; or
- making the sale of a product or the provision of a service conditional upon assuming obligations or accepting products or services the nature of which, or commercial use, is not related to the product or the service that is under consideration in the original contract or transaction.

The final two bullet points are set out as explicit violations in the Draft IR.

Entities which have a Dominant Position in a Market need to be mindful that anti-competitive practices are likely to be viewed more seriously than would be the case if they are a minor player in the Market, in particular if any of their practices could potentially be deemed to fall within the final two bullet points above.

Other Changes to the Competition Regime

Other important changes made by the New Law include the following:

- **Exemptions** will now be available if the relevant conduct can be shown to enhance the performance of the Market, product quality or technical development or innovation and that such benefits exceed the negative effects for what could otherwise be viewed as an anti-competitive practice, abuse of Dominant Position or Economic Concentrations (previously only available for anti-competitive practices and entities dealing with state owned companies). The exemption can be withdrawn in certain circumstances;
- **Prices** will be determined according to the market and the concept of free competition with the exception of products and services the prices of which are regulated and set by law or by the Council of Ministers;
- **GAC** will no longer have the ability **to permanently** cancel the commercial registration of a violating entity although it will retain the ability to issue temporary closures of up to 30 days;
- **Violations of restricted practices**, abuse of a Dominant Position, and failure to notify GAC of an Economic Concentration can incur fines of up to 10 percent of total annual sales turnover generated from the violation, or up to SAR 10,000,000 (US$ 2,666,667) if sales cannot be estimated or, at the discretion of GAC, triple the profits gained as a result of the violation. Fines may be doubled for a repeat violation should one occur within three years. The Draft IR provide that each 'aggravating circumstance' (whether determined by the New Law, the Draft IR or other laws of KSA) could result in a fine of triple the profits gained as a result of the violation when the gains exceed the maximum limit of the original fine.
- **Fines for failure to co-operate** with GAC in an investigation will be up to 5 percent of total annual sales turnover, or up to SAR 5,000,000 (US$ 1,333,334) if

"The New Law (and the Draft IR) replaces the existing Economic Concentration test that hinges on market share with one that is triggered if the total sales of all entities participating in the Economic Concentration exceeds SAR 100,000,000 (US$ 26,666,667).

annual sales cannot be estimated. Fines may be doubled for a repeat violation within three years. The Draft IR make it clear that this penalty can be imposed in addition to penalties for violations of restricted practices, abuse of a Dominant Position and failure to notify an Economic Concentration.

- **Fines for any other breach** of the New Law will be up to SAR 2,000,000 (US$ 533,334). This includes, as per the Draft IR, any provision of inducements to officers of GAC to act in a way that would prejudice fairness or the integrity of any investigation.
- **Fines for any GAC member or staff** disclosing a secret related to his job that results in a direct or indirect benefit are reduced from SAR 5,000,000 (US$ 1,333,334) and/or up to two years imprisonment to SAR 1,000,000 (US$ 266,6667).
- **GAC** will have the ability both to enter into **settlement agreements** with alleged violators and to **grant leniency** in return for informing on their co-offenders.

“The simplification of the test for ‘Economic Concentration’ is clearly calculated to remove a lot of the ambiguity embedded in the existing test and it seems reasonable to assume that the new test will lead to a lot more notifications to GAC.

What’s Next?

Now that the Draft IR have been published we will continue to monitor how the consultation phase proceeds to see whether it leads to further amendments to the Draft IR and how the New Law and Draft IR will operate applied in practice. We will provide a further update once the final implementing regulations are published.

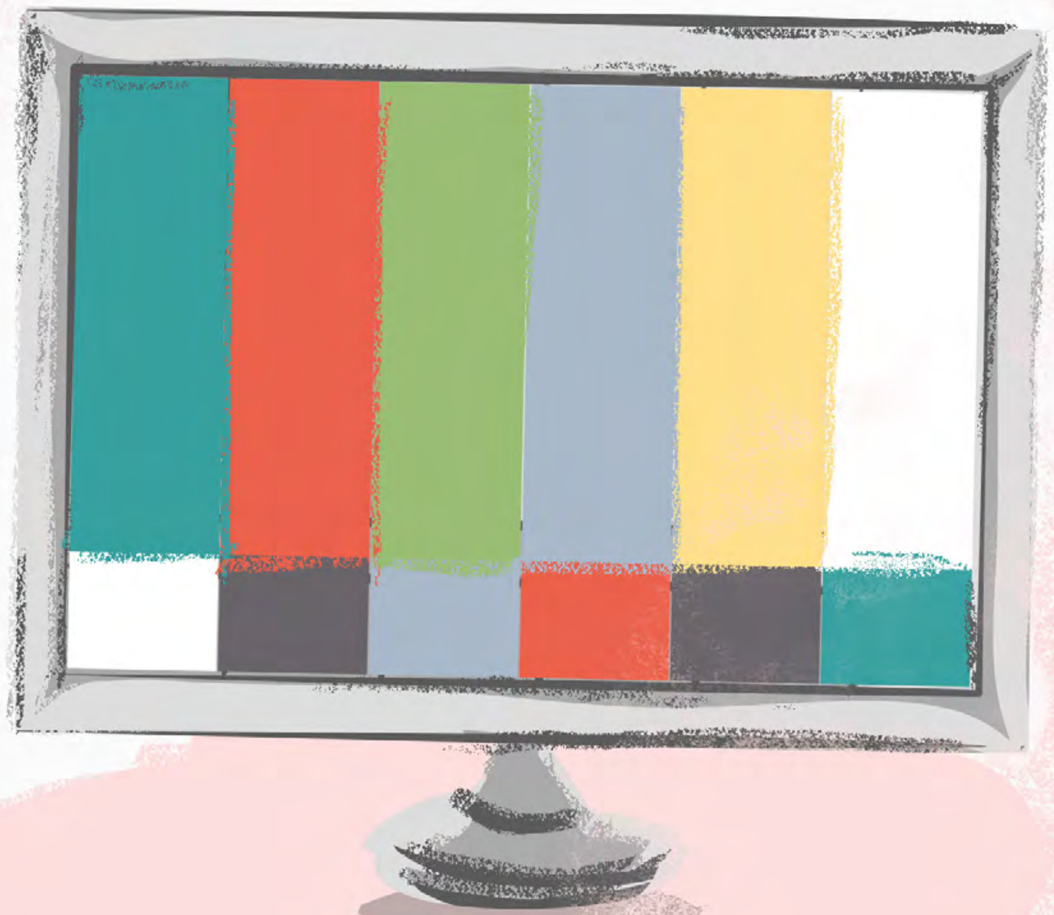
It is expected that the number of applications for Economic Concentration and/or investigations for breach will increase as a result of the New Law.

In recent years we have seen a greater willingness on the part of GAC to enter into informal discussions with entities in advance of applications for Economic Concentration and GAC has acknowledged that the current market share test is difficult for entities. It is hoped that the new test for Economic Concentration will be easier to apply than the current market share test.

We anticipate that customer interests will continue to be front and centre of the competition regime. Developments such as potential whistle-blower protection, exemptions for regulated products and for activities where the benefits outweigh the costs can all be seen in this light.

What is certain is - Saudi Arabia’s competition regime is becoming increasingly sophisticated and all current and future investors in Saudi Arabia should keep competition issues in mind when considering their business and investment strategies.

Al Tamimi & Company’s Saudi Arabian Corporate Commercial team regularly advises on competition issues. For further information please contact Rakesh Bassi (r.bassi@tamimi.com), Grahame Nelson (g.nelson@tamimi.com) or Nerissa Warner (n.warner@tamimi.com).



THE SUN ALWAYS SHINES ON TV: MEDIA LICENSING AND CONTENT REGULATION IN SAUDI ARABIA

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As part of Vision 2030, Saudi Arabia is keen to develop the audio-visual media industry in the Kingdom. A key part of this has been the development of the legal framework upon which the audio-visual media sector is based. The Audiovisual Media Law (Royal Decree No.M/33 of 25/3/1439 (13 December 2017); Council of Ministers' Resolution No.170 of 24/3/1439 (12 December 2017), and its Regulations, are a cornerstone of the development of the industry. The Law aims at creating a suitable investment environment, and ensuring that associated media content conforms to Saudi legal and cultural considerations. In this article we outline some of the key aspects addressed in the Audiovisual Media Law and its Regulations, along with some implications for both local and foreign businesses operating in this space.

Media Licensing

The Audiovisual Media Law requires those wishing to engage in broadcasting and other audio-visual media activity in the Kingdom to obtain an appropriate licence, as further detailed in the Law and Regulations, and in the associated licence manual. Audio-visual media activities include audio-visual services through satellite broadcast, cable TV, digital transmission, land transmission, TV transmission, radio, cinema, VOD, IPTV, or OTT, whether free or paid, subscription-based, charged per transaction, or based on commercials. Significantly, audio-visual media activities also includes video games.

The types of licences contemplated in the licence manual that accompanies the Regulations include:

- Media content production, and operating media production studios
- Advertising agencies
- Operating cinemas
- Satellite distribution
- Terrestrial transmission
- Satellite uplink stations
- Linear and non-linear (e.g. VOD/OTT) broadcasting
- Radio broadcasting
- IPTV and cable television
- Media audience measurement
- Importation, distribution, sale and lease of:
  - Audiovisual media content, as well as cinematic movies, videos and TV shows, and receivers and accessories;
  - Cinematic movies, videos and TV shows; and
  - Receivers and accessories.

Along with paying the applicable official fees, a basic requirement on all licensees is to comply with the requirements specified in the subject licence. Generally, and depending on the type of licence granted, licensees also need to meet requirements relating to development of the media industry, technical aspects, and cooperation with the relevant authorities. In summary:

- Licensees need to follow GCAM's policies with regard to prioritising the use of Saudi resources, including human resources; and otherwise participate in capacity building in respect of local content production capabilities.
- Where applicable, licensees need to comply with technical specifications for equipment relating to transmission and reception of media content, and with the allocation of frequencies and associated technical procedures and standards for frequency use.
- Licensees also need to cooperate with the authorities (typically the General Commission for Audiovisual Media, or "GCAM"). These requirements include a general obligation to provide GCAM with any information it requests in respect of broadcasting, production or distribution of media content. Licensees must maintain records of all media content transmitted for 90 days, and provide such content to GCAM upon request. There is also a general requirement to comply with decisions issued by GCAM.

The Regulations prohibit the encryption of broadcasted content, intended for the Saudi market, and relating to 'occasions of a national nature'.

GCAM is primarily responsible for licensing, although approval from other authorities (including final approval by the Council of Ministers) may also be required, depending on the type of licence. The Regulations set-out the relevant controls and procedures for the issuance, renewal, amendment, suspension and revocation of licences, and there are restrictions on the transfer of licences. GCAM's board is responsible for setting out the rules for determining licensing fees.

Saudi Broadcasting Corporation's television channels and radio stations are deemed to have been licensed on the day on which the Law came into force. Such channels and stations are subject to, and required to comply with, the Laws and Regulations.

Interestingly, the Regulations contemplate the licensing of foreign streaming platforms available in the Kingdom. Such entities are required to comply with local foreign investment and commercial registration requirements, and to set-up a local presence (such as a branch or representative office), as part of the requirements for seeking a licence from GCAM. It will be interesting to see how this pans-out in practice.

Media Content Regulation

The Law and the Regulations require those who engage in audio-visual media activities to comply with local content standards. Some of the requirements specified are somewhat vague (e.g. 'comply with the Kingdom's media policy', and 'show respect for the inviolability of the human person'), whereas others are somewhat more specific. The Law includes the following requirements and prohibitions, which are further detailed in the Regulations:

- To show reverence, and not show contempt, scorn or vituperation, for Allah, the Holy Quran, the Prophets, and the wives and companions of the Prophet (PBUH); and not compromise the pillars of Islamic Shari'ah.
- To show respect for the King and the Crown Prince; to avoid compromising public order, national security and the public interest; and to refrain from addressing matters that may stir up strife, division and hatred among citizens, instigate violence, or compromise security.
- To show respect for freedom of expression and opinion.
- To refrain from addressing matters that may compromise international relations with other Arab, Islamic or friendly nations, and matters that may incite terrorism and threaten peace.
- To refrain from transmitting content prejudicial to public morality, or that shows nudity, indecent clothing, provokes sexual instincts, or uses vulgar language.
- To maintain a balance between advertising content and non-advertising content, so as not to adversely affect the quality of the non-advertising content.
- To refrain from broadcasting commercials involving pharmaceuticals, food supplements, or investment materials, that have not been approved by the competent authorities in the Kingdom; and to refrain from broadcasting content that promotes drugs, psychotropic substances, alcohol or tobacco.
- To refrain from transmitting content containing false information (i.e. information that is not based on well-proven, documented facts), or that may violate privacy of the individual.
- To respect intellectual property rights.

