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LAW UPDATE

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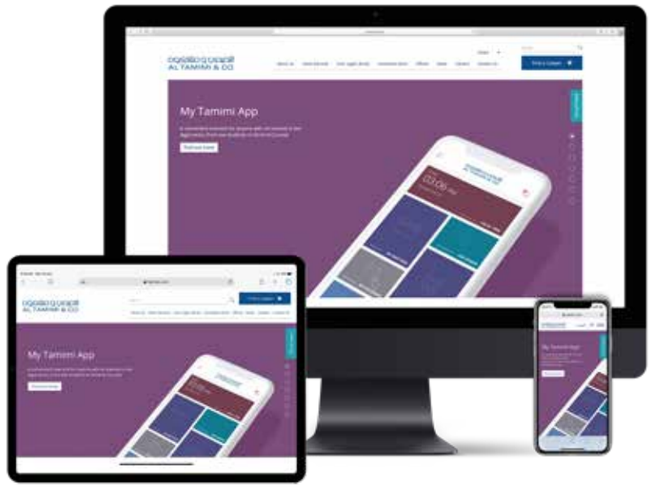
LAW UPDATE *Online*



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In this Issue

Welcome to the October 2019 issue of Law Update!

As my tenure as Managing Partner draws to a close and I prepare to pass the baton to my fellow partner, Samer Qudah, and take up new my role as Senior Partner, I would like to take a few moments to reflect on some of the significant legal developments I have witnessed over the years and which, I believe, have helped to shape the legal landscape of the UAE, and indeed the wider region.

In recent years, as Middle Eastern economies have developed and matured, it has become increasingly important for countries to continue to build on to and bolster their legal frameworks with a view to offering businesses and international investors a robust environment in which to operate; both in the contractual stages as well as when disputes arise.

One of the most significant developments in the arena of dispute resolution came in 2015 with the re-launch of the DIFC-LCIA arbitration centre via agreements amongst the DIFC Dispute Resolution Authority ('DRA'), the DAI (where Essam is (and was at the time) a member of the Board of Trustees), and the LCIA. The DIFC-LCIA marries international best practice of the tried and tested experience of the LCIA with the DRA's unique understanding of the region's business and legal culture and, in practice it has, as a result, been instrumental in placing Dubai at the heart of the resolution of national and international disputes in the region.

A more recent, yet still a key, development has been the focus on amending the Civil Procedures Law with the view to improving and streamlining the way and the time in which foreign arbitral awards are enforced. Amendments to Dubai's Civil Procedures Law this year appear to have already yielded positive results. The Kingdom of Saudi Arabia and Bahrain have followed suit by amending some of their dispute resolution procedures with the goal of providing those wishing to do business in the region, with the comfort that any disputes that may arise will be dealt with efficiently and in accordance with best international practices.

The level of maturity which the UAE legal system is now demonstrating was evident in the recent amendments made to its Insolvency Law. Rather than undertake a complete overhaul of the original law (which was just ten years old), Dubai tweaked and fine-tuned the law by adding more provisions in order to address those areas that, in practice, were exposed as lacking. Experience shows the New Insolvency Law enhances and facilitates a more efficient and effective bankruptcy regime in the DIFC. The willingness of Dubai to modernise an already, in relative terms, 'young' law exemplifies the desire of the DIFC to continue to drive development and ensure its position as the premier (and internationally respected) financial hub in the Middle East.

Positive and progressive amendments have not just been confined to the realms of Dispute Resolution and Banking & Finance. With the ongoing aim of facilitating and attracting business to the region, UAE law has extended the validity of residence visas for certain categories, including: investors; entrepreneurs; professionals; and academics. Guaranteeing residency beyond the traditional three years, is a clear draw to attracting talent from around the world. Amendments made to Real Estate regulations focus on jointly owned properties with a view to 'boosting competitiveness and enhancing the Real Estate sector. Further, the introduction of the Economic Substance Regulations (which demand certain minimum standards of quality control) have been hailed as contributing to the EU's decision to declare the UAE to be in compliance with its tax transparency rules which, in turn, led to the UAE being removed from the list of non-co-operative tax jurisdictions (the so-called EU Blacklist').

Egypt, the KSA, Oman and Iraq have each focused a lot of energy on introducing new, as well as amending existing foreign capital investment, laws with the objective of appealing to foreign direct investors.

Overall, I believe the holistic approach that the UAE and the wider region is taking with regard to improving and upscaling their legal systems only serves to solidify the progress they have made across the legal practice palette whilst, at the same time, pushing the boundaries to improve, will see the region compete as a major global competitor going forward.

Turning to our Focus practice this month, Dispute Resolution, our experts cover a broad range of issues. In Abu Dhabi our team looks at the ADGMAC Guidelines concluding the Guidelines provide parties and tribunals with a set of innovative procedures aimed at achieving greater efficiency whilst, at the same time, continuing to ensure fairness and due process (page 67).

An interesting point was thrown up by an article by our Dubai experts in relation to disputes in the pharmaceutical industry. With the value of global big pharma hitting the US$ billions, surprisingly, arbitration, it appears, is the preferred method of dispute resolution presumably because of its capability of offering expediency as well as minimal public exposure.

Looking to Bahrain, our team runs through the 'do's and don't's' for commercial agencies in the Kingdom where it becomes clear that Bahrain differs from other Middle Eastern jurisdictions which require exclusivity when it comes to commercial agency agreements (page 57).

An interesting viewpoint is raised by our UAE team when they highlight India's potential to be a competitor in the Middle East/Asian market when it comes to arbitration. This is definitely a case of 'watch this space' (page 61).

As Managing Partner for the past 12 years, it has been an honour and a pleasure to have worked alongside the talent that Al Tamimi consistently attracts. I have relished every challenge and opportunity and I wish Samer all the best in his new role.

I hope you enjoy this issue. Should you wish to reach out for further information, please do not hesitate to contact us. We look forward to hearing from you.

Best regards,

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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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Introduction

Witness evidence constitutes a valuable tool for the arbitral tribunal in its fact-finding mission. In this regard, it is no surprise that the presentation of such evidence has been addressed by the legislator.

Article 211 of Federal Law No. 11 of 1992 Concerning the Civil Procedures Code (the 'CPC'), the previous UAE Arbitration Chapter, provided that "*arbitrators should administer an oath to the witnesses and whoever makes a false statement before the arbitrators shall be deemed to have committed the crime of perjury.*" The Dubai Court of Cassation has held that the form of such an oath shall be as prescribed by Article 41 of the Federal Law No. 10 of 1992 on Evidence in Civil and Commercial Transactions (the 'Evidence Law') otherwise the finality of the arbitral award could be compromised.

The new UAE Arbitration Chapter, which came into effect in June 2018 as a result of the enactment of Federal Law No. 6 of 2018 concerning Arbitration (the 'Federal Arbitration Law') appears to have relaxed the previous and express requirement for taking witness testimony on oath, in that it allows parties to agree to depart from the application of the provisions of the Evidence Law. Specifically, Article 33(7) of the Arbitration Law provides that "*unless otherwise agreed by the parties, hearing the statements of the witnesses, including the experts, shall be carried out as per the effective laws of the State.*"

The effect of an arbitral tribunal's failure to administer an oath to witnesses was recently addressed by the Dubai Court of Cassation in Commercial Cassation No. 364 of 2019 (hearing of 19 May 2019).

Procedural Background

The Respondent, the award-creditor, sought and obtained a favourable order dated 14 October 2018 to ratify and enforce a Dubai International Arbitration Centre ('DIAC') arbitral award. The Appellant, the award-debtor, filed a grievance before the Dubai Court of Appeal seeking to challenge the arbitral award on several grounds including, the arbitral tribunal's failure to administer the oath to witnesses in accordance with Article 211 of the CPC.

The Dubai Court of Appeal rejected the grievance in a decision dated 20 February 2019 pursuant to which the Appellant filed for cassation.

In its cassation, the Appellant submitted that the Dubai Court of Appeal's decision to ratify the arbitral award violated the law and constituted an error in the application of the law given that, among other things, the arbitral award was null as a result of the arbitral tribunal's failure to administer the oath to the witnesses.

Decision of the Dubai Court of Cassation

The Dubai Court of Cassation rejected the Appellant's cassation and confirmed the earlier decisions. In doing so, the legal question that the Dubai Court of Cassation had to consider was whether the failure of an arbitral tribunal to administer the oath to witnesses during the proceedings shall cause the arbitral award to be ultimately annulled.

In order to answer the question laid before it at the cassation stage, the Dubai Court of Cassation first stated the legal principle pertaining to the scope of admissibility of the grounds for challenge laid before it. In particular, the Dubai Court of Cassation provided that only the reasons referred and relied upon in support of the arbitral award are admissible grounds for challenge. Reasons referred to, but not relied upon, or reasons which merely serve to corroborate the arbitral tribunal's views, and which are not indispensable, meaning that the absence thereof do not impact the dispositive section of the award, shall have no bearing on the viability of the grounds for challenge.

Furthermore, the Dubai Court of Cassation reconfirmed the principles relied upon by the Dubai Court of Appeal in the issuance of the decision against which the cassation was filed. In this regard, the mandatory legal requirement under Article 211 of the CPC for arbitrators to administer the oath to the witnesses before they testify was highlighted. Therefore, arbitrators cannot avoid their obligation to administer the oath to the witnesses even if the parties do not object to the failure to follow the oath procedure when hearing the testimony of witnesses. The failure to administer the oath to a witness constitutes a non-waivable irregularity which taints the proper conduct of the arbitration proceedings and which could ultimately render the final award null and void.

Notwithstanding, the Dubai Court of Cassation rejected the cassation on the basis that the arbitral award was not based upon the testimony of the witnesses in its reasoning or dispositive sections. Accordingly, the arbitrators' failure to administer the oath to the witnesses in the case at hand shall not have any impact on the validity of the arbitral award because it was not based on the testimony of the witnesses for which an oath was not administered by the arbitral tribunal.

[...] the mandatory legal requirement under Article 211 of the CPC for arbitrators to administer the oath to the witnesses before they testify was highlighted. Therefore, arbitrators cannot avoid their obligation to administer the oath to the witnesses even if the parties do not object to the failure to follow the oath procedure when hearing the testimony of witnesses. The failure to administer the oath to a witness constitutes a non-waivable irregularity which taints the proper conduct of the arbitration proceedings and which could ultimately render the final award null and void.

Conclusion

The decision of the Dubai Court of Cassation in Commercial Cassation No. 364 of 2019 is interesting in that it deals with the application of the previous UAE Arbitration Chapter of the CPC, with regards to the question of the administration of the oath to the witnesses, after the entry into effect of the Federal Arbitration Law. Indeed, the decision confirms a shift towards a less restrictive approach. In this regard, the decision is quite insightful and promising: the arbitral tribunal's failure to administer an oath to the witnesses before they testify in arbitral proceedings could taint the validity of the arbitral award if the latter based its reasoning or ruling on the defective witness testimony. We would expect a decision to equally apply under the new UAE Arbitration Chapter absent an agreement by the parties to depart from such a requirement pursuant to Article 33(7) of the Federal Arbitration Law.

Al Tamimi & Company's Dispute Resolution team regularly represents clients in arbitral proceedings and arbitration-related litigation proceedings before the courts. For further information, please contact Dr. Hassan Arab (h.arab@tamimi.com) or Sara Koleilat-Aranjo (s.aranjo@tamimi.com).

Dubai Court Clarifies the Competent Authority to Rule on Interim and Conservatory Measures

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Introduction

In a recent decision (hearing of 22 May 2019), the Dubai Court of Appeal applied the Federal Law No. 6 of 2018 Concerning Arbitration (the 'Federal Arbitration Law') in order to resolve a 'conflicts of jurisdiction' issue with respect to deciding which is the competent authority to rule on interim and conservatory measures in the event the parties to a dispute have a valid arbitration agreement. In its final decision, the Dubai Court of Appeal overruled the preceding decisions of the summary judge and the Dubai Court of First Instance and established that where parties have agreed to resolve their disputes by way of arbitration (and in accordance with the Federal Arbitration Law), the competent authority to rule on interim and conservatory measures shall be the arbitral tribunal or the Chief Justice of the Court of Appeal and not the summary judge.

Background

The parties entered into an agreement. The contractor (the 'Applicant') filed an application seeking an order for a precautionary attachment on a performance guarantee issued in favour of the employer (the 'Respondent') when the latter sought the liquidation of the guarantee.

In support of its application the Applicant alleged, amongst other things, the completion of the construction works in accordance with the agreement signed by the parties. The Claimant further submitted that the works were handed over to the consultant engineer free of any defects and that the completion and handover certificates were issued thereby rendering the Respondent's request to liquidate the guarantee baseless.

Procedural History

On 16 January 2019, the summary judge of the Dubai Court of First Instance granted the application and issued an order freezing the performance guarantee.

The Respondent filed a grievance against the summary judge's decision before the Dubai Court of First Instance on the basis that the agreement signed by the parties contained an arbitration clause. The summary judge, under the provisions of the Federal Arbitration Law, does not have jurisdiction to consider such matters.

On 24 March 2019, the Dubai Court of First Instance issued a decision dismissing the grievance and thereby confirming the decision of the summary judge.

Decision of the Dubai Court of Appeal

The question the Dubai Court of Appeal was faced with was: 'is the summary judge, which represents the ordinary and default judicial circuit, still competent to rule on an application seeking interim and conservatory measures when the parties have already validly agreed to submit any dispute to arbitration?'

In order to answer, what has often arisen in matters regarding conflicts of jurisdiction between, on one hand, the summary judge who forms a part of the state courts, and on the other, arbitral tribunals and the Chief Justice of the Court of Appeal since the entry into force of the Federal Arbitration Law, the Dubai Court of Appeal relied on a number of provisions of the Federal Arbitration Law.

First, and in order to reverse the previous decisions, the Dubai Court of Appeal confirmed that the Federal Arbitration Law, which came into effect prior to the issuance of the freezing order, was applied to the subject matter by relying on Article 2 of the Federal Arbitration Law, which sets out the scope of application of the Federal Arbitration Law. In particular the Dubai Court of Appeal cited the provisions of Article 2(1) and Article 2(3) of the Federal Arbitration Law which respectively provide "*this Law [Federal Arbitration Law] shall apply to (1) any arbitration conducted in the State, unless the parties have agreed that another law should govern the arbitration […]*" and "*(3) any arbitration arising from a dispute in respect of a legal relationship, whether contractual or not, governed by laws of the State, save as excepted by a special provision.*"

Following its determination as to the application of the Federal Arbitration Law, the Dubai Court of Appeal relied on Article 8(1) of the Law which provides that "*The Court, before which a dispute is brought in a matter covered by an arbitration agreement, shall declare the inadmissibility of the action, if the defendant raised such plea before any claim or defence on the merits.*"

In order to answer the above legal question, and reverse the earlier decisions of the summary judge and the Dubai Court of First Instance that had claimed jurisdiction over the subject matter and issued a freezing order, the Dubai Court of Appeal cited Article 18(2) and 21(1) of the Federal Arbitration Law, which respectively provide as follows:

> Article 18(2) of the Federal Arbitration Law: "*The Chief Justice of the Court may, at the request of a party, or at the request of the arbitral tribunal, order such interim or conservatory measures as he may consider necessary to be taken in respect of existing or potential arbitral proceedings, whether before the commencement of the arbitral proceedings or during their course.*";
>
> Article 21(1) of the Federal Arbitration Law: "*Subject to the provisions of Article 18 of this Law [Federal Arbitration Law], and unless otherwise agreed by the Parties, the Arbitral Tribunal may, at the request of a party or on its own motion, order any party to take such interim or conservatory measures as the arbitral tribunal may consider necessary given the nature of the dispute, in particular: […] (c) preservation of assets and funds out of which a subsequent award may be satisfied […] (e) an order to take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitration process itself.*"

Based on the above, the Dubai Court of Appeal held that a freezing order is considered a conservatory measure, the purpose of which is to preserve the debtor's assets with a view to preventing harm in the eyes of the law. In this regard, the Dubai Court of Appeal concluded that the jurisdiction with regard to considering the application for a freezing order, or ratione materiae, lies with the Chief Justice of the Court of Appeal or the arbitral tribunal, depending on the circumstances, and as long as the parties have not specifically agreed to the ordinary and default state court's jurisdiction (summary judge) to issue such conservatory measures.

In the case at hand, the Dubai Court of Appeal noted that the agreement between the parties contained an arbitration clause pursuant to which the parties had clearly agreed to resort to arbitration, and not the state courts, should a dispute arise between them. Furthermore, the Dubai Court of Appeal underlined the Respondent's defence in the state court proceedings seeking to declare the application for a conservatory measure inadmissible as a result of the parties' arbitration agreement. As a consequence of the parties' prior agreement, as re-iterated throughout the state court proceedings, the Dubai Court of Appeal held that the summary judge did not have jurisdiction to consider the application. In the case before it, the Dubai Court of Appeal ruled that the summary judge, and subsequently the Court of First Instance, erred in their respective application of the law and accordingly, their decisions were overturned.

Conclusion

The application of the Federal Arbitration Law (which expressly empowers arbitral tribunals with the authority to issue interim and conservatory measures) by the Dubai Court of Appeal in this case demonstrates that the scale is increasingly tilting towards providing an arbitration-friendly environment in the UAE. This decision of the Dubai Court of Appeal indicates a determined attempt to uphold the sanctity of arbitration agreements even when interim and conservatory measures, in support of an existing or prospective arbitration, are at issue: where parties have agreed to resolve their disputes through arbitration, and in accordance with the Federal Arbitration Law, the jurisdiction to rule on interim and conservatory measures shall now lie with the arbitral tribunal and the Chief Justice of the Court of Appeal, unless the parties have explicitly agreed to defer such matters to the original default jurisdiction of the summary judge. As party autonomy is safeguarded, this decision is another testament to the importance of the manner in which parties formulate their arbitration clauses, so as to ensure such clauses are in place at the outset and well before a dispute even arises.

Al Tamimi & Company's Dispute Resolution team regularly represents clients in arbitral proceedings and arbitration-related litigation proceedings before the courts. For further information, please contact Dr. Hassan Arab (h.arab@tamimi.com) or Sara Koleilat-Aranjo (s.aranjo@tamimi.com).

Corporate Offshore Lending based on Security Agency Structure and Corporate Guarantee

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Introduction

Article 4 of Law No. (14) of 2008 Concerning Mortgages in the Emirate of Dubai ('Dubai Mortgage Law') provides that the "*Mortgagee/creditor should be a bank, company or financial institution that is duly licenced and registered with the UAE Central Bank*" in order to provide finance for property in the UAE. This restriction means that foreign banks providing cross-border lending into the UAE are technically precluded from obtaining a mortgage over a property in Dubai.

In the Sale of Mortgaged Property Case 34 of 2016 filed before the Dubai Execution Court, a foreign bank without a presence in Dubai provided a facility to a borrower based in the Emirate. The UAE Courts generally considered the role of the security agent and noted that a security agency agreement is typically signed and executed between the lender and security agent without the borrower being a party. As a result, the court found it difficult to apply the terms of the security agency agreement between the parties and enforce against the borrower who had not signed the agreement.

The collateral to the facility was located in Dubai and the foreign bank was able to successfully foreclose on the mortgaged property when the borrower and guarantor defaulted.

Security Agent Role

When collateral is located in a jurisdiction where the lender does not have a presence, or the lender is not authorised to hold collateral in that jurisdiction, a security agent known also as collateral agent or security trustee can be appointed to hold the collateral on behalf of the lender.

Many foreign financial institutions are not licensed by and registered with the UAE Central Bank and therefore need to appoint a security agent to hold certain types of collateral located in the UAE.

A security agent could also be appointed in a syndicated loan, a form of business loan in which two or more lenders collectively provide loans for one or more borrowers. Usually, the syndicate appoints one of its members as a security agent to hold collateral on behalf of the syndicate as a whole, with the provision that the syndicate member is in fact entitled to hold collateral in the jurisdiction where the collateral is located.

Background

A Kuwaiti bank ('Lender') had granted facilities of circa AED340 million (circa US$95 million) to a company incorporated in Dubai ('Borrower'). Disbursing the facilities was conditional on the Borrower providing the Lender with collateral worth the total facility amount. The Lender was not licensed in the UAE.

The Borrower had agreed to procure, in favour of the bank an UAE based corporate guarantor ('Guarantor'), which owned 32 plots in a non-designated area in Dubai (i.e. a place where only UAE and/or GCC nationals were entitled to own real estate).

The Guarantor agreed to mortgage the 32 plots as security for the facility. The parties agreed to appoint a local UAE bank as the security agent pursuant to a Security Agency Agreement ('Security Agent'). The Security Agent was not a lender to the Borrower and its sole role was to be the legal holder of the security interest.

The Borrower and the Guarantor collectively failed to repay any amount to the Lender, which led to an accumulated outstanding amount of more than AED381 million (approx. US$104 million).

Direct Enforcement Case

Following the default, 32 notarised legal notices (one for each property) were issued to the Guarantor.

A direct enforcement case was commenced before the Dubai Court of First Instance to foreclose the mortgaged properties after a period of 30 days had passed, in accordance with Article 4 of the Dubai Mortgage Law.

After hearing arguments, the Dubai Court of First Instance issued a favourable decision to attach the 32 plots, stamped all the mortgage deeds with the execution writ and ordered the sale of all the plots by way of public auction.

Appeals

The Guarantor contested the legal proceedings by filing 13 appeal cases, two grievance cases, two objections cases and a petition case before the Dubai Court of Cassation.

One of the main challenges raised by the Guarantor before the Appeal Court was the interpretation of Article 4 of the Dubai Mortgage Law. The Guarantor argued that, under the natural and ordinary wording of Article 4, the mortgagee was also required to be a lender in the transaction in order to receive the benefit of the mortgage. The phrase 'mortgagee/creditor' means *both* a mortgagee and a creditor. As the actual Lender was a foreign bank and not duly licensed and registered with the UAE Central Bank to provide finance for property in the UAE, it should not be entitled to receive the benefit of the mortgage enforcement. The Court of Appeal ruled in favour of the Guarantor.

Further, the Guarantor filed a petition before the Dubai Court of Cassation however, the Dubai Court of Cassation agreed with the Lender's arguments that the natural and ordinary meaning of 'mortgagee/creditor' in Article 4 was *either* a mortgagee *or* a lender. This position was supported by arguments that, as a matter of regulatory requirements and business practice, it was not essential that a mortgagee also be the creditor.

The Dubai Courts are now familiar with the role of the security agent and the foreign banks' corporate lending structure based on a corporate guarantee.

Auction Process

Another interesting issue in this case was the public auction process. The court ordered five plots to be listed per auction. There was a risk that if all the plots were sold at once in a public auction, the amount collected would be more than the outstanding amount, which would cause substantial damage to the Guarantor.

For each auction session where plots had been sold, the auctioneer had to prepare a statement of account, which showed the details of the plots sold in addition to their auction value. This was required in order to help the Audit and Accounts Department at the Dubai Court track the total value of the sale proceeds.

Conclusion

This case was the first of its kind, to our knowledge, and included a number of unusual aspects:

1. the Lender was an offshore bank;
2. the Mortgagee did not participate in the facility as a lender;
3. the Mortgagee acted in the capacity of a Security Agent only; and
4. the Corporate Guarantor is not the Borrower.

As a result of this decision, the Dubai Courts have established a precedent of enforcing a direct enforcement case applying the Dubai Mortgage Law where the Lender is an offshore bank, the mortgagee/creditor is not a lender and a third party provided the collateral.

This precedent can be referred to in future cases to demonstrate the ease of enforcement of mortgages before the Abu Dhabi Courts and Federal courts in similar cases.

Al Tamimi & Company's Banking & Finance team regularly advises on Corporate lending, security agency agreements and complex foreclosure matters. For further information please contact Ahmed Zaki (a.zaki@tamimi.com).