There is specific mention of the requirement for women presenters working in television stations licensed in the Kingdom to be decently dressed, by conforming to Islamic dress code and common norms.

In some circumstances, licensed broadcasters may be required to provide GCAM with media content that has not yet been made available in order for GCAM to review it and provide consent to its display.

In the case of offending media content that is broadcast by satellite and accessible in Saudi Arabia, GCAM is empowered to 'take all necessary measures'. The Regulations contemplate GCAM notifying the foreign satellite broadcaster via diplomatic channels, and otherwise taking further legal action where appropriate.

Competition and Consumer Protection

The Law contemplates GCAM ensuring the protection of consumers, and the Regulation goes into more detail in this regard. GCAM is empowered to settle disputes between licensees and consumers, as well as disputes between licensees (except where one of the licensees is a telecommunications licensee; in which case CITC, the local telecoms regulator, will be responsible).

Interestingly, the Regulations prohibit the encryption of broadcasted content, intended for the Saudi market, and relating to 'occasions of a national nature'. 'Occasions of a national nature' include the likes of political, historical, cultural, social and sporting events that have a national nature, as further determined by GCAM.

In terms of anti-competitive behaviour, and subject to the local Competition Law, licensees are prohibited from doing anything that adversely affects the media market. Again, specific detail, including information on mergers in the media sector, is set out in the Regulations.

Generally

The Law and Regulations are wide-ranging, and contain a significant amount of detail not mentioned in this article. Examples include rules relating to registration of media industry professionals, a multi-level mechanism for considering and addressing alleged violations of the Law and Regulations, and – of course – the penalties for non-compliance. Current and prospective industry participants need to familiarise themselves with the requirements relevant to their specific media industry sub-sector so as to ensure compliance and reduce risk.

Al Tamimi & Company's Technology, Media & Telecommunication team regularly advises on media licensing and content regulatory issues in Saudi Arabia and across the Middle East. For further information please contact Nick O'Connell (n.oconnell@tamimi.com).

THE LAND TITLES SYSTEM AND PRACTICE IN THE KINGDOM OF SAUDI ARABIA

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The Land Titles System and Practice in the Kingdom of Saudi Arabia

The Realty in Kind Registration Law ('RKR Law'), issued by Royal Decree No. M/6 on 9/2/1423H, was enacted to create a transparent land identification, ownership and registration system which will ultimately cover all real estate in the KSA.

Pursuant to the RKR Law, a copy of the cadastre called a 'title deed' is issued to the owner of a plot of land or a building once the ownership is entered into the cadastre (Article 67). This title deed certifies and confirms the ownership of a plot of land or a building. Article 2 of the RKR Law provides that *"[t]he register shall have an absolute confirmation power, and its content may not be objected after the elapse of the defined periods for objection stipulated in this law, unless based on the breach of the Sharia requirements, or on forgery of such"*.

However, the application of the RKR Law is still limited to specific areas and is unlikely to be implemented beyond these areas. The predominant practice in KSA is that of titling and conveyancing through notaries (under the Ministry of Justice along with the courts) pursuant to Executive Regulation of Notaries Public Jurisdictions ('Notaries Regulations'), Ministry of Justice Circular 13/T/2460 on 25/5/1425. If a plot of land is located in an area where the RKR Law has not been implemented, the document certifying and confirming the ownership of a plot of land or a building is a title deed issued to the owner by a regional government employee of Shari'ite qualifications ('Notary Public') or a court.

In 2015, for example, the Ministry of Justice passed a resolution No. (5135) dated 4.3.1437 AH providing that the RKR Law applies to certain real estate zones (as indicated in the resolution).

Manual and Electronic Titles

Historically, title deeds in KSA were handwritten. However, since 2008, the Ministry of Justice has been implementing an initiative to convert all handwritten title deeds into an electronic format.

In regards to their content, we note that title deeds are in Arabic only (except for titles created by the Economic Cities Authority) and reference to the Municipality plot numbers. They also record details of proprietorship and may note mortgage details or other covenants. What is recorded on the title must be in accordance with Shari'a Law.

Pursuant to that initiative, any transaction concerning an old handwritten deed requires conversion into the electronic format prior to formalising any transaction or any dealing with the land.

In addition, the Ministry of Justice provides a researchable electronic database where one can enquire about land ownership by filling in the electronic title deed number of the plot.

Conveying Title

Dealings with real estate in KSA are principally carried out according to a well-established and traditional process involving private negotiations followed by the participation of the Notary Public, who completes a change in ownership and records such details in a register retained by the Ministry of Justice.

In due course the titling process may be moved under the jurisdiction of the Real Estate General Authority, pursuant to a more advanced land titles system currently under development. It is not possible to say precisely when this system may be available at this stage.

Additionally, the Registered Real Estate Mortgage Law ('Mortgage Law'), issued in 2018, has now paved the way for a traditional mortgage structure, whereby the title to the property would remain with the borrower and the bank would obtain a registered mortgage.

However, the requirement for registration is subject to the type of transaction, the parties to the transaction (whether they are individuals or companies) and their nationality.

For a transaction involving Saudi or GCC citizens, the following requirements must be met (with the provision of the indicated documentation):

i. the attendance of the parties to the Sale and Purchase Agreement or their representatives providing official documents (ID/proof of representations);
ii. the original electronic title deed;
iii. the registered payment method;
iv. the sub-division document of the property if the transfer relates to a part of the property;
v. the approval of the Agricultural Development Fund, if the property is agricultural; and/or
vi. if the property is mortgaged, the mortgagee's consent.

For a transaction involving a foreign investor(s), the documents above are required in addition to the following:

i. the approval of the competent authority (e.g. Ministry of Interior / Ministry of Foreign Affairs/SAGIA) on the purchase; and
ii. the fulfilment certificate from the Ministry of Finance (regarding the sale).

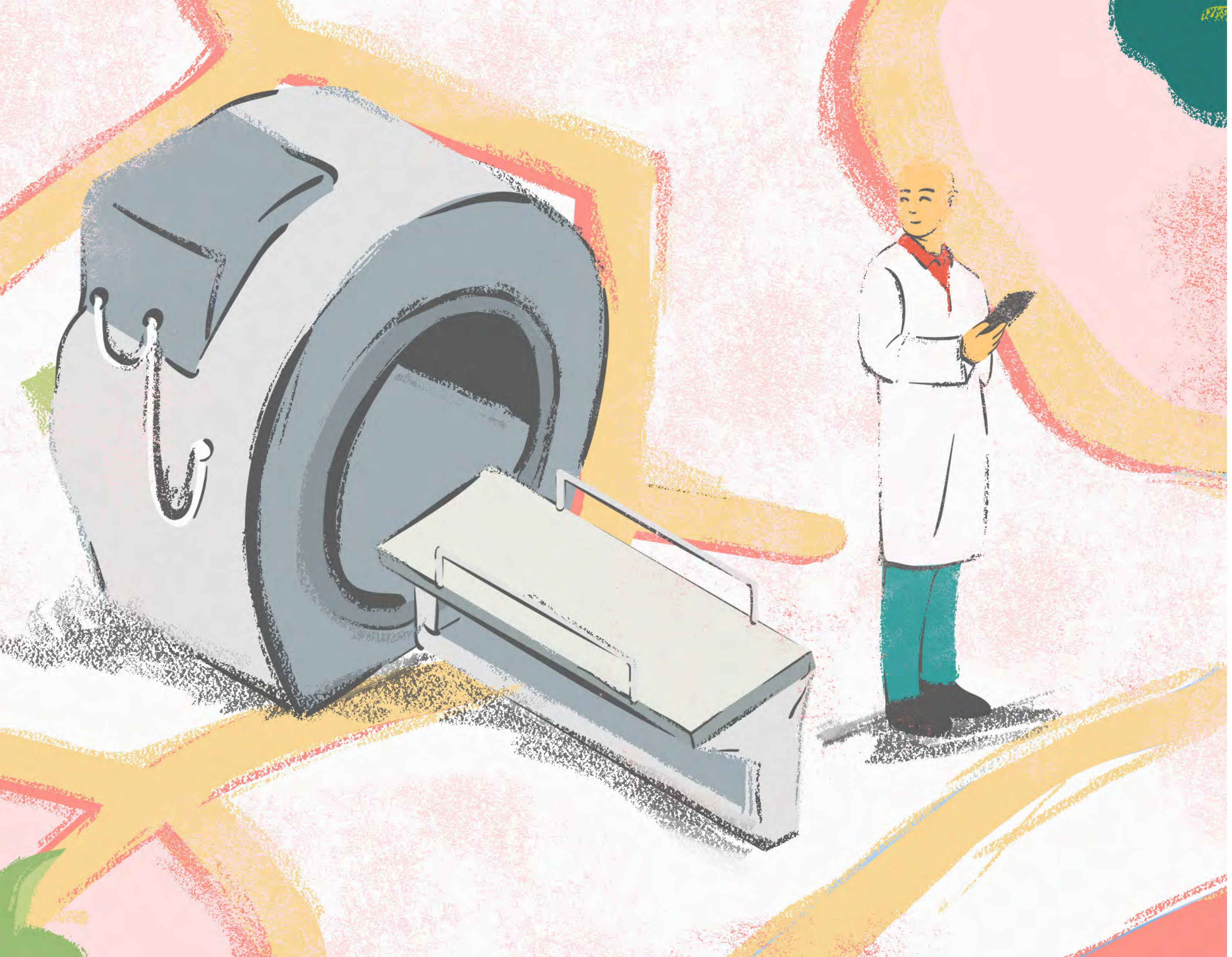
The Real Estate General Authority ('REGA') and Potential changes.

Whilst the land titles system in place is quite functional, we understand that, in due course, the real estate regulation including the land titles systems and practices are likely to be moved from the various ministries currently responsible for this to REGA. A land titles law is currently under consideration and it is anticipated that this will address:

i. more detailed titled deeds including the ability to search these by plot number and name of the owner;
ii. the ability to record covenants and easements against titles and for the obligations pursuant to these to be enforceable by the beneficiary of such rights;
iii. the ability to register Master Community Declarations and Owners Association documents against the titles and for these to be binding on the owners;
iv. the ability for REGA to prevent the transfer of title pending receipt of the approval of the master developer or and owners association;
v. more advance titling options such as the sub-division of parts of mixed use buildings; and
vi. possibly the option to record title details in English and Arabic.

Al Tamimi & Company's Real Estate team regularly advises on the sale and purchase of immovable properties. For further information please contact Jeremy Scott (j.scott@tamimi.com).

A WARM WELCOME FOR FOREIGN INVESTMENT IN HEALTHCARE IN THE KINGDOM OF SAUDI ARABIA



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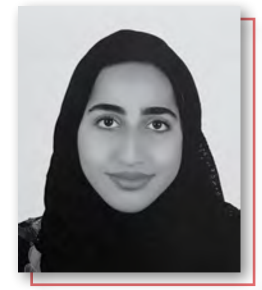

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Way back in April 2016 in a blaze of publicity Vision 2030 was announced to the world. It promised to transform the Kingdom of Saudi Arabia ('KSA') ('Kingdom') and reduce its reliance on oil income for economic growth by channelling energies into other revenue streams. Certain sectors and industries were identified as having potential for growth with one area being the healthcare sector.

The goal was to improve the quality of healthcare services and promote competition amongst healthcare providers with a move towards the private sectors as opposed to the burden falling on the public sector and, ultimately, the public purse. It was recognised that it was necessary to create an environment that will attract both local and foreign investment by making it more attractive for the right investors to invest their expertise, capabilities, energy and finances in the Kingdom.

Vision 2030 also recognises the need to embrace healthcare information technology, as digital innovations are vital for sharing knowledge among healthcare professionals as well as improving the performance and productivity of healthcare providers. Eventually all medical records will be electronic based and with the objective of linking up the Ministry of Health ('MOH) with healthcare providers in order to share patient information. We are seeing a lot of interest in healthcare information technology from foreign owned companies, especially in cloud based diagnostic software as they are keen to offer their services (through an appointed Saudi distributor) to healthcare providers and professionals.

Recent Position in Relation to Foreign Investment

Until recently there were limited options for foreign investment in the healthcare sector as foreigners could only own, operate and invest in large hospitals and were unable to invest in other healthcare institutions such as clinics, polyclinics and laboratories as well as support healthcare service centres such as physiotherapy, nutrition and optical centres. Furthermore, pharmaceuticals and medical devices not manufactured in KSA can only be distributed and sold within the Kingdom through an appointed and registered Saudi owned distributor. Therefore, the opportunities for foreign investment were slim even though the manufacture of pharmaceuticals and medical devices has been actively encouraged and ownership of hospitals became an option for foreign investors in 2015. Many manufacturers still choose to distribute their products through distributors and, to date, the uptake by foreign companies to own and operate hospitals has been slight as the Saudi Arabian General Investment Authority ('SAGIA") was only accepting applications for licences for large scale hospital projects until earlier this year.