DIFC Court of First Instance enforces Residential Ijara Mosufa Agreement for the First Time

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The DIFC Courts have considered the terms of a Sharia-compliant Ijara Mosufa Agreement in an action brought by a prominent UAE bank against a residential borrower concerning a property in the DIFC.

This is believed to be the first time an Ijara Agreement has been subject to the Courts' scrutiny rather than as an agreement only incidental to the issues in dispute before the Courts.

Background

The parties entered into the Ijara Agreement in 2007 for the off-plan purchase of an apartment in the DIFC. In 2009, the apartment was completed and the borrower took possession. The borrower's payments under the Ijara increased upon occupation, but he immediately fell into arrears and defaulted under the contract. The bank forebeared on the borrower's default for a number of years as he continued to make payments on an irregular basis.

Eventually, in 2016 the bank terminated the Ijara Agreement and subsequently brought an action in the DIFC Courts seeking the balance of the outstanding payments unpaid by the borrower, both the principal (i.e. rent) and profit sums. The bank also sought orders for unencumbered rights over the apartment, including a declaration of its rights in relation to the DIFC Real Property Register where the borrower's interests under the Ijara Agreement had been registered. Trial of the dispute was listed for 12 March.

Staff from the DIFC Courts accompanied the bank in the possession action, which concluded without controversy. The DIFC Courts have appointed a bailiff who can work with successful parties in enforcing orders in their favour. There was no requirement for the involvement of the Dubai Police or any other authorities.

Judgment

The borrower had previously successfully set aside a default judgment against him. However, because he failed to attend trial the Judge used his powers under rule 35.14 of the Rules of the DIFC Courts, which permits the striking out of any defence and allows the claimant to prove its claim and obtain judgment on its claim and for its costs.

In his judgment following the hearing, the Deputy Chief Justice, H.E. Justice Omar Al Muhairi, found that:

- the DIFC Courts had jurisdiction over the dispute as the property was within the DIFC's territory;
- the Ijara Agreement was stated to be governed by UAE law, and this could properly be interpreted to mean DIFC law given the circumstances of the case;
- the Ijara Agreement was legally enforceable and was validly terminated by the bank when it served a termination notice in 2016;
- the bank was entitled to serve its termination notice because of the borrower's persistent failure to pay the complete sums due each month;
- the bank's calculations of what sums the borrower owed, what he had paid and what remained outstanding, could be accurately relied upon;
- the bank was entitled to the sums and declarations it sought. It was entitled to an order directing the DIFC Real Property Registrar to de-register the borrower's interest in the title, re-possess the apartment and sell it; and
- the bank was entitled to its costs of the action on the indemnity basis.

The borrower was granted leave to appeal on two points: the sums credited to his obligations by the Judge, and the award of the bank's costs on the indemnity basis. Both appeals were dismissed by the Court of Appeal in a judgment on 2 October 2019.

The Court had little trouble finding that the DIFC Courts were the correct forum to bring the claim, not least because the property was within the DIFC, and that DIFC law applied to the parties' relationship.

Significance

The judgment is significant for several reasons.

Firstly, the Court of First Instance had little trouble finding that the DIFC Courts was the correct forum to bring the claim, not least because the property was within the DIFC, and that DIFC law applied to the parties' relationship. The Court was satisfied that not only were the terms of the agreement capable of referring to DIFC law, but also that DIFC law was the applicable law as a result of the operation of the DIFC Law on the Application of Civil and Commercial Laws in the DIFC (DIFC Law No.3 of 2004), the DIFC Law Relating to the Application of DIFC Laws (Amended and Restated) (Law No.10 of 2005), and the DIFC Real Property Law (no.10 of 2018).

Secondly, the defendant had earlier challenged the Sharia-compliant nature of the Ijara Agreement. However, this allegation remained unparticularised in his pleadings and unsubstantiated in his evidence. The Judge at trial, a highly experienced UAE-trained lawyer, raised no issue regarding Sharia.

Finally, the Court was willing and able to grant the bank a range of remedies in order to recover possession of the apartment for subsequent disposal, as well as to make orders for the payment of sums due and for costs.

Staff from the DIFC Courts accompanied the bank in the possession action, which was concluded without controversy. The DIFC Courts have appointed a bailiff who can work with successful parties in enforcing orders in their favour. There was no requirement for the involvement of the Dubai Police or any other authorities.

Al Tamimi & Company's International Litigation Group has the largest DIFC litigation team in the UAE and significant experience in DIFC real property disputes, particularly on behalf of landlords and lenders. For further information please contact Rita Jaballah (r.jaballah@tamimi.com), Peter Smith (p.smith@tamimi.com) or Jonathan Brooks (j.brooks@tamimi.com).

Exhaustion of the Arbitration Clause

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Introduction

Courts in the UAE generally respect agreements to arbitrate disputes over commercial matters. More often than not, they will decline jurisdiction to hear claims which conflict with arbitration provisions, provided the defendant to the litigation presents evidence of a signed contract containing an arbitration clause in the first hearing.

However, a recent judgment issued by the Dubai Court of Appeal (appeal number 505/2017 (Real Estate)) considered an arbitration clause had been 'exhausted' because, although the matter had originally been referred to arbitration, the dispute had been procedurally ended by the Arbitration Centre. This decision followed the reasoning of another judgment, issued by the Court of Cassation in Cassation No. 379/2013 (Real Estate).

Background

In this case the parties entered into a sale and purchase agreement (the 'SPA') of an apartment unit in Dubai, under which the buyer (the 'Claimant') had paid 20 percent of the purchase price. The seller (the 'Respondent') failed to fulfil his obligations under the SPA relating to completion of the project and delivery of the apartment unit. The parties settled their dispute and formed an agreement whereby the SPA was to be terminated and the Respondent was to deliver a new apartment to the Claimant in a different project. Once the terms of the settlement were agreed, the Respondent did not sign the settlement document.

The Claimant filed a request for arbitration with the Dubai International Arbitration Centre ('DIAC'), in accordance with the provisions of the terms of the SPA claiming the amount paid. However, when DIAC requested the parties to pay sums in advance of on costs, neither party made the payment. Thus, in accordance with the DIAC Arbitration Rules, the claims were considered to be withdrawn and the file was closed by DIAC.

The Claimant proceeded to file a case before the Dubai Courts claiming the amount paid plus the accrued interest. At the first hearing, the Respondent argued that the Dubai Court lacked jurisdiction to hear the matter because of an express arbitration agreement in the SPA. The Dubai Court of First Instance accepted this contention and issued a judgment declining to hear the case.

"The judgment issued by the Dubai Court of Appeal in this matter is an indication of the direction the Dubai Courts may take in future when considering whether to uphold an arbitration agreement.

Dubai Court of Appeal

The Claimant appealed the judgment of the Court of First Instance in Appeal No. 505/2017 (Real Estate). He relied on a judgment issued by the Dubai Court of Cassation in Cassation No. 379/2013 (Real Estate) in which the Court stated that "*the decision by DIAC to close the file for non-payment of arbitration costs results in the exhaustion of an arbitration clause, as the purpose of the arbitration is fulfilled by the non-possibility of pursuing the same. Thus, the parties can proceed to court to request their claims*".

Accordingly, the Court of Appeal found that, because this claim had initially proceeded to arbitration but the file had been closed by the DIAC, this resulted in the parties waiving their right to arbitration and provided the courts with jurisdiction to hear this matter. The Court of Appeal therefore overturned the appealed judgment and referred the matter back to the Court of First Instance.

Conclusion

The judgment issued by the Dubai Court of Appeal in this matter is an indication of the direction the Dubai Courts may take in future when considering whether to uphold an arbitration agreement. The decision is also authority for the automatic reinstatement of the jurisdiction of the Dubai Court in the event that the Court finds the arbitration clause has been exhausted.

It is pertinent to note the Claimant was successful when the matter was referred back to the Court of First Instance, where a judgment was issued terminating the contract and the Respondent was ordered to return the amount paid plus interest.

Al Tamimi & Company's Litigation team regularly advises on disputes related to commercial agencies. For further information please contact Nasser Yahia (ny.yahia@tamimi.com) or Sara Omer Ali (s.omerali@tamimi.com).

The Qatari Courts' Approach to Awarding Interest

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The Qatar Court of Cassation has found that an arbitral award that included an award of interest was valid and not contrary to public policy in Qatar. The award was challenged on the basis that the award of interest was incompatible with Sharia law and therefore unenforceable. The Court's judgment, Court of Cassation number 24 of 2018 handed down on 27 February 2018, is noticeable because it marks a clear shift in the court's approach with respect to awards of interest. The new approach will undoubtedly be welcomed by both the arbitration and litigation community in Qatar. This article puts the judgment in context and offers guidance as to how parties might claim interest in Qatar.

The Qatari Courts have traditionally refused to award interest for two main reasons: the courts either found that payment of interest is prohibited under the principles of Sharia[1]; or considered the claim for payment of interest as a claim for compensation flowing from either late payment or a failure of the obligor to uphold contractual obligations. Instead of awarding interest on late or defaulted payments, the Qatari Courts have directed the relevant obligor to pay the obligee a lump sum of compensation as determined by the Court[2]. However, there has been a gradual shift in this approach. In recent judgments, the Court of Cassation upheld decisions of the Court of First Instance[3] and the Court of Appeal[4] stating that the interest awarded by an arbitral tribunal amounts to compensation for breach of contract and, as such, is not contrary to public policy in Qatar.

Background

A dispute arose in relation to a construction contract which was then referred to arbitration in Qatar. Following the arbitration process, an award was rendered which directed the award debtor to pay interest from the due date until full payment of the monetary compensation. The award debtor initiated legal proceedings to set aside the award on the basis that the arbitral award was void because it stipulated that interest be paid which, it argued, was contrary to Sharia law and therefore public policy. Article 1 of the Qatari Constitution provides that "*Sharia law shall be a main source of its legislation.*" Public policy is not defined in the Qatari Civil Code but is referred to in several articles. Qatar, like in many Muslim states, considers non-compliance with Sharia law a breach of public policy.

Findings

The Court of First Instance held that the claim for interest due to late payment is a claim for compensation, and consequently awarding such interest does not constitute a violation of public policy in Qatar, the Constitution of Qatar or the principles of Sharia. The Court of First Instance referred, in particular, to Law No. 13 of 2012 relating to the Qatar Central Bank Law and Regulation of Financial Institutions (the 'QCB Law') that allows banks to charge interest on late payments; and that at the time of the ruling by the Court of First Instance, the QCB Law had not been declared unconstitutional.

This ruling of the Court of First Instance was subsequently confirmed and upheld by the Court of Appeal and the Court of Cassation, both of which found the reasoning legally sound.

Conclusion

There is a concern that arbitral awards may be set aside if deemed non-compliant with any principles of Sharia (such as the rule against interest) as they will be found to be contrary to public policy and therefore unenforceable. However, it is clear there has been a material change from previous cases on the issue of the application of interest on breach of payment obligations, which formerly denied the right to levy any interest based on the violation of principles of Sharia and public policy in Qatar.

The Qatar Court of Cassation has found that an arbitral award that included an award of interest was valid and not contrary to public policy in Qatar.

In view of the above Court of Cassation judgment, contractors in Qatar may have grounds to argue in favour of an award of interest in the event of late or defaulted payments by the obligor, provided that the payment of interest as pre-agreed compensation for late or defaulted payments is set out in the relevant agreement.

Al Tamimi & Company's Litigation and Arbitration teams regularly advise on the enforcement of arbitration awards and judgments in Qatar. For further information please contact Noelle Tannous (n.tannous@tamimi.com).

[1] *Qatari Court of First Instance, decision of 13/7/2017, Case No. 2453/2016*
[2] *Qatari Court of first instance, decision of 26/4/2017, Case No 2275/2016*
[3] *Qatari Court of First Instance - decision of 31/12/2015, Case No. 3173/2015*
[4] *Qatari Court of Appeal - decision of 22/11/2017, Case No. 228/2016*

The Construction Market: Next Steps

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Adjudication: Time for a new approach in construction?

Mashreq Bank recently published a 'Construction Think Tank' report on recommendations for change in the construction industry in the UAE ('Report'). The Report, which was compiled with input from leading entities in the industry, explores ways to increase productivity and adopt new technologies but recognises those innovations are unlikely to be adopted whilst cash-flow remains a widespread problem within the industry.

To address those cash-flow problems the Report recommends:

- Rebalancing the way risks are shared by the parties, through:
  - an industry wide move away from adversarial attitudes in favour of placing risk with the party best placed to manage that risk in the interest of the project;
  - introduction of industry wide standard contracts with a balance risk profile; and
  - a drive to improve contract administration.
- Statutory intervention to codify:
  - key terms used in the construction industry; and
  - payment and certification processes and providing for fast-track adjudication.

The Report's focus on cash-flow is not surprising. There has been significant recent commentary around the need for change in this area for some time. Further, recent government action (such as the Abu Dhabi government circular requiring 30 day payment terms in all contracts within government supply chains and the recent open letter from Sheikh Mohammed in Dubai calling for changes in the construction and real estate industry) may be seen as an acknowledgment of and willingness to address issues within the industry at the highest level.

In this article, we consider whether, in the absence of evidence of a significant shift in attitudes, there should be a statutory intervention to change industry practice and place the industry on a sustainable footing.

A Shift in Attitudes?

In any construction project, there is a substantial mutual goal for the parties, namely, completion of the project in accordance with the requested standard, without delay and without unplanned costs:

- for the employer, until this occurs, they cannot commercially exploit the works; and
- for the contractor, completing the works unlocks full payment and releases their resources for other projects.

Despite the above, parties to construction contracts remain adversarial. Employers continue to seek to transfer as much risk as possible down the supply chain irrespective of the parties' ability to manage that risk. In addition, the lowest price remains the driving factor in many procurement decisions. As a result, contractors submit bids with profit margins too low to absorb the risks they accept in order to win work in an increasingly competitive market.

This approach to contracting does not yield best value for the parties. As the Report notes, "*it is widely proven that awarding construction contracts to the cheapest tender will generally result in the most expensive project due to the additional cost of delays, poor workmanship and repairs.*" The rationale behind this statement is likely to be familiar to many in the UAE construction market. A common scenario is:

- a contractor encounters risks it has not priced, this quickly erodes any profit margin or contingency. The margin is expended and cash-flow problems slow the pace of works. Further, the contractor seeks to find savings in the construction of the works;
- delays lead to additional costs which employers are rarely fully compensated for by capped delay damages; and
- where corners are cut due to reduce the contractor's exposure, maintenance costs increase. leaving the employer in a worse position 'in the long run';

A sensible allocation of risk and pricing which takes account of the risk profile will mean the overall 'whole life' cost will be lower despite initial construction costs being slightly higher (whether through a higher tender price or through valid claims for variations and/or compensable delay).

For sub-contractors, 'back to back' payment clauses exacerbate the above issues. It is apparent that the cash-flow issues created by 'back-to-back' clauses and poor contract administration are, in our experience, increasingly being managed by diverting funds (especially advance payments) from one project to finance works on other projects and meet other liabilities. This creates a chain of projects in financial difficulty from an early stage, if the industry is to be sustainable this chain must be broken.

However, from a main contractor's perspective, why would anyone give up the protection of 'pay when paid' terms which can be imposed on sub-contractors without assurance that employers will pay them on time or at all.

It seems, therefore, that change is only likely to occur if it is led by employers looking at 'whole life' costs rather than focusing on the short-term cost of construction.

If such change is not forthcoming, there may be a case for statutory intervention. There is precedent for such intervention in other jurisdictions. The Latham Report

(1994) identified similar issues to those above in the UK industry and ultimately led to the introduction of a statutory regime for certification and payment and adjudication in 1996. Since that regime took effect in 1998 the number of construction cases and in particular payment disputes, being heard in the UK courts has dropped sharply.

Mandatory Contract Terms

The Report suggests a 'new standard form' contract with a more balanced risk profile might be part of a solution. In practice a 'one size fits all' contract is likely to be difficult to arrive at and it would still, in the absence of restrictions, be subject to amendment.

That said, there could be merit in adopting a new 'standardised' form of contract in the public sector to lead by example and encourage best practice. For example, the imposition of shorter payment timescales in Abu Dhabi government supply chains has been welcomed as a positive step and shows a willingness to lead by example.

We suggest it would be better for the industry to retain the freedom to contract as it wishes, save to the extent necessary to safeguard cash-flow and thereby the health of the industry as a whole. This would follow similar interventions in other jurisdictions such as the UK, Australia, Singapore and New Zealand.

By looking to the regimes which have been in place for many years in other jurisdictions (UK 1998, Australia 1999, New Zealand 2002, Singapore 2005), a possible framework for such legislation can be found and adapted to fit the UAE market.

For example, the New South Wales regime:

- prohibits particularly abusive practices such as 'pay when paid' or only permitting payment on completion;
- requires contracts to meet certain minimum standards designed to give the contractor certainty as to when payment is due and how much is due;
- incorporates into any contract, which does not meet those requirements, 'default' terms to ensure that a contractor will always have the benefit of clear and unambiguous payment terms; and
- incorporates a process whereby the amount which the contractor considers to be due in its payment application is deemed to be the certified amount where the engineer and/or employer fail to engage in the certification process in accordance with the contractual/implied time limits.

Schemes such as that described above ensure that there will always be a certified amount (as the employer (or the engineer) does not have the ability to delay certification)). Further, the contractor has clarity as to why a certified amount differs from the amount claimed in order to bring a claim for the difference if this is in dispute.

The above mechanisms would introduce greater clarity and certainty into certification and payment processes. However, this is of little benefit to contractors if, in the face of an employer who refuses to make payment, they do not have ready access to a dispute resolution tribunal which offers certain, timely and cost-effective redress.

The need for Adjudication

It has been said that there is no need for an additional dispute resolution mechanism given there are already a wide variety of tribunals available in the jurisdiction and contracts already contain complex multi-stage dispute resolution provisions.

In answer to this point, the aims of a statutory adjudication scheme need to be kept in mind. The overriding purpose of an adjudication scheme is to ensure that cash moves through the supply chain quickly and with minimal interruption. In order to do this, any dispute mechanism needs to:

- be available to the parties at any time without pre-condition;
- be affordable to allow resolution of interim payment disputes of mid to low value;
- produce predictable decisions;
- be capable of producing an enforceable result in a short timeframe; and
- be independent of the parties (including the engineer).

Existing dispute mechanisms do not achieve these aims with cost and timescales often being prohibitive, particularly in the case of arbitration, and with use of those mechanisms being part of a lengthy staged dispute resolution mechanism.

"In this article, we consider whether, in the absence of evidence of a significant shift in attitudes, there should be a statutory intervention to change industry practice and place the industry on a sustainable footing."

As can be seen above, none of the commonly available mechanisms adequately achieve the purpose of keeping cash moving through the supply chain on an interim basis. When the DAB (and later the DAAB) was introduced by FIDIC there was commentary on the benefits of adjudication. However, use of these processes remains rare in the Middle East. In part, the reluctance to use the DAB/DAAB process is because, without a clear route to enforcing the tribunal's decision, they simply add a layer of additional cost to the dispute resolution process.

However, experience suggests that in many cases the cause of reluctance to adopt the DAAB process is that employers have the upper hand in contract negotiations and it can be in their interest to deny contractors (and in turn sub-contractors) the ability to obtain a decision requiring payment to be made quickly or in a cost-effective manner.

Statutory Adjudication

Statutory adjudication is not a new concept and so we can look to schemes adopted in other jurisdictions in order to understand what works and where improvements can be made so as to tailor such schemes to the UAE market. Given the widespread popularity of the FIDIC forms of contract, it makes sense to adopt provisions which mimic the FIDIC approach to payment and adjudication in so far as is possible. It is also useful to look to those regimes to understand the key components of any such scheme. Those components are:

- adjudications are commenced by giving notice in the same way as arbitration;
- following the issue of a 'referral notice' the parties may agree the identity of the adjudicator or refer the appointment to an appointing body (as is common in arbitration). To ensure the process does not become 'bogged down' in this initial phase strict time limits are imposed for the appointment (seven days from issue of the referral notice);
- once appointed the adjudicator has a relatively short time, in the UK 28 days subject to extension of up to 42 days (or longer if both parties consent);
- the adjudicator has control of the timetable and process, save that both parties are allowed to make submissions and the claimant has the right to respond to the defendant's defence;
- whilst the adjudicator has a wide discretion regarding the process, submissions are usually made in writing and a hearing is often not required;
- decisions have 'temporary finality'. In other words, they are final and binding unless and until the final tribunal (courts or arbitration) issues a decision on the same issue; and

- there is no right to recover costs in adjudication, but the adjudicator can apportion his/her costs between the parties as he/her considers appropriate.

In fact, the DAAB procedure fulfils most of the above criteria and could be adopted as a basis for a mandatory adjudication procedure. In order to be effective, we consider that this would however need to be supported by legislation requiring the process to be used, preventing amendments to move away from the above principles and ensuring any decision can be enforced.

Procedure

The above process is broadly comparable to arbitration and should be readily given the widespread use of arbitration in the UAE. This suggests that the UAE market could adapt to such a process without difficulty.

There is a ready pool of arbitrators who could serve as adjudicators and no doubt the same nominating bodies as are commonly used in arbitration could, at least initially, nominate suitable adjudicators. This is borne out by the UK experience where specialist adjudication bodies and adjudicators grew out of the arbitration industry in the early years of the regime.

The shorter timescales in adjudication would require parties, nominating bodies and potential adjudicators to engage with and act much more quickly than is typically the case in arbitration processes. However, the simpler procedure and shorter timescale means that, whilst the process is intense overall, a fraction of the resources required for an arbitration is required for adjudication thereby creating significant cost savings.

Temporary Finality

Adjudicators' decisions are binding with 'temporary finality'. Some in the industry might say 'what is the point of a decision if it can be overturned?' The point is, we suggest, that the process has the overriding objective of keeping cash flowing through the supply chain, and to do so the process must be quick. A shorter, simpler process (e.g. where there is no disclosure or discovery) can lead to results which are incorrect. By stipulating that a decision is temporary but binding until a superior tribunal issues a decision, adjudication allows:

- employers to challenge what they consider to be a bad decision by adjudicators by commencing proceedings in the courts or arbitration in the usual way; and
- contractors are able to secure a decision for payment (if successful) quickly and cost effectively so that decision can be enforced and consequently ensure cash flow.

This leaves a risk that employers will be required to pay money to contractors in respect of a decision which they: (a) do not agree with; and (b) are re-litigating in the courts or arbitral tribunal. This creates a real risk that, at a later date, the employer may overturn the adjudicator's decision only to discover the contractor does not have the funds to repay the employer. Other jurisdictions have considered this risk and have concluded that:

- adjudicators tend to come to the correct decision most of the time while the volume of construction cases in the UK courts and arbitration has dramatically shrunk since the entry into force of the Construction Act in 1998, suggesting most employers are satisfied with the validity of most decisions; and
- the risk of a minority of employers being placed in this position is preferable to the majority of contractors suffering the ill effects of continuing cash-flow problems.

Nonetheless, this will be a serious concern for many employers and larger main contractors and merits further consideration. There may be an opportunity to improve on existing regimes by requiring security for costs in some way where an adjudicator's decision is disputed. However, this must be balanced against re-introducing financial barriers to fast and cost-effective dispute resolution or locking up cash as security which would undermine the overriding objective of the regime – cash flow for the benefit of the project. The New South Wales scheme, as originally drafted, sought to allow payment to be postponed where security for the amount due was provided – however this limited the effectiveness of the regime which was ultimately amended to adopt the UK style 'pay now argue later' approach.

It should be kept in mind that the whole purpose of a 'construction act' is to improve cash-flow and thereby liquidity in the industry. As the benefits of such a scheme takes effect, the risks associated with making payments to parties with a high likelihood of liquidity problems should reduce.

Enforcement and the Courts

All of the above will only be effective if there is a clear route to enforcement of an adjudicator's decision. If there is no clear and unambiguous right to enforce a decision, there is little incentive to committing to a process in the first place.

The simplest way to ensure this is to legislate so that paying parties are required to make payment in compliance with adjudicators' decisions within a fixed timescale. This creates a clear statutory obligation which, if breached, would give rise to a strict liability claim which could be enforced in the courts.

If the purpose of such an act is endorsed by the courts and robustly supported, the adjudication process, coupled with statutory requirements and default provisions in respect of payment, could have a significant positive impact on the liquidity and sustainability of the UAE's construction industry putting it in a position to embrace and lead innovation.

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).

Copyright Protection in the UAE: The Berne Convention and the Principle of Automatic Protection

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Copyright refers to a form of protection granted to authors over their original works; specifically, artistic and literary works, whatever the manner or mode of expression, purpose or significance of such works. This broad scope of application means copyright is often relied on as a 'catch-all' and fall-back enforcement measure in the protection of intellectual property, especially given the Automatic Protection Principle espoused by the Berne Convention for the Protection of Literary and Artistic Works (hereinafter 'Berne Convention'). Under this Principle, no formal requirements, such as copyright registration, are to be accorded copyright protection in the respective Member States of the Berne Convention. Nonetheless, as a Member State of the Berne Convention, whilst the UAE does not impose any copyright registration requirements, in practice, this is something that may well be needed for the adequate protection and enforcement of copyright works in the UAE.

The Berne Convention and its Fundamental Principles

First signed in Berne, Switzerland in 1886 by Belgium, France, Germany, Italy, Spain, Switzerland, Tunisia and the United Kingdom, today 177 Member States are contracting parties to the Berne Convention; including, the UAE, which acceded to the Berne Convention on April 14, 2004. The Berne Convention thereafter entered into force in the UAE on July 14, 2004.

With the stipulated, central aim of protecting the rights of authors in their literary and artistic works, "*in as effective and uniform a manner as possible*", the Berne Convention, as amended on September 28, 1979, adopts the following fundamental principles (hereinafter 'Fundamental Principles'), highlighted under Article 5 therein:

> *'(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.*
>
> *(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.*
>
> *(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.'*

These three Fundamental Principles encompass what are separately known, and referred to, as the principles of National Treatment, Automatic Protection and Independence of Protection. The Principle of National Treatment provides that copyright works originating in any one of the Member States of the Berne Convention must be accorded the same protection that each Member State respectively accords to such works of its own nationals. Additionally, the Principle of Automatic Protection prohibits the imposition of any formalities as pre-conditions to protection: including, but not limited to, registration; or notice or recordation of copyright works. Lastly, the Principle of Independence of Protection serves to ensure Member States accord the same protection to foreign copyright works, as is otherwise accorded to local copyright works, irrespective of whether or not, and to what extent, protection is afforded to such works in the Member State in which that work originated.

The Principle of Automatic Protection and its Application in the UAE

As a Member State of the Berne Convention, and pursuant to the Principle of Automatic Protection therein, the UAE does not require any formal requirements: such as, copyright registration; notice or recordation for an original literary or artistic work to be protected as copyright. This is re-iterated under the applicable domestic Federal Law No. 7/2002 as amended by Law No.32/2006 Concerning Copyrights and Neighbouring Rights (hereinafter the 'Copyright Law'). According to Article 4 of the Copyright Law, "*failure to register the creative work or its copyright or any assignments or licenses in copyright shall not prejudice the protection or rights provided by this Law.*" Thus, whilst the Copyright Law provides for a copyright registry whereby copyright works may be registered, this is not mandatory and such works are, nonetheless, afforded automatic copyright protection from the moment of their creation in a fixed medium.

However, copyright registration, as evidenced through a copyright registration certificate, creates a favourable legal presumption of ownership over the said work registered, which is especially useful where copyright ownership is, or may be, a contentious issue. Therefore, it is prudent for an author of original literary and/or artistic works to register their copyright in such works with the UAE Ministry of Economy. This is especially important to ensure the availability of administrative enforcement actions, which is the more common, time efficient and cost-effective route of enforcement initiated via the concerned authorities of the Department of Economic Development in each of the respective Emirates and which allows for a range of

...copyright registration, as evidenced through a copyright registration certificate, creates a favourable legal presumption of ownership over the said work registered.

penalties from seizure and destruction of infringing works to fines and possible closure of business premises responsible for such infringing works. The reason for this is that, unlike courts, the administrative authorities are generally unable to assume the role of the court in adjudicating on such copyright issues and thereby rendering the necessary determinations to initiate such administrative enforcement actions, on the basis of copyright infringement, where conclusive evidence of a copyright registration certificate is not available. Accordingly, in practice – save for a few rare, albeit increasing number of, instances, copyright registration with the UAE Ministry of Economy may be necessary for effective protection, as the concerned authorities will usually require a copyright registration certificate to initiate enforcement actions against third parties for copyright infringement.

Conclusion

The Berne Convention has certainly made major in-roads in the protection of original artistic and literary works, by implementing, and thereby inviting, a uniform system aimed at according authors universal protection over their works. Specifically, the Principle of Automatic Protection, as espoused under the Berne Convention, serves to afford original artistic and literary works automatic global protection from the moment of their creation, in a fixed medium, ultimately ensuring equal treatment is provided to such works. Nonetheless, in practice, in the UAE, it is always highly desirable and advisable for authors of such works to register their copyright, so they may benefit from the favourable legal presumption of ownership over such works, in addition to ensuring such authors are capable of availing themselves of the available enforcement measures in the protection of copyright works.

Al Tamimi & Company's Intellectual Property team regularly advises on copyright matters. For further information please contact Elias Nassif (e.nassif@tamimi.com).

Sharia Compliant Wills in the UAE: Your questions answered

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This article provides an overview of the legal framework relating to Sharia-compliant Wills in the UAE, being the Personal Status Law No. 28 of 2005 and highlights issues to keep in mind when considering a Sharia-compliant Will.

Although having a Will is not mandatory under Islamic Sharia, Muslims are encouraged to put their affairs in order before their passing, and also include in the Will those relatives who would not qualify as heirs and are of a poorer situation[1].

What is the Definition of a Will under UAE Law?

"A Will is a disposal of an estate that is enforceable after death".[2]

What is the Purpose of a Will?

As per the definition of a Will, a Will is a way by which a person (known as the 'testator') can determine. in advance, the disposition of his estate upon his/her death i.e. to which beneficiary(ies) he/she would like to transfer ownership of his/her assets or a sum of money, subject to the limitations described below.

A Will may also deal with non-financial matters and generally speaking, as per Islamic Sharia principles and traditions, a Will is not usually limited to the disposal of an estate. It may also include other wishes of the testator, such as his/her preferred burial location, funeral arrangements, debts to be paid, that his children shall perform a pilgrimage in his stead with their expenses to be paid out of

the deceased's estate or the appointment of a legal guardian to oversee, amongst others, his minor children's finances. In addition, a Will can be made for charitable purposes.

What are the Main Limitations of a Sharia Compliant Will?

A Will cannot include any wishes or commands that contradict Islamic Sharia. Islamic Sharia pre-determines a testator's legal heirs (i.e. those family members that are entitled to the testator's estate) and their respective entitlements to the testator's estate regardless of whether or not there is a Will. However, notwithstanding this, a testator is entitled under Sharia principles to bequeath up to one-third of his estate under a Will to non-family members (including non-Muslims), charities or other organisations. A Will may only bequeath more than one-third of the testator's estate if each of the testator's legal heirs provides their express consent to so doing, as it may result in them receiving less than their legal entitlement to the estate. The value of the one-third portion is determined once all debts relating to the estate are satisfied, because debts have priority over the term of a Will.

Strictly speaking, a Will cannot bequeath any part of the testator's estate to a legal heir as their entitlement to the estate is already determined by Sharia and to do is viewed as favouritism. However, it is possible to do so if, as above, each of the testator's legal heirs provides their express consent to the bequest.

Where the consent of the legal heirs is sought to either bequeath more than one-third of the estate and/or bequeath to legal heirs, it is possible that some of the legal heirs may provide their consent and others will not. Should this be the case, the Will shall not be enforced vis a vis those who did not provide consent, and they will receive their full legal share of the estate. Those who give their consent shall receive their respective share(s) from the remainder of the estate after the enforcement of the Will.

What Form does a Will take?

Under UAE law, a Will has no specific form, but the language should clearly reflect the desire of the testator to bequeath his estate. A Will can be concluded verbally, in writing, or even by sign language if the person is incapable of speaking or writing[3].

A Will can be absolute, contingent, or restricted by certain conditions, albeit the conditions would need to be in accordance with Sharia principles.

The testator can name whoever he/she wishes to be the executor of the Will or he can leave it open to all of the heirs to carry out his/her wishes and commands. The executor must declare his/her acceptance otherwise the court can appoint whoever it sees fit to oversee the execution of the Will.

Who are the Beneficiaries of a Will?

The beneficiaries named in a Sharia-compliant Will can be Muslim, non-Muslim or even a charity or corporate entity. As noted above, a legal heir may only be named as a beneficiary to the extent that the other legal heirs agree to so doing consent.

What are the Next Steps for the Beneficiary?

The beneficiary of a Will must accept the Will upon the death of the testator, either explicitly or implicitly, within 30 days of being notified of the existence of the Will. Where the beneficiary is not an individual (i.e. an entity, charity or institution), a legal representative is required to express acceptance on its behalf. A Will may be accepted in whole or in part.

Ownership of the bequeathed asset(s) is transferred to the beneficiary(ies) instantly upon the death of the testator, unless the beneficiary refuses the Will. Consequently, if the beneficiary passes away before expressing his/her acceptance or refusal of the Will, title to the bequeathed assets passes on to his/her heir(s)[4].

[1] *Holy Quran, Surat Al Bakara, verse No. 180.*
[2] *Article 240 of the Personal Status Law (PSL) No. 28 of 2005, Unofficial translation by Thomson Reuters, Arabic text prevails.*
[3] *Article 247 of PSL.*
[4] *Article 255 of PSL.*

A Will cannot include any wishes or commands that contradict Islamic Sharia. Islamic Sharia pre-determines a testator's legal heirs (i.e. those family members that are entitled to the testator's estate) and their respective entitlements to the testator's estate regardless of whether or not there is a Will.

How to make a Valid Will

A Will must be made by a person of legal age, that is, at least 21 years of age. The beneficiary of a Will must be alive at the time of death of the testator.

The bequeathed asset(s) under the Will must be lawfully owned by the testator.

If the value of the bequeathed asset(s) under the Will exceeds one-third of the total value of the testator's estate, it will not be valid unless, and until the testator's legal heirs have provided their consent.

How to register a Will

A testator must submit a request to the Personal Status Court and such request must include: his/her name; the names of the beneficiaries; and the bequeathed assets[5]. The judge must verify that the testator is free of all legal or religious impediments and that the assets which are the subject of the Will are lawfully owned by the testator, after which a certificate is issued which evidences that the Will is officially registered at the court.

Can a Will be revoked?

A testator can retract his/her Will at any point during his/her life, whether in whole or in part.

A Will may also be revoked (in whole or in part) if a beneficiary dies before the testator, if a beneficiary explicitly rejects the Will, or if any bequeathed asset perishes or is lawfully claimed by a third party.

Al Tamimi & Company's Private Client Services team regularly advises on succession and inheritance matters. For further information please contact Dipali Maldonado (d.maldonado@tamimi.com).

[5] *Administrative Decision No. 3 of 2010 concerning Certificates and Attestations in Emirate of Dubai, Article 23.*

Life after Death: Protecting your Loved Ones and your Legacy

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Many non-Muslim expatriates living in the UAE are unaware that in the absence of a Will, recognised by the UAE legal system, the process of transferring their assets after death can be time consuming, costly and fraught with legal complexity. Serious complications can occur when infant children are left behind and no guardianship arrangement recognised in this country has been put in place. As a default, Sharia Inheritance rules would apply to property and it would be at the discretion of a local judge to choose a child's guardian.

If an expatriate passes away without a Will, Federal Law No. 5 of 1985, concerning the issuance of Civil Transactions Law of the UAE (the 'Civil Code'), and Federal Law No. 28 of 2005 regarding the UAE Personal Status Law (the 'Personal Status Law') guide the local Courts on the distribution of assets, only where it is not contrary to public policy. In some cases, it is possible that the Courts will apply principles of Sharia law to the estate of a non-Muslim, so mandatory rules of division between certain members of the deceased's family will apply.

As a practical matter, access to the assets of the deceased individual is restricted. Assets cannot be transferred or be dealt with in any manner without direction from the local Court. In some circumstances, this can give rise to delays and financial complications at what is a critical time.

Many expatriates fail to put measures in place to protect their families and their assets. Even where investments are held offshore in foreign jurisdictions, individuals fail to consider what would happen to infant children, UAE bank accounts, end of service and gratuity payments, their freehold properties or shares in this country. There are a number of options now available to non-Muslims and in the Year of Tolerance, it is apt that these options have only grown, as detailed below.

Will Registration for Non-Muslims in the United Arab Emirates

Non-Muslim expatriates with assets in the UAE now have the ability to register Wills and this has the effect of creating legal certainty for the inheritance of their assets after death and the appointment of guardians for their children. This not only allows individuals to have testamentary freedom to dispose of their assets as they wish, it also provides peace of mind that an individual's estate will be distributed according to their wishes and potentially avoids the need to have multiple Wills to cover assets in different jurisdictions. Below we discuss the available options for registering a Will in the UAE:

1. The Dubai International Financial Centre ('DIFC') Wills Service Centre

The DIFC Wills Service Centre (formerly known as the Wills and Probate Registry) was established by Resolution No. 4 of 2014, issued by Sheikh Maktoum bin Mohammed bin Rashid Al Maktoum, the President of the Dubai International Financial Centre.

In May 2015, the DIFC Wills Service Centre introduced a new avenue for succession and inheritance matters for non-Muslims holding assets in Dubai and later Ras Al Khaimah, backed by protocols concluded with other public authorities.

The DIFC Wills Service Centre allows eligible non-Muslim individuals to formally register their English language Wills according to the principles of testamentary freedom, enabling them to choose to dispose of their Dubai or Ras Al Khaimah based assets upon death as they see fit. Once registered with the DIFC Wills Service Centre, heirs of the deceased are then able to enforce the deceased's inheritance wishes through the DIFC courts, as an alternative to other judicial routes. All probate grants are issued by judges of the DIFC Court.

On 30 June 2019, Order No. 3 of 2019 in respect of the DIFC Courts' Wills and Probate Registry Rules came into effect to allow non-Muslims to include all of their worldwide assets in a DIFC Will. Testators whose Wills are already registered with the Wills Service Centre have the option to modify their existing Will to include global assets.

2. Abu Dhabi Judicial Department

Sheikh Mansour bin Zayed, Deputy Prime Minister and Chairman of the Abu Dhabi Judicial Department, issued a resolution in May 2017 to create an Office for Wills and Probate for non-Muslims in the Emirate of Abu Dhabi.

The new system has assisted in closing a gap in the legal system. Previously, there was no clear mechanism for the registration of Wills for non-Muslims in Abu Dhabi and the only way for beneficiaries to secure their assets was to request the application of the law of their home country, in keeping with the UAE's Personal Status Law. Otherwise, assets would be automatically distributed according to Sharia principles.

The new Office allows non-Muslims with assets in Abu Dhabi and other Emirates to have the option to deal with their estates as they so choose. It also offers flexible legal options, where previously there was inflexibility, to assist non-Muslim families in the event of death. This better protects their intentions and assists in easing a process that otherwise would be long, stressful and complicated. The growing number of non-Muslim property owners are now also able to ensure their real estate assets are passed on, in accordance with their wishes, without further dispute.

The new Office was introduced shortly after the establishment of a special Court to deal with non-Muslim family law and inheritance affairs, as announced by Sheikh Mansour, which itself was a crucial development for the legal system.

Even enforceability has been considered and codified. On 22 September 2019, the Judicial Department in Abu Dhabi issued Administrative Decision No. (178) of 2019 on the Execution of Non-Muslim Wills. According to the decision, a Will shall be considered as

an execution instrument in which it could be enforced directly through the Execution Department at Court, without the need for a court judgment.

As far as we are aware, no grant of probate or similar proceedings have yet taken place in the Courts of Abu Dhabi following the death of a testator.

3. Dubai Local Courts

For non-Muslims, the law of the deceased's nationality can be applied if a Will is made formally. The UAE Civil Code stipulates that the law of the home country of a non-Muslim can be applied to matters of inheritance as defined by Article 17 (1), which states "*inheritance shall be governed by the law of the deceased at the time of his death*". However, where a Will refers to the disposal of real estate in the UAE, then Article 17 (5) states that UAE law "*shall apply to wills made by aliens disposing of their real property located in the state*". This is subject to a possible exception in the case of freehold property.

Furthermore, Article 1(2) of the Law of Personal Status allows non-Muslim expatriates, with assets in the UAE to make a Will under the law of their home country, to govern succession to his or her UAE estate instead of Sharia-based rules. However, the Will must be proved in the formal legal fashion before the Inheritance Court, a process greatly expedited if the expatriate has previously had the Will translated into Arabic and notarised here in the UAE.

Even though the Personal Status law provides non-Muslim expatriates with the right to request the UAE Court to apply their home country law, the Personal Status Law does not however expressly amend the UAE Civil Code. This leads to potential uncertainty as to whether or not a non-Muslim Will would be subject to Sharia law and not interpreted according to their personal wishes, as per the law of their home country. To date, difficulties have been faced in enforcing these Wills due to a reluctance on part of the Personal Status Courts in enforcing Wills that are contrary to the Sharia.

New Dubai Wills for Non-Muslims Law

On 31 October 2017, Vice President and Prime Minister of the UAE and Ruler of Dubai, HH Sheikh Mohammed bin Rashid Al Maktoum, issued a new law regarding the registration of Wills by Non-Muslims, in the emirate of Dubai.

The new law will create further legal certainty for the inheritance of a non-Muslim expatriate's assets after death and the appointment of guardians for their children (if any). This will not only allow individuals to have testamentary freedom to dispose of their assets as they wish, it will also provide peace of mind that an individual's estate will be distributed according to their wishes.

The new law will apply to all Wills and assets of non-Muslims based in Dubai, including the Dubai International Financial Centre.

The new system will allow non-Muslims who have registered their Wills and probates before now at DIFC courts to remain valid.

The law will come into place once it is published in the government's Official Gazette.

The UAE is the first jurisdiction in the Middle East which has enabled non-Muslims to make a Will under internationally recognised common law principles, safe in the knowledge, that upon their passing, the terms thereof can be easily enforced by their heirs.

Type Of Will	UAE Assets	Worldwide Assets	Registration/ Notarisation Fees
Abu Dhabi Judicial Dept. Will	✓	✗	AED 1,000 + VAT*
DIFC Single Will	✓	✓	AED 10,000 + VAT
DIFC Mirror Wills	✓	✓	AED 15,000 + VAT
Dubai local Court Will	✓	✗	AED 2,000 + VAT*

Al Tamimi & Company's Private Client Services team regularly advises on Wills for non-Muslims and inheritance matters. For further information please contact Ruksana Ellahi (r.ellahi@tamimi.com) or Dipali Maldonado (d.maldonado@tamimi.com).

Wills: How much for your peace of mind?

Having a Will in place in their country of origin is regarded by many Expatriates as essential planning when they move to live and work abroad, offering peace of mind in the event of a tragedy.

However many Non-Muslim Expatriates in the UAE are unaware that in the absence of a legally registered Will in the UAE, the process of transferring assets after death can be extremely time consuming, costly and fraught with legal complexity. This could mean that assets accumulated during their time in the UAE may not go to their loved ones as they would have intended.

But I rent my property and have few assets

You may think that you have no assets but have you considered what would happen to:

- Money in bank accounts
- End of Service Payments
- Gratuity Payment
- Death in Service benefit
- Investments
- Personal possessions

There is no rule of survivorship in the UAE. Therefore if you have a joint bank account, then on the death of one of the account holders, the bank account will be frozen and funds unattainable until a Court Order is received.

Things to consider

Guardianship

If you have children and have not appointed a guardian for them under the terms of your Will, then it would be at the discretion of the Local UAE Courts as to who would become your child's guardian and how your assets would be distributed. In such circumstances local laws would apply.

Executors

An executor is a person named by the testator to carry out the instructions of the Will. The executor's duties include distributing property to the beneficiaries as designated in the Will, obtaining information of potential heirs and collecting and arranging for payment of debts of the estate.

Beneficiaries

A beneficiary is a person who is set to inherit from an estate when someone passes away. This might be money, possessions, property or stocks and shares – anything that the person who has died left behind.

A residuary beneficiary is someone who will receive all or part of an estate after all debts, taxes and specific gifts have been taken care of.

Why Al Tamimi & Company?

An incorrectly drafted Will can cause many complications after a person has passed away. If the terms of the Will cannot be interpreted correctly, then the Will will be deemed invalid; the person will have passed away without a valid Will and Sharia Inheritance Rules will apply to their estate. Therefore it is of the utmost importance to instruct a legal professional to draft your Will.

Our specialist Private Client Lawyers at Al Tamimi & Company offer a **FREE** initial consultation to assist you in effectively registering a Will, to ensure it is legally sound and provides piece of mind to each testator.

For further information or advice, please contact, Ruksana Ellahi (r.ellahi@tamimi.com) or Dipali Maldonaldo (d.maldonaldo@tamimi.com).

Just Scoot over here: E-scooter Regulation in the UAE

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Regulating the use of electric scooters ('E-scooters') has become a trending topic around the world. E-scooter-related incidents are growing, with many international governments and city officials unsure about the adequate level of safety measures to impose. In the UAE, the governments of irrespective Emirates of Abu Dhabi and Dubai are taking action on this issue.

What exactly are E-scooters?

E-scooters are a motorised version of the two-wheel kick scooter, powered by rechargeable batteries. The E-scooter's battery life ranges depending on model. Currently, you can expect to travel 40km on average E-scooter.

Providing users with a more convenient and environmentally friendly means of transport, use of E-scooters is becoming widespread in densely populated cities all around the world.

Worldwide services that allow users to rent E-scooters for a short period, as an e-hail service via a booking app are becoming very popular (i.e. companies such as Bird, Lime or Jump).

Yet it is unclear whether the positives outweigh the negative consequences of their extensive use.

In the past year, cities across Europe have experienced issues managing the influx of E-scooters in their communities. The death of a 25-year old hit by a truck driver while riding an electric scooter in Paris signalled a massive demand for the introduction of legislation to regulate the use of E-scooters. Businesses are complaining about scooters being left in front of their shop terraces, as designated parking spaces have not been created in most cities. The crowding of pavements by electric vehicles is, most importantly making it unsafe for pedestrians. In 2018 in Barcelona, a 92-year-old woman was fatally run over by an E-scooter.

These events have made it clear that regulations are needed to control the introduction of new transport technologies in the so-called 'micro-mobility' market -and the subsequent risks associated to them.

What are European Countries doing to Regulate the use of E-scooters?

France has implemented a nationwide ban of E-scooters on pavements from September; with riders subject to a fine of around US$150 if they break the law. Paris has drafted new legislation setting speed limits to 20 km/h in most areas and requiring brakes and a bell, (as well as reflective gear when driving in the dark). Spain is reported to be working on regulations that would also ban E-scooters from pavements and set speed limits but additionally require for riders to wear reflective wear and have insurance for E-Scooter.

Where does the U.A.E stand on E-scooters?

E-scooters are even popular in extreme weather conditions and could provide a quick, effective and cheap solution to beating the heat in the UAE. Not having to walk to the metro, wait for the bus or pay for a taxi for short distance commuting are some potential benefits UAE residents get from E-scooters.

Under Federal Traffic Law No.21 of 1995, as amended, E-Scooters are considered to be in the same category as motorcycles (as a "motorcycle" is defined as a vehicle of two wheels or more and equipped with a mechanical engine, and is intended to transport persons or things).