We believe there is no plan to allow foreign companies to directly sell and distribute pharmaceuticals and medical devices in the Kingdom and this will remain the preserve of Saudi owned entities and individuals.

Opening of Doors for Foreign Investment

In March 2019, it was announced that foreign companies could own and manage private healthcare institutions and support healthcare service centres in KSA with the exception of clinics and pharmacies. Article 2 of the Private Health Institutions Law and Executive Regulations issued by Royal Decree No (M/40) dated 3/11/1423 (corresponding to 6, January 2003) will be amended to reflect this change but it is not yet in force even though it has been approved. However, both the MOH and SAGIA have implemented the change and are accepting applications for operating licences and foreign investment licences respectively. Both authorities are encouraging of foreign investment and the MOH has even published a Healthcare Investor Licensing Guide, which documents all the recent changes to foreign investment in the Kingdom's healthcare industry and explains, in simple terms, the licensing application process.

All healthcare institutions and support healthcare service centres must have a Saudi Managing Director and with the exception of hospitals and support healthcare service centres, all healthcare institutions must be supervised by a Saudi physician. Hospitals must have a qualified Saudi Medical Director rather than be supervised by a Saudi physician.

The operating licence application process has improved significantly and is now carried out online. From our experience, the process is relatively straight forward and efficient.

SAGIA has no minimum capitalisation requirements for healthcare investment, which is welcome news, as previous investment opportunities open to foreign investors required a substantial minimum investment. We recommend that all investment vehicles have a minimum capitalisation of five hundred thousand Saudi Arabian Riyals (SAR 500,000) as this is the usual minimum requirement expected by SAGIA as it demonstrates a firm commitment by the foreign investor to commit to investment in the country.

Both SAGIA and the MOH have reported significant interest from potential foreign investors and are proving to be very willing to assist potential investors. We are currently assisting a number of clients in exploring available options and establishing healthcare institutions and support healthcare service centres within the Kingdom. We believe that some large healthcare providers are watching the Saudi market closely and we know of at least one market leader that is keen to enter the Saudi marketplace.

Telemedicine

The MOH now offers licences for Telemedicine and Telehealth Centres ('Telemedicine Centres'). In conjunction with this, the Telemedicine Regulations were, after much anticipation, finally published in June of this year and we shall discuss these regulations in more detail in our Healthcare Law Update to be published in November this year. Telemedicine Centres do not need to be owned by medically qualified investors but must have a Saudi Managing Director and be supervised by a suitably qualified medical professional (with no nationality specified.). Telemedicine Centres allow for the collaboration between medical institutions inside and outside Saudi Arabia to share knowledge and experience in order to make more accurate diagnoses. Telemedicine enables healthcare professionals within the country to have access to and assistance from expertise outside the Kingdom which will benefit patients and will enable Saudi based medical practitioners to develop expertise in their chosen field.

Through collaborations with medical institutions in other countries, a number of hospitals within the Kingdom already provide a telemedicine facility as an additional service to its patients. This is a growing trend and we expect to see more examples of this in the future. Healthcare insurance now provides for reimbursement of telemedicine fees which makes investment in this area even more attractive. Telemedicine and teleconsulting is ripe for investment and it will only be a matter of time before foreign investors recognise this opportunity.

"Vision 2030 also recognised the need to embrace healthcare information technology as digital innovations are vital to instil and share knowledge among healthcare professionals and to improve the performance and productivity of healthcare providers.

The Kingdom's Commitment to Foreign Investment

The opening up of foreign investment into healthcare institutions and support healthcare service centres this year demonstrates the Kingdom's seriousness in developing and improving the private healthcare market to benefit its citizens. It is actively seeking foreign investment and is welcoming the right investors with open arms and is paving the way for easier incorporation without administrative delays and complications. We are confident that the healthcare market will change beyond recognition over the next few years with high quality healthcare services being available to all through traditional mediums and digital platforms. We anticipate that once the changes to foreign investment opportunities are widely known we shall see a number of foreign owned healthcare service providers and joint ventures with Saudi partners entering the marketplace throughout the Kingdom providing for healthy competition and heightened service levels as anticipated in Vision 2030. The changes have taken everyone by surprise and though longed for were not anticipated in practice. It is now time for foreign investors to enter the Saudi Arabian market with confidence and to help change the healthcare landscape. The opportunities are endless for the investor with vision, drive and ambition.

Al Tamimi & Company's KSA Regulatory team regularly advises on healthcare matters. For further information please contact Julie Bassi (j.bassi@tamimi.com).

A LOOK AT THE NEW LABOUR COURTS IN KSA

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Introduction

It has been over three years since the Kingdom of Saudi Arabia ('KSA') embarked on its journey towards reform and modernisation under the ambitious Vision 2030 programme. The rate of change over the past three years demonstrates the commitment of the KSA government to fulfil the various aims under Vision 2030. One of the key aims of Vision 2030 is to diversify the economy away from its dependence on oil and to attract foreign investment to strengthen the economy. In order to encourage more foreign investment, the KSA government has implemented a number of measures to facilitate easier investment into KSA but it is also conscious that investor confidence will be strengthened by confidence in the legal system.

Against that background, we have witnessed a number of changes within the broader legal infrastructure within KSA to increase the efficiency and quality of the judicial system. This article looks at one such change, namely the introduction of formal Labour Courts to determine disputes arising from employment relationships.

Background

When the Labour Law (issued by Royal Decree Number M/51 dated 23 Sha'ban 1426 corresponding to 27 September 2005) was amended in 2015 it introduced the creation of specialised labour courts in order to determine labour disputes in accordance with Article 34 of the Law of Civil Procedures (issued by Royal Decree Number M/1 dated 22 Muharram 1435 corresponding to 25 November 2013). However, no such courts were officially created and, instead, disputes relating to an employment relationship were heard by commissions known as the Preliminary Commission for the Settlement of Labour Disputes ('Preliminary Commissions') which had semi-judicial authority and came within the jurisdiction of the Ministry of Labour ('MoL'). The Preliminary Commissions were not official courts, were not presided over by judges qualified in Shariah law, and were not subject to the Law of Civil Procedures which applied to other civil courts. Decisions were sometimes considered to be inconsistent and lacking in legal sophistication. Appeals were considered by the High Commission for the Settlement of Labour Disputes and many of the criticisms which were levelled at the Preliminary Commissions also applied to the High Commissions.

New Labour Courts

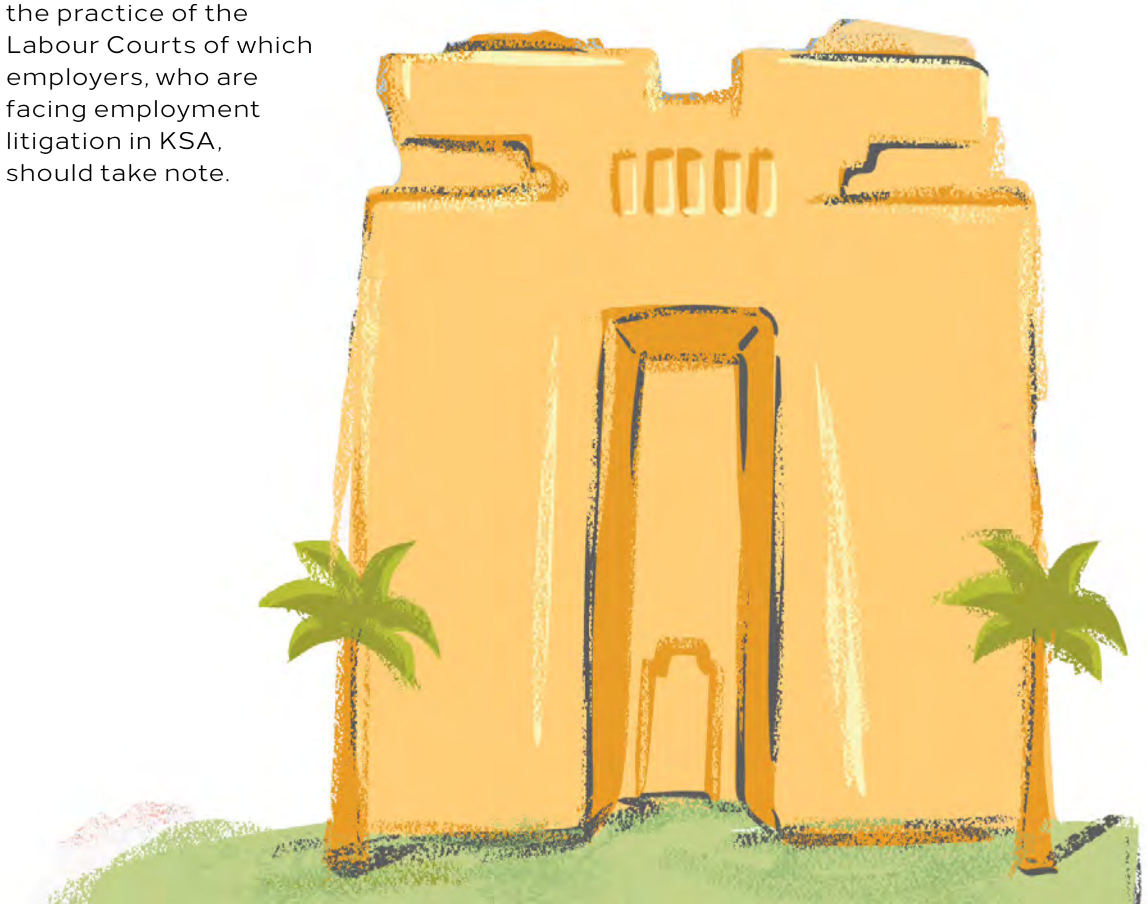
Pursuant to the Royal Decree number 20712 dated 29 Rabi al Thani 1439H corresponding to 16 January 2018, the new Labour Courts were introduced in KSA on 20 Safar 1440H corresponding to 29 October 2018. The new Labour Courts are under the jurisdiction of the Ministry of Justice. They have jurisdiction over disputes relating to employment contracts, wages, employment rights, injuries, compensation and social insurance claims, among others.

As part of the initial introduction phase, seven Labour Courts have been established across KSA in areas which have historically seen the most labour disputes, including in Riyadh, Jeddah and Dammam. In addition, over 20 circuit courts have been established in various provinces and governorates to deal with labour cases. Six appellate courts will review judgments issued by the first instance Labour Courts.

To support the introduction of specialised Labour Courts, over 50 judges have been appointed to preside over the Labour Courts and have been trained to specialise in labour laws and regulations.

The main objectives for the creation of dedicated Labour Courts with judicial functions and capabilities were to expedite the delivery of justice and to improve both the quality and efficiency of the judicial process in labour disputes.

Below, we explain some of the differences between the approach being adopted by the new Labour Courts as well as some of the trends that are starting to emerge from the practice of the Labour Courts of which employers, who are facing employment litigation in KSA, should take note.



Comparison of approach in the New Labour Courts Compared to Old Labour Commissions

We have set out below some comparisons between the new Labour Courts and the old Labour Commissions in the approach taken towards managing employment litigation in KSA:

- **Length of proceedings:** Under the old Labour Commissions, labour disputes would often run for a number of months or sometimes years involving a number of hearings to deal with both factual and legal issues; it was not uncommon for disputes to continue for 12 to 18 months. This led to an inefficient and unsatisfactory system for resolving labour disputes, particularly where the issue related to non-payment of wages. Under the new Labour Courts, labour claims are being determined far more efficiently, sometimes during the first hearing where issues can be determined on the available documents or, where that is not possible, within a matter of days or weeks after the first hearing. By way of illustration, we represented a client in a complex labour claim which was determined by holding seven hearings over nine working days; under the old Labour Commissions, such a claim would likely have taken over a year to determine. Indeed, the President of the Labour Court in Jeddah has informed us that the Jeddah Labour Courts aim to deliver judgment in labour claims within 30 days of the claim being received by the Labour Court following the conclusion of the initial 21-day amicable resolution stage of the proceedings.
- **Role of the judge:** Under the old Labour Commissions, hearings were presided over by 'counsellors' who lacked judicial qualifications. Often, the counsellors in the Labour Commissions adopted a passive approach to managing the litigation, and would need to be directed by the parties or their representatives to consider the relevant legal and factual issues. This, coupled with their lack of judicial qualification, sometimes produced unpredictable and inconsistent judgments. Under the new Labour Courts, the judges are taking a more proactive role in both managing the litigation process, as well as directing the parties as to what they consider to be the legal and factual issues in the claim. Further, judges in the Labour Court are also directing that other public authorities intervene in labour disputes where necessary to determine certain issues; for example, in a case involving an alleged assault in the workplace, a Labour Court recently directed that the Public Prosecutor should investigate the matter to determine whether an employee had committed an assault which would justify a summary dismissal.
- **Judicial procedures:** The old Labour Commissions were governed by loosely drafted procedural regulations which contributed to the often inefficient management of labour claims. By contrast, procedures in the new Labour Courts are governed by the Law of Civil Procedures which apply to all civil lawsuits in KSA. The Law of Civil Procedures provides a far more comprehensive framework for the administration of legal proceedings in all civil courts. This is likely to lead to a more consistent approach and practice of litigation in the new Labour Courts.