Different Emirates have their own transport authorities that are responsible for the registration and licensing of vehicles in that Emirate. We discuss the approaches of the competent authorities in Abu Dhabi and Dubai to the regulation of E-Scooters below.

Abu Dhabi

As of July this year, E-scooter rentals are now authorised in the Emirate of Abu Dhabi. Media reports have indicated that government officials believe this will reduce traffic congestion and encourage residents to use environmentally friendly solutions for their daily commute.

The regulations recognise the use of E-scooters rentals to provide links between public transport stops stations to destinations such as shopping malls, other facilities and residential areas.

Companies can register with the transport sector regulator to rent them out once the necessary permits have been obtained. Users will need to register on an app to use the service.

The Integrated Transport Centre ('ITC') has put in place some regulations similar to the European laws governing E-scooters: speed limits should be around 15-20km/h, and paths designated for pedestrians and cyclists should be used. Under the regulations, riders of E-scooters endangering pedestrians, blocking traffic flow or parking in undesignated parking spots should be penalised.

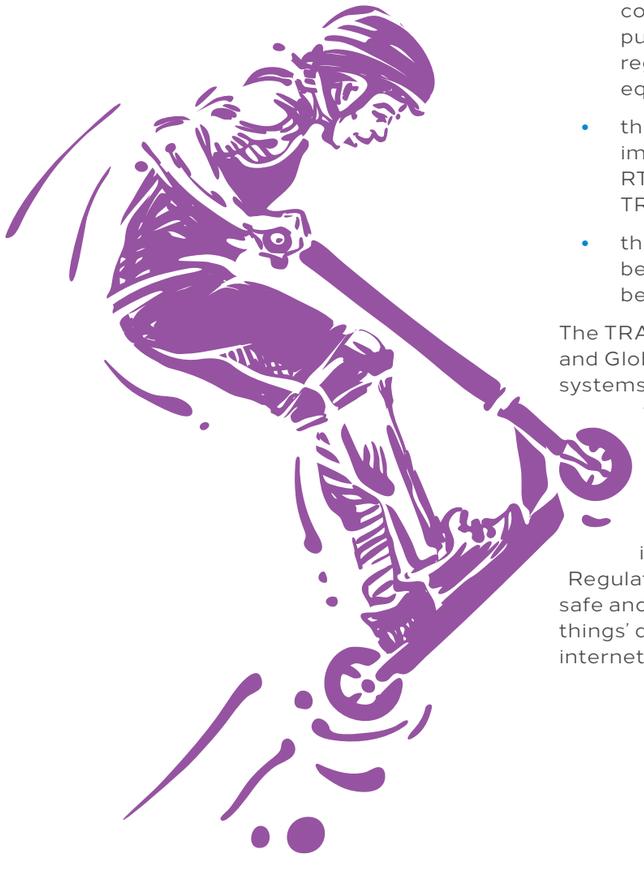
Corniche Street and Khalifa Bin Zayed Street are currently the only places where E-scooters are available to rent in Abu Dhabi. This will enable the ITC to study public demand for such services in order to assess the need for an extended roll-out over the next year. It has been reported that Careem is currently in talks regarding the launch of its own E-scooter hailing service in Abu Dhabi.

Dubai

In Dubai, the renting of E-scooters has been banned since March 2019 on the grounds of safety and will continue to be banned until such time as new and appropriate regulations come into force.

Due to the growing demand for E-scooters in the Dubai market, the RTA is conducting a study about the vehicles with a view to formulating regulations regarding their use based on the study's findings.

Reports suggest that the director-general and chairman of the board of executive directors of the RTA recently met with E-scooter rental companies to discuss the current ban and recommended effective solutions for E-scooter users, pedestrians and other vehicles that will also be affected by this development.



Need to comply with Telecommunications Regulations

E-scooter rental companies offer their services using E-scooters that are fitted out with GPS trackers and wireless connectivity. Such technology is regulated under Federal Law by Decree No.3 of 2003 Regarding the Organisation of Telecommunications Sector, as amended ('Telecoms Law').

The Telecoms Law makes it an offence for anyone to use, sell, offer for sale or connect any telecommunication equipment that is not Type Approved. Type Approval is achieved under the UAE telecommunications Regulatory authority's ('TRA') Telecommunications Equipment Type Approval Regime Regulations (2 October 2018) by registration of the equipment concerned with the TRA as follows:

- Type Approval is achieved through conformity with technical specifications published by the TRA and by registration of the telecommunications equipment concerned with the TRA;
- the applicant for Type Approval (dealers, importers or manufacturers of the RTTE) must first be registered with the TRA themselves; and
- the application for Type Approval must be made on the official form (which can be done online).

The TRA's Instructions for Satellite Tracking and Global Positioning Systems 'GPS Tracking systems' (dated 1 November 2017) require the registration of the GPS tracking system supplier, as well as the registration and Type Approval of GPS tracking system.

Further, the TRA has recently implemented an Internet of Things Regulatory Policy ('IoT Policy') to ensure a safe and secure development of 'internet of things' devices that are now connected to the internet, collecting and sharing data.

"Regulators in the UAE appear to be taking advantage of having the benefit of witnessing the impacts of E-scooters overseas and are acting to introduce measures to ensure safe use of the vehicles.

Key features of the IoT Policy include:

- an IoT Service Provider must register with the TRA to provide IoT Services;
- there are data localisation requirements. Data that is classified as 'secret', 'sensitive' and/or 'confidential' is to be stored primarily in the UAE. However, such data may be stored outside of the UAE if the destination country meets or exceeds any data security and user protection policies/ followed in the UAE; and
- there are additional requirements for telecommunications equipment which provide IoT Services, including that all key features and functionalities need to be indicated on the device or its packaging or in the user documentation.

The IoT Policy formally defines IoT very broadly as "a global infrastructure for the information society, enabling advanced services by interconnecting (physical and virtual) things based on existing and evolving interoperable information and communication technologies".

In light of the above the IoT Policy could apply to rental E-scooters with wireless connectivity, but this will need to be formally confirmed by the TRA on application by E-scooter rental companies wishing to operate in the UAE.

Conclusion

Regulators in the UAE appear to be monitoring the impacts of E-scooters overseas and how individual governments address the issues thrown up by their use. As a result, the relevant UAE bodies are positioning themselves to introduce measures to ensure the safe use of the vehicles for both riders and other road/pavement users. Such measures are likely to include road safety training, controls, regulations and effective signage. Telecommunications regulations will also apply to E-scooter rentals, because of the technology used by these services.

Al Tamimi & Company's Technology , Media & Telecommunications and Transport & Insurance teams regularly advise on laws and regulations impacting the introduction of new technologies in the transport sector.
For further information please contact Andrew Fawcett (a.fawcett@tamimi.com) or Bushra Abu Tayeh (b.abutayeh@tamimi.com).

A Focus on Dispute Resolution

In this month's special feature of Law Update, we focus on dispute resolution. In our current economic environment, we are seeing parties resorting to courts, arbitral tribunals, and other dispute resolution mechanisms at a steady, if not accelerated, pace.

This edition contains articles on several notable developments and issues of interest in the context of dispute resolution regionally and globally.

Regarding the UAE Federal Law No. 6 of 2018 (the 'UAE Federal Arbitration Law'), adding to our article titled '*The UAE Federal Arbitration Law on its First Anniversary*' issued in the June–July 2019 edition of Law Update, we discuss the new regime established by the UAE Federal Arbitration Law against the background of the challenges faced in selecting arbitrators as well as recusing them: see '*Challenges and Recusal of Arbitrators under the UAE Arbitration Law*'. The Abu Dhabi Global Market Arbitration Centre recently issued its Arbitration Guidelines (the 'Guidelines'). The Guidelines offer a set of innovative, best practice procedures that parties may utilise in ad hoc or institutional arbitral proceedings, in whole or in part, at any stage, and in any seat. In an article titled '*The ADGMAC Arbitration Guidelines: An Overview*', we provide an overview of the key aspects of the Guidelines.

We also look to Bahrain and Oman. In '*The Legal Landscape for Commercial Agencies in Bahrain*', we discuss a local agent's right to seek statutory compensation for the termination of agency under Bahraini law, the method employed by the local courts in the calculation of such compensation, and the potential issues that may arise when such claims are brought in arbitral proceedings seated in Bahrain. In '*Executing Foreign Judgments in the Sultanate of Oman*', our experts offer a summary of the legal framework regarding the recognition and enforcement of foreign judgments in Oman.

In '*Resolving Pharmaceutical Disputes through Arbitration*', our team focuses on the pharmaceutical industry. The article outlines the current landscape and nature of pharma-related disputes as well as setting out the advantages that arbitration offers as a dispute resolution mechanism with a view to achieving an efficient resolution of disputes.

Globally, the opening of the United Nations Convention on International Settlement Agreements Resulting from Mediation (known as the 'Singapore Convention') for signature was a milestone event that occurred in August 2019. The Singapore Convention establishes a framework for the cross-border recognition and enforcement of settlement agreements. In '*Mediation in the Middle East: Before and After the Singapore Convention*', we look at the prospects of mediation as a means of resolution of commercial disputes in the Middle East in the wake of the recently signed Singapore Convention.

In India, the Arbitration and Conciliation (Amendment) Act, 2019 (the 'Amendment') was enacted earlier this year amending the Arbitration and Conciliation Act, 1996. In this edition, we also comment on the success of the Amendment in '*Made in India? Should Parties be Choosing India as their Seat of Arbitration?*'.

More generally, and in light of their regular usage in the region, we provide a snapshot of the objective and value of multi-tier dispute resolution clauses in an article entitled '*A Practical Approach on the Multi-tiered Dispute Resolution Clauses*'. The article also offers insight into the factors that must be kept in mind when drafting such clauses.

This Law Update edition also benefits from notes on five important judgments. Specifically with respect to the UAE, in '*Dubai Court of Cassation Rules on the Effect of the Failure to Administer an Oath in Arbitral Proceedings*', we discuss the recent ruling of the Dubai Court of Cassation which sets out an arbitration-friendly principle relating to the administration of oaths whilst confirming the strict grounds on which parties may request to set aside an arbitral award.

In '*Dubai Court Clarifies the Competent Authority to Rule on Interim and Conservatory Measures*', we discuss a recent Dubai Court of Appeal decision, wherein the Court ruled that the competent authority to rule on interim measures is the arbitral tribunal and the Chief Justice of the Court of Appeal and not the summary judge.

In '*DIFC Court of First Instance Enforces Residential Ijara Mosufa Agreement for the First Time*', we record the first decision of the DIFC Courts on an Ijara Agreement.

In '*Judgment and Commentary: Corporate Offshore Lending based on Security Agency Structure and Corporate Guarantee*', we discuss a recent decision by the Dubai Courts in which Dubai Law No. (14) of 2008 (the 'Dubai Mortgage Law') was deemed, for the first time, applicable to cases where the lender was an offshore bank and where the mortgagee and the lender were two separate entities. This decision provides some clarity to the wording of the Dubai Mortgage Law.

Finally, in a note titled '*The Qatari Courts' Approach To Awarding Interest*', we discuss a 2018 decision by the Qatari Court of Cassation in which the court found that an arbitral award that included an award of interest was valid and not contrary to public policy in Qatar. This decision is noteworthy because it marks a clear shift in the Qatari courts' approach to awards of interest which are now deemed incompatible with Shari'a law. This decision has had the effect of strengthening the pro-arbitration image of the country.

We trust that you will find this special feature useful and thought provoking. Please contact us for any queries relating to these articles or general dispute resolution related inquiries.

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Challenges and Recusal of Arbitrators under the UAE Arbitration Law

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Introduction

The doctrine of challenge of arbitrators provides the mechanism through which an arbitrator can be recused or disqualified if he/she does not satisfy the necessary requirements, such as impartiality and independence, to orderly perform the arbitral mandate. In this regard, challenging an arbitrator provides the parties with the requisite safeguards in order to ensure that the arbitral award is fair and just and is kept at bay from procedural irregularities which could ultimately affect its enforceability.

This article provides a brief overview of the grounds of challenges and recusal of arbitrators as set out under Federal Law No. 6 of 2018 Concerning Arbitration ("UAE Arbitration Law"). In this article, the authors specifically examine the default statutory provisions, in the event the parties have not agreed on the application of a procedural framework to challenge an arbitrator, whether through a direct agreement, or indirectly, through an agreement to apply institutional arbitration rules.

Available Grounds for Challenging Arbitrators

The general framework for the grounds for challenging arbitrators has been expressly set out under Article 14 of the UAE Arbitration Law.

Article 14(1) of the UAE Arbitration Law provides that "*an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his/her impartiality or independence, or if he/she does not possess the qualifications agreed to by the parties or stipulated by this law.*" In this regard, the UAE adopted the approach of the UNCITRAL Model Law on International Commercial Arbitration with respect to the grounds for challenging arbitrators.

Moreover, Article 10(1) of the UAE Arbitration Law sets out the general statutory required qualifications of an arbitrator's capacity to conduct the arbitral mandate who "*shall be a natural person who is not a minor or under court interdiction order or without civil rights by reason of bankruptcy; unless he/she has been discharged, or due to a felony or misdemeanour conviction for a crime involving moral turpitude or breach of trust, even if he/she has been rehabilitated*".

Articles 10(2) and 10(3) of the UAE Arbitration Law respectively set out special statutory required qualifications of an arbitrator who "*cannot be on the board of trustees or the administrative body of the Arbitration Institution responsible for administering the arbitration in the State (UAE)*" and "*need not be of a specific gender or nationality, unless otherwise agreed upon by the parties or provided for by law.*"

Furthermore, the UAE Arbitration Law imposes an explicit obligation on arbitrators to disclose any circumstances, which are likely to give rise to "*justifiable doubts*" on the said arbitrators' impartiality and independence. In this regard, Article 10(4) of the UAE Arbitration Law imposes a continuous positive obligation on an arbitrator to "*(...) disclose in writing anything likely to give rise to doubts as to his/her impartiality or independence.*"

The question as to whether or not the grounds give rise to "*justifiable doubts*" on the said arbitrators' impartiality and independence is a matter which usually falls within the remit of the supervisory court pursuant to the law of the seat or, where applicable, the rules of the arbitral institution administering the arbitration.

It is noteworthy that the UAE courts have adopted a relatively consistent approach in determining the standards of what qualifies as circumstances that would give rise to justifiable doubts as to the arbitrators' impartiality or independence. In this regard, the standard that the UAE courts tend to apply is the objective standard test. Accordingly, the UAE courts will assess whether a reasonable third party would deem the specific circumstances leading to the challenge to give raise to "*justifiable doubts*" as to arbitrator's impartiality or independence.

Procedure for Challenging Arbitrators

The UAE Arbitration Law provides, under Article 15, a specific procedure for the challenge of arbitrators that a challenging party must follow unless the parties have agreed to a different procedure, whether through an explicit or implicit (e.g. reference to and application of institutional rules) arrangement.

In accordance with the UAE Arbitration Law, the challenging party shall issue a notice of challenge in writing stating reasons for the challenge within fifteen (15) days after becoming aware of the appointment of the arbitrator or after becoming aware of any circumstances justifying the challenge. A copy of the notice must be served upon the other appointed members of the tribunal as well as the parties to the arbitration.

In case the challenged arbitrator does not withdraw from the mandate or the other party does not agree to the challenge within fifteen days (15) from the date of the notice of challenge, the challenging party may present it to the relevant authority (e.g. the court or where applicable, the arbitral institution) within fifteen (15) days following the first fifteen (15)-day period. Such an authority then has ten (10) days to decide on the challenge and its decision is not subject to any force of appeal.

It is noteworthy to note that in accordance with Article 15(3), the UAE Arbitration Law provides that a challenge to an arbitrator shall not have a suspensive effect (i.e. no stay of the proceedings) and the tribunal, including the challenged arbitrator, may continue the arbitral proceedings and issue an award, even if the relevant authority, has not yet issued its determination on the said challenge. Such a provision is indeed positive as it is likely to deter frivoulous challenges the purpose of which would be to disrupt and intentionally delay the arbitral proceedings.

"(...) the UAE adopted the UNCITRAL Model Law on International Commercial Arbitration approach with respect to the grounds for challenging arbitrators.

Effects of the Challenge on the Arbitral Proceedings

The direct effect of a successful challenge is the recusal or the diqualification from an arbitrator from continuing to serve as an arbitrator in the arbitral proceedings. In other words, the disqualified arbitrator specific arbitral mandate in the proceedings would be considered as terminated.

Furthermore, Article 15 (4) of the UAE Arbitration Law provides that in case an arbitrator decides to withdraw from the arbitral mandate (concept of auto-recusal) or if the parties mutually agree to terminate his/her mandate, such withdrawal shall not imply the arbitrator's acceptance of the grounds of challenge.

When agreeing on the termination of the mandate of an arbitrator, the parties are not required to disclose the reasons for terminating the said arbitrator's mandate.

Subsequent to the termination of the arbitrator's mandate following the parties' agreement, which shall take effect ipso facto, the arbitrator shall refrain from taking any further actions in the proceedings. However, any steps already taken by the concerned arbitrator shall be valid and effective unless the parties expressly agree not to recognize such steps and consider them as void.

It is worth highlighting that in addition to the challenge procedure which would lead to the recusal of the arbitrator, and ultimately the termination of the arbitral mandate, the UAE Arbitration Law sets out standalone circumstances where an arbitrator's mandate can be considered as terminated. In accordance with Article 16(1), the arbitrator's mandate can be terminated if the arbitrator is unable to perform the functions or fails to act in a manner that leads to unjustifiable delay in the arbitration proceedings or deliberately fails to act in accordance with the arbitration agreement. Article 16(2) provides that an arbitrator's mandate shall terminate upon the latter's death, incapacity or loss of one of the required qualifications for his appointment given the intuitu personae nature which usually commands the arbitral mandate.

Conclusion

The finality of an arbitral award can be put to test in the event of serious procedural irregularities in the arbitral proceedings, which may affect arbitrators. In this regard, the procedure for challenging arbitrators is aimed at safeguarding the arbitral award and its prospective enforceability. Based on the above overview, following the enactment of the UAE Arbitration Law, it is clear that the grounds for challenge are now brought in line with the international standards. The challenge procedure benefits from a streamlined process aimed at deterring frivolous challenges. The regime for challenging arbitrators as provided under the UAE Arbitration Law constitutes a welcome basis for the development of the UAE as a leading arbitration hub in the Middle East and beyond.

Al Tamimi & Company's Dispute Resolution team regularly represents clients in arbitral proceedings and arbitration-related litigation proceedings before the courts. For further information, please contact Dr. Hassan Arab (h.arab@tamimi.com) or Sara Koleilat-Aranjo (s.aranjo@tamimi.com).

Resolving Pharmaceutical Disputes through Arbitration

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Introduction

The pharmaceutical industry is one of the largest and fastest-growing business segments in the world. Its importance and influence are expected to maintain growth; having reached a worth of $934.8 billion in 2017, the estimated global revenue is expected to be $1170 billion by 2021.

The industry provides a wide range of goods and services such as the development of pharmaceutical products, medical equipment and equipment used in diagnostics. This requires the key players involved in the industry to devise and maintain commercial legal arrangements, carry out cross-border transactions, and comply with national and international regulatory requirements.

With its size and value, it is no surprise that the industry players often get involved with complex and high value disputes. The pharmaceutical industry is a complex field and consequently disputes of a different nature arise. As such, arbitration is gradually becoming the preferred method of dispute resolution for pharma-related disputes. This article intends to discuss the nature of pharmaceutical disputes and highlight some of the added values of resorting to arbitration in resolving such disputes.

1. Nature of Most Common Pharmaceutical-related Disputes

Some of the most common pharmaceutical-related disputes are as follows:

IP Disputes

The pharmaceutical industry is a research-based industry with a focus on innovative methods to develop, improve and adapt new and existing drugs, equipment and medical processes. As such, patents are crucial to the industry, and patent rights secure investments made during the research and development.

The players in the pharmaceutical market must also rely on the protection of trade secrets and undisclosed data in order to maximise their profits and to avoid having their competition use certain information to their advantage.

Therefore, it is no surprise that Intellectual Property Disputes ('IP Disputes') remain a principal issue and are the most common disputes in the pharmaceutical industry.

These IP Disputes usually involve cases of patent infringements, patent invalidations, and violation of trademarks and trade secrets.

M&A Disputes

With the growing demand for new drugs and mandatory regulatory requirements, there is a proportionate increase in the costs of pharmaceutical research and development, forcing most innovators and small to medium enterprises ('SMEs') to consider consolidation. For example, through mergers and acquisitions ('M&A') deals with major pharmaceutical companies.

These M&A deals often allow the pharmaceutical companies to capitalise on opportunity, economies of scale and focus on the core research and development of the business.

By the same token however, these opportunities to consolidate open the door for major M&A-related disputes during the post-acquisition stage and often give rise to working capital, net assets, indemnity claims, earn-outs, liability and warranty claims.

Licensing Disputes

Licensing agreements are some of the most frequently used agreements in the pharmaceutical industry. In the context of licensing, these agreements involve technology transfer transactions involving patent and know-how licensing with patent and know-how owners granting licences to major pharmaceutical companies to commercially exploit the patent and know-how products or processes in return for a royalty payment. Unsurprisingly, as the core of the agreements entails the sharing of intellectual property or even raw material, these agreements often give rise to disputes. The subject matter of the disputes is typically centred around disagreements over differing expectations, payment allocations, and responsibility for costs of development. According to a recent survey conducted by the World Intellectual Property Organization ('WIPO'), most pharmaceutical disputes stem from licensing agreements.

Disputes Arising out of Collaboration and R&D Agreements

Collaboration and Research & Development ('R&D') agreements have become a necessity in the pharmaceutical industry due to the costly process of drug development. Parties agree to collaborate with one party conducting research studies and licensing out their intellectual property to the other party that will then commercialise the product or technology in exchange for a payment or a certain amount of royalties. The reality is that, more often than not, the commercial relationship between pharmaceutical companies and their research collaboration partners (such as SMEs, Universities and Medical Centres) are not successful. Consequently, disputes arise from differences in parties' interests such as IP ownership disputes, breach of confidentiality and so on.

2. Key Advantages of Resolving Pharmaceutical Disputes through Arbitration

Considering that the pharmaceutical industry is wide-reaching and of significant size, the underlying disputes are often complex, multi-jurisdictional and involve high value claims. As a result, parties often seek to have them resolved swiftly and confidentially. For these reasons, it may be preferable for the parties to use arbitration in order to solve their disputes. It is however worth highlighting that certain pharma-related disputes, specifically those arising out of patent invalidations, are considered non-arbitrable in the UAE given that they deal with amendments to public records. Notwithstanding this, arbitration is now being recognised as an effective and advantageous means of dispute resolution for the pharmaceutical industry namely for contractual related matters. Arbitration allows the parties to agree to arbitrate most of their disputes which may arise without having to refer the same to national courts. An agreement to arbitrate can be made ex ante, during the stage of drafting of the underlying agreements between the parties, or ex post, by entering into a separate arbitration agreement when the dispute arises. The dispute is then referred to an independent tribunal, which subsequently issues a final and binding award. We set out below some of the key advantages that arbitration can offer to parties seeking to resolve their pharma-related disputes.

Party Autonomy and Minimal Intervention by the State Courts

The parties referring their disputes to arbitration have the freedom to appoint an arbitrator of their choice. This is particularly important in resolving sector-specific disputes like those relating to the pharmaceutical industry, as resolution of these disputes often requires a specific level of technical expertise. The parties have the option to consider the background of the arbitrators and determine the tribunal best suited for resolving their dispute.

In addition, arbitration also grants parties the freedom to agree on the arbitral procedure and the arbitral tribunal to conduct the proceedings. This autonomy allows the parties to carefully select or design an arbitral process that will increase the likelihood of a favourable outcome.