Lessons to Learn from Emerging Trends

We have set out below some lessons which employers, involved in labour disputes in KSA, can learn from trends that are emerging from claims which have been litigated in the new Labour Courts:

- **Prepare for litigation early:** As the new Labour Courts are aiming to deliver judgments as early as possible in the legal proceedings, judges are expecting the parties to come prepared to address the issues at the first hearing. They have suggested that the parties should use the initial amicable resolution stage of the proceedings at the Labour Office as an opportunity to understand what the claim relates to, to reach agreement on any accepted facts or issues and, where a claim has not settled at the amicable resolution stage, should be ready to make submissions on any disputed legal or factual issues during the first hearing. Employers should, therefore, start to prepare their defence to any potential labour claims once they receive notification of a hearing at the amicable resolution stage. This includes collating documents and considering their position in response to any claims advanced by a complainant at the amicable resolution stage so that they are prepared to engage in the litigation proceedings at the first hearing at the Labour Court.

- **Ensure a valid power of attorney is in place:** Related to the point above, employers should ensure that they have an appropriate power of attorney in place in order for a lawyer to legally represent them at a hearing. The new Labour Courts have adopted a robust approach where legal representatives do not have a valid power of attorney to represent an employer in defending a labour claim. Given the international nature of many businesses in KSA, powers of attorney often have to be issued by foreign parties (e.g. shareholders in other jurisdictions), and this process typically takes up to four weeks before the power of attorney can be issued for use in legal proceedings. In order to ensure that an employer's position in the litigation process is not prejudiced, employers should review any existing powers of attorney to check if they will be valid in any potential labour claims.
- **Ensure that due process has been followed:** The Labour Courts are placing considerable emphasis on ensuring that the disciplinary process set out in the Labour Law has been followed before employers issue any disciplinary sanctions, particularly in relation to termination of employment on the grounds of disciplinary offences. Employers should, therefore, be careful to follow the disciplinary process, and comply with the applicable timescales, set out in the Labour Law in order to demonstrate, for example, that a decision to terminate employment on disciplinary grounds was procedurally correct.
- **Ensure that reasons are sufficiently valid in cases of summary dismissal:** Where an employer is considering summary termination of employment, it must ensure that it has a sufficiently strong reason to justify a summary dismissal. The Labour Courts are applying a high threshold to justify summary dismissals, and employers will be required to demonstrate why a summary dismissal, which will deny an employee certain statutory rights (e.g. the end of service award), was warranted. In particular, where the reason for a proposed summary termination relates to potential criminal conduct, for example, misappropriation of money, fraud or forgery, employers should consider whether it is necessary to refer the matter to the police for investigation in order to demonstrate that there are sufficiently strong grounds to summarily dismiss an employee.

"Employers should start to prepare their defence to any potential labour claims once they receive notification of a hearing.

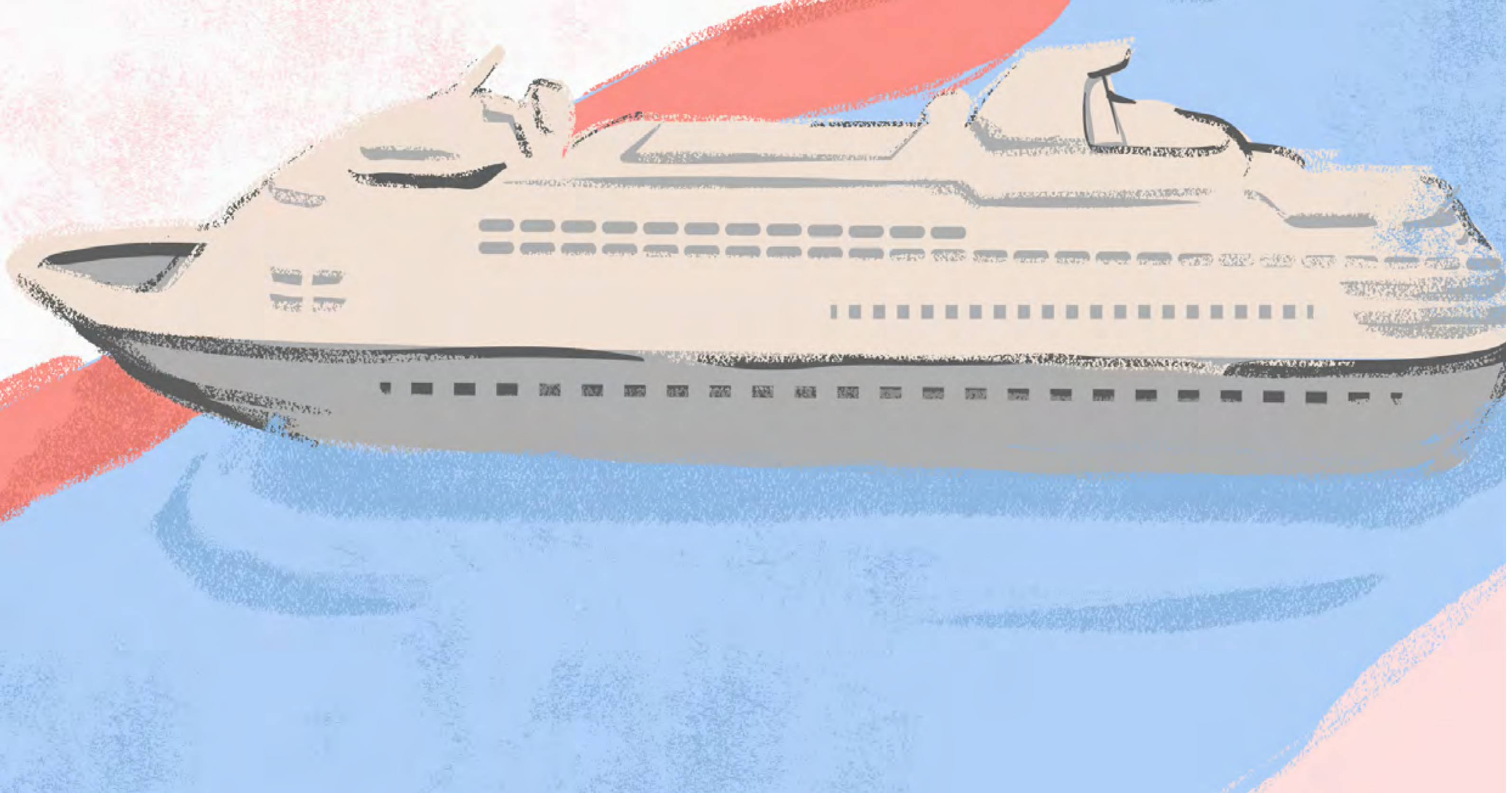
"Under the new Labour Courts, labour claims are being determined far more efficiently.

Conclusion

The new Labour Courts are a welcome development in the resolution of labour disputes. Although litigation practitioners are still adapting to the new approach to dealing with labour claims, the overall consensus is that there is increased efficiency in the labour litigation process. However, as the number of labour claims continues to rise (there are currently approximately 7,000 claims a year) and as the issues become more complex, it remains to be seen how the new Labour Courts will manage the increasing demands on its resources and how that affects the administration of justice in dealing with labour disputes as the country continues to move forward towards achieving its aims under Vision 2030.

Al Tamimi & Company's Employment & Incentives and Litigation teams regularly advise on employment disputes. For further information please contact Mohsin Khan (mohsin.khan@tamimi.com) or Mustafa Abudawood (m.abudawood@tamimi.com).

HIGHLIGHTS OF THE NEW SAUDI COMMERCIAL MARITIME REGULATIONS



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N.B. This article was first published in LexisNexis.

The Kingdom of Saudi Arabia has recently modernised its Commercial Maritime regime, with a host of new regulations, that will impact maritime contracts, debt enforcement, offshore platforms and ship agents in the Kingdom.

New Maritime Approach in the Kingdom of Saudi Arabia

The new Saudi Commercial Maritime Regulation was released via Royal Decree No. M33/1440 and published in the Official Gazette on 5, January 2019, together with Saudi Arabia Cabinet Decision No. 197/1440, which approved this Regulation which came into force in early July 2019. These regulations are part of the Saudi Government's initiatives to develop the Commercial Maritime business in the Kingdom.

The previous legislation, Articles 150 to 431 of the Commercial Court Regulation, which governed commercial maritime business in Saudi Arabia, the Ports, Harbours and Lighthouses Regulation and its Executive Rule continued to apply until the new Commercial Maritime Regulation came into force.

These regulations are not the only recent change to Saudi Maritime Law. The Saudi Ports Authority also issued the new Ship Agents Regulations a few months ago which regulate the licensing of ship agents in Saudi Arabia, for both Saudi and foreign companies. What is particularly interesting about those regulations is that they now allow foreign investors to operate as ship agents in the Kingdom, subject to satisfying various requirements.

Under these regulations, ship agents must also follow certain procedures when dealing with cargo shipping, receipt and delivery, issuing bills of lading and dealing with shipping documentation. The Ship Agents Regulations are also part of the government's efforts to develop this sector in Saudi Arabia.

The Saudi authorities hope that by allowing foreign investors to set-up 100 percent owned legal entities in the Kingdom and obtain a ship agent licence, it will help the Saudi market to become one of the most attractive global markets for foreign investors, which in turn will create job opportunities for Saudi nationals. The overall aim will help make Saudi ports a hub for international trade.

Commercial Maritime Regulation

The New Commercial Maritime Regulation covers the nationality, registration and ownership of ships as well as bareboat chartered ship registrations, offshore platforms licensing, classification accreditation, shipbuilding contracts and ownership of new built ships and ship repairs. It also covers the creation, termination and

The new Commercial Maritime Regulations tend to regulate the legal rights and obligations of the parties to the maritime transaction and maritime claims and casualties. They will enhance the legal framework for maritime business in the Kingdom and help related business entities have more comprehensive and effective legal procedures and tools to protect their legal rights. The new Ship Agents Regulations issued few months ago, regulate the licensing and practice of ship agents in Saudi Arabia for both Saudi and foreign companies.

transfer of ownership rights and looks at priority debts or maritime liens, their time limits and how they are extinguished.

There are also provisions on maritime mortgages, including how they are registered as well as ship arrests against maritime debts and details of their release against a guarantee. These include provisions on judicial execution ship arrest and sale, ship owners and managers' liability and their limitations. In addition, the new regulation covers ship master authorities and obligations, shipping agent and freight forwarder rights and obligations.

There is also significant detail on maritime contracts, including maritime employment contracts, charterparties, and transportation of passengers by sea contracts, carriage of goods by sea contracts under bills of lading and coverage of points such as the place of filing claims and arbitration agreements under bills of lading, collisions, salvage, marine loss and general average .

Also included are provisions on marine insurance contracts covering both vessels and cargo liability, although a whole host of new maritime areas have been covered in the new Commercial Maritime Regulations which include marine pollution, collisions, towage, pilotage, salvage, ship agency and freight forwarding. Helping the new regulations is the modernisation of the regulatory language used. For example, there are now distinctive provisions on licensing offshore platforms, which is unprecedented compared to the maritime laws of other countries in the region.

In addition, ship arrest is now a precautionary procedure. This will also encourage local and foreign creditors to follow and arrest vessels in Saudi Arabia in order to secure and enforce their maritime claims.

Steps that must be taken by the Affected Entities

All affected local entities, or foreign investors thinking of investing in Saudi Arabia, should seek proper legal advice to ensure they are complying with these regulatory changes, particularly in areas such as ship registry and mortgage requirements under the new Commercial Maritime Regulation.

They should also be looking at the new ship agent requirements under the Ship Agents Regulation. Ship agents will have to also familiarise themselves with the new operational requirements when dealing with shipments and containers and the exact legal liability they are now exposed to. In addition, those who are seeking legal claims and recovery against any vessel trading in Saudi waters should start thinking of following the targeted vessels .

Applicable Penalties

The Commercial Maritime Regulations regulate the legal rights and obligations of the parties to the maritime transaction and maritime claims and casualties. Part of this regulation provides regulatory obligations for shipping entities, and in this context, penalties will be applied for non-compliance. Relevant parties should therefore be aware of particular penalties. These include fines of between 100,000 and 1,000,000 Riyals for ship owners and managers (including bareboat charterers or masters) if their vessel flies the Saudi flag but is not registered in Saudi Arabia; likewise if they hide, blank out or erase any of the vessel's details (unless this is done to avoid captivity).