Given the prevailing cross-border nature of pharma-related disputes, arbitration constitutes an appropriate dispute resolution method because it gives the parties the opportunity to agree on the seat of arbitration. The choice of the seat of arbitration is vital to the resolution of complex and cross-border disputes as it determines the national law applicable to the procedure of the arbitration and the supervisory court, which has the power to intervene in the procedure and make decisions when the arbitral awards are challenged. Thus, by resorting to arbitration, the parties have an option to select a jurisdiction recognised as pro-arbitration with the assurance of limited intervention by the national courts.

A Fact-Finder with the Requisite Technical Expertise

The shift towards an increasingly pro-arbitration industry is further exhibited by the actions taken by the International Centre for Dispute Resolution ('ICDR'), the American Arbitration Association ('AAA'), and the International Chamber of Commerce ('ICC'). Following a significant growth in the number of pharmaceutical disputes referred to arbitration, these arbitral organisations have initiated services to cater to the requirements of the pharmaceutical industry by including expert arbitrators with pharmaceutical sector-specific expertise.

"The party autonomy, choice of adjudicators and seat [afforded by arbitration] allow the pharmaceutical industry to reap the benefits of an alternative dispute resolution method and tailor the process to the industry's requirements.

This increased number of experts with the relevant technical expertise enables parties to solve their dispute effectively, precisely and in a timely manner as the arbitral tribunals would have the requisite technical experience to resolve the issues in dispute. The growing stance of arbitration as a dispute resolution method for pharmaceutical-related disputes has also led the World Intellectual Property Organisation ('WIPO') to open a centre specifically for providing Alternative Dispute Resolution Services for Life Sciences, which aims to resolve disputes in connection with the pharmaceutical and life sciences industries.

(…) the World Intellectual Property Organisation (WIPO) [has opened] a centre, specifically established for providing Alternative Dispute Resolution Services for Life Sciences, which aims to resolve disputes in connection with the pharmaceutical and life sciences industries.

Confidentiality and Enforceability of Awards

Another factor that needs to be considered in any dispute is the enforceability of the prospective award or judgment. As most pharmaceutical disputes involve a multitude of jurisdictions, the enforcement of foreign court judgment may be difficult at times. However, there exists a number of international treaties and conventions, which ensure a streamlined procedure of recognition and enforcement of arbitral awards between states, including the successful New York Convention on the Enforcement of Foreign of Arbitral Awards of 1958.

Furthermore, as the pharmaceutical disputes often involve high value claims, confidential IP issues, trade secrets and know-how, parties are often inclined to have the disputes resolved through a confidential process. Many of the institutional rules of arbitration provide for confidentiality in relation to documents, submission and evidence. Generally, parties can also include an express confidentiality obligation in their arbitration agreement. As such, while confidentiality, and its scope, are not always guaranteed, there is usually a tendency for a higher threshold of preservation of confidentiality in arbitral proceedings as opposed to court litigation proceedings.

Conclusion

Based on the foregoing, and considering the nature of pharmaceutical disputes, arbitration is a suitable dispute resolution method. Indeed, arbitration provides a neutral forum and often enables the parties to keep the disputed matters confidential. Overall, arbitration is essential for the pharmaceutical industry, an industry riddled with cross-border and multi-jurisdictional disputes. The party autonomy, choice of adjudicators and seat allow the pharmaceutical industry to reap the benefits of an alternative dispute resolution method and tailor the process to the requirements of the industry. However, it is paramount that the arbitration agreements, which command the consensual nature of arbitration, are robustly drafted in order to safeguard the arbitral process and the finality of the arbitral award.

Al Tamimi & Company's Intellectual Property and Dispute Resolution teams regularly advise and represent clients in intellectual property-related disputes. For further information please contact Ahmad Saleh (ah.saleh@tamimi.com) or Sara Koleilat-Aranjo (s.aranjo@tamimi.com).

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$1170 billion.

The Legal Landscape for Commercial Agencies in Bahrain

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The remarkable growth of the Bahraini economy has resulted in the creation of a significant market and an increased demand for worldwide recognised brands to be imported into the country. In particular, the rapid growth of all sectors in Bahrain and the region, in general, has given rise to increasing demand for international services and products. Accordingly, since the 1970s Bahrain has introduced laws aimed at governing and regulating these transactions which have resulted in a significant number of international brands registered and trademarked in Bahrain.

The primary pieces of legislation for distributorship and franchise arrangements in the Kingdom is the Commercial Agency Law No. 10 of 1992 as amended (the 'Agency Law') and its implementing regulation No. 2 of 1993 (the 'Implementing Regulations') as well as certain provisions under the Bahrain Law of Commerce, Legislative Decree No. 7 of 1987 as amended (the 'Law of Commerce') and the Civil Code No. 19 of 2001 (the 'Civil Code').

The Agency Law and the Implementing Regulations apply to locally registered distributorship or agency agreements. Under Article 13 of the Agency Law the distributorship agreement should be registered with the Ministry of Industry, Commerce and Tourism ('MOICT'). Failure to register the same would bar any action under the Agency Law, but this does not mean that the action itself is barred. A claim can be made in general terms for contracts falling under the Civil Code and to some extent the Law of Commerce.

Finally, it should be noted that there is no clear registration requirement under the Law of Commerce, which contains a cross-reference to the commercial agency law of 1975 which was superseded by the Agency Law.

Further, to be eligible for registration in the Commercial Agency Directorate of the MOICT and so have a dealer agreement registered as a commercial agency, the Bahrain territory dealer must be a registered entity in Bahrain possessing the necessary features required by law, including a minimum of 51 percent ownership by a Bahraini.

In addition, the agent must hold an active commercial registration and legitimate licence to carry out the agency's activities. Evidence of the agency's activities are also required in order to allow it to engage in its activities as a business in Bahrain.

Unlike other similar jurisdictions, Bahrain does not require exclusivity for the commercial agency agreement.

The Local Commercial Agent's Right to Claim Statutory Compensation

Once a registered commercial agency is terminated, the local agent has a statutory right to claim compensation. This right does not mean that compensation is automatically payable to the agent. An agent will need to prove it is entitled to such compensation. In our experience the Bahrain Courts usually require the local agent to submit proof evidencing that the agency was profitable

and that its efforts resulted in successfully promoting the principal's products and/or increasing its customer base (i.e. the principal's decision to terminate the agency agreement prevented the local agent from earning profits from a demonstrated market success). Failure to do so would very likely result in the rejection of the agent's statutory compensation claim.

Pursuant to Articles 8 and 9- b of the Agency Law, unless a substantive or procedural defence is otherwise available to the principal, the agent is entitled to compensation upon termination of the agency relationship, whether such termination results from the actions of the principal or simply from the expiration of the terms of the agreement. Moreover, the parties are not permitted to contract out of the obligation to pay compensation under Articles 8 and 9 of the Agency Law, as to do so would be generally considered a matter of public policy under Bahraini Law.

As noted above, the issue of compensation for an agent upon termination of an agency relationship (other than by the fault of the agent) is compulsory in Bahrain. This is viewed as a matter of public policy/order requiring Bahraini Courts to apply Bahrain Law instead of the stated governing law (insofar as the stated governing law would allow for contracting out of this compensation). In this regard Articles 4 and 5 of the Bahrain Conflicts of Laws Statute, Law No.6 of 2015 (the 'Conflicts Law') confirm that the parties may select the law governing their contractual relationship provided that this does not conflict with Bahrain public order.

The scheme of statutory compensation aims to reimburse the local agent for any effort, cost and/or loss resulting from the deprivation of the local agent's opportunity to benefit from its work to promote the brand and maintain or expand its market share. In other words, the statutory compensation aims, mainly, to compensate the agent for any future loss of profit and consequently the cost incurred by the agent where its efforts (e.g. marketing, promotion, services associated with selling the products etc.) have resulted in obvious success to the principal's products or has increased the market share and the agency relationship has been terminated other than by the agency's fault. The rationale for such statutory compensation is to ensure that the agent receives the benefit of profits derived from its efforts promoting the products. Essentially this protects an agency that introduced a brand to the market from being replaced by an agency seeking lower commissions whilst enjoying the benefits of taking over an agency with already established products.

The Mechanism of Awarding Statutory Compensation

There is no one mechanism or universal calculation method upon which Bahrain Courts may base an award for compensation to an agency following termination. From our experience, in similar matters, we note that the compensation varies from case to case. It is important to be aware that the Bahrain Courts, in considering agency claims, have not followed consistent principles for assessing these types of claims or measuring the severity of a breach. As a result and taking into consideration that the judge/tribunal also acts as finder of fact in practice, there can be wide variations in how the court approaches the issue of damages and how it quantifies damages on the facts of any particular case.

In principle, in cases where the local agent/distributor is able to successfully bring a claim for compensation before the Bahrain Courts, the court can examine all relevant factors including the following when considering the amount of compensation payable:

- the duration of the relationship with the local agent/distributor;
- the level of net profits accruing to the local agent/distributor;
- the level of expenditure on marketing and investment by the local agent/distributor;
- the effect of the termination on the reputation of the local agent/distributor;
- the effect on the employees of the local agent/distributor; and
- the anticipated net loss of profits of the local agent/distributor.

The above is a non-exhaustive list which may be taken into account by the court when quantifying compensation and which is based on observations of past Bahraini Court decisions.

As indicated, in the absence of any precise method for establishing how and to what extent compensation is payable, in practice the Bahrain Courts tend to take a broad approach in assessing compensation. In determining the compensation amount, the court/tribunal will hear any evidence adduced in relation to local agency/distributor loss of profit, the costs of promoting the products, and often may appoint an expert to quantify the damages. Even where experts are appointed however, as the determination of compensation is very case-specific, and no established methodology is adopted, the recommendations of the experts and the decisions of the courts tend to lack consistency.

We are aware of cases where courts have granted agencies an amount equal to the average net profit realised by the agency in the three to five year prior to termination or expiration of the agency agreement multiplied by a factor of three to seven (plus exceptional expenses incurred by the agency).

It is interesting to note that under Article 12 of the Agency Law the existence of a dispute (whether litigation or arbitration) between the agency parties does not affect operations and/or transactions relating to the products covered by the agency. This provision can be used as the basis, in cases where the appointment of a new agency is disputed, for applications for injunctive relief against the new agency before the Bahrain Court.

In case the parties have amicably agreed to terminate and de-register the commercial agency, the default position (i.e. unless otherwise agreed) would entitle the local agent to receive compensation from the new agent equalling the stock value (i.e. market price or cost price, whichever is less) in addition to five percent of the value.

The Agreement on Arbitration and Applicable Laws

No provision of Bahrain law prohibits the parties from agreeing on foreign law and arbitration even where the subject of the contract is not connected with Bahrain, unless the agreement breaches local laws and/or public policy. In this regard, and as noted above, Articles 4 and 5 of the Conflicts Law confirm that the parties may select the law governing their contractual relationship provided that this does not conflict with Bahrain public order. Being a procedural law, this applies to cases before the Bahrain courts as well as to cases before competent arbitral panels.

It follows that if, in any Bahrain-seated arbitration, the foreign law does not provide for an award of compensation, and no such compensation is awarded, this could arguably give rise to a breach of local law resulting in a challenge to the award and/or to challenges in an enforcement context (including for any non-Bahrain seated award).

The jurisdiction provisions contained in the agency agreement could also be sufficiently valid to confer the necessary jurisdiction. Bahrain has enacted an arbitration law derived from the UNICTRAL Model Law on International Arbitration with 2006 amendments pursuant to Law No. 9 of 2015. This law provides for the prima facie validation of an arbitration agreement where such agreement is in writing and where it is not otherwise null and void, inoperative or incapable of being performed. Arbitration in the commercial agency context is specifically accepted (i.e., it is not de jure null and void), and it can therefore be anticipated that the Bahraini courts (and tribunals) will take a pro-arbitration stance in giving effect, where possible, to arbitration agreements.

On a final note, it is worth highlighting that the primary ground, in practice for seeking to invalidate an arbitration clause is derived from a lack of capacity of the signatory to bind the party to such agreement. This is a matter for the laws of the jurisdiction governing the arbitration agreement. In the event a party to the arbitration agreement files a case before the Bahrain courts, the defendant can challenge the jurisdiction of the court prior to submitting any substantive pleading. Otherwise, this will be deemed as implicit consent to the jurisdiction of the court.

Al Tamimi & Company's Litigation team in Bahrain regularly advises on issues relating to Bahrain dispute resolution process with regards to the termination, compensation, and deregistration of distribution agreements and commercial agencies in general. For further information please contact Mahmood Al -Araibi (m.alariabi@tamimi.com).

Made in India? Should Parties be Choosing India as their Seat of Arbitration?

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India, like the UAE, has recently made amendments to its arbitration law that are designed to make India more 'arbitration-friendly'. Due to the significant trade connections between the UAE and India, these developments are important for many in the UAE.

A snapshot of the economic ties between these two nations demonstrates their significance to each other. 9.9 percent of India's exports go to the UAE, making it the second most popular destination for Indian exports, and 5 percent of India's imports come from the UAE, making the UAE the third most popular origin of imports into India[1]. For the UAE, India is a significant trading partner - 11 percent of UAE exports go to, and 7.9 percent of its imports come from, India[2].

How does this relate to Indian arbitration law? Put simply, many of the contracts that underpin these statistics are between India and UAE based parties. Often, these contracts have arbitration clauses, and where they do, the parties will likely agree a seat of arbitration.

If a party is considering choosing India as the seat of their arbitration, understanding the arbitration landscape in India is essential. The arbitral seat will determine, amongst other things, the supervisory courts and the procedural law of the arbitration.

So, what is the arbitral landscape like in India? The full answer to that would justify a separate (and lengthy) article but, in summary, the landscape is changing and becoming increasingly arbitration-friendly. But there remains a long way to go.

India's arbitration law[3] (the 'Indian Arbitration Act') was overhauled in 2015[4] (the '2015 Amendments'). In general, the aim of the 2015 Amendments was to improve the efficiency and reliability of arbitration in India and to put India on the path to developing as an arbitration hub[5]. As is often the way with new legislation, the 2015 Amendments have attracted some criticism.

[1]See, Pocket World in Figures, The Economist, 2020 Edition, page 155.
[2]See, Pocket World in Figures, The Economist, 2020 Edition, page 227.
[3]Arbitration and Conciliation Act 1996.
[4]Arbitration and Conciliation (Amendment) Act 2015.
[5]Part 1 of the Indian Arbitration Act as amended applies to Indian seated arbitrations. To try and reflect the needs of international users of commercial arbitration, the Indian Arbitration Act has some carve-outs and separate provisions for what it terms an "international commercial arbitration" (defined at section 2(f)). Unless otherwise stated, the provisions in Part I of the Act apply to all Indian seated arbitrations whether or not they are international commercial arbitrations.

Earlier this year, and after the publishing of a draft Bill in 2018, the Indian legislature introduced further amendments to the Indian Arbitration Act (the '2019 Amendments')[6]. The 2019 Amendments received the President's assent on 9 August 2019. While some sections of the 2019 Amendments came into force on 30 August 2019[7], the remaining sections are not yet in force.

The 2019 Amendments are broadly positive; in particular, they deal with one of the main criticisms levelled at the 2015 Amendments (i.e., the time limit placed on international commercial arbitrations seated in India) and go some way to demonstrating India's commitment to arbitration. However, the 2019 Amendments also introduce significant and potentially negative changes to India's arbitration landscape. Parties who are considering whether to seat their arbitrations in India should approach with caution. They should take advice so as to ensure that the arbitral landscape in India satisfies their requirements.

The key changes introduced by the 2019 Amendments can be broadly summarised as relating to:

- increasing government regulation of arbitration;
- limits on who can sit as an arbitrator;
- the length of proceedings;
- confidentiality; and
- set aside.

We consider each of these issues in turn below.

Increasing Government Regulation of Arbitration

Perhaps the most significant change is the creation of the Arbitration Council of India (the 'Council'). The Council, intended to be a corporate entity with its head office in New Delhi, will be responsible for promoting arbitration, mediation and conciliation.

On its face, the creation of the Council is a positive development for arbitration in India. There is, however, some cause for concern. The Council, whose power derives from, and whose members, including the Chairperson, will be appointed (directly or indirectly) by the government, has extensive powers to affect fundamentally the development of arbitration within India. This is because the remit of the Council goes well beyond simply promoting arbitration.

Although its role is not entirely clear, the Council will have a degree of influence in the regulation of arbitration, arbitral institutions, and arbitrators. By way of example, the Council may: (a) frame policies regarding, the grading of arbitral institutions; (b) grade and review the grading of arbitral institutions and arbitrators; (c) recognise professional institutes, provide accreditation of arbitrators; (d) frame, review and update norms to ensure a satisfactory level of arbitration; (e) make recommendations regarding personnel in and infrastructure of arbitral institutions; and (f) 'such other functions' as decided by the government.

Also significant is the new definition of 'arbitral institutions' under the 2019 Amendments[8]. Now, only those arbitral institutions that have been 'designated' by either the Indian Supreme Court or High Court (and designation appears to require a prior grading by the Council)[9] will be recognised as arbitral institutions under the Indian Arbitration Act. Not only are the logistics of how this will work in practice unclear, but also it is a further example of the state seeking to control what is supposed to be a form of dispute resolution based on party autonomy and freedom of choice.

Many will find it unpalatable that the state is able to exercise this level of control over the practice of arbitration in India and many commercial parties, in particular those that contract with the state or an arm of the state, may be put off choosing it as the seat for their disputes for this very reason.

[6] *Arbitration and Conciliation (Amendment) Act 2019.*
[7] *Sections 1, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 15 of the 2019 Amendments.*

Parties need to be certain that the arbitral institution they choose to administer their arbitration is duly designated and otherwise recognised in India, and they should keep in mind that designations may be removed, such that an institution designated at the time of the drafting of their arbitration agreement, may cease to be by the time a dispute crystallises.

Limits on who can be an Arbitrator

The 2019 Amendments make clear that arbitrators are immune from civil suits with regard to good faith actions done or intended to be done pursuant to the arbitration[10]. This clarity as to immunity is welcome and brings Indian legislation into line with modern arbitral practice. In 2015, the Chartered Institute of Arbitrators identified arbitrator immunity from civil liability as one of the essential features of a 'safe seat'[11].

One of, if not the main, reasons to provide immunity to arbitrators is to ensure that the very brightest and best are willing to sit as arbitrators in your jurisdiction. Leaving people open to claims for decisions made in arbitrations makes them less inclined to want to sit as arbitrators in those seats.

With this in mind, it is unfortunate that at the same time as bringing clarity to the issue of arbitrator immunity, India has also taken significant steps to limit who can sit as an arbitrator in India-seated arbitrations.

The 2019 Amendments introduce a new Eighth Schedule to the Indian Arbitration Act. Although introduced as the requirements for 'accreditation' of arbitrators[12], the Schedule expressly states that "*a person shall not be qualified to be an arbitrator unless …*" and then goes on to set out the minimum requirements of a 'qualified' arbitrator. The nine-point list severely limits the parties' ability to choose an arbitrator best suited

to their dispute[13]. Not only is the ability of the parties to choose an arbitrator from a relevant background limited but, in addition and perhaps most notably, save for relatively narrow exceptions, a foreign (i.e., non-Indian) person is unlikely to be able to sit as an arbitrator in India-seated arbitrations[14]. Not only does this limitation appear to contradict section 11 of the Indian Arbitration Act ("*A person of any nationality may be an arbitrator, unless otherwise agreed by the parties*") but it is likely to have a significant impact on whether foreign parties, whose deals have a nexus with India, will be willing to choose India as the seat of any of their arbitrations.

These requirements are expected to adversely affect the development of arbitration in India. Lord Goldsmith commented that these provisions "*will I predict set back the cause of Indian arbitration by many years, perhaps a generation.*"[15] In practice, parties, in particular non-Indian parties, should be comfortable with the idea of not being able to appoint non-Indians as arbitrators if they choose India as the seat of their arbitrations.

[8] *Section 2(1)(ca), as amended: "arbitral institution means an arbitral institution designated by the Supreme Court or a High Court under this Act."*
[9] *See, Section 11(3A) as amended.*
[10] *See, Section 42B as amended.*
[11] *CIArb London Centenary Principles, principle 10: https://www.ciarb.org/media/4357/london-centenary-principles.pdf*
[12] *See, Section 43J, as amended.*
Constitution of India, …".

India's willingness to amend its law to reflect developments in practice and the needs of the market is commendable. There are not many jurisdictions that would be so willing to listen to and reflect the feedback of users.

Timing

The 2019 Amendments have introduced various changes in respect of the timing of arbitral proceedings. Most significantly, for international commercial arbitrations, there is now no longer an express obligation to complete an arbitration within a year of the tribunal entering upon the reference[16]. This is a welcome change. The 12-month time limit has been extensively criticised as being unrealistic and a means by which to force parties to go to court. Alexis Mourre, President of the ICC, commented that the time limit was "*extremely unfortunate*" and "*needs to be fixed if India wants to be become an international arbitration venue.*"[17]

Interestingly, although the 12-month deadline has been removed for international commercial arbitrations, some guidance on timing remains. Now, awards in international commercial arbitrations should be made "*as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of the pleadings.*" This language appears to have been a new addition from legislators; it did not appear in the draft Bill and, although well-intentioned, it may well lead to its own problems. What constitutes "*as expeditiously as possible*"? What constitutes an appropriate level of "*endeavour*"? And if a party considers these things are not happening, what may they do about it?

In addition, now any statement of claim and statement of defence must be completed within six months from the date that the arbitrators received notice of their appointment.[18] It is unclear how this will work alongside things such as party-agreed stays of arbitral proceedings.

Confidentiality

The 2019 Amendments expressly stipulate that the arbitrator, the arbitral institution, and the parties to an arbitration agreement shall maintain the confidentiality of all arbitration proceedings. However, an award need not be kept confidential if "*its disclosure is necessary for the purpose of implementation and enforcement of*" an award.[19]

Interestingly, the new provisions relating to the Council state that the Council will create an electronic depository of awards made in India "*and such other records related thereto.*"[20] It is not clear whether parties will be entitled to opt out of the inclusion of their awards in the depository, what steps will be taken to keep the awards confidential while in the depository and who will be able to access the depository. The existence and maintenance of such a depository may well raise concerns as to confidentiality.

Parties should ensure that they are comfortable that the Council will store any arbitral award arising out of their dispute, if they choose India as the seat of their arbitration.

Interim Measures

Previously, a party could seek certain interim measures from a tribunal, either during the arbitral proceedings or, at any time after the arbitral award was made, but before it was enforced. The 2019 Amendments change this so that a tribunal can no longer grant interim measures after it has issued the award.[21]

Set aside

The 2019 Amendments have reduced the scope for setting aside an arbitral award.[22] This is a positive development in that it should lead to greater certainty in arbitral awards. Now, a party may only rely on the record in the arbitration as a basis to prove the grounds to set aside an award, i.e., it cannot use new evidence that was not presented to the arbitral tribunal. This significantly narrows options for set-aside and should make enforcement of awards a more straightforward process.

Conclusion

India's willingness to amend its law to reflect developments in practice and its efforts to meet the needs of the market is commendable. There are not many jurisdictions that would be so willing to listen to and reflect the feedback of users. This approach in and of itself reflects an openness to change and a desire to develop India as an arbitral hub. However, many of the changes brought about by the 2019 Amendments are a cause for concern. Parties who are considering India as a seat of arbitration should think carefully about the implications of these amendments. In particular, the increasing role of government in arbitration and the limits on who may sit as an arbitrator in Indian seated arbitrations may mean that an Indian seated arbitration is not the best choice for some parties.

Al Tamimi & Company's Arbitration team regularly advises on arbitrations and other dispute resolution mechanisms. For further information please contact Jane Rahman (j.rahman@tamimi.com).