Offshore platform owners, which could include bareboat charterers or managers, will also be required to pay a fine between 100,000 and 500,000 Riyals if they operate their offshore platform without the necessary safety requirements in place to protect personnel and the environment.

There are additional penalties under the Ship Agents Regulations too. For example, penalties are levied on ship agents who violate rules on licensing and business practices, who will have to pay a fine of 500 Riyals for every day after the expiry of the licence, until such time as a new licence is obtained.

Finally, if a ship agent does not deal with dangerous cargo under these regulations, they will be liable for a fine of 3000 Riyals for every day from the date of its arrival until it returns to its source. There are also fines to be aware of if port dues or supporting services are not paid within the period stipulated, which are calculated according to the value of the invoice.

Conclusion

The main aim of these new regulations is to enhance and modernise the legal framework for maritime business in the Kingdom and thereby enable business entities to have more comprehensive and effective legal tools and procedures to protect their rights. The new regulations also introduced new terminologies used in the modern day shipping industry to replace the existing 90 year old ones.

Now that the legal regime in this area is more in line with the international legal systems it will make international trade easier and more practical for those seeking enforcement of their legal rights in Saudi Arabia.

Al Tamimi & Company's KSA Transport & Insurance team regularly advises on matters related to maritime regulations. For further information please contact Siri Hashem (s.hashem@tamimi.com).

COMMON TRIPARTITE CIRCUIT FOR DIVISION OF ESTATES EXCEEDING ONE HUNDRED MILLION RIYALS

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Common Tripartite Circuit

When we look at the reality of succession, we cannot help but notice that the division of large estates is often complex and tangled, and it often takes the heirs a very long time to receive their respective bequests. Indeed, it is not unusual for it to take many, many years for the heirs to receive their share. As disputes drag on, relations amongst the beneficiaries can become strained, and even jeopardised. Conversely, heirs may choose to give up their rights to their share of an estate in order to preserve family harmony.

Recognising the potential pitfalls related to the distribution of large estates, a minister who has worked tirelessly to elevate the judiciary to a stage that meets expectations, has been a major driving force behind an unprecedented development in the Kingdom's judicial arena; that of addressing the problems associated with succession in Saudi. In an attempt to find a solution to the historically long and protracted process of distributing large family estates and in the public interest, H.E. was responsible for, amongst others, the establishment of a Tripartite Circuit to consider estates exceeding one hundred million riyals (US$27 million) pursuant to decision No. 38/2/105 dated 23/07/1438 AH.

The decision does not limit the Circuit's jurisdiction to the adjudication of future inheritance cases of more than one hundred million riyals, but also includes the cases that are still currently being disputed before general and family courts but which have not yet been adjudicated under the Follow-Up Committee. The Inheritance Cases Follow-Up Committee is charged with supervising the work of the Circuit, validating its procedures as well as ensuring the consistent and speedy delivery of the Circuit's decisions all whilst preserving the independence of the judiciary.

Having appeared before this Circuit, we can attest to its particular interest in and commitment to delivering speedy judgments in inheritance cases, e.g., by issuing hearing dates and timetables in advance thereby streamlining the process and setting transparent and practical expectations for beneficiaries and those tasked with administering estates.

Other developments of note on the judicial front include the establishment of labour courts and commercial courts, as well as various judicial committees, as a means of reducing caseload strain on other courts. This has had the impact of improving 'turn around' times which, consequently, enables judges to spend more time and effort on individual cases. There are also validation committees to receive and verify cases based on the completeness and clarity of their details and documents as well as to consider jurisdictional aspects in terms of territory and subject matter, before referring them to the judicial Circuit for trial.

To conclude, this Circuit has brought about a qualitative leap in the Saudi judiciary, which is characterised by the improved and increasing accuracy of judgments, competency of its personnel, and speedy adjudication of cases referred thereto.

Al Tamimi & Company's KSA Litigation team regularly advises on the Division of Estates. For further information please contact Abdulaziz AlShahrani (a.alshahrani@tamimi.com).

THE CMA'S NEW RULES ON THE OWNERSHIP OF FOREIGN STRATEGIC INVESTORS IN COMPANIES LISTED ON TADAWUL

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In an effort to further attract foreign investment in the KSA, the Capital Market Authority ('CMA') issued the Instructions for the Foreign Strategic Investors Ownership in Listed Companies ('FSI Instructions') in June 2019. The FSI Instructions remove the foreign ownership limitations contained in the Rules for Qualified Foreign Financial Institutions Investment in Listed Securities ('QFI Rules'), with regard to persons qualifying as foreign strategic investors.

The QFI Rules

KSA has traditionally restricted foreign investment in Saudi securities. Until 2015, when the QFI Rules were introduced, it was not possible for foreign persons to directly invest in securities listed on the Saudi Stock Exchange (Tadawul). Instead, foreign investors were only able to invest in listed securities through swap agreements entered into with CMA authorised persons (i.e. entities authorised by the CMA to engage in securities business in the KSA).

Since 2015, it has been possible for qualified foreign investors ('QFIs') to directly invest in securities listed on Tadawul and exercise all rights associated with them. The QFI Rules set out the procedures, requirements and conditions for QFIs to invest in listed securities and specify the obligations of QFIs as well as the obligations of authorised persons assessing them.

In order for a foreign (i.e. non-GCC) entity to qualify as a QFI, it must be a financial institution having a legal personality and must fall in any of the following categories:

a. banks;
b. brokerage and securities firms;
c. insurance companies;
d. government and government related entities;
e. investment funds;
f. any other financial institution considered eligible by the CMA.

The financial institutions mentioned above must be incorporated in a jurisdiction applying regulatory and monitoring standards equivalent to those of the CMA or acceptable to it.

Furthermore, with the exception of governments or government related entities, the foreign financial institution must have assets under management or custody of at least SAR 1,875,000,000 (or an equivalent amount) - although the CMA may reduce such assets.

In order to obtain the qualification, the foreign entity must file an application with an assessing authorised person (which is an authorised person licensed to conduct 'custody' or 'dealing' activities). Such authorised person will assess the application in accordance with the procedures and criteria set out in the QFI Rules.

In terms of investment restrictions, the QFI Rules stipulate the following:

- a QFI may not own more than 10 percent of the shares or convertible debt instruments of a listed issuer;
- the maximum proportion of shares or convertible debt instruments in any listed issuer that may be owned by all foreign investors – in all categories, whether resident or non-resident, excluding foreign strategic investors pursuant to the FSI Instructions – is 49 percent;
- limitations set out in the constitutional documents of the listed companies or any instructions issued by the competent supervisory or regulatory authorities as well as any other legislative limitations on foreign ownership in joint stock companies must also be adhered to.

The FSI Instructions

The QFI Rules do not apply in relation to foreign strategic investors ('FSIs'). A FSI, pursuant to the FSI Instructions, is a foreign legal entity that aims to own a 'Strategic Shareholding' in Tadawul listed companies. 'Strategic Shareholding' is a direct ownership percentage in the shares of a listed company, through which it is intended to contribute in promoting the financial or operational performance of the listed company.

In order for a FSI to own a Strategic Shareholding in a listed company it must:

- be established or licensed in a country that applies regulatory and supervisory measures similar to those applied by the CMA or acceptable to it;
- have a client account with an authorised person and an account with the Securities Depositary Centre; and
- meet any other requirements or conditions as the CMA may require.

Given that the QFI Rules do not apply to FSIs, the ownership restrictions set out in the QFI Rules (including the 49 percent maximum limit) will not be relevant to FSIs. However, investments of a FSI will still be subject to the following restrictions:

- the limitations set forth in the constitutional documents of the listed company or any instructions issued by the competent regulatory and supervisory authorities;
- other legislative limitations on foreign ownership in joint stock companies (for instance foreign investors may not currently acquire shares in companies investing in the development of the Holy Cities of Makkah and Madinah); and
- the FSI may not dispose of any of the shares it owns in accordance with the FSI Instructions within a period of two years after the date of acquiring such shares.

It is worth noting that the Listing Rules of Tadawul specify a minimum 30 percent float requirement for shares listed on the main market and a minimum 20 percent float requirement for shares listed on the parallel market (unless the CMA permits lower percentages). On this basis, it seems that the maximum holding limit for a FSI in any issuer listed on the main market is 70percent of the shares and 80 percent of the shares in any issuer listed on the parallel market - subject always to any other applicable limitations as mentioned above.

Other issues to consider

Industry-specific regulators (e.g. in the area of telecommunications) may be required to provide their approval before a strategic investment is made in a listed company under their supervision. Furthermore, the General Authority for Competition may be required to assess and approve a transaction involving the shares of a listed company where this would result in an economic concentration.

Moreover, the CMA's Merger and Acquisition Regulations provide that the CMA has the right to require an investor acquiring over 50 percent of a given class of listed shares carrying voting rights, to make a mandatory bid for all shares of the same class in the target.

"In an effort to further attract foreign investment in the KSA, the Capital Market Authority issued the Instructions for the Foreign Strategic Investors Ownership in Listed Companies in June 2019.

Conclusion

By introducing the QFI Rules in 2015 and the FSI Instructions in 2019, KSA has taken significant steps towards reducing regulatory obstacles to foreign investment in KSA listed companies. A testament to the continuous efforts of KSA to modernise its stock market is the recent debut of Tadawul in the emerging markets indexes of FTSE Russell, S&P Dow Jones and MSCI. It is expected that these developments will further boost foreign investment in the Saudi market.

Al Tamimi & Company's Banking & Finance team regularly advises on capital markets and regulatory matters. For further information please contact Rafiq Jaffer (r.jaffer@tamimi.com) or Agathi Trakkidi (a.trakkidi@tamimi.com).

CYBERABIA: DEVELOPMENTS IN THE CYBERSECURITY REGULATORY LANDSCAPE IN SAUDI ARABIA

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Cybersecurity can be summarised as the use of technology, and other measures, to ensure the safety of data and computer systems from incidents, both accidental and deliberate, that might compromise their integrity. For businesses, cybersecurity is of increasing importance. Besides the operational impact of a cybersecurity incident, such incidents can result in legal liability, reputational damage and financial loss. The urgent need to counter cybersecurity threats has resulted in greater measures being adopted by legislators and regulators around the world, and the situation in Saudi Arabia is no different.

In 2018, Saudi Arabia's National Cybersecurity Authority ('NCA') issued guidelines in the form of Essential Cybersecurity Controls ('ECC'). In 2019, the local telecoms regulator, the Communication and Information Technology Commission ('CITC'), proposed a cybersecurity framework, the Cybersecurity Regulatory Framework ('CFR') for the Information Communications and Technology Sector ('draft CRF'), aimed primarily at the telecommunications industry.

This article outlines the NCA's ECC, and the proposed CRF for the Information Communications and Technology Sector.

NCA'S Essential Cybersecurity Controls

The 'NCA Regulation' (the Regulation of the National Cybersecurity Authority, approved by Royal Decree No. 6801 dated 11/2/1439H (31 October 2017)) sets out the key features and responsibilities of the NCA. These include:

- preparing a national cybersecurity strategy and supervising its implementation;
- developing and circulating policies, frameworks and standards for cybersecurity implementation, risk management, incident response and encryption, and supervising their implementation; and
- building, supervising and operating national and sectoral cybersecurity operation centres and platforms with the capability to command, control, investigate, monitor and exchange information and analysis on cybersecurity in the Kingdom.

In 2018, the NCA published the ECC the minimum cybersecurity requirements for Saudi government organisations (including ministries, authorities, establishments and others) and its companies and entities, as well as private sector organisations owning, operating or hosting critical national infrastructure. The NCA encourages all other organisations in Saudi Arabia to utilise the ECCs to improve their cybersecurity.

The ECCs consist of 114 cybersecurity controls, linked to national and international regulatory requirements, structured into five main domains, comprising:

- cybersecurity governance;
- cybersecurity defence;
- cybersecurity resilience;
- third party and cloud computing cybersecurity; and
- industrial control systems cybersecurity

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“Organisations subject to the Essential Cybersecurity Controls need to have physical security and other measures in place to protect their information and technology assets from various threats.

Cybersecurity Governance

The ECC's governance requirements contemplate the development and implementation of a cybersecurity strategy that contributes to compliance with relevant laws and regulations. They set out the personnel, processes and other steps that organisations, that are subject to the ECCs, need to put in place to achieve effective cybersecurity.

Cybersecurity roles and responsibilities are to be set out clearly and kept up to date. Cybersecurity is to be managed with the support of an 'organisation head', delegated to oversee the organisation's cybersecurity strategy. Cybersecurity policies and procedures are to be adopted, supported by technical security standards and kept up to date. A risk management process is to be documented and implemented at key risk points and reviewed as necessary.

Project and change management present a cybersecurity risk for organisations. The ECCs require the adoption of cybersecurity policies and procedures relating to these activities. Personnel can also represent a significant risk to cybersecurity. Protocols to ensure that these risks are managed must be in place. Examples include employee vetting and cybersecurity awareness and training.