[13] *See, the Eighth Schedule, "A person shall not be qualified to be an arbitrator unless he – (i) is an advocate within the meaning of the Advocates Act 1961 having ten years of practice experience as an advocate; or (ii) is a chartered accountant within the meaning of the Chartered Accountants Act 1949, having ten years of experience as a chartered accountant; or (iii) is a cost accountant within the meaning of the Cost and Works Accountants Act, 1959 having ten years of practice experience as a cost accountant; or (iv) is a company secretary within the meaning of the Company Secretaries Act, 1980 having ten years of practice experience as a company secretary; or (v) has been an officer of the Indian Legal Service; or (vi) has been an officer with a law degree having ten years of experience in the legal matters in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in private sector or self-employed; or (vii) has been an officer with engineering degree having ten years of experience as an engineer in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in private sector or self-employed; or (viii) has been an officer having senior level experience of administration in the Central Government or State Government or having experience of senior level management of a Public Sector Undertaking or a Government company or a private company of repute; or (ix) is a person, in any other case, having educational qualification at degree level with ten years of experience in scientific or technical stream in the fields of telecom, information technology, Intellectual Property Rights or other specialised areas in the Government, Autonomous Body, Public Sector Undertaking or [at] a senior level managerial position in a private sector, as the case may be."*

[14] *See also, Eighth Schedule, General norms applicable to Arbitrator, (v): "the arbitrator should be conversant with the Constitution of India, …".*

[15] *Essential Rules for Counsel in Preparation for an International Commercial Arbitration, 11th Annual International Conference of the Nani Palkivala Centre, 16 February 2019.*

[16] *Section 29A as amended.*

[17] *National Initiative Towards Strengthening Arbitration in India, Inaugural Session, 21 October 2016.*

[18] *Section 23(4) as amended.*

[19] *Section 42A as amended.*

[20] *Section 43K as amended.*

[21] *Section 17(1) as amended.*

[22] *Section 34(2), as amended.*

The ADGMAC Arbitration Guidelines: An Overview

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Introduction

The Abu Dhabi Global Market Arbitration Centre ('ADGMAC') published its Arbitration Guidelines (the 'Guidelines') in September 2019. The Guidelines comprise a series of 'Modules', which offer a set of procedures that parties may utilise in ad hoc or institutional arbitral proceedings, in whole or in part (due to their modular nature), at any stage, and in any seat (subject to any local mandatory rules, of course). In this article, we review key aspects of each of the Modules.

Module 1: Written Submissions, Issues and Applications

The purpose of Module 1 is to ensure that the tribunal, the parties to the arbitration, and their counsel conduct the arbitration in an efficient and cost-effective manner. In summary, Module 1 provides that:

- parties should submit their written submissions in electronic format only;
- pleadings should be limited to a statement of claim, statement of defence and counterclaim, and reply to the statement of defence and counterclaim;
- reply submissions are to be limited to responding to points raised in the submission to which it responds - no new issues may be raised, unless the parties agree otherwise or with leave from the tribunal; and
- the tribunal may impose page limits on written submissions.

In addition, Module 1:

- encourages parties to agree on the list of issues (of fact and law) after the exchange of pleadings;
- enables the tribunal to bifurcate the arbitral proceedings where it considers that it is appropriate to do so, taking into consideration the circumstances of the dispute and potential cost and time saved; and
- sets out the procedure under which a party may request an order or direction from the tribunal at any stage of the arbitral proceedings.

Module 2: Fact Witness Evidence

The purpose of Module 2 is to provide tribunals, the parties to the arbitration, and their counsel with practical guidance relating to the submission of fact witness evidence in the arbitral proceeding, with a view to avoiding the wasted time and costs associated with the unnecessarily voluminous submission of factual evidence in arbitral proceedings.

Module 2:

- enables the tribunal to adopt procedural measures relating to fact witness evidence, as it considers appropriate, including whether it is necessary to give directions as to which issues should be dealt with by fact witness statements;

- requires each of the parties to identify the number of fact witnesses it intends to rely on, to itemise the specific issues that will be raised by the fact witnesses, to explain how the fact witnesses will materially assist the tribunal's adjudication of the dispute, and to provide an estimated page count of each fact witness statement;
- limits the parties' replies to fact witness statements only to responding to points raised in the fact witness statement to which it responds - no new issues may be raised, unless the parties agree otherwise or with express leave from the tribunal; and
- does not permit the parties to submit any further fact witness statements after the replies have been submitted, except in exceptional circumstances and only with the permission of the tribunal or by agreement of the parties.

In addition, Module 2:

- empowers the tribunal to exclude any fact witness from testifying at the evidentiary hearing on the basis that the testimony would not materially assist the its determination of the specific issues under consideration at the evidentiary hearing to which the fact witness's evidence is said to be relevant; and
- enables the tribunal to decide whether it will take into account or give weight to the evidence of any fact witness who has submitted a witness statement but failed to testify at the evidentiary hearing.

Module 3: Expert Witness Evidence

The purpose of Module 3 is to provide tribunals, the parties to the arbitration, and their counsel with practical guidance relating to the submission of expert witness evidence, which aims to avoid the wasted time and costs associated with the unnecessarily voluminous submission of expert evidence in arbitral proceedings.

Module 3:

- enables the tribunal to adopt procedural measures relating to expert witness evidence, as it considers appropriate, including whether it is necessary to give directions as to which issues should be dealt with by expert witness statements;
- requires each party to identify the number of expert witnesses it intends to rely on, to itemise the specific issues that will be raised by the expert witnesses, to explain how the expert witnesses will materially assist the tribunal's adjudication of the dispute, and to provide an estimated page count of the expert witness statement;
- limits the parties' replies to the expert witness statements only to responding to points raised in the expert witness statement to which it responds - no new issues can be raised, unless with leave from the tribunal or by agreement of the parties; and
- does not permit the parties to submit any further expert witness statements after the replies have been submitted, except in exceptional circumstances and only with the permission of the tribunal or agreement of the parties.

In addition, Module 3 enables the tribunal to:

- set a time limit for the parties' respective experts to produce a joint statement setting out the areas of agreement and disagreement for each of the issues on which they have been instructed;
- order further expert joint statements where it considers that the submission of which would materially assist its cost-effective and timely adjudication of a claim or counterclaim, or defence thereto;
- appoint an independent expert to report to it on specific issues that are of a technical nature, in appropriate circumstances, and only after consultation with the parties;
- exclude any expert witness from testifying at the evidentiary hearing on the basis that the testimony would not materially assist its adjudication of specific issues; and/or
- decide whether it will take into account or give weight to the evidence of any expert witness who has submitted a witness statement but failed to testify at the evidentiary hearing.

Module 4: Documentary Evidence

The purpose of Module 4 is to provide the tribunal, the parties to the arbitration, and their counsel with practical guidance relating to the request and production of documents, with the aim of avoiding time-wasting and costs associated with the production of documents in arbitral proceedings. The Guidelines provide that document requests should be organised in a 'Redfern Schedule' format.

Module 4:

- enables the tribunal to adopt proportionate and cost-effective procedural measures relating to documentary evidence, as it considers appropriate, including whether or not to permit parties to submit document requests;
- permits the parties to apply to the tribunal for a direction permitting the service of document requests within a reasonable time after the service of the opposing party's written submission;
- in exceptional circumstances, also permits the parties to apply to the tribunal for permission to serve further document requests at a later stage of the proceedings; and/or
- obliges the party (to whom the document request is addressed) to produce all documents that are in its control, custody or possession, failing which the tribunal may impose appropriate sanctions.

Significantly, Module 4 does not allow parties to use the document requests' process as a method to point out evidentiary gaps in the other party's claim.

"...the Guidelines provide parties and tribunals with a set of innovative best practice procedures to assist in bringing greater efficiency to the arbitral process, while endeavouring to ensure fairness, equality and due process.

Module 5: Hearings

The purpose of Module 5 is to provide the tribunal, the parties to the arbitration, and their counsel with practical guidance relating to the procedural and evidentiary hearings in the arbitral proceeding, with the aim of ensuring that the hearings are conducted in a fair, efficient and cost-effective manner, having regard to the complexity, value and significance of the issues in dispute.

Module 5:

- enables the tribunal to convene hearings for the purpose of: (a) determining procedural and organisational matters, i.e., case management conferences; and (b) hearing fact and expert witness evidence and oral submissions relating to the merits of the dispute or any jurisdictional challenges, i.e., merits or jurisdictional hearings;
- requires the tribunal to organise all case management conferences and merits hearings in a fair, efficient and cost-effective manner, having regard to the complexity, value and significance of the issues in dispute;
- encourages parties to convene case management conferences by telephone or by video-conference, unless the parties agree otherwise or the tribunal is reasonably satisfied that it is necessary and cost-effective for the parties to meet in person; and
- allows parties to apply to the tribunal for one or more of its fact or expert witnesses to attend a merits hearing by videoconference or telephone.

In addition, Module 5 stipulates:

- stringent timelines relating to the parties' preparations in advance of case management conferences;
- stringent timelines relating to the parties' preparations in advance of the merits' hearings;
- that all case management conferences and merits hearings are to be held in private.

Module 5 also encourages the parties to make use of an electronic document management system for merits' hearings, and minimise the use of hard-copy document bundles.

Finally, Module 5 provides that all documents, recordings, transcripts and other records of case management conferences and merits hearings are confidential.

Module 6: Counsel Conduct

The purpose of Module 6 is to promote procedural fairness between the parties by setting out the expected standards of the conduct of party representatives. Module 6 defines 'party representatives' as

> *"any person, including an employee of a party, who appears in an arbitration on behalf of a party and makes submissions, arguments or representations to the Tribunal on behalf of such Party (other than as a witness or expert), whether or not they hold a legal qualification or are admitted to practice law in any jurisdiction".*

Module 6 prohibits party representatives from:

- communicating with the tribunal without communicating the same to every other party to the proceedings before or at the same time as the communication to the tribunal;
- knowingly or recklessly, making a false statement to the tribunal;
- knowingly assisting in the preparation of, or submitting, or making submissions based upon, any factual witness or expert evidence which the party representative knows is, or believes might be, false; or
- knowingly concealing, or advising a party to conceal, documents that the tribunal has ordered to be produced.

Where the party representative becomes aware of a document that should have been produced, but was not, the party representative must advise that party of its duty to produce that document and the consequences of failing to do so. And where the party representative becomes aware that a document that should have been produced was destroyed, the party representative should inform the opposing party and the tribunal as soon as practicable explaining the circumstances of the document's destruction.

Module 6 sets out the process of complaints for a party representatives' breach of Module 6. A party, or the tribunal on its own initiative, may file a complaint against a party representative. The complaint must be accompanied by the proposed consequences of the breach. Where the tribunal decides to uphold a complaint, the Guidelines empower the tribunal to order any one or more sanctions including; (a) a written reprimand to the party representative;(b) a written caution as to the party representative's future conduct in the arbitration; (c) adverse inferences may be drawn when assessing the evidence relied upon, or legal submissions made, by the party representative; (d) an award of costs in relation to the conduct the subject of party representative's breach, against the party instructing the party representative; or (e) any other appropriate measure the tribunal considers necessary to preserve the fairness and integrity of the proceedings. The submission of an unwarranted complaint may itself constitute a breach of the Guidelines.

Commentary

As can be seen, the Guidelines provide parties and tribunals with a set of innovative best practice procedures to assist in bringing greater efficiency to the arbitral process, while endeavouring to ensure fairness, equality and due process. The Guidelines allow the parties and tribunals to adopt all, or some of the provisions in the Modules, in order to give greater structure to certain aspects of the arbitral process and better control time and costs of the proceedings. The Guidelines also have built-in flexibility and procedural safeguards, which enables parties to adapt the Guidelines to the unique circumstances of their dispute.

Al Tamimi & Company's Arbitration team regularly advises on arbitration-related matters. For further information, please contact John Gaffney (j.gaffney@tamimi.com).

Executing Foreign Judgments in the Sultanate of Oman

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In a developing world, businesses are increasingly contracting with parties in jurisdictions other than their own and owning assets, real estate and operations in countries other than their own. Accordingly, many countries have made arrangements, through their domestic laws or international treaties, to recognise foreign judgments and facilitate their enforcement. The aim of such arrangements is to prevent parties from evading their obligations and responsibilities under relevant transactions and contracts and thereby build confidence in international trade and investment.

The Omani judiciary first addressed the implementation of foreign judgments with the Enforcement of Judgments, Warrants, and Judicial Announcements, GCC Agreement which was signed in 1997. Oman is a signatory to the Riyadh Arab Agreement for Judicial Cooperation, which was ratified by the Sultanate in 1999. Most recently, the Civil and Commercial Procedures Code was issued in 2002, which elaborated in section IV on the provisions for implementation and enforcement of foreign orders.

Recognition of Foreign Judgments

Prior to executing a foreign judgment in Oman, the judgment must first be recognised as capable of implementation in Oman. In this respect, the issuing country must be assessed in terms of whether:

- the Sultanate has a special arrangement or common collective agreement with the relevant country in relation to the implementation and enforcement of judgments; or
- the practice between Oman and the issuing country falls under the rules of reciprocity, whereby each jurisdiction recognises the judgments of the other in accordance with international law.

The Sultanate has ratified a joint agreement regarding the implementation of the judgments and orders of the other Gulf Cooperation Council ('GCC') countries. The Riyadh Agreement on the enforcement of judgments in the countries of the GCC provides for mutual recognition if a judgment or order is issued by one of the GCC States in accordance with the Riyadh Agreement. Accordingly, judgments issued by GCC countries shall be recognised in the Sultanate of Oman with the other conditions relating to the acceptance of judgments, falling to be considered by the Oman court thereafter.

The Sultanate also recognises foreign judgments issued by any state with which it has a special agreement for the implementation of Oman judgments in accordance with the law of that state. The Sultanate shall then reciprocate by recognising and enforcing judgments from that state in accordance with the law of the Sultanate of Oman.

Acceptance of the Implementation of Foreign Judgments

The execution of foreign judgments in the Sultanate of Oman shall be accepted in accordance with the provisions of Article 352 of the Civil and Commercial Procedures Law by filing a judgment execution application before the Court of First Instance. The tribunal panel at the Court of First Instance consists of three judges who shall determine whether the provisions to be implemented meet the following conditions mandated by Article 352:

1. the judgment must be rendered by a competent judicial authority in accordance with the rules of international jurisdiction established in the country's local laws in which it was issued and that it has become final in accordance with that law and has not been issued on the basis of fraud;
2. the parties in the proceedings in which the foreign judgment was rendered have been summoned to appear and have been lawfully represented;
3. the judgment does not contain a request based on a breach of any of the laws in force in the Sultanate of Oman;
4. the judgment does not contradict a decision previously issued by a court in the Sultanate and does not include anything contrary to public order or morals; and/or
5. the country in which the judgment has been issued accepts the execution of the Omani courts' judgments in its territory.

The Court of First Instance shall initiate the lawsuit, in its usual manner, by considering the case and summoning, to a hearing session, the party against whom the foreign judgment has been issued. After completion of the formalities, the court shall consider the subject matter of the lawsuit by applying the provisions of Article 352 of the Civil and Commercial Procedure Law to the foreign judgment. The court may refuse to execute the foreign judgment if, for example, the execution of the foreign verdict is found to be contrary to the public order and morals of the Sultanate of Oman. The court has a very wide discretion in respect of such matters. If the Court finds the conditions to be in accordance with the provisions of Article 352, the court shall rule on the acceptance of the execution of the foreign judgment. In both cases, the party against whom the judgment is made, has the right to appeal the decision before the Court of Appeal and then further appeal the same to the Supreme Court.

Executing Foreign Judgments

Once the court issues a decision to execute a foreign judgment and it becomes final, the person to whom the judgment has been granted shall have the right to submit an execution application. The execution application initiates the execution procedures in relation to the foreign judgment against the defendant (judgment debtor). Execution is performed according to the usual execution procedures applied in the Omani courts, before the execution judge at the enforcement department, which issues the decision to execute the foreign judgment. The judgment debtor must start the execution of the judgment voluntarily within seven days from the date announcing the execution, failing which, the execution judge will seize the property of the judgment debtor (real estate, movables and cash) by:

- serving letters to the bank requesting the freezing of relevant accounts of the defendant; and
- seizure of the property and movables in preparation for sale by auction with payment of the proceeds to the applicant of execution.

The execution judge also has the right to issue an order to imprison the judgment debtor if he is a natural person or an authorised signatory of a non-natural person.

The execution procedures will continue until the judgment is fully implemented.

Oman is a signatory to the Riyadh Arab Agreement for Judicial Cooperation, which was ratified by the Sultanate in 1999. Most recently, the Civil and Commercial Procedures Code was issued in 2002, which elaborated in section IV on the provisions for implementation and enforcement of foreign orders.

Conclusion

The Omani judiciary recognises and executes foreign judgments under specific international agreements and arrangements. The Oman courts also, in accordance with Article 352 of the Code of Civil and Commercial Procedures, recognise and enforce judgments and orders from countries that do not have specific arrangements with Oman but which treat Oman equally, in terms of the recognition and enforcement of Oman judgments and orders by the courts in their home territories. By building confidence among parties to civil and commercial transactions in Oman or concerning Oman-based assets and operations, Oman's approach contributes to an attractive and benign investment environment in the Sultanate.

Al Tamimi & Company's Litigation team in Oman regularly advises on Dispute Resolution. For further information please contact Faris Al Maashari (f.almaashari@tamimi.com).

Mediation in the Middle East: Before and After the Singapore Convention

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N.B. *An edited version of this article has been previously published on the Kluwer Mediation Blog.*

The United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the Singapore Convention on Mediation (the 'Singapore Convention'), was opened for signature on 7 August 2019. The Singapore Convention already boasts 46 signatories. Of these 46 nations, five belong to the Middle East. At first sight, and when compared to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the 'New York Convention') in absolute numbers of Middle Eastern signatories, it would appear that the Singapore Convention may not have been as warmly received as the New York Convention (with a total of 13 Middle Eastern signatories). However, on a closer look, and when compared on the basis of the number of Middle Eastern signatories at the time of its launch (only Jordan from the Middle East signed the New York Convention on 10 June, 1958), the prospects of the Singapore Convention in the region instantly seem brighter.

In this article, we aim to provide a vignette of mediation practice across the Middle East and highlight the prospects of its continued development in the region in light of the Singapore Convention, after discussing some of the key highlights of this international law instrument.

Selected Highlights of the Singapore Convention

The Singapore Convention has been hailed as the "*missing piece*" in the international dispute resolution enforcement framework. It establishes a framework for the cross-border recognition and enforcement of settlement agreements (Article 3 of the Singapore Convention) and aims to bring predictability and stability to the international framework on mediation. Noteworthy provisions of the Singapore Convention include:

1. Clearly Defined Scope of Application

Article 1(3) of the Singapore Convention precludes settlement agreements that are enforceable as court judgments or arbitral awards from its application. This has created a well defined field for the exercise of this Convention and eliminates potential overlaps with other conventions regulating international trade such as the New York Convention and the Hague Convention on Choice of Court Agreements (2005).

While the New York Convention will continue to govern settlements achieved through mediation that is part of Med-Arb and Arb-Med-Arb processes, the Singapore Convention now grants an equal level of authority to settlements solely resulting from mediation. Indirectly therefore, this will help establish mediation as an independent and more effective means of Alternative Dispute Resolution ('ADR'), as opposed to a subsidiary step in the arbitration process.

2. Procedural Safeguards

Articles 5(1)(e) and (f) of the Singapore Convention provide that the competent authority may refuse relief on the grounds of "*serious breach of standards applicable to the mediator or the mediation*" and failure to disclose "*circumstances that raise justifiable doubts as to the mediator's impartiality or independence*".

Interestingly, the Singapore Convention does not stipulate the standards that are to be used to assess the conduct of the mediation, the mediator or the latter's impartiality. According to the Travaux Préparatoires, it was noted that "*the competent authority [would be allowed] to determine the standards applicable, which could take different forms such as the law governing conciliation and codes of conduct, including those developed by professional association*" and further stated that "*the text accompanying the instrument would provide an illustrative list of examples of such standards.*"

As the Singapore Convention does not set out any illustrations for either provision, and since there is no soft law or guidance on which States may rely (unlike arbitration, mediation receives scant attention from international associations; a quick scan of the International Bar Association Committee web pages for arbitration and mediation is enough to arrive at this conclusion), the onus for clarifying these standards now lies with the competent authorities in each ratifying State.

Consequently, and where required, signatory States will have to include standards within their own national laws before they will be able to ratify the Singapore Convention. In turn, this may spur the production of soft law instruments to streamline and harmonise these standards. As a result, there is sure to be the creation of standards so far elusive in mediation aside from the generation of greater awareness and discussion of mediation in the visible future. It is worth noting that at present, the recently launched Saudi Centre for Commercial Arbitration ('SCCA') provides a code of ethics for mediators in Saudi Arabia.

"[The Singapore Convention] establishes a framework for the cross-border recognition and enforcement of settlement agreements (...) and aims to bring predictability and stability to the international framework on mediation.

Mediation in the Middle East: In Retrospect

Mediation ('al-Wasata') has historically been an integral element of the traditional structure of dispute resolution in the Middle East. While it has been popular as an informal means of settling commercial disputes, recently, there have also been continuous developments in commercial mediation in the region.

For example, in the United Arab Emirates ('UAE'), agreements resulting from mediation have been enforceable through certain avenues for some time now. Federal Law No 26 of 1999 Concerning the Establishment of Conciliation and Arbitration Committees at Federal Courts established conciliation and reconciliation committees at the Federal Courts for facilitating the settlement of civil, commercial and labour disputes. Any settlement reached through the committees is embodied in a court document and treated as a writ of execution.

Similarly, the Centre for Amicable Settlement of Disputes in Dubai was established pursuant to Dubai Law No. 16 of 2009 Establishing a Centre for Amicable Settlement of Disputes. The Centre is associated with the Courts and is tasked with attempting to mediate disputes before they are referred to the Courts. Any settlement agreement arrived at is legally enforceable and is equivalent to an executive instrument which may be directly enforced through the Execution Courts.

Jordan passed the Mediation in Resolving Civil Disputes Act in 2006. This paved the way for a standalone regime for court-based mediation; mediations were subject to time constraints (they had to be completed within three months) and the settlements arising out of them were final. Private mediations were also recognised but were not privy to the enforcement mechanisms that are available to court-based mediations.

Similarly, in Saudi Arabia, the SCCA which was set up in 2016 provides both arbitration and mediation services. With regard to mediation, the Centre has developed rules closely modelled on the ICDR-AAA Rules apart from the aforementioned code of ethics for mediators. In December last year, the Ministry of Justice also organised an advanced training programme for qualifying court mediators on best practices to settle disputes following international standards.

In Qatar, the Qatar International Center for Conciliation and Arbitration ('QICCA') was established in 2006 and adopted a set of Conciliation Rules in May 2012 (the' QICCA Conciliation Rules'), which were modelled on the UNCITRAL Conciliation Rules. The Qatar International Court and Dispute Resolution Centre ('QICDRC') has also been providing mediation services in partnership with the Centre for Effective Dispute Resolution ('CEDR') since 2010.

As it stands currently, and within the Arabic States, the Singapore Convention has been signed by Jordan, Qatar and Saudi Arabia. This leaves behind established centres of ADR in the region like the UAE as well as growing centres such as Egypt, Bahrain, Kuwait, Lebanon and Oman. This is not to say however that significant changes are not already underway in these countries.

In Bahrain, the Bahrain Chamber for Dispute Resolution ('BCDR-AAA'), an independent dispute-settlement institution in operation from 2010, has been offering mediation services to commercial and governmental parties in the region. In July this year, the Mediation Rules were updated to coincide with the signing of the Singapore Convention. Most notable, amongst the changes, are the updated provisions on independence and impartiality and the option for parties to commence or continue parallel arbitral or judicial proceedings.