Finally, the ECCs require organisations to have a system in place so that cybersecurity controls are reviewed and audited.

Cybersecurity Defence

Organisations subject to the ECCs need to have physical security and other measures in place to protect their information and technology assets from various threats. As a preliminary step, an inventory of all IT assets should be kept. Only authorised personnel should access information as required to perform their roles and access to other information should be restricted. Unauthorised access should be prevented by having systems to log on and establish credentials.

Organisations are required to take measures to protect information systems against cyber risks. As well as protecting workstations, devices and careful handling of external storage media, the email service and external web applications need to be protected appropriately. Various minimum requirements to manage the security of an organisation's network are mandated. The use of mobile devices and employees' own devices pose their own additional cybersecurity risks, and the organisation must define and implement cybersecurity requirements including minimum controls as set out in the ECCs.

Data and information are to be classified and protected accordingly. Encryption is to be used in line with the organisation's policies and relevant laws, and measures must be in place relating to back-up and recovery. This extends to measures to detect vulnerabilities and conduct penetration testing.

Cybersecurity events are to be logged and analysed, while systems to identify incidents and mitigate their effects must be in place.

Cybersecurity Resilience

Cybersecurity resilience aspects of the ECC's main controls contemplate the incorporation of cybersecurity resiliency requirements into business continuity processes, thus minimising the impact of cybersecurity incidents on systems, data processing facilities and critical services.

Third-Party and Cloud Computing Cybersecurity

In terms of third-party risks, the ECC's main controls are focussed on issues relating to outsourcing and managed services, including the need to ensure that outsourcing and managed services follow organisational policies and procedures, as well as related laws and regulations.

With regard to cloud computing, the focus is on protecting cloud-hosted data and IT assets, as well as those processed or managed by third parties. For entities subject to the ECCs, the ECCs contemplate some degree of localisation, in that data hosting and storage sites need to be located in the Kingdom.

Industrial Control System Cybersecurity

Entities subject to the ECCs are required to ensure that industrial control systems are managed appropriately to protect the confidentiality, integrity and availability of their assets against unauthorised access and destruction.

Proposed Cybersecurity Standards For ICT Service Providers

In May 2019, the CITC invited feedback on its draft Cybersecurity Regulatory Framework for the Information Communications and Technology Sector. The draft CRF sets out requirements to increase effectiveness in cybersecurity risk management in line with international best practices. The draft CRF would apply to all service providers licensed by the CITC (i.e. any person licensed by the CITC who either provides a telecommunications service to the public, operates a telecommunications network used by such person or by another person to provide a telecommunications service to the public, or both) their affiliates, staff, related third parties and customers.

The draft CRF contemplates CITC setting security targets by defining compliance levels pursuant to a risk based approach. Each level comprises a set of cybersecurity controls of varying complexity. Fulfilment of the preceding requirements will be necessary to achieve the next level of cybersecurity compliance. The draft CRF contemplates service providers being classified according to criticality in order to determine the applicable target compliance levels:

- Level One will comprise basic security controls;
- Level Two is to set out advanced requirements, in addition to the Level One requirements; and
- Level Three is to include requirements focusing on efficiency monitoring and continuous improvement to the Level One and Level Two controls.

Service Providers' Obligations

The essential responsibilities of licensed service providers include measures to be undertaken in the areas of governance, asset management, cybersecurity risk management, logical security, physical security and third party security.

Governance

Licensed service providers are required to:

- adopt appropriate strategies and roadmaps to help achieve the compliance requirements;
- implement the CRF requirements and ensure the compliance targets specified by the CITC are met;
- undertake independent cybersecurity audits to measure compliance;
- train staff and personnel to ensure necessary qualification and skill;
- promote awareness among customers;
- fulfil reporting obligations through self-assessment or as requested by the CITC; and
- provide information to and co-operate with the CITC as and when required.

Asset Management

Licensed service providers are required to:

- maintain up-to-date asset inventories of all information assets;
- classify such assets and adopt a risk-based protection approach;
- appropriately manage personnel devices;
- prepare and enforce acceptable use policies of information assets; and
- establish proper disposal methods for information assets.

Cybersecurity Risk Management:

Licensed service providers are required to prepare and enforce an appropriate cybersecurity risk assessment approach; and an appropriate approach to monitor and treat cybersecurity risk.

Logical Security

The draft CRF sets out obligations applicable to licensed service providers in developing software applications. These obligations include fulfilling the following requirements:

- implementing appropriate encryption techniques to ensure confidentiality, integrity, authentication and non-repudiation of information at all times;
- taking appropriate measures to prevent unauthorised and accidental modification to information;
- identifying vulnerabilities and prescribing remedial actions;
- ensuring time constraints are met in applying security patches;
- ensuring protection of their networks from malicious threats and building resilience;
- effectively monitoring event logs for suspicious activities;
- properly managing access rights;
- maintaining an authorised list of software applications;
- increasing effective response to cybersecurity breach events and minimising their impact;
- preventing the spread of malware;
- ensuring information recovery; and
- conducting penetration tests to assess defensive capabilities.

Physical Security

Licensed service providers will need to protect their information assets against physical damage and threats, manage physical access to facilities hosting such assets, address any environmental threats to such assets, and extend the same protection to such assets located outside their premises.

"The CITC proposes to set security targets by defining three compliance levels pursuant to a risk-based approach. Each level comprises a set of cybersecurity controls of varying complexity.

Third Party Security

The draft CRF proposes making it mandatory for licensed service providers to require third party cloud service providers and third party outsourced service providers to adopt the cybersecurity requirements stipulated by the CITC.

CITC's Role

Pursuant to the draft CRF, the CITC will have the overall role of the regulator and will be empowered to monitor and enforce compliance of the stipulated requirements. For such purposes, it may undertake inspections of service provider facilities, carry out workshops for training and awareness, and undertake active and reactive audits. It will also be responsible for setting compliance targets and deadlines.

The draft CRF does not propose any penalties for licensed service providers who may be in violation of the stipulated requirements. Under its founding statute, the CITC is empowered to impose penalties for violations of the laws and regulations pertaining to the telecommunications sector, and we expect that this will provide the basis under which the CRF, if it comes into effect, will be enforced.

Future Outlook

The public consultation process on the draft CRF was completed as of June 27, 2019. It is unclear when the finalised version of the draft CRF will become effective, or if any changes will be adopted in the interim. Industry participants are encouraged to watch this space.

Meanwhile, government agencies and critical national infrastructure operators will need to review their cybersecurity arrangements for compliance with the Essential Cybersecurity Controls.

Al Tamimi & Company's Technology, Media & Telecommunication team regularly advises on regulatory issues concerning technology, telecommunications and cybersecurity in Saudi Arabia and the Middle East. For further information please contact Nick O'Connell (n.o'connell@tamimi.com), Amy Land Pejoska (a.pejoska@tamimi.com) or Zil Ur Rehman (z.rehman@tamimi.com).

SAUDI'S NEW PROCUREMENT LAW

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The much anticipated new Government Tenders and Procurement Law ('GTPL') was approved by the Council of Ministers on 16 July 2019. It replaces the previous law issued in 2006.

The Implementing Regulations (which are referred to in the new law over 60 times) are expected to follow in the next two months. A great deal of detail will be concentrated in those regulations so a complete view of the new regime will only be possible once they are in circulation. The new Law is expected to come into force in late November 2019.

It is not yet clear whether a consultation process on the draft Implementing Regulations will be initiated so as to allow interested parties to express a view to the Ministry of Finance on the regulations.

What's New?

One welcome change will be a greater range of template contracts (Article 57). The current template contract was drafted primarily with input-based civil construction works (priced on a bill of quantities ('BOQ') basis) in mind and many of its provisions do not adapt tidily to a range of modern services type contracts.

In addition, the new GTPL now contains a two-phased tender process: inclusion of knowledge transfer in contracts; and a role for the Ministry of Finance as well as two new government entities with defined roles in the procurement process – the Local Content and Government Procurement Commission and the Unified Procurement Competent Entity.

Other innovations include thematic chapters and sections, along with a definitions Article, which includes the new concept of a framework agreement, reverse e-bidding, pre-qualification and post-qualification, as discussed in further detail below.

Knowledge Transfer

The new GTPL sets out a range of measures regarding knowledge transfer. This will aid government employees in accessing and sharing knowledge and precedents. GTPL says that contracts may impose knowledge transfer requirements (which would include practical as well as theoretical skill transfer). Companies interested in Saudi government procurements should be aware of this requirement as it provides a further opportunity to distinguish their service offerings. Bidders should, in any event, consider this requirement at the outset as this requirement may not always be explicitly stated in the tender documentation.

Pre- and Post-qualification

Government entities will be able to assess the suitability of potential tenderers before issuing a tender document allowing potential bidders to showcase their capabilities, and thereby highlight their strengths, ahead of the tender process. Again, the Implementing Regulations will set out further details.

The GTPL states that pre-qualification, where undertaken, (it is not mandatory for government entities to require pre-qualification) will be a vital opportunity for bidders. If they do not successfully pre-qualify, they will not be invited to tender. Those wishing to participate in a tender process should carefully review all tender documentation to check if pre-qualification is specifically required.

Post-qualification may occur after selection of the best bid and before a contract is awarded, with the aim of confirming the successful bidder is, in fact, capable of implementing the contract. Scant detail on post-qualification is provided and we await the Implementing Regulations to learn more about what they will entail.

Bid and Performance Bonds and Advance Payments

Bid and performance bonds will not be required for direct purchases, government-to-government contracts, not-for-profit contracts or SME contracts. Bid bonds will also not be required for the newly added 'ideas contests'. The new GTPL also waives the requirement for SMEs to submit a preliminary bank guarantee; an undertaking letter to procure such a guarantee, in due course, will be sufficient. A bid bond of one to two percent of the proposed contract price is still required for all other contracts.

In addition, performance bonds will not be required for works valued at under 100,000 Saudi Riyals (approximately US$26,666), government-to-majority government-owned entity contracts or additional works. There will be an opportunity to avoid the need to pay a performance bond if the contractor is able to fulfil the contract requirements within the period for depositing the performance bond. Performance bond requirements can also be complied with via partial delivery of the contract value in the form of the contracted goods.

Advance payments can be made as long as a performance bond is lodged. There is now no limit on such advance payments, whereas in the old GTPL this is limited to five percent of the contract value (or 50 million Saudi Riyals (approx. US$13,000,000), whichever is lower), although the Implementing Regulations may set out some limits.

The new GTPL may also boost arbitration in Saudi Arabia, by enabling the selection of arbitration for dispute resolution (subject to approval on a case-by-case basis). Other dispute resolution options may be outlined in the Implementing Regulations.

Transparency and Integrity

The new GTPL aims to enhance the transparency of the government procurement process. The Implementing Regulations are expected to set out guidance on how to avoid or otherwise deal appropriately with conflict of interest situations. Also, the GTPL will introduce a regulation regarding the ethics of those who apply the provisions of the GTPL.

Reverse E-Bidding

The option to use Reverse E-Bidding (as employed in other jurisdictions) is introduced in the GTPL. Using the E-Portal, bidders will have the opportunity to submit successively lower bids in the special bid period – clearly a mechanism to apply price pressure to bidders.

Note that the lowest price will not necessarily result in the tender being awarded because the GTPL specifies that other criteria are also to be applied in selecting a winning bid, and those criteria are expected to be set out in the tender documentation, with more detailed guidance expected in the Implementing Regulations.

Ideas Contests

Article 36 appears to open up the opportunity for companies to contract with government entities if they win an 'ideas contest'. This is often seen on architectural design projects but, innovatively, it seems that the GTPL will permit government entities to run competitions for good ideas in the virtual, design and creative sectors generally.

Governance

A new section has been added, setting out the role of the Ministry of Finance explicitly and covering its key tasks of developing templates, maintaining and promoting the E-Portal and ensuring transparency and compliance. This clarity will help participants to understand the procurement system in Saudi Arabia, and assist in levelling the playing field. There are also two new government entities that will work alongside the Ministry of Finance to give effect to aspects of the GTPL.

The Local Content and Government Procurement Commission ('LCGPC') was established by Royal Order on 27 December 2018 and will specifically focus on ensuring Saudi publicly listed firms and SMEs can win contracts or a portion of the work ('local content') where appropriate. More detail is contained in the new GTPL to secure local content and SME participation where possible. This will be backed up by fines for non compliance with local content rules and the Implementing Regulations will set out further guidance. The LCGPC will also manage technology transfer negotiations with foreign firms.

The Unified Procurement Competent Entity ('UPCE') is tasked with developing framework agreements where multiple government entities require the same work or procurements, aimed at reducing costs and minimising duplication of effort. The UPCE will also formulate a list of projects and works that can only be procured under framework agreements that it has entered into with relevant suppliers on behalf of all Saudi government entities. Government entities will not be permitted to procure those works or services themselves (however they have the option to seek an exemption).