Within the last year, the following three countries have seen major changes to their mediation frameworks.

Q1 2018
UAE

127 mediation cases
valued at Dh18 million (approx. US$ 4.9 million)

In Lebanon, Law No. 82, was published in the Official Gazette on 18 October 2018. This law, which entered into force in May 2019, enables parties to access mediation once their dispute is submitted to the court, at any time during the court proceedings. This will supplement the Lebanese Arbitration and Mediation Center ('LAMC') that already provides mediation services. In Oman, the Oman Commercial Arbitration Centre ('OCAC') was launched in July this year. At the press conference, an OCAC Board Member noted that the Centre would include mediation services as part of its competencies. Around the same time in the UAE, the Abu Dhabi Global Market ('ADGM') Courts announced the launch of their court-annexed mediation service for ADGM entities and litigants before the ADGM Courts. This brings the ADGM Courts on par with the other offshore jurisdiction in the UAE - the Dubai International Financial Centre ('DIFC'), where the DIFC Courts include mediation in certain procedures and promote mediation as an alternative means of resolving disputes (the DIFC-LCIA Arbitration Centre also offers mediation services to users modelled on the LCIA Mediation Rules).

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.

Mediation in the Middle East: Prospects

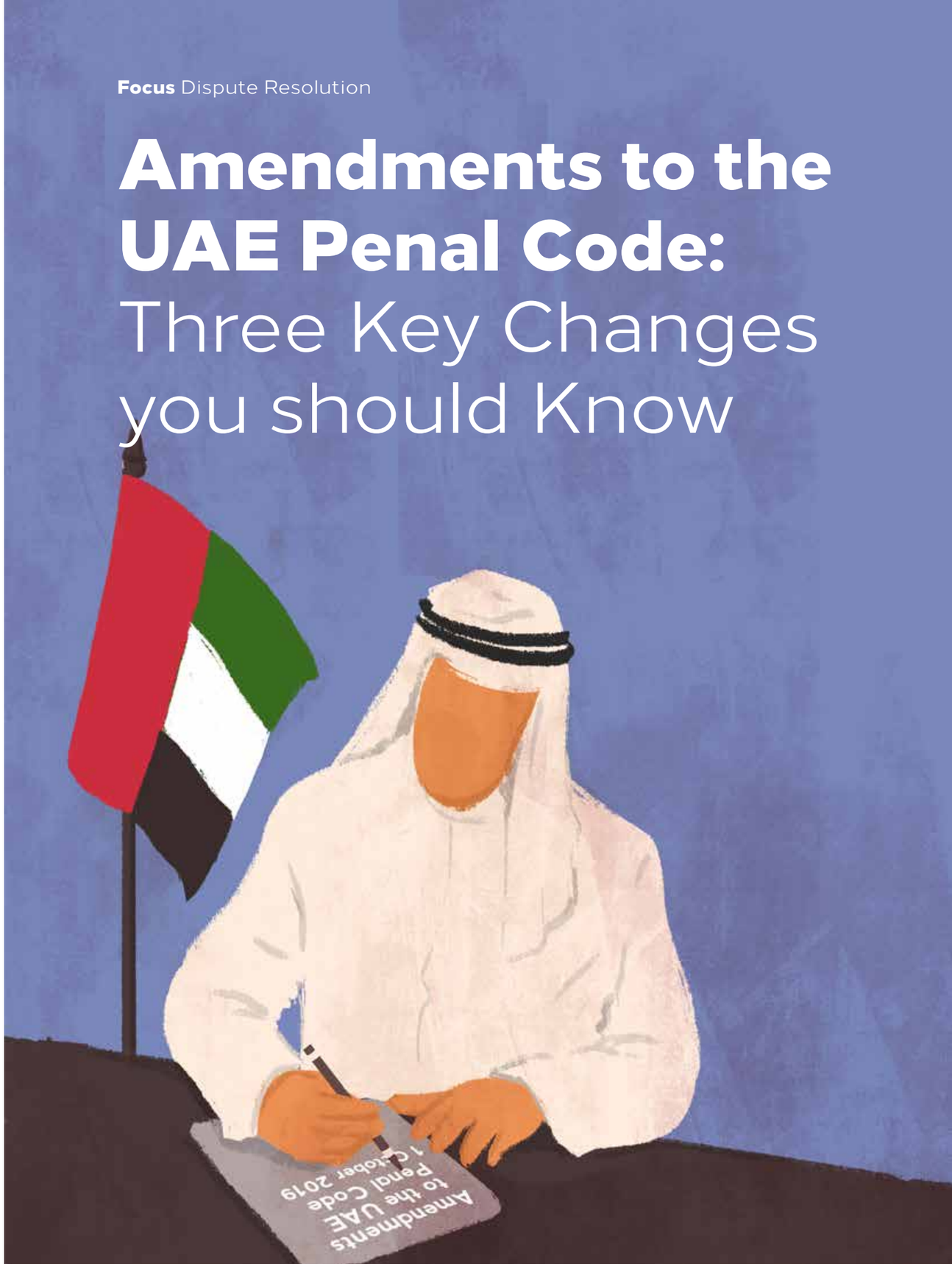
As underlined at the start of this article, the initial reception of the Singapore Convention in the Middle East is to not to be deemed as indicative of its ultimate success. Since State parties may accede at any stage to the Singapore Convention it is, more than likely, that the nations in the Middle East that have not yet signed the Singapore Convention will soon follow in the path of their peers that have signed the Singapore Convention to keep up with the rising demand for mediation in the region. For example, in the UAE alone, the Dubai International Arbitration Centre ('DIAC'), which sits under the umbrella of the Dubai Chamber of Commerce and Industry, reported 127 mediation cases valued at Dh18 million (approximately US$ 4.9 million) in the first quarter of 2018.

With the need to bring their national laws in line with their obligations under the Singapore Convention, signatories in the region will have to amend or, as in most cases, introduce dedicated standalone national laws on mediation. While there is much that remains in the air with regard to how effectively, and through what strategies, each of these countries will implement the Singapore Convention in their jurisdictions, one thing that we know for certain is that mediation in the Middle East is in for a facelift with a view of a promising future.

Al Tamimi & Company's Dispute Resolution team has the capability to provide advice to clients on mediation proceedings, to assist as counsel in mediations and to act as mediators in commercial disputes across the region. For further information, please contact Sara Koleilat-Aranjo (s.aranjo@tamimi.com).

Focus Dispute Resolution

Amendments to the UAE Penal Code: Three Key Changes you should Know



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In line with the vision and direction of H.E. Sheikh Mohammed Bin Rashid Al Maktoum, Vice President and Prime Minister of the UAE and Ruler of the Emirate of Dubai, that justice should be administered expeditiously and efficiently, the UAE Attorney General issued a new decree dated 1 October 2019 on the penal order ('Order').

The Order consists of five articles specifying the criminal offences and penalties that can be issued by public prosecutors according to their jurisdiction and grades. The Order makes a number of substantial amendments to the administration of criminal justice in the UAE, three of which are flagged below:

1. More offences to be dealt with summarily by public prosecutors

A number of crimes listed in the Order may be disposed of by public prosecutors rather than by transferring them to the criminal court. This measure is aimed at avoiding lengthy and complex procedures before the criminal courts, with a view to reducing the load of criminal cases before the UAE criminal courts which ultimately may result in speeding up the criminal justice process.

The Order addresses approximately 30 offences, including defamation, traffic and bounced cheques offences, and authorises members of the Department of Public Prosecution whose grade is not lower than a senior prosecutor to issue penal orders.

A limited form of appeal is included: members of the Department of Public Prosecution whose grade is not lower than that of a chief prosecutor may amend or revoke any penal order within seven days of the date of issuance. The Case Examination and Follow-up Department at the Attorney General's office is empowered to consider mitigating the penal order and, if appropriate, to revoke or replace a penalty with community service.

2. More sentences to be mitigated

The Order significantly mitigates or reduces a number of sentences mandated under the UAE Penal Code (Law No. 3 of 1987). The Order includes 20 offences governed by the Penal Code 18 of which had sentences of imprisonment and/or fine. However, under the Order such offences are now punishable by only a fine which should not exceed a prescribed limit. The wording of Articles 1 and 2 of the Order leave open the interpretation that it is subject to the public prosecutor's discretion to adjudicate offences in accordance with the Order's provisions. As such, the public prosecutor may have recourse to those provisions or alternatively follow the regular route of transferring offences to the competent criminal court. It is pertinent to note, however, that the Order is silent on any criteria that should be applied by public prosecutors when exercising their discretion.

3. Lower penalties for dishonoured cheques

Bounced cheques of an amount not exceeding AED 200,000 (circa US$54,500) are included within the ambit of the Order. Article 3(16) states that fines of AED 10,000 (circa US$27,22) will apply to persons issuing cheques in bad faith, without sufficient funds available and provided the cheque amount is greater than AED 100,000 (circa US$27,229) but not exceeding AED 200,000 (circa US$54,500).

The fine amount shall be reduced as a pro-rata amount of the bounced cheque. If the cheque amount does not exceed AED 50,000 (circa US$13,610), the fine will be AED 2,000 (circa US$545). If it is greater than AED50,000 (US$13,610) but does not exceed AED 100,000 (US$27,229), the fine will be AED 5,000 (circa US$1,360). This offence is also punishable under Article 401 of the Penal Code by imprisonment of up to three years or a fine (between AED 1,000 (circa US$272) and AED 100,00 (circa US$27,229).

In practice, where there are several cheques related to the same parties and their aggregate value exceeds AED 200,000 (circa US$54,500), the Department of Public Prosecution will consolidate such offences and will refer them to the Criminal Court (although this practice is not stipulated in the Order).

A Fine is not a Remedy to the Victim

A fine for a dishonoured cheque is a criminal punishment but it is not necessarily a remedy to the victim creditor. The public prosecution will directly enforce any fine imposed through the available enforcement measures. This will leave the creditor with no remedy other than filing a civil suit with a view to obtaining a judgment enforcing the debtor to pay the cheque amount.

Typically, creditors should go through the normal civil proceedings. Under the Civil Procedure Law (Law No. 11 of 2015) and the Executive Regulations of the Civil Procedure Law No. 57 of 2018, a creditor has the right to seek adjudication of its application on a summary basis (i.e. before the fast-track court) by introducing a claim identifying the dishonoured cheque as a debt instrument. However, many courts in the UAE that are rejecting this approach and instead prefer to examine the merits of the claims rather determining them on a summary basis, means a lengthier process. The Dubai Civil Courts tend to deal with such claims on a summary basis.

> **Lower penalties for dishonoured cheques.**

Deterrent Penalties

It has become evident that cheques play a vital role in the national economy, with most transactions involving a cheque being issued. Accordingly, it is essential that law enforcement should maintain credibility and reliability of cheques as a proper and authentic payment method. As such, it is important to apply severe penalties to offenders otherwise, the reliability of such instrument would be prejudiced.

Conclusion

The shift in policy in relation to bounced cheques marked in the Order may make it less likely that defendant debtors will voluntarily pay the sums due under the cheques, given the reduced risk of jail. A creditor can protect its position in such circumstances by taking a number of simple steps. If a criminal complaint is contemplated, it should be filed as early as possible. Once a criminal complaint has been filed, frequently follow up with the Public Prosecution as to whether any decision on dealing with the complaint has been made, particularly in relation to whether the complaint will be dealt with under the process described in the Order or whether it will be referred to the Criminal Court. Finally, if the Public Prosecution decides to deal with the complaint under the process described in the Order, a creditor should proceed immediately to file a civil claim to seek recovery of the sums due.

Al Tamimi & Company's Litigation team regularly advises on civil, commercial and criminal liability transactions. For further information please contact Mohamed Abdelsabour (m.abdelsabour@tamimi.com).

A Practical Approach to Multi-tiered Dispute Resolution Clauses

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When drafting an agreement, Parties have option of choosing how disputes, should any arise, be settled. They have a number of options, including bringing the dispute directly to national courts, or resolving it via Alternative Dispute Resolution mechanisms ('ADR'). Today, some Parties tend to insert what is referred to as a 'multi-tiered dispute resolution clause' ('MTDR clause') in their agreement.

What is a Multi-tiered Dispute Resolution Clause?

Also known as 'ADR-first or Multi-step clauses, a MTDR clause involves a series of steps in the overall dispute resolution process. The main point of this type of clause is to offer parties the chance to settle their disputes outside of court or arbitration. The clauses state, step-by-step, the procedure that the parties should follow to in order to resolve a dispute. They usually contain different phases, each one independent from the other, such as negotiation, mediation or expert determination. Failing these phases, National Courts or Arbitration are generally the last resort.

The primary value of MTDR clauses is the involvement of ADR in the settlement process, since ADR helps dealing with disagreements at an early stage before the parties become entrenched in their respective positions. The inclusion of ADR is particularly useful in disputes where the parties have a long-term relationship and wish to see that relationship continues.

However, unless already provided for in the contract, the possibility of ADR may not immediately occur to the parties. Practically, some commercial parties may consider the suggestion of ADR at an early stage could be a sign of weakness. The incorporation of an ADR mechanism clause in a contract via a MTDR clause overcomes this mindset, by justifying employing ADR in advance of a dispute without any thoughts of weakness or lack of confidence by either side.

Why should we think of adding MTDR Clause in an Agreement?

One of the major advantages of a MTDC clause is that they provide a contractual 'cooling-off period' during which the parties can reassess and evaluate the possibility of seeking a compromise outside of the Arbitration/Litigation context. MTDR clauses can be very useful in circumstances where parties have maintained a long-term commercial relationship that they wish to preserve, since the cooling-off period may lead to reach compromises and thereby avoid an escalation of the dispute.

MTDR clauses are also found to be a more cost-efficient way of managing disputes between parties. They act as a filter for different types of disputes. It gives a place for minor disputes to be resolved either by

The inclusion of ADR is particularly useful in disputes where the parties have a long-term relationship and wish to see that relationship continues.

negotiation or any other in-house resolution techniques mentioned in the MTDR clauses. This means that only the major disputes will go before an Arbitral Tribunal or a National Court. In other words, Parties become bound by a contractually mandated opportunity to resolve disagreements relatively inexpensively, whilst also avoiding the costs and delays associated with actual Arbitration/ Litigation proceedings.

By following the steps set out in the MTDR clause, Parties may narrow the issues to be arbitrated, by settling some issues by seeking a common ground in advance of Arbitration/ Litigation. Therefore, where issues in dispute can be settled in the early stages, few issues will need to be resolved by an Arbitral Tribunal or Court which, in turn results in a more efficient and cost-effective process. Indeed, the correct application of a MTDR clause is considered to be time-efficient, when compared to going directly to a National Court, which can take years for a decision to be reached.

Is a MTDR Clause always necessary?

Instead of helping Parties to resolve their disputes, MTDR clauses can sometimes have the opposite effect. In some cases, the nature of the dispute may be such that Court/ Arbitration is the most appropriate form(s) of dispute resolution from the outset, but the MDTR clause might be drafted in such a way that it requires Parties to employ all the prescribed ADR methods first, thereby wasting time and possibly incurring additional costs.

A concrete example can be found in cases where interim measures are required. The obligation to conduct pre-trail negotiations can negatively affect a party's ability to secure interim measures in time-sensitive disputes by postponing the commencement of formal proceedings. The claim can be barred while waiting for the contractually mandated negotiation period to expire.

Further, in some particularly complex disputes, additional claims may be discovered or come to light after the formal proceedings have commenced. MTDR clauses in such cases can lead to objections on the grounds that these new claims were not expressly negotiated during pre-arbitration negotiations, and were not first subject to settlement discussions.

Finally, MTDR clauses that are vaguely and/ or ambiguously drafted can confuse or even mislead parties. In some complex situations, the weak drafting of MTDR clauses may cause complications in the mandatory steps, and hence the probability of settling the dispute would be reduced, potentially leading to the failure of pre-trial negotiations and heading to the formal procedures, after consuming unnecessary time and money.

Drafting a MTDR Clause and Enforceability

Generally, MTDR clauses are not governed by a specific law regarding which methods should be adopted and the relevant procedures. In other words, what is stipulated in the clause is what will be enforced on Parties. If drafted correctly, the MTDR clause can be very effective but if not, it can be used tactically and controversially to delay matters.

If obligatory terms are used, such as the parties 'shall' or 'should', the parties must invoke the mandated terms and apply all appropriate steps. If terms, such as 'may' or 'might' are used, the parties have the option either to or not to resort to the ADR methods mentioned in the clauses.

To improve the chances of success of enforcement, the clause should be sufficiently detailed and explicit about who must be involved in the discussions/negotiations, how to initiate the process, how long the process must take, and whether any information must be exchanged prior to or during the process.

Hence, it all depends on the language used, and the precision with which it is used. As it is the sole guide for the parties, the drafting should ensure that it is clear when one stage ends and another begins. A structured timescale is needed, detailing when each step takes place as well as the time frame for each stage.

What should Parties consider when drafting MTDR Clauses?

As demonstrated above, if a MTDR clause is drafted carefully, it can provide parties with a commercial and cost-effective dispute resolution mechanism. Conversely, poor drafting can add an extra layer of bureaucracy.

The following are some recommendations to consider when drafting a MTDR clause:

1. insert mandatory vocabulary, not permissive language, e.g. 'Parties shall' not 'Parties may;
2. avoid using vague terms such as 'amicable negotiations, 'best undertakings' or 'good faith'. The interpretation of these terms during disagreement period could be manipulated;
3. define the time frame of each step. This allows each party to know how long the process will take, and offers clarity on potential limitation/time bar issues;
4. define every step, in full detail. Define the process precisely. Clearly set out how each step is commenced and how it is to be conducted. Do not leave matters or steps 'to be agreed';
5. improve the success of enforceability of the pre-trial steps by specifying the consequences of t failure to comply with any of the stipulated steps. For example, a warning can be added at the end of the clause, mentioning that the pre-trial procedures are mandatory, and non-compliance with the MTDR clause may affect the jurisdiction of the Arbitral Tribunal.

A Sample of a MTDR Clause

Many Arbitration institutions have introduced model MTDR clauses. For example, the Cairo Regional Centre for International Commercial Arbitration ('CRCICA') has suggested the following model for a MTDR clause involving Mediation as a pre-trial procedure:

> *"If any dispute arises in connection with this agreement, directors or other senior representatives of the parties with authority to settle the dispute will, within [ ] days of a written request from one party to the other, meet in a good faith effort to resolve the dispute.*
>
> *If the dispute is not resolved at that meeting, it shall be settled by Mediation in accordance with the Rules of Mediation of the Cairo Regional Centre for International Commercial Arbitration (CRCICA).*
>
> *Unless otherwise agreed between the parties, the mediator will be nominated by CRCICA. No party may commence any court proceedings or arbitration in relation to any dispute arising out of this agreement until the dispute has been referred to mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue court proceedings or arbitration is not prejudiced by a delay. In case of failure of the mediation process, the parties agree to refer the dispute to arbitration in accordance with the Arbitration Rules of the CRCICA."*

In conclusion, inserting a MTDR Clause in an agreement, and involving ADR in the process can be a double-edged tool. The inclusion of a cooling-off period where the parties can seek a compromise whilst preserving their commercial relationship, is critical. However, while drafting a MTDR clause, Parties should be very cautious, since the choice of each and every word of the clause will determine how successful the enforcement or otherwise of the clause may be.

Al Tamimi & Company's Dispute resolution team regularly advises on ADR and other dispute resolution mechanisms. For further information please contact Nada Abouelseoud (n.abouelseoud@tamimi.com).

YEAR OF Tolerance

PEACE
HUMANITY
COEXISTENCE
RESPECT

Source: www.theyearoftolerance.ae

Ammar Haykal
Partner, Head of Office - Ras Al Khaimah

It is almost 12 years since I came to the UAE with my family, during these years I witnessed tolerance, respect love and affection between all segments of the UAE society either citizens or residents from different nationalities. Therefore, I became to feel that it is a secure and safe country enabling me and my children to achieve their goals and dreams.

Arabic

مضى على وجودي في دولة الامارات العربية المتحدة مع عائلتي 12 عاماً شهدت فيها معاني الاحترام والتسامح والحب والمودة التي يتبادلها كافة شرائح المجتمع الاماراتي سواء مواطنين أو مقيمين من مختلف الجنسيات فأصبحت أشعر بأن دولة الامارات مستقر آمن لي ولأولادي يمكنهم من تحقيق أمانيهم واحلامهم.

Heba Roushdy
Business Development & Marketing Manager

Tolerance leads to less stress and greater respect; when you practice tolerance, you accept the idea that someone different has the right to conflict with your believes and opinions, but with all respect.

Essam Al Tamimi
Senior Partner

It is indeed inspiring to see how the UAE has become a regional role model in promoting Tolerance.

Tolerance requires simple useful applications, such as looking at the argument of the other person without regard to his/her colour, nationality, religion, origin or rank; and the UAE perfectly practices those principles. It is simply a question of respecting and accepting others even if they are different; this is the basic principle of most religions.

Ibtissem Lassoued
Partner, Head of Advisory

"Whatever you can do or dream you can, begin it; Boldness has genius, power, and magic in it."
-Goethe

This is what I felt when I landed from Paris and navigated into the United Arab Emirates 12 years ago.

12 years later, in 2019, the Year of Tolerance, this sentiment is reinforced by the principles that are built into the foundations of the Nation. The pillars of tolerance that were established by the late Sheikh Zayed have ensured that this Nation is a welcoming one that embraces all races, nationalities, religions, abilities and backgrounds, allowing us all to thrive.

French
"Quoi que tu entreprennes ou rêves d'entreprendre, commence-le. L'audace a du génie, du pouvoir, et de la magie." -Goethe

C'est ce que j'ai ressenti quand je suis arrivé de Paris aux Émirats Arabes Unis il y a 12 ans.

12 ans plus tard, en 2019, Année de la Tolérance, ce sentiment a été renforcé par les principes intégrés aux fondements de la Nation. Les piliers de la tolérance établis par feu Cheikh Zayed ont fait en sorte que cette Nation soit une Nation accueillante qui englobe toutes les races, nationalités, religions, capacités et origines, nous permettant à tous de prospérer.

Arabic
"كل ما يمكنك القيام به ومهما كان ما تحلم به، فابدأه الآن... فالجرأة فيها العبقرية والقوة والسحر .... جوته ..لتحقيق كل ذلك"

هذا ما شعرت به لأول مرة حينما انتقلت من باريس للإقامة بدولة الإمارات العربية المتحدة منذ 12 عاما مضت.

وبعد مضي 12 عام، واليوم ونحن في العام 2019، عام التسامح، يتعزز لدي هذا الشعور بالمبادئ التي تأسست عليها هذه الأمة. فقد كفلت ركائز التسامح التي أرساها الشيخ زايد رحمه الله ان تكون هذه الأمة مرحبة ومحتضنة لجميع الأعراق والجنسيات والأديان والقدرات والخلفيات بما يسمح لنا جميعا بالنمو والازدهار.

Lina Kourdi
TM Database Administrator

Tolerance is when all people around the world live in harmony with themselves and others, and respect the rights of each person.

Russian
Толерантность это когда все люди мира живут в согласии с самим собой и другими, и уважают права каждого человека.

Manel Ben Said
Senior Associate

Tolerance is accepting each other beyond our differences.

French
La tolérance ç'est s'accepter au-delà des différences.

Maitha Al Hashimi
Associate

Tolerance is an equation, it is not one trait, rather a combination of qualities. Being patient, respectful, open minded makes us embrace the value of tolerance.

I am fortunate to be an individual that grew up in a diverse country where more than 200 nationalities convene, a country which embeds multi- faith tolerance in the heart of every citizen and residents.

Arabic
التسامح عبارة عن معادلة، فهي ليست صفة واحدة بل مجموعة من السمات الحسنة. قيم التسامح تنطوي على التحلي بالصبر والاحترام والانفتاح الفكري.