One key element where further clarity may be expected relates to the National Centre for Privatisation ('NCP'). The NCP was established in the summer of 2018 with overarching authority as regards privatisation and PPP contracts. How and to what extent the new GTPL dovetails with NCP initiatives (such as the Privatisation Manual and the still draft Private Sector Participation Law) remains to be seen. The old GTPL was disapplied from such projects by Royal Decree (No.101) but the GTPL does not explicitly address the point.

Future Planning and Budgeting

The GTPL contains some changes that require government entities to undertake pre-RFP to determine and plan for approved expenditure at the beginning of each financial year. In addition, a tender may be cancelled if all bids received are higher than the approved amount and no compromise can be reached. There is therefore now a higher risk of tenders being cancelled.

Government entities will be required to publish their procurement plans in broad terms for the coming year, early in each fiscal year. This is a particularly welcome step. Those interested in procurement opportunities in Saudi Arabia would be advised to monitor any such published plans to assist with their own forward planning.

Some added discipline around contract term duration is also included, in recognition of the fact that funds will be approved annually. Together with termination and review powers of agency heads, there is a greater focus on ensuring continued value for money is being achieved.

Delegations and Powers

The GTPL sets out the delegations and powers for the head of a government entity with respect to procurements. A head can approve tenders below a 10 million Saudi Riyals (approximately US$2,666,666) threshold, and also has the ability to adjust works (for example by adding to the deliverables, for additional funding subject to a 5 million Saudi Riyals (approximately US$1,333,333) limit. A head of government entity can also terminate a contract or cancel a tender, and delegate these powers.

In the old GTPL the circumstances in which a government entity could pay a third party (if so agreed by the contractor) were limited but now, it will be possible to pay a sub-contractor or supplier directly. However, restrictions on a contractor sub-contracting without the government entity's permission remain in place. More detail on all this is expected to be contained in the Implementing Regulations.

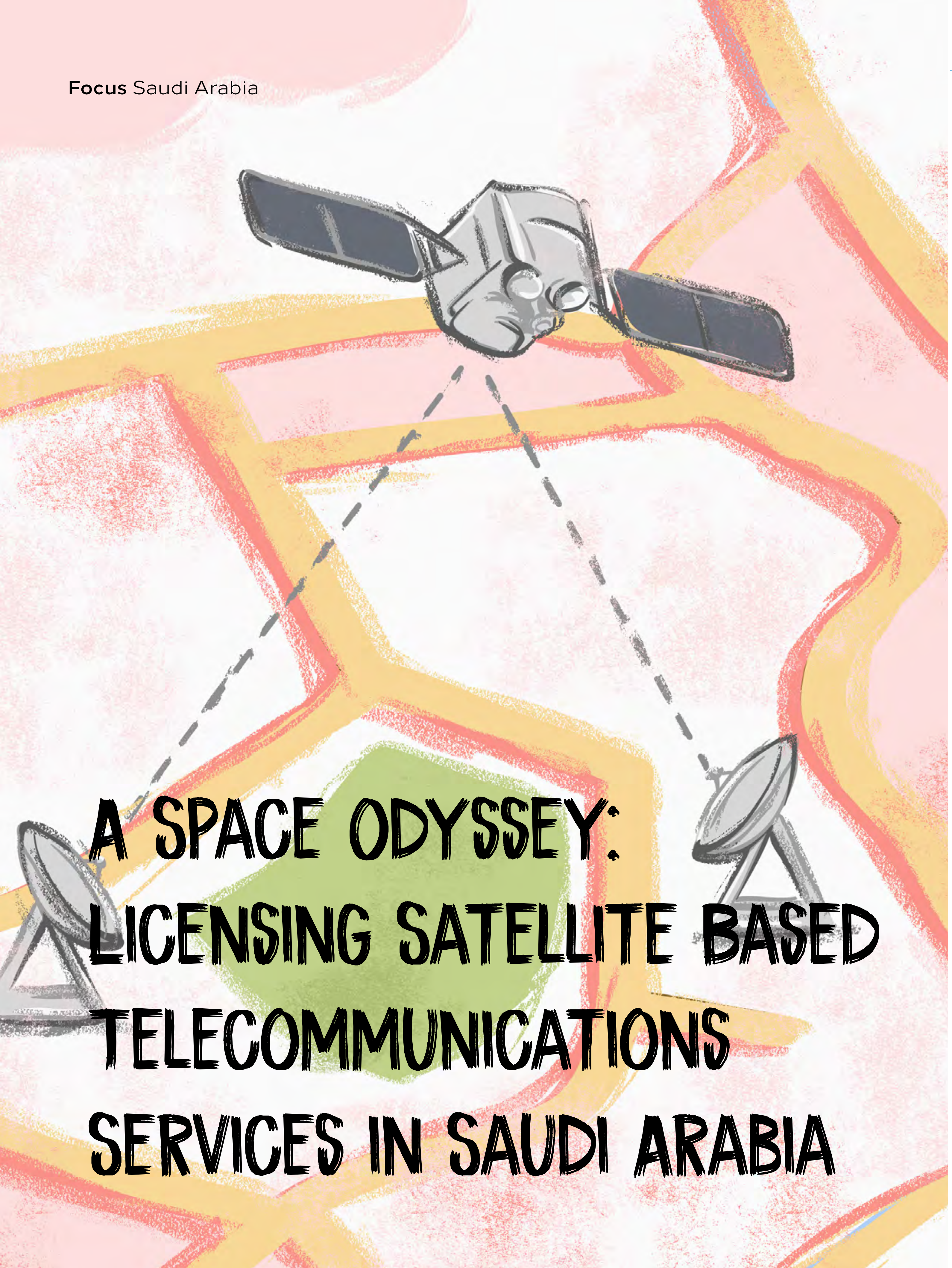
There is a requirement to evaluate the performance of contractors, and the results of such evaluation may become public. This will involve greater scrutiny on contractors and, potentially, reputational implications. The ability to boycott remains in place. Fines and penalties such as changing a company's 'classification' (presumably under the evaluation and Pre-qualification processes) are added punitive options.

A government entity is permitted to appoint another entity to manage a procurement process on its behalf. Presumably in making such an appointment, the contract would itself need to be tendered (in the absence of an express exemption which allows that).

What's next?

The accompanying Implementing Regulations are expected by mid-October 2019. They will need to capture the finer detail signposted by the broad brushstrokes of the GTPL.

Al Tamimi & Company's Corporate Structuring team regularly advises on procurement. For further information please contact Omar AlHumaid (o.alhumaid@tamimi.com).



A SPACE ODYSSEY: LICENSING SATELLITE BASED TELECOMMUNICATIONS SERVICES IN SAUDI ARABIA

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Technological developments in the telecommunication industry have led to strong competition between various modes of providing communication services. Satellite-based communications systems compete with other media of data transfer, such as fibre optics and other land-based delivery systems such as micro-waves and even power lines. One unique feature of satellite-based communication systems is that signals (and subsequently data) can be distributed from one point of transmission to many receiving locations. (This makes satellite-based communication systems well suited for “point-to-multipoint” communications, such as broadcasting.) Another advantage is that high investments in on-the-ground infrastructure are not required, making satellite communication systems ideal for marginalised and remote areas characterised by scattered populations. Satellite communication is also distance insensitive (i.e. the cost of capacity does not increase with increasing distances between communication points), it is available to maritime and even aeronautical markets, and it is tremendously versatile and supports diverse forms of communications (ranging from point-of-sale validation to bandwidth intensive applications). Following the exponential growth of the internet, considerable data traffic now utilises satellite-based communications technology to flow from one location to another. This makes internet service providers one of the largest customer base of satellite-based communications service providers.

Regulation of satellite-based communications services is important for a variety of reasons including transparency, accountability, competition and quality assurance. This article focuses on licensing of satellite-based communications services in Saudi Arabia.

Licensing Satellite-based Communication Services in Saudi Arabia

The Communication and Information Technology Commission (‘CITC’) is the government entity responsible for regulating satellite-based communications services in Saudi Arabia.

The Telecoms Law (Royal Decree No. (M/12) of 12/03/1422H (3 June 2001); Council of Ministers Resolution No. (74) of 05/03/1422H (27 May 2001)) prohibits the provision of satellite-based communications services without obtaining a licence from the CITC.

Presently, the CITC distinguishes, and licenses, satellite-based communications services, as per the following three categories:

- Very Small Aperture Terminal (VSAT) satellite services;
- Global Mobile Personal Communication Services (GMPCS); and
- Broadband Satellite Services.

VSAT Satellite Services

The CITC's *Special Conditions for Licensing Provision of Telecommunications Services Using VSAT System* ('VSAT Conditions') set out the specific terms and requirements to be fulfilled in order to obtain a licence to provide VSAT satellite services within Saudi Arabia. As per the VSAT Conditions, the scope of the licence granted by the CITC allows the licensee to establish a telecommunications network in Saudi Arabia using VSAT technology conforming to international standards and approved by a recognised international standards organisation, and to operate and maintain the network to provide services in accordance with the VSAT Conditions. The licensees are permitted to use space capacities of the satellites allowed to be used in KSA. The licensee may reach an agreement with other operators licensed for VSAT systems to participate in these capacities. Pursuant to the VSAT licensing regime, licensees can provide telecommunication services using the VSAT system at local and national levels.

Licensees may interlink closed groups inside or outside the Kingdom. Typically, a closed group is a user group configuration that restricts access beyond the user group members. Calls and similar telecom services are only available between users within the group. Internet service provision is channelled to closed user groups through CITC licensed international gateways.

CITC is empowered to impose certain requirements of universal access and universal services which the licensee is obligated to fulfil. Coordination is required with the CITC in order for the licensee to register the VSAT stations/station hubs pursuant to regulations under the International Telecommunications Union ('ITU'). All VSAT stations/station hubs are to be located within the boundaries of Saudi Arabia.

GMPCS Systems, Networks and Services

The CITC currently makes available two types of licence for GMPCS-based satellite services. These are:

- "GMPCS Operations" licence: *Special Terms and Conditions of Type B Class License to Operate Systems and Networks of GMPCS; and*
- "GMPCS Provision" licence: *Special Terms and Conditions Type B Class License to Provide GMPCS Services.*

Common Conditions for GMPCS Provision Licences and GMPCS Operations Licences

There are certain conditions imposed on licensees common to both GMPCS Operations licences and GMPCS Provision licences. These include:

- Assignment of the licence, or sub-contracting any services to be provided under the licence, is subject to CITC's prior written approval.
- Continuity of service must be ensured if the licence is revoked, suspended or expires.
- Equipment needs to be 'type approved'.
- CITC must be supplied with periodic reports, and such other information as it may request of the licensees.
- Equipment and networks need to be accessible for security monitoring equipment can be interconnected to relevant networks.
- Government authorities need to be able to use the networks during times of emergency.

GMPCS Operations

The GMPCS Operations licence allows licensees to install, operate and manage the network necessary to provide GMPCS in Saudi Arabia, and use prescribed frequencies to support provision of GMPCS. (The GMPCS Operations licence does not allow the actual provision of GMPCS based services.)

There are special considerations for the licensee in respect of the use of frequencies. The licensee is required to apply all reasonable commercial procedures to increase the efficiency of using the allocated frequencies. The licensee must use the allocated frequencies in a manner consistent with applicable international understandings, requirements and regional governmental arrangements designed to reduce radio interference. The licensee must notify the CITC promptly of any interference resulting from other countries' allocation of frequencies, so as to enable the CITC to take the necessary steps to address such interference.

Certain service obligations are also levelled upon the licensee. These include obligations pertaining to universal service and access; system performance and quality of service; provision of information on commercial arrangements; relationship with other GMPCS operators; interconnection; and colocation.

GMPCS Provision

The GMPCS Provision licence is separate to the GMPCS Operations licence, and allows for the provision of GMPCS services to customers on a non-exclusive basis. These services include basic services; emergency services; SMS services, short information messages services; data services; value added services; and closed user groups.

The GMPCS Provision licence requirements include obligations on invoicing, non-discrimination in customers, quality of service, and reporting to the CITC. The CITC is to be consulted when setting and varying tariffs. Licensees are allocated numbers in accordance with Saudi Arabia's numbering plan.

Broadband Satellite Services

The provision of satellite-based broadband services is regulated under the *Special Terms and Conditions Type B Class License for Providing Broadband Satellite Services*. The licensee is allowed to provide mobile, fixed or nomadic services, including broadband data satellite services, voice communications through broadband, value added broadband services, and internet. (The transmission of content requires a separate licence and approvals from other authorities.) The licensee is not permitted to launch satellites, or to build or operate terrestrial transmission facilities or an international gateway, but may obtain these services from licensed service providers. The licensee is required to construct and operate certain infrastructure facilities within Saudi Arabia. These include a network operation centre to provide service, support and control to the users, and at least one land station interlinked to at least one satellite with terminals for management of the licensed services.

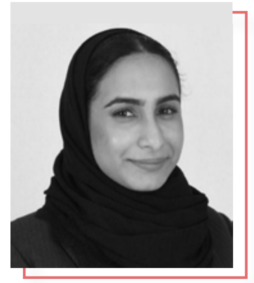
Further conditions imposed on licensees providing broadband satellite-based communication services are broadly consistent with those set out above and common to both GMPCS Operations licences and GMPCS Provision licences.

Conclusion

The CITC has considerable power to investigate and prosecute offences and any violations of the terms and conditions of the licenses discussed above. The CITC has a violations committee that considers and rules on violations. Penalties for non-compliance with the Telecoms Law, its By-Laws, and any associated regulations, rules and licensing requirements, can include fines of up to SAR25M (about USD6.5M), as well as an account of profits and publication of details of the violation and the violator. In appropriate circumstances, criminal prosecution may also occur, and affected parties may also make a claim for damages. Generally, licensees who have committed violations are provided with an opportunity to be heard and reasonable time to rectify the breach. Any acts undertaken by the licensees to rectify the violation will be taken into consideration by the violations committee. Against this background, it is important to be aware of, and comply with, the relevant licensing requirements for providing satellite-based communications services in Saudi Arabia.

Al Tamimi & Company's Technology, Media & Telecommunication team regularly advises on Licensing of Satellite Based Telecom Services in Saudi Arabia and the Middle East. For further information please contact Nick O'Connell (n.oconnell@tamimi.com) or Zil Ur Rehman (z.rehman@tamimi.com).

Oman's New Commercial Companies Law



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Summary of the Key Changes

Oman's new commercial companies law ('CCL') is now in force and repeals in full the previous law that was passed in 1974. Al Tamimi & Company's corporate team has reviewed the CCL and a number of progressive changes to the rules governing legal entities in Oman have been noted, including the changes that will require companies to take action over the coming months.

The key structural highlight of the CCL is that limited liability companies, the entry level incorporation vehicles that are commonly used to conduct business in Oman, can now be incorporated with a single natural person or corporate shareholder. It is pertinent to highlight that this single shareholder option is not an explicit repeal of the Foreign Capital Investment Law of Oman and the option to incorporate a legal entity with a single shareholder is likely to be available only to pure GCC companies, GCC citizens and/or the investment arms of the Omani Government.

A number of other key modifications have been introduced by the CCL. While many of those changes are subtle, modernising provisions, others have been designed clearly with the aim of enhancing corporate governance and transparency. This article looks at some of the key changes introduced along with some suggested guidance for companies.

Limited liability companies (L.L.C.)

i. **Single shareholder companies:** as described above, the CCL now permits companies to be incorporated with a single natural person or single corporate shareholder. This is an helpful addition to the existing suite of available corporate vehicles and eliminates the need driven by the old law to create private contractual arrangements between shareholders, particularly where one of the shareholders holds a minority of the share capital. This new structural change may also assist in mitigating inheritance risks where one of the shareholders is a natural person and the other shareholder is a corporate entity;

ii. **Minimum share capital:** the CCL is now silent on the minimum share capital required to establish a limited liability company and we expect that this area will be clarified by the Ministry of Commerce and Industry in due course. The old law stipulated a minimum of OMR 20,000 (USD$ 52,000);

iii. **Liability of authorised managers:** the CCL expressly stipulates that the liability of authorised managers is identical to the liability of directors who own joint stock companies. This now settles the argument that authorised managers operate under a lighter touch enforcement regime than directors of a joint stock company;

iv. **Conflicts of interest:** authorised managers must now make a formal notification at shareholders' meetings of any conflict between the interests arising from transactions involving an authorised manager and the company which he or she serves;

v. **Related party loans:** the CCL now completely prohibits a company from providing any form of lending facility to its authorised managers and shareholders. The CCL now views such arrangements as void and unenforceable and makes the recipient of the loan liable to compensate the company. This is an important development particularly as related party arrangements involving shareholders of limited liability companies are ubiquitous; and

vi. **Shareholder information rights:** shareholders may now request documentation relating to companies in which they hold shares going back ten years. This right is designed to provide shareholders with greater visibility on specific operational matters that have an impact on decision making.

Joint stock companies (S.A.O.C./S.A.O.G.)

i. Board meetings

- the CCL now sets a minimum quorum for meetings of the board of directors at two thirds of the board (under the old law, only a majority of the board was required to be in attendance) with decisions being validly passed by an absolute majority. The company's articles may require a higher majority;
- decisions of the board can now be circulated in advance in the form of draft minutes and ratified by the board (exceptions will apply). The concept of circulating minutes in advance for later ratification was not covered by the old law;
- any person who signs the minutes of the meeting will be liable for the content of those minutes. The CCL does not expressly state as such but such liability could extend to advisers who attended the meeting for which the minutes were prepared;
- board members may appoint a proxy to attend the meeting in the appointing director's place, however the proxy may not attend more than two consecutive meetings for the same director; and
- the chairperson no longer has a statutory casting vote. The old law provided that in case of equality of votes, the chairperson's vote would decide the resolution.

ii. Shareholder meetings:

- one or more shareholders holding at least 10 percent of the share capital can now call a general meeting. The old law gave this right only to those holding 25 percent or more of the share capital;
- one or more shareholders holding at least five percent of the share capital can now request the board of directors to include an item on the agenda at the general meeting. The old law gave this right to those holding at least 10 percent of the share capital;
- a person appointed as a proxy for more than one shareholder may only attend the general meeting if that proxy represents shareholders holding more than five percent of the share capital, in aggregate;

i. **Director interests:** the company must now maintain a register of interests that records direct/indirect interests in transactions involving a director. Interested directors are under an obligation to notify the company of such interests within a short period following appointment;

ii. **Dividend to equity:** cash distributions that are declared for payment to shareholders can now be partly converted into equity instead of receipt of a cash dividend. This is particularly helpful for companies that wish to retain profits in order to fuel expansion;

iii. **Global depositary receipts:** the shares of joint stock companies can now be converted into global depositary receipts to enable investors outside Oman to trade the equity of companies that are listed on the Muscat Stock Market ('MSM'). This provision is likely to have the effect of increasing foreign direct investment and providing the ability to raise funds in a different currency;

iv. **Loss making companies and officer liability:** the board of directors and auditors are now stated to be jointly liable for damage caused by them in failing to preserve the company's available share capital. The practice undertaken by the Ministry of Commerce and Industry has now been written into the law so that if a company's accumulated losses exceed its registered share capital by 25 percent or more, the board is under an obligation to turn the company around. If the differential exceeds 50 percent, an extraordinary general meeting must be held to determine the progress of the company;

v. **Reduction of capital:** the time period for creditors to raise objections to a reduction of capital has been reduced from 60 to 15 days, following publication of the notice in the daily press. This is a significant change and will reduce the time taken to make the reserves available that commonly arise from a reduction.

The key structural highlight of the CCL is that limited liability companies, the entry level incorporation vehicles that are commonly used to conduct business in Oman, can now be incorporated with a single natural person or corporate shareholder.

Companies have 12 months to comply with the requirements of the CCL and the regulations that flow from the CCL.

What must Companies now do to Comply?

Companies have twelve months to comply with the requirements of the CCL and the regulations that flow from the CCL, once those regulations have been passed by the Ministry of Commerce and Industry and the Capital Markets Authority.

Many companies in Oman will have adopted constitutional documents a number of years ago without subsequent amendment to reflect international practice and corporate governance improvements. As a consequence of the changes introduced by the CCL, limited liability companies and joint stock companies will undoubtedly require adjustments to their articles of association and will need to implement provisions and adopt systems that deal with conflicts of interests and related party transactions. Resolutions and other documents that are required to be filed with the Ministry of Commerce must now be filed within seven days. Failure to implement some of the changes may expose companies, authorised managers, directors and/or shareholders to criminal and/or civil sanctions.

Other companies may benefit from the ability to form single person companies and should consider moving ownership of the share capital from the minority to the majority shareholder, with consent from the Ministry of Commerce and Industry. As highlighted above, this option is unlikely to be available for companies that are subject to the Foreign Capital Investment Law of Oman, which remains in force.

Al Tamimi & Company's Corporate Commercial team regularly advises on corporate and commercial matters in Oman. For further information please contact Ahmed Al Barwani (a.albarwani@tamimi.com), Arif Mawany (a.mawany@tamimi.com) or Richard Baxter (r.baxter@tamimi.com).

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 659
28 Dhu al-Qidah 1440H
31 July 2019

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- From the Ministry of Climate Change and Environment

69 of 2019 Governing the use of foot-and-mouth disease vaccines in the UAE.

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- From the Insurance Authority

33 of 2019 Regulating Committees for the Settlement and Resolution of Insurance Disputes.

- From the Securities and Commodities Authority

  - Certificate of approval of amendment of the Articles of Association of Abu Dhabi National Insurance Company PSC.
  - Certificate of approval of amendment of the Articles of Association of Dubai Investments PJSC.
  - Certificate of approval of amendment of the Articles of Association of Al Fujairah National Insurance Company PSC.
  - Certificate of approval of amendment of the Articles of Association of Emirates Integrated Telecommunications Company PJSC (du).

United Arab Emirates
Ministry of Justice

49th Year
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- From the Central Bank of the UAE

  - Corporate Governance Regulation for Banks.

- From the Securities and Commodities Authority

  - Certificate of incorporation of Mudon Real Estate Company PJSC.
  - Certificate of approval of amendment of the Articles of Association of National Bank of Fujairah PJSC.
  - Certificate of approval of amendment of the Articles of Association of Takaful Emarat PJSC.
  - Certificate of approval of amendment of the Articles of Association of Union Properties PJSC.
  - Certificate of approval of amendment of the Articles of Association of Gulf Navigation Holding PJSC.

29-30
AUG

7th Annual East Africa International Arbitration Conference (EAIAC) 2019

Al Tamimi & Company was proud once again to sponsor the 7th Edition of the Annual East Africa International Arbitration Conference ('EAIAC'), taking place in Nairobi, Kenya on 29th and 30th August 2019.

The EAIAC Conference was organised by the EAIAC Committee, in partnership with GBS Africa, I-ARB Africa and W&Co|Law+Policy. This year's theme was *'Government Contracting and Investment Disputes: Lessons for States and Investors'*. Thomas Snider, Partner, Head of Arbitration discussed contracting, trade, and dispute resolution issues between Chinese and African parties. Khaled Attia, Partner, Head of Dispute Resolution - Egypt focused on challenges facing dispute resolution in Islamic Finance transactions such as interest rates and application of Islamic Law.

The conference was excellent and very successful. Al Tamimi & Company are already looking forward to EAIAC 2020!

Thomas Snider, Partner, Head of Arbitration

Khaled Attia, Partner, Head of Dispute Resolution - Egypt

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.

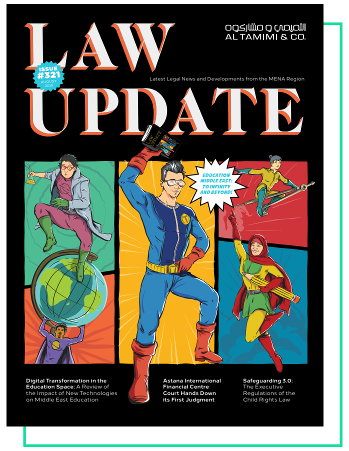
We are a full-service firm, specialising in advising and supporting major international corporations, banks and financial institutions, government organisations and local, regional and international companies. Our main areas of expertise include arbitration & litigation, banking & finance, corporate & 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.

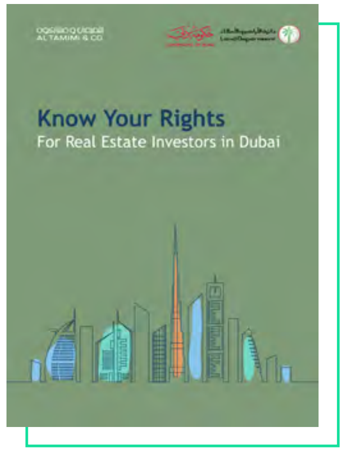
Our business and regional footprint continues to grow, and we seek to expand further in line with our commitment to meet the needs of clients doing business across the Middle East.

17	9	75	360	50+
Offices	Countries	Partners	Lawyers	Nationalities

Publications

Al Tamimi & Company is at the forefront of sharing knowledge and insights from the Middle East with publications such as Law Update, our monthly magazine that provides the latest legal news and developments, and our "Doing Business" and "Setting Up" books, which have proven to be valuable resources for companies looking to do business in the region. You can find these resources at www.tamimi.com.





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“We appreciate the diversity of the lawyers’ backgrounds – there’s always someone qualified to answer any query.

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