انا سعيدة لكوني شخص نشأ في دولة يجتمع بها أكثر من 200 جنسية، دولة تشمل التسامح المتعدد في قلب كل مواطن ومقيم على أرضها.

Murad Sawalha
Associate

Practicing tolerance means that we acknowledge one another's right to believe and obey in their own conscience; and the UAE is real life example where multiple societies, communities, religions and races co-exist and prosper while bearing tolerance as their coat of arms.

Mary Joyce Martinez
Team Leader/
Executive Secretary

Tolerance is our ability to be open to diversity and embracing it with unconditional kindness and utmost respect; it transcends differences of all aspects. It is a gift of moral value that if and once manifested by every individual in this world would create a welcoming, healthy and pleasant environment where everyone would love to live in and be a part of.

Tagalog
Ang pagpaparaya ay ang kakayahang maging bukas sa pagkakaiba-iba ng bawat isa na may pagtanggap ng taos-puso at paggalang ng walang hinihintay na kaakibat na kondisyon; isinasantabi nito ang pagka-kaibaiba sa anumang aspeto. Ang maging mapagparaya ay maitututing na biyaya sa kagandahang asal, na kung ang lahat ng tao sa mundo ay may kakayahan na magpakita ng ganitong pag-uugali, maglilikha ito sa mundo na ating kinagagawalan ng mas bukas, ka-ayaaya and matiwasay na pamumuhay kung saan ang lahat ay maghahangad na mamuhay at maging bahagi nito.

Omar Obeidat
Partner, Head of Intellectual Property

The foundation of the UAE was built on diversity and toleration. For many years, the UAE job market attracted and welcomed people from all colors and religions, which constitutes in itself appreciation and tolerance to all cultures and openness to hosting different ethnicities and religions. The receiving of religious authorities over the past year, demonstrates the UAE's vision to embark on a broader chapter of tolerance and we at Al Tamimi & Co. are working on legislative initiatives to provide the legal framework for this vision.

Saleem Khalid
Computer Systems Manager

Tolerance is the product of awareness and acceptance, which is an international human right.

Urdu

رواداری بیداری اور برداشت سے پیدا ہوتی ہے جو ایک بین الاقوامی انسانی حق ہے۔

Zane Anani
Senior PSL

The most prosperous civilisations emerged as a consequence of tolerance and co-existence. Inter-faith, inter-cultural dialogue and collaboration can enrich a society.

Patrick Earl
Chief Operating Officer

The UAE's focus on Tolerance is a useful reminder that we must never take basic human values for granted. For me, Tolerance is about respecting the views of others, accepting compromise and appreciating diversity. If we all practise Tolerance in our everyday lives, then the world becomes a more pleasant place for everyone around us.

Initiatives

Ali Mustafa
Secretary / PRO

Dubai Police have announced that motorists can avail of discounts on traffic fines during the Year of Tolerance. Drivers can get up to a 100% reduction on the total accumulated existing traffic fines.

Arabic

أعلنت شرطه دبي ان سائقي السيارات يمكنهم الاستفادة من الخصومات على المخالفات المرورية خلال عام التسامح. كما يمكن للسائقين الحصول على ما يصل إلى 100% تخفيض على إجمالي الغرامات المرورية الحالية المتراكمة.

Odai Mismar
Associate

The Department of Economic Development in Umm Al Quwain announced a new discount equals 20% from the total license renewal fees of the registered companies in the Department of Economic Development in Umm Al Quwain.

Arabic

أعلنت دائرة التنمية الاقتصادية في ام القيوين عن خصم جديد يساوي 20% من إجمالي رسوم تجديد الترخيص للشركات المسجلة في الدائرة.

Hussam Helal
Associate

Starting the beginning of October 2019 RAK Economic Development Department (RAKDED) granted companies a grace period to change their status and settle their situation including any violations, in this regard, RAKDED initially addressed written notices, instead of imposing fines and other immediate measures such as freeze of license.

Arabic

قيام الدائرة الاقتصادية في إمارة رأس الخيمة بمنح المؤسسات والشركات فرصة زمنية ابتداءاً من أول أكتوبر لتعديل أوضاعهم وتسوية المخالفات وبالتالي توجيه إنذارات أولية بدلاً من فرض الغرامات التلقائية وغيرها من إجراءات فورية مثل تجميد الرخصة.

Year of Tolerance: Lessons for the UAE Arbitration Community?

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Introduction

Sheikh Khalifa bin Zayed Al Nahyan, President of the UAE, declared the year 2019 as 'The Year of Tolerance'. The Year of Tolerance emphasises tolerance as a universal concept and a sustainable institutional endeavor, and expands the scope and opportunities for communication, respect, and openness amongst the diversity of cultures and nationalities in the UAE.

The UAE's Year of Tolerance is apposite for its highly diverse society, which hosts more than 200 nationalities (with only 11 percent of its population comprising UAE citizens). Diversity in the UAE includes ethnicity, race, culture, gender, age, religious beliefs, and socio-economic status. The objectives of the Year of Tolerance thus include, amongst other things, building a tolerant society that believes in the importance of communication amongst different cultures, establishing values of tolerance, enabling tolerance in society through policies and legislation, and openness to others.

Tolerance and Diversity in the UAE

The Year of Tolerance, and its focus on diversity, builds on the UAE's efforts to promote the values of co-existence. The UAE has long promoted equality amongst different cultures and nationalities through international conventions that prohibit discrimination on the basis of race, gender or faith, including the 1974 International Convention on the Elimination of All Forms of Racial Discrimination, and the 2001 ILO Convention on the Prohibition of Discrimination in Employment and Occupations. The UAE also issued national legislation explicitly forbidding discrimination on the basis of someone's religion, belief, faith, race, colour, or ethnic origin (Federal Law No. 2 of 2015).

In addition, the UAE is a signatory to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, and a number of international treaties protecting the rights of women, including the Convention on the Elimination of All Forms of Discrimination against Women 2004. Because of the foregoing, women are now playing an increasingly stronger role in business, military and government in the UAE. According to the World Economic Forum's 2018 Global Gender Gap report, the UAE was ranked as a leading country in gender equality in the region in 2018, having closed 64 percent of their overall gender gap.

The UAE also recognises that gender balance is a key performance indicator in achieving a cohesive society, and in supporting Vision 2021, which aims for a more diversified and knowledge-based economy. In 2017, the UAE Gender Balance Council and the Organization of Economic Cooperation and Development launched the Gender Balance Guide. The UAE Gender Balance Council was established in 2015 to improve the gender balance in the UAE as well as achieve empowerment and equal participation of both men and women in the workplace.

The Zayed Tolerance Pledge

Further, in line with the Year of Tolerance, the UAE introduced the Zayed Tolerance Pledge campaign. The Zayed Tolerance Pledge aims to promote the values of co-existence amongst diverse cultures and confirms the UAE's status as a global capital for tolerance. The Zayed Tolerance Pledge highlights diversity in the UAE and aims to create a society based on understanding, acceptance, and openness to different cultures. The Pledge includes the commitments to "*uphold the duty of tolerance*" and "*always stand up for these values: Zayed's values for tolerance and human fraternity.*"

Tolerance and Diversity in Arbitration

In the past few years, diversity in international arbitration has featured as a key area of development. True diversity is not confined to gender; it includes ethnicity; race; color; culture; geography; age; political beliefs; functional diversity; and socio-economic status. The inclusion of individuals of varied racial, ethnic, gender and social backgrounds in international arbitration ought only to enhance the legitimacy of the system.

Arbitrations often involve parties with different nationalities and cultures. Arbitral tribunals are the decision-making authorities in arbitration proceedings - thus, the importance of diversity across arbitral tribunals cannot be underestimated. There should be sufficient diversity so that parties are able to view the arbitral tribunal as representing a modern, creative, and diverse section of the business world. A diverse arbitral panel can provide a wider range of experiences and perspectives, and ultimately lead to better decision making.

The UAE Federal Arbitration Law (No. 6 of 2018) also promotes diversity in the arbitral selection process. The Arbitration Law does not require an arbitrator be a certain nationality, unless otherwise agreed by the parties. In addition, the Law does not require an arbitrator be of a certain gender, unless otherwise agreed by the parties. Women have an equal opportunity to be appointed as members of the tribunal.

Promoting Tolerance in the UAE Arbitration Community

It follows that all members of the UAE arbitration community can and should play a role in promoting tolerance and diversity in arbitration. It is incumbent on all involved – institutions, arbitral centres, arbitrators, counsel, experts, and indeed parties – to consider how they can help to contribute to the objectives of the Year of Tolerance. Just as the Equal Representation in Arbitration Pledge has had a beneficial impact in the international arbitration community, there is no reason why the Zayed Tolerance Pledge could not also have a positive impact on UAE arbitration through the promotion of the values it seeks to uphold. Amongst other things, the arbitral community could seek to bridge cultural divisions, actively promote and support the appointment of female arbitrators, and educate individuals on the existence of unconscious bias in the arbitral selection process, all the while promoting the UAE as a model of arbitral diversity in its widest sense.

Al Tamimi & Company's arbitration team regularly advises on arbitration-related matters. For further information, please contact John Gaffney (j.gaffney@tamimi.com).

Year of Tolerance: Relaxation of Immigration Requirements

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This article considers some key immigration implications arising from the decision of His Highness Sheikh Khalifa bin Zayed Al Nahyan, the President of the UAE and the Ruler of Abu Dhabi to proclaim 2019 as "*The Year of Tolerance*" in the UAE. As a wider goal, the purpose of this year was to highlight the UAE as a global capital for tolerance through legislation and policies aimed at establishing the values of tolerance, dialogue, co-existence and openness to different cultures, especially amongst the youth, which will reflect positively on society as a whole.

As announced by the Supreme National Committee, the general framework of the Year of Tolerance focuses on seven main pillars, which aim to spread peace and tolerance between all communities in the UAE. The seven pillars are: community; education; workplace; culture; UAE model; media; policies and legislation. As part of this overall aim, legislative changes have taken place to emphasise the importance of tolerance within society.

How have the Immigration Requirements been Relaxed?

Turning specifically to immigration, there have been major changes to the current policies via the introduction of a 10-year residence visa (which has received much press attention as the so-called 'Golden Card') and a new 5-year residence visa for certain qualifying expatriates. We consider each in further detail below.

The 10-year renewable residence visa is available for long-term residents who have contributed to the country's developments through their investments or achievements. The General Department of Residency and Foreign Affairs ('GDRFA') has outlined certain eligible categories namely: investors; entrepreneurs; scientists; outstanding students; executive directors; inventors; artists; and culture specialists. The residents who meet the requirements of one of these criteria may submit an application to GDRFA. If the application is deemed to satisfy the criteria, GDRFA will submit the application to a committee which will then take it into consideration and decide whether the individual is eligible for a Golden Card.

To qualify for a Golden Card as an investor, the applicant must have in place a deposit of AED 10 million (US$ 2.7 million) in an investment fund in the UAE, or ownership of a company with AED 10 million (US$ 2.7 million) in capital or be a partner in a company with a share of up to AED 10 million (US$ 2.7 million). As an alternative, the investor could also have an investment of AED 6 million (US$ 1.6 million) or own a company with a capital of AED 6 million (US$ 1.6 million) and own a property or properties with a value of AED 4 million (US$ 1.1 million) in order to meet the AED 10 million (USD 2.7 million) threshold. For the avoidance of doubt, the investment must be fully owned by the applicant (or their company) rather than it being funded by a bank or through a loan and, likewise, the property or properties must also be fully owned by the investor and not mortgaged by any bank.

The second newly introduced long-term residence visa is the five-year renewable residence visa. The UAE will provide this visa to residents who own a property in the UAE with a value of AED 5 million (US$ 1.3 million) or more. This visa may also be utilised during retirement, an important step as many long-term expatriates have historically had to leave the UAE upon reaching retirement. This will certainly prove to be a positive change in the context of the property market as it will encourage current residents and foreign investors to buy properties in the UAE. The previous three year renewable residence visa for residents or investors who own properties with a value less than AED 5 million (US$ 1.3 million) is still effective in conjunction with the newly introduced five-year visa.

"MOHRE and GDRFA adopts the UAE's Year of Tolerance initiative.

Following the same ideology, the Ministry of Human Resources and Emiratization (the 'MOHRE') has also relaxed its requirements insofar as work permits (also known as labour cards) for UAE residents are concerned. Now MOHRE will allow UAE companies to hire men sponsored by and under their existing family residence visa. Previously, only women (daughters or wives) sponsored by a parent or a spouse were issued work permits whilst continuing to be provided a residence visa by a family member. This new approach will enable companies to potentially save costs associated with obtaining residence visas, Emirates ID and medical coverage, which will continue to be borne by the sponsoring family member. In turn, this may encourage employers to hire more staff or at least a different profile of employee.

In our view, these new policies help underline the UAE's commitment to the Year of Tolerance whilst also encouraging entrepreneurship, generating more foreign investment and retaining existing talent.

Al Tamimi & Company's Employment & Incentives team regularly advises on employment and immigration issues. For further information please contact Alaa Momtaz (a.momtaz@tamimi.com) or Gordon Barr (g.barr@tamimi.com).

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 661
28 Dhu'l-Hijjah 1440H
29 August 2019

FEDERAL DECREES

105 of 2019 Appointing the Undersecretary of the Ministry of Culture & Knowledge Development.

106 of 2019 Appointing a non-resident ambassador to Lesotho.

107 of 2019 Appointing the UAE Ambassador to Zimbabwe.

109 of 2019 Repealing Federal Decree No. (8) of 2019 appointing a UAE ambassador to Uganda.

110 of 2019 Terminating the duties of the UAE Ambassador to Austria.

111 of 2019 On performing the duties of the UAE Ambassador to Austria.

112 of 2019 Transferring the UAE Ambassador to Uzbekistan to the Headquarters of the Ministry of Foreign Affairs and International Cooperation.

113 of 2019 Appointing the UAE Ambassador to Uzbekistan.

114 of 2019 Appointing a non-resident ambassador to San Marino.

REGULATORY DECISIONS OF THE CABINET

52 of 2019 On excise goods, excise tax rates and the method of calculating the excise price.

55 of 2019 On the excise price of tobacco products.

56 of 2019 On the Register of Finance Leases Over Movable Assets.

MINISTERIAL DECISIONS

- From the Ministry of Health & Prevention

479 of 2019 Approving, amending and removing vaccinations under the National Health Program.

ADMINISTRATIVE DECISIONS

- From the Securities and Commodities Authority

  - Certificate of approval of amendment of the Articles of Association of Shuaa Capital PSC.

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16 Muharram 1441
15 September 2019

REGULATORY DECISIONS OF THE CABINET

57 of 2019 Professional licensing service fees for the UAE education sector.

58 of 2019 Regulatory powers relating to the activities listed in Cabinet Decision No. (31) of 2019 Specifying the Requirements for Real Economic Activity.

MINISTERIAL DECISIONS

- From the Ministry of Interior

337 of 2019 Amending various rules and procedures for traffic control operations.

- From the Ministry of Finance

38 of 2019 On the formation of the Committee for Designation of Qualified Financial Contracts.

175 of 2019 On the application of the finance lease accounting standards.

207 of 2019 On the nomination of the members of the Financial Activities Committee.

- From the Ministry of Climate Change & Environment

417 of 2019 Regulating the import of palm trees.

ADMINISTRATIVE DECISIONS

- From the Insurance Authority (IA)

36 of 2019 Chairman of IA Board decision Repealing IA Board Decision No. (13) of 2015 concerning Anti-Money Laundering and Combating the Financing of Terrorism in Insurance Activities.

- From the Securities and Commodities Authority (SCA)

27/RM of 2019 Chairman of SCA Board decision amending SCA Board Decision No. 11/R.M of 2016 on the Regulations for Issuing and Offering Shares of Public Joint Stock Companies.

28/RM of 2019 Chairman of SCA Board decision amending Chairman of SCA Board Decision No. (2) of 2001 concerning the Regulations as to Trading, Clearing, Settlement, Transfer of Ownership and Custody of Securities.

- Certificate of approval of amendment of the Articles of Association of Gulf Pharmaceutical Industries PSC.

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 663
1 Safar 1441H
30 September 2019

REGULATORY DECISIONS OF THE CABINET

59 of 2019 Repealing Cabinet Decision No. (27) of 2008 establishing the Health Council.

MINISTERIAL DECISIONS

- From the Ministry of Justice

660 of 2019 Authorizing certain officials at the Securities & Commodities Authority to enforce the law as judicial officers.

810 of 2019 Authorizing certain officials at the Sharjah Directorate of Human Resources' Environment & Protected Areas Authority to enforce the law as judicial officers.

811 of 2019 Authorizing certain officials at the Department of Planning & Development – TRAKHEES DUBAI to enforce the law as judicial officers.

812 of 2019 Authorizing certain officials at the Ajman Free Zone Authority to enforce the law as judicial officers.

814 of 2019 On the formation of the Committee on Legislative Drafting for the Purpose of Implementation of the Insurance Authority-Securities & Commodities Authority Merger.

- From the Ministry of Health & Prevention

677 of 2019 On the procedures and regulations on traveling with narcotic and controlled drugs.

ADMINISTRATIVE DECISIONS

- From the Insurance Authority

40 of 2019 Amending Insurance Authority BoD Resolution No. 3 of 2010 adopted in the form of directives pertaining to the Code of Ethics and Professional Practice for insurance companies operating in the UAE.

41 of 2019 On the Fintech regulatory sandbox for the insurance sector.

42 of 2019 Amending Insurance Authority BoD Resolution No. 13 of 2018 adopted in the form of directives pertaining to the marketing of insurance policies through banks.

Bahrain ups the ante for legal graduates with the introduction of the Professional Legal Practice Certificate (PLPC)

The Bahrain PLPC was rolled out this year to 20 legal graduates to build on the academic knowledge already acquired whilst doing their law degree. Introduced by the Bahrain Judicial & Legal Studies Institute (JLSI) the purpose of the PLPC is to prepare students for their training contracts by bridging the gap between academic study and professional practice.

The course was conceptualised after one of the JLSI surveys revealed that many young law graduates from local universities lack key "employability skills." As a result the PLPC course was born, and 20 of the country's highest achieving students were given opportunity to enrol on this 9-month programme, consisting of 11 modules and a 2-month internship conducted in English. The course offers students a chance to compete with other law graduates many of whom have trained internationally; in countries such as the UK where a practical qualification (e.g. LPC) is a mandatory prerequisite if you are to qualify as a practicing lawyer.

Al Tamimi was one of eight firms that partnered with JLSI to develop and deliver this programme. We thank Foutoun Hajjar, Allison Hosking, Amanda Davies, Anita Sailopal, Matthew Heaton, Mahmood AlAraibi, Natalia Kumar, Rad El Treki, Rafiq Jaffar, Shaden El Shibiny, Victoria Grundy and Zane Anani for their tremendous effort in supporting the PLPC by drafting comprehensive materials and assessments and delivery of training to the students. Tamimi training comprised Banking & Finance Law, Business Drafting, Ethics, Legal Practice & Technology and Legal Research. Other contributors to the course included Capital Impact, Newton Legal Group, Elham Hassan & Associates, DLA Piper Middle East, MENA Chambers, the American Bar Association, BIBF and Thomson Reuters. For the full article, please click here.

To find out more about the course please contact Foutoun Hajjar, Partner, Head of Bahrain Office.

IFLR Awards 2019

We are proud to have won four awards at the IFLR Awards including the prestigious Managing Partner of the Year Award which went to Husam Hourani.

In addition we were awarded UAE Firm of the Year, together with Project Finance Deal of the Year for our role in the Mohammed bin Rashid Al Maktoum Solar Park Phase IV, and Restructuring Deal of the Year for our role in the Dana Gas restructuring. For a full list of the awards, please click here.

Congratulations to all the winners!

Al Tamimi & Company takes part in Dubai Courts' live video hearing at GITEX 2019

On 10th October 2019, at the Dubai Courts' stand at the GITEX conference (the biggest technology show in the Middle East, North Africa & South Asia) in Dubai, the Dubai Courts screened a one hour hearing session via a live video conference.

The Chief Judge of the Commercial Court invited Essam Tamimi to participate in the hearing, which was watched by HE Maktoum bin Mohammed Al Maktoum.

The court was very appreciative of Al Tamimi & Company's cooperation. Taiba Alsafar, Partner, who arranged the opportunity would like to thank Essam for his participation, despite the short notice, and also the IT team, especially Aijaz Anwar, for their support in arranging the video conference.

It is great to be a part of the evolving technological landscape of the Dubai Courts.

18th
SEPT

Let's Talk UAE: In celebration of Emirati Women's Day

Al Safa Art & Design Library, Dubai, UAE

On Wednesday 18th September, in honour of the recent Emirati Women's Day, Al Tamimi & Company hosted the first edition of 'Let's Talk UAE' alongside J.P. Morgan. The event brought together many accomplished Emirati entrepreneurs as well as legal and banking sector experts to discuss the key trends shaping the Emirati female community and the economy at large.

The 'Let's Talk UAE' initiative was formed as an interactive platform for both female and male Emiratis to discuss and address some of the key themes relating to the UAE's growth and development. Through a series of insightful sessions and discussions, the event deep dived into relevant topics and one of the most notable takeaways was the integral role Emirati women play towards creating a better UAE and in driving forward the country's development and vision.

The keynote session was by H.E. Hessa Tahlak, Assistant Undersecretary of Social Development, Ministry of Community Development highlighted the role of the Ministry in empowering Emirati women and ensuring their social well-being with the support of several initiatives and programs.

Maya Prabhu, Managing Director, Head of Wealth Advisory, EMEA, J.P. Morgan Private Bank, said: "*It was an honour and privilege to address a room full of inspirational Emirati women who are making great strides in the realms of government and business, while also creating a palpable impact on the community and wider economy. They are breaking boundaries and becoming a force to be reckoned with, and I hope this trend sees a positive domino effect in encouraging more women to chase their dreams and fulfil their career aspirations.*"

24th
SEPT

IBA 2019: Private Dinner

TopCloud52, Seoul, South Korea

On Tuesday 24th September 2019, Al Tamimi & Company's IBA delegation, Samer Qudah, Partner, Head of Corporate Structuring, Foutoun Hajjar, Partner, Head of Office - Bahrain, Fiona Robertson, Senior Counsel, Head of Media, Sara Aranjo, Senior Associate, Jiwon Ha, Senior Associate and Dukgeun Yun, Senior Associate, hosted a private dinner in Seoul, South Korea for Al Tamimi & Company's key contacts and clients as part of the 2019 International Bar Association conference which gathered over 6000 lawyers from 120 countries.

The restaurant located on the 52nd floor overlooking Seoul's eye catching skyline provided opportunity to enhance our international network, and strengthen relationships with new and existing contacts.

Other Events

Wednesday, 11th September

UAE Employment: Key Legal Considerations
DIFC Office

Speakers:
Gordon Barr, Partner, Employment & Incentives

Yasmin Naja, Associate, Employment & Incentives

Monday, 16th September

The Health Sector in the Middle East:
An Update and Project Opportunities
The Law Society

Speaker:
Andrea Tithecott, Partner, Head of Regulatory, Healthcare

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

Client Services

Practices

Arbitration | Banking & Finance | Capital Markets | Commercial | Competition | Construction & Infrastructure | Corporate/M&A | Corporate Services | Corporate Structuring | Employment & Incentives | Family Business | Financial Crime | Insurance | Intellectual Property | International Litigation Group | Legislative Drafting | Litigation | Mediation | Private Client Services | Private Equity | Private Notary | Real Estate | Regulatory | Tax | Technology, Media & Telecommunications |

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Country Groups

China | India | Korea |

Al Tamimi & Company's key strength is providing quality service – maintaining international standards whilst providing the advantage of being a cost-effctive external provider.

Chambers Global

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.

Regional Footprint

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JORDAN
Amman

KUWAIT
Kuwait City

OMAN
Muscat

QATAR
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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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